



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

PROSECUTORIAL STANDARDS AND ETHICS

TAB 4

THE ROLE OF MINSTERIAL POLICIES

Relevant Passages from the *Federal Prosecution Service Deskbook*, “Preface” (2005)

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The prosecution guidelines contained in this Deskbook are the instructions of the Attorney General of Canada to the prosecutors, in-house or agents, who act on the Attorney General’s behalf before the criminal courts of this country. It is therefore essential that these guidelines receive broad distribution and that they be understood, reviewed regularly, and adhered to by all those acting on behalf of the Attorney General of Canada. The Deskbook is a permanent work-in progress: all FPS counsel should be conscious of the need to suggest changes where policies are unclear or out-dated. FPS managers are obliged to monitor application of the policies to ensure they are properly applied.

In applying these guidelines to the specific facts of the case before them, prosecutors act independently without the fear of political interference or improper or undue influence. They are, however, accountable to the Attorney General for the way in which they have exercised this grave and important responsibility. The reporting obligations that are contained in the guidelines are also designed to support this accountability process.

The decisions that must be taken by prosecutors are often difficult or unpopular. Prosecutors are not expected to be governed by public opinion or other external pressures. They must only be governed by the public interest as articulated in these guidelines in making their decisions. In a speech to federal prosecutors in 1998, the then Deputy Attorney General, George Thomson, confirmed that prosecutors who exercise their discretion in accordance with the policies contained in the Deskbook will be supported by the Assistant Deputy Attorney General, the Deputy Attorney General and the Attorney General.

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Relevant Passages from the Ontario *Crown Policy Manual* (2005), “Preamble”, p. 4

Crown Policy Manual

One of the chief mechanisms by which the Attorney General for the Province of Ontario provides advice and guidance to Crowns on the exercise of prosecutorial discretion is the Crown Policy Manual which sets out the overall philosophy, direction, and priorities of the Ministry. In carrying out the duties of the Crown Attorney, a natural tension exists between prosecutorial discretion exercised in individual cases and general prosecution policy formulated by the Attorney General.

Crown counsel have a broad discretion to conduct cases to ensure that justice is done in individual circumstances. This prosecutorial discretion is necessary to allow Crown counsel to respond to unique circumstances in cases including victims, offenders, and local conditions. Prosecutorial discretion, when exercised fairly and impartially, is an essential component of the criminal justice system.

Notwithstanding the importance of discretion, it is also necessary in the public interest to have uniform prosecution policies applicable across the province. Policies assist and guide individual prosecutors in exercising their prosecutorial discretion. The policies in this Manual are not intended to replace the sound judgment that Crown counsel exercise. They set out appropriate considerations for prosecutorial decision-making, while supporting flexibility. Crowns are expected to exercise their discretion in accordance with overall priorities in the Manual, keeping in mind the need to see justice done in individual cases. Directives which bind the discretion of Crown counsel in the conduct of individual cases are few and far between.

There are many discretionary decisions made daily by Crown counsel that are not specifically described in these policies. In general, Crown counsel should exercise their discretion in keeping with the spirit of the policies in this Manual.

Purposes of the Crown Policy Manual

The Crown Policy Manual provides consistency of approaches to prosecutions across the province, for example, in such areas as child abuse, sexual assault, and spouse/partner abuse. The Manual conveys the Attorney General’s instructions and priorities as well as the rationale for them to Crowns. It provides the public with an indication of the guiding principles for Crowns, thus enhancing public accountability.

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ESSENTIALS OF
CANADIAN LAW

ETHICS AND CANADIAN CRIMINAL LAW

HON. MICHEL PROULX

Quebec Court of Appeal

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A Quicklaw Company

ETHICS AND CANADIAN CRIMINAL LAW

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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.

Though our courts have not intervened to lay down detailed rules governing the exercise of a prosecutor's discretionary power,⁶¹ excep-

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."

tionally they have done so with respect to disclosure, beginning with the landmark decision in *R. v. Stinchcombe*.⁹² Prior to *Stinchcombe*, prosecutors in some Canadian jurisdictions enjoyed close to an absolute discretion concerning whether information under their control should be disclosed to the defence. In *Stinchcombe*, the Supreme Court of Canada set out guidelines for Crown disclosure. What had been primarily an ethical obligation thus assumed legal and constitutional elements. The components of the disclosure obligation are analysed further below in section D.

The need for policies and guidelines to help prosecutors discharge their responsibilities is undisputed. However, these aids may only incidentally serve as ethical standards, and are not necessarily commensurate with rules of professional conduct. For instance, in the chapter on the "Decision to Prosecute," the FPS Deskbook sets out the main criteria that Crown counsel must consider when deciding whether to proceed with charges. After setting out the factors that must be taken into consideration by the prosecutor in exercising the discretion to prosecute, the Deskbook points out that this decision cannot be influenced by personal feelings, possible political advantage, disadvantage to the government, or the possible effect on the career of the prosecutor. It must also not be based on race, national or ethnic origin, colour, religion, sex, or other grounds of discrimination. These criteria are based on high standards that, on the one hand, are consistent with the Crown's primary duty as minister of justice and, on the other, leave to the particular decision maker an amount of latitude to exercise discretion. Within these boundaries, the prosecutor exercises an unfettered discretion. Yet the ethical propriety of the prosecutor's decision to prosecute is not necessarily in issue just because an administrative guideline has not been respected. It is also possible that compliance with an administrative guideline does not, without more, guarantee ethical behaviour.