THE LAMER COMMISSION OF INQUIRY INTO THE PROCEEDINGS PERTAINING TO:

RONALD DALTON
GREGORY PARSONS
RANDY DRUKEN

REPORT AND ANNEXES

The Right Honourable Antonio Lamer,
P.C., C.C., C.D., L.L.D., D.U.

The Report of the Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons, Randy Druken may be obtained from:

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time pressures and limited resources. It may be particularly difficult for less experienced Crown attorneys to exercise contrarian thinking. Experienced Crown attorneys, in leadership roles must foster critical thinking and independence in their younger counterparts. A Crown attorney, like a judge, must not only exercise good judgment but must also be willing to make unpopular decisions.

(ii) Advising the Police:

Reference was made to the role of Bernard Coffey in advising the police from the first days of the investigation, *supra*, at p. 129. This culminated in a meeting with the police on January 9th, 1991, also attended by Mr. Coffey's superior, Colin Flynn, then Director of Public Prosecutions. The exact role played by each of these lawyers is not clear. What Sergeant Singleton and the other officers took away from this meeting was that:

- the hearsay statements might well be admissible under recent case law, and, particularly, the *Khan* case; and,
- if admitted, there would be a good possibility of a successful prosecution.

The next day, Gregory Parsons was charged with the first-degree murder of his mother.

The recent Police-Crown Relationship Policy, *supra*, at p. 130, and Annex 9, makes clear that, "All charging decisions rest with the police", and that, prior to a charge being laid:

> ...the advice provided by a Crown Attorney will be limited to legal advice on specific legal issues only.

The policy also establishes a protocol for obtaining such advice. All requests must be made in writing except in "exigent circumstances". Where that is necessary, a written request must still be made at the first available opportunity.

In my view, this policy is most welcome and would have resulted in a more stringent analysis had it been in effect at the time of the Parsons investigation. The criterion for the police to lay a charge is whether, on the available evidence, there are reasonable grounds to believe that the person has committed an offence. This is a low threshold.

The *Crown Policy Manual* states that, in providing legal advice to the police:

> ...if there is concern about the strength of the evidence available, then the Crown should express that opinion to the police. This involves a higher standard than one of the reasonable grounds to believe. It involves a question of the success of the prosecution based on the sufficiency of the evidence, the credibility of the various witnesses, the capacity of the witnesses...

If the Crown is in a position to assess the strength of the evidence, even before a charge is laid, the Crown must also advise the police about the probability of a conviction. It is obvious that Messrs. Coffey and Flynn were not in a position to assess the strength of the evidence and particularly the statements during the January 9th meeting. It would not have been possible to do so since there was no police analysis of the statements that could have been presented to them.

The *Crown Policy Manual* recognizes that:

> ...it would be an unusual case where the Crown will know the strength or weakness of the evidence at first instance. Rather, the usual practice is for the Crown to assess these factors prior to the preliminary inquiry or trial. In such circumstances, the same question must be answered - the probability of a conviction.

In the case of Gregory Parsons, then, this responsibility became that of the Crown attorney who would conduct the preliminary inquiry or trial.

(iii) Deciding to Prosecute:

The policy recognizes that the roles of the police and the Crown, respectively, are very different once a charge has been laid:

> ...Once a charge has been laid full responsibility and control of the case rests with the Crown. All decisions, including whether or not to proceed with a prosecution, become the exclusive domain of the Crown. The role of the police at this point is simply supportive, at the discretion of the Crown Attorney. The Crown Attorney may request that further investigation take place and that in the absence of that further investigation the Crown Attorney may decide not to prosecute.

Under the policy, if a Crown attorney has been assigned to provide ongoing legal advice in a major investigation, that attorney "will not be involved" in a subsequent prosecution. Again, this is a sound approach since it provides a

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

...

11.3.4 Charge Review

The role of Crown counsel in the assessment or "screening" of charges raises a number of difficult issues. Investigators are clearly entitled to seek and receive legal advice before laying charges. Equally clear is the desirability of an effective working relationship to foster consultation when charges are considered. However, the extent to which the Attorney General can at law prevent the laying of charges, because of insufficient evidence or because a particular prosecution is not in the public interest, is not at all clear.

Some authorities argue that it is fundamental to our system of laws that no one can direct an investigator to lay a charge, or to refrain from doing so. Indeed, whether and to what extent the right of "anyone" (including a police officer) to lay an information under section 504 of the Criminal Code can be confined or abrogated is debatable.

In practice, however, a form of pre-charge screening or "charge approval" occurs in Quebec, New Brunswick and British Columbia. Under these schemes, charges can be laid only if Crown counsel reviews and approves them. Four main arguments have been advanced in support of a charge approval process: it is fairer to the accused; it ensures that only cases with a reasonable prospect of conviction will proceed; it is more efficient because fewer mistakes will occur in the laying of charges; and the decision whether to prosecute is more objective.

On the other hand, opponents of pre-charge screening say that Crown control of the process leads to an erosion of police independence, the making of decisions behind closed doors rather than in open court, and a pre-empting by the Crown of the role to be played by the courts in the criminal trial process.

The Attorney General of Canada considers that the following policy principles strike the appropriate balance between the role of the police and the role of Crown counsel before charges are laid:

> Members of investigative agencies are entitled to investigate offences and carry out their duties in accordance with the law and general standards, practices and policies established by those agencies. During the investigation, investigators are entitled -- and encouraged -- to consult with Crown counsel about the evidence, the offence and proof of the case in court. At the end of the investigation, investigators are again entitled (and strongly encouraged in difficult cases) to consult with Crown counsel on the laying of charges. This consultation might include discussions about the strength of the case and the form and content of proposed charges. Ultimately, however, investigators have the discretion at law to commence any prosecution according to their best judgment, subject

to statutory requirements for the consent of the Attorney General, and the authority of the Attorney General to stay proceedings if charges are laid. However, investigators may not give any undertaking to the accused or counsel for the accused about the conduct of the proceedings (concerning, for instance, conditions of bail, whether the charge will proceed or not) without first consulting Crown counsel.

It is important to note that the Supreme Court has indicated the Crown and the police are to be given some latitude in deciding how to structure their relationship. In R. v Regan, LeBel J. stated: "Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained."

Where the Attorney General of Canada chooses to participate in a process of pre-charge screening, the Attorney General of Canada will apply the charge approval standard established in Part V, Chapter 15, "The Decision to Prosecute", to all proceedings proposed to be commenced at the instance of the Government of Canada.

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

TAB 5C

After Charges are Laid

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

...

11.3.5 Conduct of Post-Charge Proceedings

The right and duty of the Attorney General, through Crown counsel, to supervise criminal prosecutions once charges are laid is a "fundamental part" of our criminal justice system. Generally, just as peace officers are independent from political control when laying charges, Crown counsel are independent from the police in the conduct of prosecutions. Crown counsel's independence extends, for instance, to assessing the strength of the case, electing the mode of trial, providing disclosure to the accused, deciding which witnesses to rely on (including decisions about immunity from prosecution) and deciding if the public interest warrants continuing or staying a prosecution.

The authority of the Attorney General to screen charges at this stage is clear. Indeed, as described in Part V, Chapter 15, "The Decision to Prosecute", Crown counsel "are expected to review the [original] decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction". Crown counsel are also obliged to pursue early and fair resolution of all cases.

Once charges are laid, full responsibility for the proceedings shifts to the Attorney General. On request, police have the responsibility to carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court. As well, the Attorney General has the authority to control the proceedings after charges are laid, including conditions of bail, staying or withdrawing charges and representations on sentence. These decisions should, wherever reasonably possible, be made in consultation with the investigators although consultation (much less agreement) is not required as a matter of law.

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(iii) Crown Role in Trial Preparation:

General:

After Randy Druken was charged with murder, on August 20, 1993, Crown attorney Wayne Gorman was assigned the file. Constable Randell was the police officer assigned to convey all of the police information and

documentation to Mr. Gorman and to assist him in preparing for court. Their working relationship is described, *supra*, at pp. 203-4.

The responsibility of the Crown attorney at this stage is to learn as much as possible about the evidence established by the police investigation. From the perspective of presenting the case in court, any perceived "gaps" or inconsistencies in the evidence would be identified for possible further investigation.

Of course, the primary responsibility for putting together a comprehensive and credible case against the accused lies with the police. The information presented to the Crown attorney for prosecution should identify weaknesses as well as strengths in the police evidence. In this case, there was no comprehensive police "brief" which would summarize and assess the evidence for the benefit of the Crown attorney. The difficulties with the police "theory" were discussed *supra*, at pp. 255-7. As Lieutenant Peddle testified, the problem was not that the police analysis was inadequate but that no analysis was done at all. As a result, Mr. Gorman simply received a mass of documentation including multiple statements from the key witnesses, containing glaring inconsistencies. An important aspect of pre-trial preparation would be to interview those witnesses and try to determine exactly what each would say when taking the stand in court.

The Role of the Crown was discussed in the previous chapter, *supra*, at pp. 134 *et seq*. That entire discussion is relevant to this chapter as well, but I wish to draw particular attention, once more, to the following passage from the Police-Crown Relationship Policy:

> ...Once a charge had been laid full responsibility and control of the case rests with the Crown. All decisions, including whether or not to proceed with a prosecution, become the exclusive domain of the Crown. The role of the police at this point is simply supportive, at the discretion of the Crown Attorney. The Crown Attorney may request that further investigation take place and that in the absence of that further investigation the Crown Attorney may decide not to prosecute.

It appears that in this case, just as in the prosecution of Gregory Parsons, there never was a serious decision taken by the Crown, whether or not to proceed with the prosecution. Rather, the police belief in the guilt of Randy Druken, based on tunnel vision, was simply accepted by the Crown from the beginning.

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Under the policy, if a Crown attorney has been assigned to provide ongoing legal advice in a major investigation, that attorney "will not be involved" in a subsequent prosecution. Again, this is a sound approach since it provides a

second opportunity for a lawyer to assess the strength of the case put together by the police, but in much greater detail.

However, at the time of the Gregory Parsons prosecution, no such policy existed and it was expected that Mr. Coffey would conduct the preliminary inquiry as well as the trial.

Other responsibilities prevented Mr. Coffey from doing so and the conduct of the preliminary inquiry was contracted to a private lawyer, Mark Pike. It still was expected that Mr. Coffey would take the trial but another commitment resulted in the trial being assigned to another Crown Attorney about a month before it was to commence. As a result, there never was a critical assessment of the Crown evidence, within the DPP's Office, prior to the Parsons trial, to determine whether there was a reasonable probability of conviction.

As we have seen, the trial itself, was no assurance of quality control. In *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, then Madam Justice Berverley McLachlin, writing for the majority stated:

> ...Our colleague relies greatly on the facts that the preliminary inquiry judge concluded there was sufficient evidence to send the appellant to trial; that the trial judge did not direct a verdict of acquittal; and that the jury convicted. However, these events post-dated the prosecutor's decision, and were in each instance decisions governed by different considerations. More importantly, the trial was, as found by the unanimous Court of Appeal in the criminal case, deeply flawed. In our opinion, the prosecutor cannot bootstrap his own position on the basis of flawed court decisions that were swept away by the acquittal directed by the Court of Appeal.

These comments are equally applicable to the Crown's failure to critically assess the evidence against Gregory Parsons. It is essential that the DPP have a failsafe system in place to ensure that the evidence in every major case be critically assessed at the latest, upon completion of the preliminary inquiry.

Report of the Attorney General's
Advisory Committee
on

Charge Screening, Disclosure, and Resolution Discussions

The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D.
Chair

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3. The Flow of Information Between Crown Counsel and the Police

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. In the Committee's view, the identity of interest between Crown counsel and the police, and the tradition of co-operation between the two, is sufficient to ensure that, for the most part, this reliance is well placed. Both Crown counsel and the police are concerned with the due enforcement of the criminal law, and both Crown counsel and the police are duty bound to discharge their duties objectively, with integrity, and with fairness. In addition, Crown counsel's power to discontinue criminal proceedings is perhaps the ultimate assurance that everything necessary to properly screen a case and to provide full disclosure is brought forward by the investigators to the satisfaction of Crown counsel.

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 evidence, or, indeed, as to any other part of the case where the advice of Crown counsel is desirable. Thus, Crown counsel must both read the material provided by the investigators, and familiarize himself or herself with the relevant law, so that he or she can discharge the duty to assess whether the materials appear lacking, and ask such further questions as are necessary in sufficient detail to permit the police to respond to them satisfactorily. Having made the inquiries that are necessary based on a knowledgeable review of the materials, and having been told by the police that all that is relevant has been provided, Crown counsel has discharged his or her duty. Any relevant material not brought to the attention of Crown counsel following such a request is a failing on the part of the police, rather than Crown counsel. In essence, Crown counsel is required to review the materials carefully, rather than certify their completeness, and the completeness of the investigation.

Ensuring that there is sufficient material to properly screen a case, and properly provide for disclosure is, therefore, a matter of exercising reasonable care and attention in the context of the working relationship that presently exists between the Crown and the police. Sensitivity to this pre-existing working relationship ensures that the duty imposed on Crown counsel is one that they are functionally capable of discharging. Further, expressing the duty in these terms recognizes the parallel obligations, discussed in this chapter and in Chapter III, placed upon the police to make full disclosure to Crown counsel. The diligent discharge of their respective duties by *both* Crown counsel and the police is necessary if charges are to be properly screened and accused persons accorded full disclosure. The Committee is confident that the tradition of co-operative consultation presently enjoyed by the Crown and the police in Ontario will quickly come to characterize this aspect of the administration of criminal justice.