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

PROSECUTORIAL STANDARDS AND ETHICS

TAB 5

THE PROSECUTOR and INVESTIGATIONS

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TAB 5A

Generally (Investigations)

CROWN ATTORNEYS CODE OF PROFESSIONAL CONDUCT

Crown Policy Manual

With Respect to the Police

The Crown Attorney shall:

...afford due respect to the recommendations and advice of experienced police officers, but recognize that all legal decisions are solely the independent responsibility of the prosecutor;

...give careful, current and impartial legal advice upon request, in a timely way;

...not become actively involved in the investigation;

...not recommend or authorize charges which have no reasonable expectation of conviction, or which are not in the public interest;

...bring to the attention of the appropriate Senior Crown Attorney, any allegation of wrongdoing or improper conduct on the part of any police officer;

With Respect to Conduct of a Case

In conducting a prosecution, the Crown Attorney shall:

...make full and fair disclosure of all relevant evidence as soon as possible or when requested by defence counsel;

...call, or make defence counsel aware of, all material witnesses to the incident in question;

...disclose all statements, documents and exhibits as required to ensure a fair trial;

...resist pressure to lay more charges than are appropriate or charges more serious than those presented by the facts;

Relevant Passages from *R. v. Regan* (S.C.C., 2002), para. 66

[2002] 1 S.C.R. 297 (LeBel J.)

...

(b) The Police/Crown Relationship

...

66 The need for a separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail in Canada. The Royal Commission on the Donald Marshall, Jr., Prosecution, vol. 1, Findings and Recommendations (1989) ("Marshall Report") speaks of the Crown's duty this way: "In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition" (pp. 227-28). The Marshall Report emphasizes that this role must remain distinct from (while still cooperative with) that of the police (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement -- is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

...

Relevant Passages from the Ontario *Crown Policy Manual* (2005), "Preamble", pp. 3

The Role of Crown Counsel in Relation to the Police

Although Crown counsel work closely with the police, the separation between police and Crown roles is of fundamental importance to the proper administration of justice. The police investigate and lay charges where they believe on reasonable grounds that an offence has been committed. Crown counsel will carefully review all charges to ensure they meet the Ministry's screening standard. Crown counsel proceed only with prosecutions which present a reasonable prospect of conviction and where the prosecution is in the public interest. A distinct line between these two functions, which allows both the police and Crown counsel to exercise discretion independently and objectively, forms part of a system of checks and balances. Given the current reality of large and complex police investigations, access to timely advice from Crown counsel in these cases may be crucially important. Special task forces often include and benefit from both Crown and Police participation, necessitating a close working relationship. The independence of roles and responsibilities, upon which the justice system depends, must be respected in any of these special working relationships.

Relevant Passages from the Ontario *Crown Policy Manual* (2005), "Police: Relationship With Crown Counsel"

PRINCIPLES

...

Police have the sole responsibility for charging decisions except where the consent of the Attorney General is required by statute. Crown counsel are solely responsible for determining whether a charge is to proceed once it has been laid.

Police may seek advice from Crown counsel concerning legal issues arising in the investigation of offences. Crown counsel may ask the assistance of police in conducting further investigations and providing further information. Each agency has a role to play, independent of the other, and neither agency is subordinate. This independence is fundamental to the maintenance of their role as "Ministers of Justice", and is essential to the proper administration of justice.

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch.11, "The Relationship Between Crown Counsel and Police" (2005)

...

11.3 Role of Crown Counsel Before and After Charges Are Laid

11.3.1 Introduction

Crown counsel and investigative agencies play complementary roles in the criminal process. Both have roles to play before and after charges are laid.

While the involvement of Crown counsel is not generally required as a matter of law at this stage, it has become increasingly apparent that it is desirable. Co-operation and effective consultation between the police and Crown counsel are essential to the proper administration of justice, as investigators are expected to gather evidence that is admissible and relevant to the charge. Later, when deciding whether to prosecute, consultation will often be helpful in assessing the sufficiency of the evidence and the public interest criteria.

Accordingly, Crown counsel should be available for consultation during an investigation and before the laying of charges. This will encourage investigators to ask their advice. In complex cases, Crown counsel may need to work closely with the police in identifying and acquiring relevant and cogent evidence. This does not mean, however, that Crown counsel should assume responsibility for work that properly should be done by investigators. At the end of an investigation, counsel's role is to provide the investigators with a fair and objective assessment of the strength of the case and the appropriateness of proceeding. In performing this assessment, counsel must be guard against the possibility that he or she has been afflicted by "tunnel vision", i.e., has lost the ability to conduct an objective assessment of the case through contact with the investigating agency.

...

11.3.3 Non-Statutory Involvement of Crown Counsel

Crown counsel can provide a wide range of assistance to investigators. In most of these non-statutory roles, Crown counsel play a supporting role, with the investigator drafting the materials and providing them to Crown counsel for review.

11.3.3.1 Advice Concerning the Operational Plan

The police have complete autonomy in deciding whom to investigate and for what suspected crimes. They also have the discretion to decide how to structure an investigation and which investigative tools to use.

However, prior to undertaking an investigation or in its early stages, investigators may wish to consult with Crown counsel for advice and guidance as to how the investigation should be structured to ensure a sustainable prosecution. It is best to make structural decisions early in the investigation, rather than waiting until it is too late to take corrective action. For example, if the operational plan contemplates an investigation of a large criminal organization, it may be prudent to consult Crown counsel prior to undertaking the investigation. Decisions can be made early in the investigation that may assist in developing a case that can be put before the courts in an effective manner.

11.3.3.9 General Advice Needed During the Course of an Investigation

It is impossible to anticipate all forms of advice that Crown counsel is able to give during the course of investigation. When in doubt whether Crown counsel can assist, a senior investigator should contact the local FPS Director to determine if assistance can be given. Some examples of general advice include:

* ice on limitation periods for the laying of charges and the renewal or extension of court orders;

* providing advice concerning agents and informers;

* providing advice as to whether a search warrant is needed in particular circumstances;

* measures such as the Controlled Drugs and Substances (Police Enforcement) Regulations; and

* should be conducted with witnesses (e.g. "K.G.B." statements) and questions that should be asked to address certain aspects of proof. Counsel may also review transcripts and videotapes of interviews of key witnesses to provide input to investigators on the quality and reliability of such persons as Crown witnesses.

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Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage

*Michael Code**

* B.A., LL.B., LL.M. (Toronto). Of Sack Goldblatt Mitchell, Toronto.

The author would like to thank Murray Segal and Harvey Strosberg for reading early drafts of this work, when it was still a legal opinion, and providing many valuable suggestions.

2. The Role of Crown Counsel and Their Relationship to the Police

A certain amount of this topic concerning the role of Crown counsel at the investigative stage has already been covered indirectly under the previous heading, concerning the role of the police. However, in asserting that Crown counsel must not direct the police at the pre-charge stage or prevent the police from proceeding with an investigation because of lack of proof at the early stages, the Crown's role has been defined in only a limited fashion by stating two negative propositions.

21. (1990), 78 C.R. (3d) 282 (Ont. Ct. (Prov. Div.)).

The positive role for Crown counsel at the pre-charge stage is to assist the police by providing legal advice about investigative issues. The key characteristic of this role as legal adviser is independence, in my opinion. The authorities state that Crown counsel is not the police officer's lawyer in the sense that the police officer is not a "client" who can retain and instruct Crown counsel, as contemplated by the traditional solicitor-and-client relationship.[22] Rather, Crown counsel is a *quasi*-judicial officer of the court and agent of the Attorney-General who must maintain some distance from the police in order to have the detachment necessary to carry out the role of independent legal adviser.

One of the principal ways in which Canadian Crown counsel and their English counterparts in the D.P.P.'s office have traditionally maintained this independence from the police, unlike their American counterparts, is by not becoming involved in the investigation.

22. See J.Ll.J. Edwards, *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984), at pp. 89 and 97; *R. v. Girouard* (1982), 68 C.C.C. (2d) 261, 37 B.C.L.R. 354, 138 D.L.R. (3d) 730 (S.C.); *Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Commissioners (No. 2)*, [1972] 2 All E.R. 353 (C.A.), affd [1974] A.C. 405; *Waterford v. Commonwealth of Australia* (1987), 71 A.L.R. 673 (H.C.); *R. v. Gray* (1992), 74 C.C.C. (3d) 267 (B.C.S.C.); *R. v. Gray* (1993), 79 C.C.C. (3d) 332, 39 W.A.C. 208 *sub nom. Palmer v. Gray* (B.C.C.A.), and *R. v. Sander* (1994), 90 C.C.C. (3d) 41, [1994] 8 W.W.R. 512, 91 B.C.L.R. (2d) 145 (C.A.).

The appropriate practice for prosecutors in Ontario, on this subject, has recently been the subject of extensive analysis in the Martin Report:[24]

22a. The Ministry of the Attorney General for Ontario has recently issued a new Crown Policy confirming this practice. Its title is "Police — Relationship with Crown Counsel" and it was released on August 5, 1997. The key passages are as follows:

It is unwise to participate directly in the gathering of evidence in the pre-charge stage of an investigation. Prosecutors should avoid participating directly in statement taking or attending a fresh crime scene to supervise the gathering of evidence. Any such participation may lead to a blurring of our role as advisors and prosecutors and impair our ability to review independently a charge after an Information is sworn.

. . . . . .

In difficult cases police officers may be tempted to seek practical direction from Crown counsel rather than legal advice. To protect the independence of both the police and the Crown it is recommended that the following routine be followed in difficult cases when the police seek charging advice (this practice will not be required in every case — only the most difficult):

1. Require that the police provide a full *written* investigative brief that will form the basis of your advice.
2. Where feasible, your reply should be in writing. The issue you should be addressing is whether there are reasonable grounds to support specific criminal charges based on the evidence contained in the investigative brief. Your letter should explicitly set out that your legal advice is based solely on the written brief before you. [Emphasis in original.]

23. *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964), at pp. 394-5.
24. *Supra*, footnote 10, at pp. 37-9 and pp. 116-17 (footnotes omitted).

> As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel, as that advice relates to the conduct of the investigation and the laying of charges.
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> This relationship of independence between Crown counsel and the police appears to differ from the relationship between investigators in the United States, and a District or U.S. Attorney. While the practice varies among the various states and the federal government, it appears that American prosecutors may be, generally speaking, actively involved in charging decisions, and in the conduct of the investigation.
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> However, the independence of Crown counsel and the police also places upon the police some important responsibilities. Most importantly, the Crown is entitled to rely on the police, as the investigative source of most of the information relevant to the guilt or innocence of an accused person, to bring forward accurately and completely whatever has a bearing on the case.
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> Unlike, for example, many jurisdictions in the United States, there is in both law and practice in Ontario a relatively clear separation of the functions of investigator and prosecutor. Many District or United States Attorneys conduct investigations and lay charges, whereas Crown counsel in Ontario do not; this is done by the police.

It can be seen that 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 as an officer of the court and preserves the police officer's exclusive control over the investigation. It is for these reasons that a strong body of case-law and of opinion from various commissions and commentators is to the effect that the Attorney General's real powers in relation to criminal matters do not commence until the post-charge stage (subject to a few narrow statutory exceptions, such as wire-tap applications, that require the intervention of Crown counsel). Any interference with the absolute right of a police officer (or a private citizen) to lay a criminal charge would contravene both the provisions of the

Criminal Code and the constitutional convention concerning police independence.[25] I am aware that there is a practice in Quebec, British Columbia and New Brunswick requiring the approval of Crown counsel before a police officer can lay a charge. Suffice it to say that this is neither the law nor the practice in Ontario and in the majority of Canadian provinces. Furthermore, in my opinion, the charge approval practices that exist in these three provinces do not mean that Crown counsel directs the police investigation. It simply means that Crown counsel must approve any prosecution *at the end of the investigation*.

The importance of these principles was particularly brought home to Crown counsel in this country by the revelations of the Marshall Commission concerning the handling of the criminal investigation of a provincial Cabinet Minister in Nova Scotia (Roland Thornhill). That report was released in 1989 and it concluded:[26]

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function — that of investigation and law enforcement — is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.
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> In Nova Scotia, there clearly has been confusion over the question of the police's unfettered right to lay charges. In the Thornhill investigation, for example, Deputy Attorney General Gordon Coles strongly believed that he, acting for the Attorney General, had the right to instruct the RCMP not to lay charges. Although the RCMP did not accept the validity of this position, they did acquiesce in the face of the Attorney General's wishes.

Just one year after the Marshall Commission Report, the

25. See *Québec (Attorney General) v. Lechasseur* (1981), 63 C.C.C. (2d) 301, 28 C.R. (3d) 44, [1981] 2 S.C.R. 253; *R. v. Dowson* (1983), 7 C.C.C. (3d) 527, 35 C.R. (3d) 289, [1983] 2 S.C.R. 144; the Martin Report, *ibid.*, at pp. 120-27; Working Paper 62, "Controlling Criminal Prosecutions: The Attorney-General and the Crown Prosecutor" (L.R.C.C., 1990), at pp. 69-76; Royal Commission on the Donald Marshall Jr. Prosecution ("the Marshall Commission"), Vol. 1 (1989), at pp. 231-5; and the Phillips Royal Commission on Criminal Procedure, Cmnd 8092 (H.M.S.O., 1981), at pp. 146-9.

26. *Ibid.*, at pp. 232-4.

L.R.C.C. released its extensive study of the same general subject and it too was widely circulated amongst senior Crown counsel in Attorney General departments in this country. That report stated:[27]

> The investigation of crime should be kept separate from the prosecution of crime, a position that is supported by the recent trend in Canada to remove control of the police from Attorneys General . . . A further argument for the independence of the two aspects is the role of the police. Their independence provides a valuable safeguard against concerns of improper pressure being brought to bear, particularly when the case involves allegations about employees of the Attorney-General or members of the government. The Marshall Inquiry in Nova Scotia, for example, has turned up instances of confusion over these roles possibly affecting the laying of charges.

These strong admonitions to Crown counsel not to become too involved in police investigations, particularly when senior government officials are implicated in the investigation, were well known and were followed closely in Ontario when I was Assistant Deputy Attorney General. They should be borne in mind when evaluating Crown counsel's conduct in criminal investigations in this country.

Before leaving this topic it should be noted that even once criminal charges have been laid, and the Crown counsel is now in full control of the prosecution, there is still some doubt in our law as to whether the Crown has the power to order the police to carry out further investigations. This doubt is due to the fact that police and prosecution functions are entirely separate and independent of each other and police are not subject to direction from Crown counsel. As a result, a number of recommendations have emerged from the commentators to the effect that this one limited incursion into the doctrine of separation between police and prosecution is justified in order to give the Crown the power to require further investigation at the post-charge stage.[28] Needless to say, there can be no suggestion

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27. Working Paper 62, "Controlling Criminal Prosecutions", *supra*, footnote 25, at pp. 71-2.

28. See, for example, Recommendation 14 of the L.R.C.C. report, "Controlling Criminal Prosecutions", *supra*, footnote 25, at p. 61; Recommendation 36(b) of the

that Crown counsel has this authority over the police at the pre-charge stage.

Marshall Report, *ibid.*, at p. 232 ("after the laying of charges, police shall carry out any investigations in accordance with the instructions of the Attorney-General or appropriate prosecutor with a view to preparation of the case for presentation in Court"); see also the *Crown Attorneys Act*, R.S.O. 1990, c. C.49, s. 11(a).

The Martin Report described Crown counsel's fairly limited obligations to insure the completeness of the investigative brief, *even at this post-charge stage* (*supra*, footnote 10, at pp. 133-5):

> As discussed above, Crown counsel as agents of the Attorney General, and the police, are practically and legally independent of each other. This mutual independence is an important system of "checks and balances" that protects the public. Important as this practical and legal independence is, however, it raises the practical issue of how it can be ensured that the information flow between Crown counsel and the police is sufficient for the important tasks of charge screening and disclosure. The Committee has settled on the following recommendation, understood in light of the commentary which follows it.
>
> 25. The Committee recommends that the Attorney General's agents be required to be duly diligent in making efforts to obtain all information that relates to a case for purposes of screening and disclosure.
>
> *Discharging the duty of due diligence in acquiring the information necessary to screen a case or provide disclosure does not, in the Committee's view, require Crown counsel to re-investigate the charge. The mutual independence of the Crown and police precludes any such requirement. Crown counsel exercises no supervisory authority over the police. Such a requirement would in practical terms undermine the important principle of mutual independence by effectively obliging Crown counsel to supervise the police. This would amount to importing the District Attorney/investigator relationship that exists in many jurisdictions in the United States. The Committee rejects such a relationship as undesirable in principle, impractical, expensive and unnecessary.*
>
> Crown counsel's duty to be duly diligent in obtaining information for charge screening must take account of the present nature of the relationship between the Crown and the police. Accordingly, Crown counsel is, in the Committee's view, required at the outset to review the material provided to him or her by the investigators. *There is no initial duty to go behind the contents of these materials. Crown counsel is entitled to rely on the skill and judgment of police investigators to ensure that all relevant material is brought forward.*
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> *If, however, following an initial review of the material provided to Crown counsel, there are any apparent deficiencies in the material* that call into question whether the threshold test is met, whether a prosecution is in the public interest, or whether the material is sufficient to enable Crown counsel to make full disclosure as required by *Stinchcombe*, *supra*, *Crown counsel has a duty to follow up with such further inquiries from the investigators as are necessary*. Crown counsel should also give appropriate legal advice to the police as to any difficulties with the proposed evi-

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TAB 5B

Before Charges are Laid

R. v. Regan (S.C.C., 2002), paras. 67-70
[2002] 1 S.C.R. 297 (LeBel J.)

(b) The Police/Crown Relationship

...

67 ...The distinct line appears to be that police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges. (See testimony of Philip Stenning, Appellant's Record, [page335] at p. 975.) The Nova Scotia Solicitor General's Directive on Laying of Charges (1990), which responded to the Marshall inquiry, states:

> All Police Departments must implement the following protocol for the resolution of disputes between police and Crown over the laying of criminal charges:
>
> (i) no charge shall be laid, contrary to the advice of a Crown Prosecutor, until discussion concerning the matter has taken place between the Police Department and the Crown Prosecutor;
> (ii) if there is no resolution of the disagreement at that level, the matter must be referred to a senior police official of the department, who will discuss the matter with the Regional Crown Prosecutor;
> (iii) if, following such discussion, the police remain of the view that a charge is warranted, the charge shall be laid.

68 The protocol encourages a police and Crown joint assessment pre-charge: there is nothing in these recommendations that indicates that the separation between police and Crown functions must be implemented by preventing Crown contact with potential witnesses pre-charge. Therefore, while the Marshall Report speaks of a distinct line between police and Crown functions, it is one that may be drawn conceptually and figuratively, through conscious practice, rather than literally by the act of laying charges.

69 The appellant also drew the Court's attention to the 1998 Report of the Commission on Proceedings Involving Guy Paul Morin, which inquired into another recent instance of wrongful conviction, after which Morin spent several years in jail, before his innocence was recognized. This inquiry focussed on the Crown's failure of objectivity throughout the process as a result of too close contact between the [page336] Crown counsel and police. Justice Kaufman, who wrote the report, concluded that, at the root of the problems in the Morin case there had been a failure by the Crown prosecutor to assess objectively the reliability of evidence, before charges were laid (vol. 2, at pp. 909, 911 and 1069-70):

> The bottom line is this: [the Crown] failed to objectively assess the reliability of evidence which favoured the prosecution. It is difficult to determine the precise extent to which each of the prosecutors appreciated just how unreliable some of the evidence tendered was... .
>
> The prosecutors showed little or no introspection about these contaminating influences upon witnesses for two reasons: one, the evidence favoured the prosecution; this coloured their objectivity; two, their relationship with the police which, at times, blinded them, and prevented them from objectively and accurately assessing the reliability of the police officers who testified for the prosecution... .
>
> It is also understandable that this belief [of Morin's guilt] would affect the prosecutors' assessment of their own evidence and the evidence tendered by the defence. Their failing was that this belief so pervaded their thinking that they were unable, at times, to objectively view the evidence, and incapable at times to be at all introspective about the very serious reliability problems with a number of their own witnesses. As I have said earlier, their relationship with the police, at times, blinded them to the very serious reliability problems with their own officers. [Emphasis in original.]

70 The parties agree in the present case that Crown objectivity and the separation of Crown from police functions are elements of the judicial process which must be safeguarded. What the Morin inquiry shows is that objectivity can be lost without the Crown's involvement in pre-charge interviews, and that this loss of objectivity in fact did occur, in part, as a result of post-charge Crown interviews. It does not mean that the absence of pre-charge interviews would be, of itself, a guarantee of fair process or that the restrained use of such interviews may not be consistent with a separation of Crown and police functions.

...

R. v. Regan (S.C.C., 2002), para. 161

[2002] 1 S.C.R. 297 (Binnie J., dissenting on other grounds)

...

161... However it is clear to me that the Crown was integrally immersed in the decision-making process as it applied to the laying of charges. In so doing it became heavily involved with interviewing potential complainants. Unlike Mr. Pearson, they did not critically review a police report. Instead they collaborated fully with the police to create what in essence became a joint charging decision. Cooperation led to consensus, but only at the expense of the process which became homogenized. Thus the applicant was denied that hard objective second look (at the charging decision) which is so fundamental to the role of the Crown.

...