



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

PROSECUTORIAL STANDARDS AND ETHICS

TAB 3

THE ROLE OF THE INDEPENDENT PROSECUTOR

POLICY STATEMENT:

Public prosecutions commenced at the instance of the Province of Manitoba are normally conducted by the Province's Crown Attorneys. This cadre of Crown Attorneys is amongst the most experienced and talented group of criminal litigators in Manitoba, and the Department of Justice is fortunate to have their services.

There are, however, some cases that, if prosecuted by the Province's Crown Attorneys, might give rise to inappropriate public perceptions and raise issues of public confidence. Most commonly, these cases involve situations where those who are involved in the administration of criminal justice in Manitoba are themselves directly involved in the case. For instance, where, following a police investigation, it is proposed that criminal charges be laid against a prosecutor or a judge, there exists the need to assure the public that decisions will be made on a principled basis, free from any sort of bias.

The purpose of this policy is to ensure confidence in the justice process by providing for the appointment of independent counsel in those situations where a reasonable person would perceive that an accused person may receive differential treatment because of his/her relationship with Manitoba Justice. The likelihood of such a perception is determined, in large part, by the closeness of the relationship between the accused and the Department. The nature of the alleged offence may also be a secondary factor. The following categories describe the circumstances in which independent counsel should be appointed, as well as the method by which that decision should be made.

1. Direct Connection to the Justice System. Whenever a criminal charge is laid against a person who is directly connected to the justice system, there may be a reasonable perception that the accused could receive some kind of differential treatment if prosecuted by a staff Crown Attorney. In all such cases, the prosecution must be conducted by independent counsel.

Persons who come within this category include judges, Crown Attorneys, police officers, lawyers involved in criminal defence work (or those having regular business with the Department), as well as employees of the Department of Justice who have direct involvement in either the court process (e.g. court clerks) or Prosecutions (e.g. support staff within Prosecutions). Members of the Legislative Assembly, and their immediate staff and family are also in this category.

For greater certainty, independent counsel must be appointed where the Department has been asked by the Commissioner of the Law Enforcement Review Agency to consider whether criminal charges should be laid following an investigation under *The Law Enforcement Review Act* respecting the conduct of a police officer.

The Assistant Deputy Attorney General has delegated the authority to appoint independent counsel to the Director of Regional Prosecutions and Education. Therefore, when a case in this category arises, the Crown Attorney is expected to refer it, as soon as possible, to the Director of Regional Prosecutions and Education for the appointment of independent counsel.

2. General Connection to the Justice System. This category includes employees of Manitoba Justice who are not directly involved in the court process and, in addition, close relatives of a person with a direct connection to the justice system (provided the Crown is aware of this relationship). In these cases, independent counsel will often be appointed. However, in order to require the appointment of independent counsel, the connection of the accused to the justice system must be more than trivial. In making this judgment, consideration should also be given to the seriousness and notoriety of the alleged offence.

In cases where the accused has a general connection to the justice system, the Crown Attorney is expected to refer the case as soon as possible to the Director of Regional Prosecutions and Education along with a recommendation as to whether independent counsel should be appointed. The Director of Regional Prosecutions and Education will determine whether the circumstances warrant prosecution by a staff Crown Attorney or outside independent counsel.

3. No Obvious Connection to the Justice System. In the vast majority of cases, there will be no connection between the accused and the justice system. These cases should generally be prosecuted by staff Crown Attorneys. However, there may be unusual circumstances where facts come to light that suggest that independent counsel is appropriate. Crown Attorneys must be alert to situations where a reasonable person may perceive that the accused could receive differential treatment because of a connection between the accused and the justice system.

If the Crown Attorney, after consultation with his/her Supervising Senior Crown, believes that an accused has a connection to the justice system that might give rise to a perception of bias, the case should be referred to the Director of Regional Prosecutions and Education for a decision as to whether independent counsel should be appointed.

Other Considerations

This Policy applies to individuals who have been charged with criminal offences. However, it may be appropriate to appoint independent counsel in cases involving provincial statute offences given the closeness of the accused's relationship to the Department and given the nature or severity of the offence. Crown Attorneys who, after consultation with their Senior Supervising Crown, are concerned about the need to appoint independent counsel in a non-criminal case should refer the matter to the Director

of Regional Prosecutions and Education for a decision as to whether independent counsel will be appointed.

It may also be appropriate to apply this Policy, where the individual is not charged with an offence but is the victim of a crime or will be called as a material witness. If the case is one in which a reasonable person would have concern about differential treatment or where the Crown Attorney is concerned that his/her decisions about the case may be influenced because of the identity of a witness or victim, the Crown Attorney should refer the case to the Director of Regional Prosecutions and Education for a decision regarding the appointment of independent counsel.

Where charges to which this Policy applies have already been laid, or an opinion is sought on whether charges are appropriate, counsel should refer the matter as soon as possible to the Director of Regional Prosecutions and Education for the appointment of independent counsel. Immediate steps are necessary to ensure that even preliminary issues such as release on bail, adjournment of the charges and disclosure to the defense are decided by the independent counsel.

Nature of Appointments

There are an infinite variety of circumstances in which it may become necessary to appoint independent counsel. In view of this, there are a number of alternative approaches that may be adopted to ensure an independent decision-making process. In ascending levels of independence from government, they are:

a) *Appointment of a Crown Attorney from within Manitoba but from another Crown Office*

In some situations, the necessary degree of independence may be achieved through this type of appointment.

b) *Appointment of a Private Practitioner from Manitoba*

Where a former Crown Attorney who has since left the Department is being considered for appointment as independent counsel, care must be taken to ensure that sufficient time has elapsed to gain a "distance" from the Department. Care must also be taken to ensure that the person selected has not had any previous dealings with the alleged offender.

c) *Appointment of a Crown Attorney from Another Province*

Informal protocols exist between this Department and many other provinces and territories to facilitate the appointment of a Crown Attorney from outside of Manitoba. This approach was judicially approved by the Alberta Court of Appeal in *Kostuch v. AG Alberta* (1995), 101 C.C.C. (3d) 321 Alta. C.A., at p. 333 (in which a Manitoba Crown Attorney was appointed to prosecute in Alberta to avoid a perceived conflict of interest in that province).

d) *Appointment of a Private Practitioner from Another Province*

This option gives maximum independence from the Department. It is also the most expensive option, given the need to travel to and from Manitoba to interview witnesses and conduct proceedings. This option should only be pursued in exceptional cases, and after conferring with the Deputy Attorney General.

Depending on the issues that arise in a particular case, it may be necessary to appoint independent counsel for only one aspect of the case (e.g. the examination or cross-examination of a specific witness).

APPENDIX TO THE POLICY

Upon determining that independent counsel should be appointed, the Director of Regional Prosecutions and Education will proceed to make the appointment. While individual Crown Attorneys may have relatively little involvement at this stage, it is important that the process should be as transparent as possible and it is useful for Crown Attorneys to be aware of the process.

The Process of Appointment

The principal criteria for the selection of an independent counsel are:

- independence from government and the individuals involved in the specific case;
- excellence in the practice of law;
- a track record for integrity; and
- significant previous experience in either the prosecution or defense of criminal charges in the court system.

In some cases, the Director of Regional Prosecutions and Education will consult with the Assistant Deputy Attorney General and/or the Deputy Attorney General before making a final decision. *Ad hoc* appointments will usually be appropriate as individual cases arise. In matters arising under *The Law Enforcement Review Act*, a standing appointment of the independent counsel will be made to facilitate referrals from the Commissioner of the Law Enforcement Review Agency directly to the independent counsel.

Terms and Conditions of Appointment

Where a lawyer from outside the Department is retained to act as an independent counsel, the terms of reference under which the independent counsel is retained should be reduced to writing and made publicly available upon request in order to ensure a transparent process and public accountability. A copy of this Policy Statement must also be provided to the independent counsel once retained, and be made available to the public on request.

Absent exceptional circumstances, the following should generally form a part of the terms of reference:

- a) The retainer agreement, including the terms of reference and any subsequent amendments, are publicly available on request;
- b) Where a legal opinion is sought, the precise question(s) for which the advice is being sought, and the person to whom it should be provided;

- c) The advice and decisions in the case are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General, which direction, if given, will forthwith be made public;
- d) The independent counsel has full access to all employees within, and all documents and information held by the Department of Justice for the Province of Manitoba;
- e) The independent counsel is to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba, which apply to all provincial prosecutions throughout the province. This includes, for instance, the charge approval standard (see: Crown Policy on Laying and Staying of Charges), disclosure policies as well as directives from the Attorney General on the position to be taken in cases of gang-related crime, violent crime, child victims, etc.
- f) In many cases, it will be appropriate to include in the terms of reference a statement to the effect that advice is also being sought on the extent to which information concerning the case, including the opinion sought, should be made available to the public. This will be especially important where the case has attracted considerable public attention and scrutiny.

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Terms and Conditions of Appointment

Where a lawyer from outside the Department is retained to act as an independent counsel, the terms of reference under which the independent counsel is retained should be reduced to writing and made publicly available upon request in order to ensure a transparent process and public accountability. A copy of this Policy Statement and any prosecutions policies or directives that reasonably appear at the outset to be applicable to the retainer must also be provided to the independent counsel once retained, and be made available to the public on request.

Absent exceptional circumstances, the following should generally form a part of the terms of reference:

- a) The retainer agreement, including the terms of reference and any subsequent amendments, are publicly available on request;

- b) Where a legal opinion is sought, the precise question(s) for which the advice is being sought, and the person to whom it should be provided;
- c) The advice and decisions in the case are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General, which direction, if given, will forthwith be made public;
- d) It is acknowledged that there will be an ongoing relationship between the Department of Justice and the independent prosecutor in the post-retainer period. This relationship is reasonable, necessary and exists for administrative, practical and consultative purposes. It does not detract from the independence of the prosecutor. As such, the independent counsel has full access to all employees within, and all documents and information held by the Department of Justice for the Province of Manitoba. This access might reasonably be sought by the independent counsel in a number of situations, such as, to consult regarding matters requiring a degree of expertise possessed by departmental prosecutors pertaining to prosecutions in a particular area such as commercial crime, cyber crimes, domestic violence, or youth crime, or relating to questions of local practice or best prosecutorial practices. Such consultation is to be encouraged, recognizing that the ultimate decision-making authority rests with the independent prosecutor. In addition, independent prosecutors, particularly those from outside the jurisdiction, may require the assistance of departmental prosecutors to attend to administrative or preliminary tasks on their behalf, such as remanding a matter at the request of the independent prosecutor. If the independent counsel wishes to exercise the on-going right of access, the Director of Regional Prosecutions and Education shall facilitate such contact between the departmental prosecutor and employee and the independent counsel and assist in accessing any documentation held by the Department of Justice;
- e) The independent counsel is to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba, which apply to all provincial prosecutions throughout the province. This includes, for instance, the charge approval standard (see: Crown Policy on Laying and Staying of Charges), disclosure policies as well as directives from the Attorney General on the position to be taken in cases of gang-related crime, violent crime, child victims, etc.
- f) The independent counsel is required to consult with the Manitoba Justice Constitutional Law Branch on issues of constitutional law, should they arise in a particular case. This will ensure that independent counsel do not take positions that are different from, or incompatible with constitutional law positions taken by departmental prosecutors regarding requirements of the Constitution and other related issues.
- g) The independent counsel is bound by the same obligations as those imposed on departmental prosecutors with respect to *The Victim's Bill of Rights*. A copy of the prosecutions policy regarding legislative obligations on departmental prosecutors

under *The Victim's Bill of Rights* must also be provided to the independent counsel. Additional inquiries can be directed by independent counsel to the Director of Regional Prosecutions and Education who can facilitate consultation with the Victims Services Branch.

- h) Periodic administrative meetings may be held between the Director of Regional Prosecutions and Education and independent counsel to ensure that the referrals to independent counsel are being handled in a conscientious manner (in particular, that files are not being neglected). These administrative meetings are necessary and reasonable and do not diminish the independence of the prosecutor, as the ultimate decision-making authority remains with the independent counsel.
- i) In many cases, it will be appropriate to include in the terms of reference a statement to the effect that advice is also being sought on the extent to which information concerning the case, including the opinion sought, should be made available to the public. This will be especially important where the case has attracted considerable public attention and scrutiny.

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch. 7, “The Role of Agents in the Delivery of Prosecution Services” (2002)

7.1 Introduction

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Effective and efficient delivery of prosecution services requires a decision as to what work can, or should be performed by agents, and also managing those agents to ensure a consistent quality of work.

The process of deciding which work is given to private sector agents has become known as "profiling". This chapter provides guidelines for profiling the work of the Federal Prosecution Service supervision, and remuneration.

7.2 Statement of Policy

7.2.1 Generally

The Government of Canada is entitled to receive a high quality of legal service and advice, and to have that service provided in a cost effective manner. Work that is essential to the Department's litigation mandate should, absent extraordinary circumstances, be done by in house counsel. Other work may be assigned to private sector agents bearing in mind both cost effectiveness and the quality of service.

Assignment of work to private sector agents may require consultation with client departments. Where this is the case, bilateral agreements between the Department of Justice and the client department will govern.

Effective management of work performed by agents requires a system of training and supervision. To that end, the Department has established the National Agent Supervision Program, discussed at section 7.4.

7.2.2 Case Profiling

Cases handled by the Federal Prosecution Service can be divided into two broad classes. The first ("Class One" cases) involves cases which are to be handled by departmental counsel only, unless exceptional circumstances, including clear lack of resources, are present. The second ("Class Two" cases) involves cases which may be assigned to private sector agents depending on the factors listed in s. 2.3, "General Profiling".

7.2.2.1 "Class One" cases

These cases shall be conducted by departmental counsel. (Under exceptional circumstances, a private sector agent may assume responsibility for them. However, where this occurs, counsel from the supervising office shall closely monitor the case and instruct the private sector agent on important strategic, policy and evidentiary issues). Class One cases involve:

- * appeals before provincial or territorial courts of appeal, especially those involving significant Charter issues, and all appeals in the Supreme Court of Canada;
- * aboriginal treaty rights;
- * extradition and mutual legal assistance;
- * constitutional challenges to legislation;
- * complex cases, such as proceeds of crime matters, or applications under Part VI of the Criminal Code ("Invasion of Privacy");
- * challenges to the authority or discretion of the Attorney General or an agent of the Attorney General (for example, preferred indictments, consent to the initiation of prosecutions, etc.);
- * prosecutions under new legislative initiatives, at least until the jurisprudence has been established;
- * fisheries offences involving foreign nationals;
- * prosecutions under the Security Offences Act and the Official Secrets Act;
- * proceedings relating to the protection of the environment; and
- * war crimes and crimes against humanity.

7.2.2.2 "Class Two" cases

These cases may be assigned to private sector agents in accordance with agreements between the Department and client departments, and depending on the application of the criteria set out in "General Profiling", infra. However, enough of these cases should be retained by the Department to provide training to new departmental counsel and to retain departmental expertise in developing areas of the law. Class Two cases involve:

- * routine drug prosecutions (e.g., possession, trafficking, possession for the purpose of trafficking, including non-complex proceeds of crime cases which do not arise out of a specific proceeds of crime investigation but are incidental to other drug charges, and conspiracy to commit any of these offences);
- * routine regulatory offences;

- * proceedings undertaken by virtue of the Contraventions Act;²
- * major drug prosecutions (for example, "mothership" cases, international drug conspiracies, and major proceeds of crime cases once the jurisprudence has been established);
- * tax evasion;
- * smuggling;
- * rogatory commissions (particularly where the investigation is conducted by the RCMP or where the case will be handled by departmental counsel);
- * applications for a prerogative remedy such as mandamus, certiorari or habeas corpus;
- * significant regulatory prosecutions, or those with a notable regional or national profile; and
- * cases involving prosecution of the Crown.

7.2.3 General Profiling Criteria

The following factors shall be considered when deciding whether to assign a case to an agent in the private sector:

- * the nature of the case;
- * current workloads of departmental counsel and their resultant availability (the heavier the departmental workload, the more likely it is that agents will be used);
- * the complexity and length of proceedings (depending on the type of prosecution and the issues raised, either departmental counsel or agents may be appropriate);
- * investigative department or agency concerns over conduct of the case (if such concerns exist, departmental counsel will likely be used);
- * the cost and location of the proceedings, including the travel costs of departmental counsel (cases outside the normal "reach" of Regional Offices will usually be assigned to agents);
- * availability of departmental counsel with membership in the appropriate law society or equivalent professional association;
- * international obligations and foreign interest in the case (departmental counsel will normally be used);

- * local or national profile of the case (departmental counsel will normally be used in cases raising a substantial public interest);
- * level of court (departmental counsel almost always handle litigation in the Supreme Court of Canada and provincial or territorial courts of appeal; agents may be used for lower courts);
- * importance of the issues to the administration of justice and to the core mandate of the Federal Prosecution Service (departmental counsel will normally litigate significant Charter and other constitutional cases requiring an understanding of the policy background);
- * importance and relevance of the issues to current government priorities (the more important and relevant the issue, the more likely that departmental counsel will be used);
- * the level of expertise or knowledge available in the Department (if expertise is not available in the Department, experienced agents may be retained);
- * the importance of investing in future expertise, i.e., if the case represents a type of litigation for which it would be beneficial for the Department to develop expertise, it ought to be kept in house;
- * the level of expertise in the local private sector;
- * the need to provide ongoing training to new departmental counsel (sufficient numbers of routine cases should be kept for departmental counsel to acquire proficiency);
- * the appearance of a conflict of interest or other circumstance making it inappropriate for departmental counsel to appear on the case; and
- * whether issues of confidentiality or Crown privilege are expected to arise.

7.3 Appointing and terminating private sector agents

7.3.1 Appointment

Private sector agents, whether standing or ad hoc, are selected and appointed by the Minister. In the selection and appointment of agents, the Minister must, above all, have confidence in the capability and integrity of the agent.

Departmental counsel can assist the Minister in two ways: by suggesting for appointment lawyers who are members of the private bar and, when consideration is being given to the appointment of a person not put forward by departmental counsel, by advising as to the qualifications of that person. Standing Agents are to be appointed by judicial district, not electoral district.

When assessing the qualifications of a prospective private sector agent, counsel should be guided by several criteria. Specifically, a prospective agent should:

- * be a member in good standing of a provincial or territorial bar;
- * have the requisite professional knowledge and skills in the subject area concerned;
- * exhibit integrity, good judgment, and discretion;
- * be willing and able to work with and be supervised by departmental counsel, to ensure compliance with the policies and standards of the Attorney General;
- * be willing to participate in training programs established by the Department of Justice;
- * be willing to meet departmental reporting and other administrative requirements;
- * be willing and able to comply with departmental conflict of interest guidelines; and
- * be able to maintain the confidence of the departments or agencies on whose behalf the agent prosecutes.

In addition, Standing Agents and ad hoc agents are subject to special Terms and Conditions of Appointment which govern their actions for the duration of their mandate. Prospective standing agents are required to indicate their willingness to comply with these terms and conditions prior to their appointment. Some of the subjects covered by the Terms and Conditions of Appointment include:

- * The Role of the Agent Supervisor;
- * Training;
- * Conflict of Interest;
- * Reporting Obligations;
- * Performance Review;
- * Confidentiality of Justice files;
- * Media Relations;
- * Administrative Issues, including billing and taxation of accounts; and,
- * Non-compliance and Sanctions.

Of particular importance are the provisions in the Terms and Conditions of Appointment dealing with conflict of interest. (In addition, see infra: s.7.5.1, "Conflict of Interest").