

Special Prosecutor Review

July 8, 2010

Stephen Owen

Overview

By letter of May 19, 2010 (Appendix 1), Attorney General Michael de Jong, QC, asked me to review the system of Special Prosecutors in British Columbia enacted by the *Crown Counsel Act* (1991) (Appendix 2) and as further described in the Crown Counsel Policy Manual (Appendix 3). In his letter, the Attorney General stated, “It has been 20 years since your original Owen Commission report and enactment of the *Crown Counsel Act* (CCA). The system has worked very well over the years. An opportunity presents itself to consider recommendations to further improve the system of special prosecutors in British Columbia.” He then listed terms of reference, which this review is to address.

In the course of this review, I have interviewed a number of people with expert knowledge of and experience with the special prosecutor system in B.C. (Appendix 4). I am grateful for their candour and thoughtfulness in providing me with their views. I do not quote directly, indirectly or inferentially any of these experts as the observations and recommendations in this report are solely my responsibility. Some vary slightly from some of the advice I have received, and others are an amalgam of various points of view.

As a general matter, there is pride and confidence in the special prosecutor system, as there is with the public prosecution service administered by the Criminal Justice Branch (CJB) within which it operates, and which is unique in Canada.

Foundational aspects of the B.C. system, set out in the CCA, are : (1) the prosecutor-based criminal charge approval process which ensures a common standard; (2) an appeal process should there be disagreement between police recommendations and Crown Counsel; (3) a two pronged standard whereby there must first be a “substantial likelihood of conviction” and second (and only after the first condition is met) that a prosecution is in the public interest; (4) the requirement that private prosecutions are taken over by Crown Counsel to ensure that a private citizen is not burdened with the expense of prosecution and that a common charge standard is applied; (5) the appointment by the Assistant Deputy Attorney General (ADAG) of a special prosecutor from a list of criminal lawyers in private practice compiled by the Deputy Attorney General (DAG), ADAG and the President of the Law Society “where there is a significant potential for a perceived or real improper influence in prosecutorial decision making in a given case” and, if charges are approved, the special prosecutor conducts the prosecution and, if charges are not approved and the case is in the public domain, the special prosecutor publicly explains the reasons for not proceeding; and, (6) if the AG, DAG or ADAG gives a direction to a prosecutor, such direction must be in writing and published in the Gazette.

While there is general agreement that the special prosecutor system has been a success, a recent case has raised the question of potential or apparent conflict of interest where there is some relationship between the special prosecutor and the person being investigated. Given

that a prime reason for appointing a special prosecutor is to address perceptions of improper influence in prosecutorial decisions, it is a sad irony when the relationship itself suggests a conflict of interest.

Over the 20 years that the special prosecutor system has been legislated in B.C., and during Social Credit, NDP and Liberal governments, 42 lawyers have been appointed as special prosecutor in 153 cases. Three lawyers have been appointed in 13 cases each, and 8 lawyers have been appointed in more than 50% of the total cases. The system is used regularly but sparingly and engages a small number of lawyers in private practice, who are generally recognized as leading criminal counsel. In my opinion this is as it should be. It should be noted that the hourly fees paid to special prosecutors are generally lower than lawyers of this experience would charge.

In general answer to the questions asked in the Attorney General's terms of reference, I believe that the process for selecting lawyers for the special prosecutor list, the size of the list and the appointment from the list to a specific case, are appropriate. However, greater attention needs to be given to ensure that there is no inappropriate relationship between the special prosecutor and the person(s) under investigation. In addition, greater attention by the CJB and a special prosecutor needs to be given to ensure that the investigation and prosecution decision are completed in a timely fashion.

While a small number of lead counsel are appointed as special prosecutor for most of the cases, I believe the list needs to be regularly refreshed and that an individual should be on the list for a term of 5 years, but renewable through the same process as initially listed. I do not think it is necessary or appropriate for lawyers from outside B.C. to be on the list. In the exceptional case where this might be desirable, an ad hoc appointment can be made.

One of the most critical issues raised in this review is the timelines of special prosecutor investigations, decisions and proceedings. The often high profile of the issues and persons involved in special prosecutor cases can create an amplified negative impact on the subject under investigation. It is in the public interest and is a matter of fairness to bring these cases to a point of decision in a timely way. The Criminal Justice Branch should require a progress report from a special prosecutor and the investigating police agency at least every 6 months.

Perhaps the most important caution that must accompany a special prosecutor system is that it is understood to be for "special" cases only and that it not reduce public confidence in our general prosecution service, which has an outstanding record of objectivity and expertise. Familiarity with prosecution policy and charging standards, team-based resources for complex cases, and independent prosecutorial discretion (subject only to AG/DAG/ADAG direction which must be in writing and published) ensure the highest level of professionalism.

On the other hand, if the special prosecutor system were to be expanded beyond its current use, it is likely that less experienced counsel, increased potential conflicts, and a denigration of professional Crown Counsel, could result.

Discussion

The Special Prosecutor List

The current process used to recruit lawyers for the list of qualified special prosecutors is appropriate. Potential special prosecutors are identified by Regional Crown Counsel, approved by the ADAG and DAG, and confirmed by the President of the Law Society as being in good standing and without professional compromise. No public requests for nomination should be made. Those qualified are well known. The appointment provisions in the *Provincial Court Act* and the *Queen's Counsel Act* requiring at least 5 years' experience should also apply to special prosecutors.

Special prosecutors must be at the top of their profession with regard to the type of case that is to be investigated for possible criminal prosecution. Length of practice is not the only measure. The special prosecutor list should include lawyers with specific expertise from a range of cases from impaired driving to the most complex commercial fraud, terrorism or organized crime. While many of the most serious cases are prosecuted in the Lower Mainland, the special prosecutor list should include senior lawyers from other regions where knowledge of the local context is important. The list should also properly reflect the balance of gender and expertise within the Criminal Bar.

There are currently 38 lawyers on the special prosecutor list. Some are no longer in active practice and some have only occasionally been appointed to cases. The current practice is to refresh the list by 5 or 6 lawyers every two years. This is about right. Special prosecutor appointment should be seen as an extraordinary event and the professional Crown Counsel should remain the mainstay of public prosecution in British Columbia. The *Braidwood Commission** on the death of Robert Dziekanski, building on the recommendations of the *Davies Commission* * on the death of Frank Paul, recommended the creation of a civilian-based Independent Investigation Office(IIO) to investigate all police-related incidents throughout the province in which death or serious injury, among other harms, occurs. Justice Braidwood further recommended that in all such cases a special prosecutor be appointed in accordance with the CCA. With great respect, I disagree with this last aspect.

* May 2010

* February 12, 2009, Interim report

The BC Coroners Service reports an annual average of 16 in-custody or police-involved deaths from 1992-2007 (Appendix 5). A former police complaints commissioner for municipal police forces in B.C. estimates that he handled 15 serious complaints per year, and that RCMP officers outnumber municipal police officers 2 to 1. This suggests that the call for special prosecutor appointments could multiply several times per year. For the reasons noted, the Crown Counsel service in BC is sufficiently insulated from improper interference to command the utmost public respect, and only needs bolstering by special prosecutors in the most unusual situations, i.e. “where there is a significant potential for a perceived or real improper interference in prosecutorial decision making.” The appointment of a special prosecutor to reconsider the original decision by Crown Counsel not to charge the four RCMP officers involved in the Dziekanski death is such an exceptional case, given the evidence that subsequently arose from the Braidwood inquiry.

Time Limits on List

It is important that the list of special prosecutors contains lawyers in active practice and at the top of their profession in specific areas of criminal law, and that there be some regional representation. While most of the high profile, multi-party or otherwise complex cases will be heard in the Metro Vancouver and Capital Regional District courts, there will be cases of high political sensitivity heard in courts in other regions of B.C. Where the list remains static or when a small number of lawyers are assigned the bulk of the cases, there can be an “old boys” image to special prosecutors. This is not healthy or realistic. A review of a particular lawyer’s continuing on the list should occur every five years. This could be done on a rolling, annual basis by the ADAG, DAG and President of the Law Society, in the same way that periodic additions to the list are made. Lawyers could be reappointed for a further 5 years or replaced to refresh the list with those in active practice and to ensure the requisite numbers and range of experience to meet shifting needs.

It would be difficult to create a comprehensive list of objective criteria that constitute “cause” for removal. By definition, special prosecutors, in addition to being experienced criminal counsel, must exercise exemplary judgment and diligence in their work. However, failing to remain in good standing with the Law Society, leaving active practice, or demonstrating poor judgment by acting in the face of an obvious conflict of interest could be cause for being dropped from the list during the annual review. In the interim, listed special prosecutors who perform below standard would simply not be assigned to new cases.

Conflicts of Interest

The special prosecutor system was enacted in the *Crown Counsel Act* (1991) following the public inquiry into allegations by the Opposition of improper, political interference in a decision by the Attorney General's Ministry not to follow the RCMP's recommendations to charge a provincial cabinet minister with a criminal breach of trust related to the distribution of lottery funds. While born out of alleged political interference, the concept of special prosecutor is more broadly situated in cases "where there is a significant potential for real or perceived improper influence in the administration of criminal justice because of proximity of the suspect, or someone with a close relationship to the suspect, to the investigation, charge approval or prosecution processes. Such cases would include those involving cabinet ministers, senior public officials and police officers." (Discretion to Prosecute Inquiry, 1990. Vol 1, P.115)

The special prosecutor system, as practiced, goes beyond political cases and elected officials. However, the issue triggering this review is the relationship between a politician under investigation and the special prosecutor. In particular, it involves a special prosecutor who, individually or as a member of a law firm, has donated to the politician or that person's party or campaign.

Here, and in other such special prosecutor cases, we are dealing with a spectrum of potential conflict which includes the timing of the donation, whether it is from the firm or the individual lawyer, whether the lawyer was involved in the firm's decision to donate, whether the firm donated to other parties or candidates as well, and whether the politician being investigated is part of a government which is a major client of the firm or the individual special prosecutor.

All law firms must have an internal system for identifying potential conflicts of interest so that they do not find themselves acting for different sides of the same case. Such discipline must also apply when a lawyer is considered for appointment as a special prosecutor. The ADAG has recently amended the appointment letter as follows:

Please take into account that a Special Prosecutor must both be and appear to be free of the control or influence of government. In that regard I ask that you consider whether the existence of any financial relationship, including a history of political contributions, and any political or other affiliation, on the part of you or your firm present a significant potential for real or perceived improper influence in the independent exercise of prosecutorial discretion. Should you feel that any such factors may raise concerns, please contact me at your earliest convenience so that we may assess whether they are relevant to your appointment.

The appointment of a particular lawyer as a special prosecutor clearly requires the exercise of excellent judgment by the ADAG and the private lawyer accepting the case. In order to ensure that the fullest attention is brought to this sensitive question, and given the relatively small number of special prosecutor appointments each year, it is recommended that the ADAG meet face-to-face with the lawyer to probe any possible such conflicts of interest, real, perceived or potential, in the particular circumstances of that case. Some lawyers on the current special prosecutor list simply do not align themselves with any party or politician by way of political donation, personally or by their firm. Given the high sensitivity for perceptions of improper interference in political cases, it is recommended that when a MLA is the subject of investigation, no lawyer who has donated, or whose firm has donated, to that MLA's campaign be appointed as special prosecutor.

Special Prosecutors from Outside British Columbia

Richard Peck, Q.C., a senior Vancouver criminal lawyer who is frequently appointed as special prosecutor in B.C. cases, was recently appointed by the Attorney General of Ontario to decide whether criminal charges should be brought against a former senior Ontario cabinet minister related to the death of a bicycle courier resulting from a motor vehicle incident. Ontario does not have a formalized special prosecutor system similar to British Columbia's, but even if it had such a system, this case may have been appropriate for an out-of-province appointment.

The Ontario case was exceptional. Should such a case occur in British Columbia, an ad hoc appointment of a lawyer from another province could be made. There is no need for outside lawyers to be on the special prosecutor list as the unique characteristics of such a case cannot be anticipated.

However, there are sound reasons why the appointment of extra-provincial counsel may not be appropriate. First, the extraordinary expense of retaining senior lawyers to travel to and spend perhaps long periods of time investigating and then prosecuting a case in British Columbia would be prohibitive. Second, the outside counsel may be unfamiliar with the particular legal culture (both law enforcement and courtroom) in British Columbia.

Most substantively, the "line of authority" of a particular criminal offence may be different in different provinces, where the specific elements of a charge have not been considered by the Supreme Court of Canada, so to apply nationally. In addition, British Columbia uses a different charging standard from other Canadian jurisdictions, so that local familiarity with its application is of considerable importance.

An interesting example of going outside B.C. for a prosecutorial decision was in the case involved in the Discretion to Prosecute Inquiry (1990). The question arose as to whether the

Opposition Attorney General critic should be charged with the publication of unlawfully taped telephone conversations involving the Attorney General; and whether the Attorney General should be charged with obstruction of justice for comments he had made in the taped conversation.

In this situation, the B.C. Deputy Attorney General asked the RCMP to investigate possible criminality, and then sent the police Report to Crown Counsel to the Alberta Deputy Attorney General to make the charging decisions. His decision was that there was no “substantial likelihood of conviction” in one case. He thought there was in the other case but he did not feel qualified to answer the second prong question of whether it was in the public interest to prosecute. He thus sent that issue back to the B.C. Deputy Attorney General to decide.

Timeliness

In many cases the very reason for the appointment of a special prosecutor is to give the public confidence in the integrity of the criminal justice system and, in particular, that prosecution decisions are not made for political or other improper reasons. The often very public nature of the cases also puts the subject of a special prosecutor case in a highly exposed position, and can curtail a government’s effectiveness until resolved. Therefore, as a matter of fairness, government accountability and public confidence, special prosecutors and investigating police must act in a timely way. While sensitive and complex investigations and prosecutions can take time, and while commencing a prosecution in a premature way can trigger disclosure and court process timelines that if neglected can threaten a prosecution, time is of the essence. Special prosecutors, because of their particular expertise, often have very busy practices. For all these reasons, the ADAG should have a full discussion with special prosecutors at the outset about the resources needed and time estimates for concluding the investigation and charge decision. Further, the ADAG should meet with or otherwise receive a full report from the special prosecutor and senior investigating police officer at least every 6 months to ensure progress and timeliness are being achieved. This type of “active management” of the progress of the case should not be confused with interference with the independent role of the special prosecutor.

It should be noted that due to recent concerns with the length of time for some special prosecutors to conclude their charge assessment the ADAG has added the following paragraph to the appointment letter:

Please note that this file, being appropriate for assignment to a Special Prosecutor, brings with it particular sensitivity. In order to maintain public confidence in the administration of justice it is imperative to make any charge assessment decision in

as timely a manner as is practicable, and to ensure that any process which may follow is pursued expeditiously.

Conclusion

The specific question in this review is whether the special prosecutor system established through the *Crown Counsel Act* (1991), detailed in the Crown Counsel Manual and practiced for the past 20 years in British Columbia meets the overriding public interests of fairness, accountability and public confidence in our criminal justice system. The strong opinion of many senior people working with the system is that it does so. However, improvements can be and are being made to ensure that before a special prosecutor is appointed to a particular case, there is a specific and direct turning of the mind of the ADAG and the special prosecutor to the potential for real or perceived conflict of interest.

In addition, concluding a special prosecutor investigation, together with the police, and making and acting on the charge decision must be done in a time-sensitive way, as a matter of fairness to the person being investigated and of public confidence in our system of justice and government.

The special prosecutor system must be, and can only be, an adjunct to the public prosecution system under the Criminal Justice Branch. By definition, it should be limited to very few cases and as a specific precaution in highly sensitive situations. To expand the system beyond a very limited use could damage the professionalism, reputation and effectiveness of the Criminal Justice Branch. The provisions of the *Crown Counsel Act* properly insulate public prosecutors from improper interference in their work. They are highly skilled and dedicated professionals and there is no evidence of anything but excellence in their work. Any expansion of the special prosecutor system could potentially expose the criminal justice system to greater improper influence or lower standards because of the distributed nature of private legal practice and the greater difficulty in overseeing quality.

In conclusion, the special prosecutor system in British Columbia works well in the public interest. However, it should be restricted to a very particular type of sensitive case, it should not be expanded beyond its current use, and extra precautions should be exercised to ensure against conflicts of interest and unnecessary delay in proceedings.

Respectfully submitted,

Stephen Owen, Q.C., P.C.

Appendix 1



May 19, 2010

FAXED
19 05 10

The Honourable Stephen Owen, QC PC
Vice President
External, Legal and Community Relations
University of British Columbia
6328 Memorial Road
Vancouver, BC V6T 1Z2

Dear Mr. Owen:

Review of Appointment of Special Prosecutors

Further to our May 13, 2010 meeting, I wish to confirm the terms of reference for the review you have agreed to conduct into the appointment of special prosecutors under the *Crown Counsel Act*.

It has been 20 years since your original Owen Commission report and enactment of the *Crown Counsel Act* (CCA). In my view the system has generally worked very well over the years. An opportunity presents itself to consider recommendations to further improve the system of special prosecutors in British Columbia. Your present review is therefore to address the following areas:

1. The process for selecting lawyers who are qualified to be on the list of qualified special prosecutors.
2. Whether the method of and criteria for selection of a special prosecutor from the qualified list where the individual being investigated is a Member of the Legislative Assembly should differ from other cases. If so, the review will recommend what the criteria and method should be.
3. Measures to ensure that, as the CCA requires, special prosecutors carry out their “mandate, as set out in writing” by the Assistant Deputy Attorney General, Criminal Justice Branch (ADAG), including as to the time within which the special prosecutor is to report to the ADAG on whether any charges are to be laid.

Regarding the first two matters, the review is to consider and make recommendations respecting the following:

1. The process used to recruit lawyers for the list of qualified special prosecutors that the ADAG uses in appointing a special prosecutor. (For example, should there be a public request for qualifications?)

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2. The level of experience, knowledge and ability required to be a special prosecutor.
3. The process used to consider candidates and to decide which lawyers should be placed on the list of special prosecutors. (For example, who should select special prosecutors and how should the deliberations be conducted?)
4. Whether there should be a larger or smaller number of lawyers on the list of qualified special prosecutors. (At present, there are 35 lawyers on the list.)
5. The frequency with which the list of qualified special prosecutors should be reviewed and refreshed.
6. Whether a time limit should exist for how long a lawyer remains on the list of qualified special prosecutors. (For example, is there a need to review a lawyer's ongoing eligibility periodically and, if so, who should do that, how and when?)
7. Whether there should be criteria and a process for removal for cause of a lawyer from the list of qualified special prosecutors.
8. Whether political donations, activities or affiliation should bar a lawyer from acting as a special prosecutor. If so, in which cases should this be so (*e.g.*, should any such bar apply only where the individual being investigated is an elected official?)
9. Whether the list of qualified special prosecutors should include lawyers from outside British Columbia.

Regarding the third matter, above, the review is to consider and make recommendations respecting the timeliness of the discharge by special prosecutors of their mandate from the ADAG under the CCA, specifically as to the time within which they are to report to the ADAG on whether any charges are to be laid.

I further confirm our agreement that you will complete your review by July 15, 2010, with delivery of a written report at that time to me, setting out any recommendations respecting the above matters. The report will be made public.

Allow me to thank the University for agreeing to offer your valuable services on a *pro bono* basis. I am also very grateful to you for taking the time out of your demanding schedule to take on this mandate.

I look forward to receiving your report.

Yours truly,



Michael de Jong, QC
Attorney General
Solicitor General and
Government House Leader

Appendix 2

CROWN COUNSEL ACT

[RSBC 1996] CHAPTER 87

Definitions

1 In this Act:

"ADAG" means the Assistant Deputy Attorney General, Criminal Justice Branch;

"Branch" means the Criminal Justice Branch of the Ministry of Attorney General;

"offence" means an offence

(a) under the *Criminal Code* or any other enactment of Canada with respect to which the Attorney General of British Columbia may initiate and conduct a prosecution, and

(b) under an enactment of British Columbia.

Functions and responsibilities of the Criminal Justice Branch

2 The Branch has the following functions and responsibilities:

(a) to approve and conduct, on behalf of the Crown, all prosecutions of offences in British Columbia;

(b) to initiate and conduct, on behalf of the Crown, all appeals and other proceedings in respect of any prosecution of an offence in British Columbia;

(c) to conduct, on behalf of the Crown, any appeal or other proceeding in respect of a prosecution of an offence, in which the Crown is named as a respondent;

(d) to advise the government on all criminal law matters;

(e) to develop policies and procedures in respect of the administration of criminal justice in British Columbia;

(f) to provide liaison with the media and affected members of the public on all matters respecting approval and conduct of prosecutions of offences or related appeals;

(g) any other function or responsibility assigned to the Branch by the Attorney General.

Assistant Deputy Attorney General

3 (1) The ADAG is charged with the administration of the Branch and with carrying out the functions and responsibilities of the Branch under section 2.

(2) The ADAG is designated, for purposes of section 2 of the *Criminal Code*, as a lawful deputy of the Attorney General.

Responsibilities of Crown counsel

- 4 (1) The ADAG may designate as "Crown counsel" any individual or class of individual who is lawfully entitled to practise law in British Columbia.
- (2) Each Crown counsel is authorized to represent the Crown before all courts in relation to the prosecution of offences.
- (3) Subject to the directions of the ADAG or another Crown counsel designated by the ADAG, each Crown counsel is authorized to
- (a) examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate,
 - (b) conduct the prosecutions approved, and
 - (c) supervise prosecutions of offences that are being initiated or conducted by individuals who are not Crown counsel and, if the interests of justice require, to intervene and to conduct those prosecutions.
- (4) The Attorney General may establish an appeal process under which law enforcement officials may appeal the determination of any Crown counsel or special prosecutor not to approve a prosecution.

British Columbia Crown Counsel Association Agreement

4.1 (1) In this section:

"**BCCCA**" means the British Columbia Crown Counsel Association, a society incorporated under the *Society Act*;

"**Crown counsel**" means an individual described in section 4 (1) who is an "employee" as defined in section 1 of the *Public Service Act* but does not include

- (a) the Assistant Deputy Attorney General,
- (b) the Director, Special Justice Programs,
- (c) the Executive Director, Criminal Justice Branch,
- (d) the Regional Crown counsel,
- (e) the Deputy Regional Crown counsel,
- (f) the Director, Criminal Appeals,
- (g) the Director, Legal Services,
- (h) the Communications Officer,

- (i) the Director, Policy and Legislation,
- (j) the Deputy Director, Commercial Crime,
- (k) the Deputy Director, Criminal Appeals, and
- (l) the persons in other positions specified by agreement of the employer and the BCCCA;

"employer" means the government represented by the BC Public Service Agency.

(2) The BCCCA is the exclusive bargaining agent for all Crown counsel and is authorized to enter into agreements with the employer which must include all matters affecting wages or salary, hours of work and other working conditions, except the following:

- (a) the principle of merit and its application in the appointment and promotion of employees, subject to section 4 (3) of the *Public Service Act*;
- (b) a matter included under the *Public Sector Pension Plans Act*;
- (c) the organization, establishment or administration of the ministries and branches of the government, except the effect of reductions in establishment of employees, which must be negotiated by the parties;
- (d) the application of the system of classification of positions or job evaluation under the *Public Service Act*;
- (e) the procedures and methods of training or retraining of all employees not affected by section 15 of the *Public Service Labour Relations Act*, other than training programs administered with a branch or ministry that apply to one occupational group only.

(3) The employer and the BCCCA must bargain collectively in good faith and make every reasonable effort to conclude agreements referred to in subsection (2).

Directions from Attorney General on specific prosecutions

- 5 If the Attorney General or Deputy Attorney General gives the ADAG a direction with respect to the approval or conduct of any specific prosecution or appeal, that direction must be
- (a) given in writing to the ADAG, and
 - (b) published in the Gazette.

Policy directive from Attorney General

- 6 (1) If the Attorney General or Deputy Attorney General wishes to issue a directive respecting the Criminal Justice Branch policy on the approval or conduct of prosecutions, that directive must be given in writing to the ADAG and, in the discretion of the ADAG, may be published in the Gazette.

(2) If the Attorney General or Deputy Attorney General wishes to issue a directive respecting the administration of the Branch, that directive must, if requested by the ADAG, be given in writing and may, in the discretion of the ADAG, be published in the Gazette.

Special prosecutors

- 7** (1) If the ADAG considers it is in the public interest, he or she may appoint a lawyer, who is not employed in the Ministry of Attorney General, as a special prosecutor.
- (2) A special prosecutor must carry out his or her mandate, as set out in writing by the ADAG, and in particular must
- (a) examine all relevant information and documents and report to the ADAG with respect to the approval and conduct of any specific prosecution, and
 - (b) carry out any other responsibilities respecting the initiation and conduct of a specific prosecution.
- (3) If the ADAG appoints a special prosecutor, the ADAG must advise the Deputy Attorney General
- (a) that a special prosecutor has been appointed, and
 - (b) the name of the special prosecutor.
- (4) If, after a special prosecutor receives the mandate under subsection (2), the Attorney General, Deputy Attorney General or ADAG gives a direction to a special prosecutor in respect of any matter within the mandate of the special prosecutor, that direction must be given in writing and be published in the Gazette.
- (5) Subject to the mandate given to the special prosecutor by the ADAG or to a directive referred to in subsection (4), the decision of a special prosecutor with respect to any matter within his or her mandate is final, but a decision not to approve a prosecution may be appealed by a law enforcement officer under the process established by section 4 (4).

Delay in publication

- 8** (1) The Attorney General, Deputy Attorney General or ADAG may direct publication in the Gazette of those matters referred to in section 5 or 7 be delayed if to do so would be in the interests of the administration of justice.
- (2) A delay under subsection (1) must not extend beyond the completion of the prosecution or matter or any related prosecution or matter.

Appendix 3



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 125-20/CCAC	EFFECTIVE DATE: November 18, 2005	POLICY CODE: SPE 1
SUBJECT: Special Prosecutors		CROSS-REFERENCE: CHA 1 PRO 1

Policy

The Assistant Deputy Attorney General (ADAG) is empowered to appoint a special prosecutor in cases where the ADAG believes there is a significant potential for real or perceived improper influence in prosecutorial decision-making.

Above all other considerations, the ADAG regards the need to maintain public confidence in the administration of criminal justice as the paramount consideration in deciding whether a case requires the appointment of a special prosecutor.

Any case which Crown Counsel believes warrants consideration of the appointment of a special prosecutor, and any request for the appointment of a special prosecutor received from members of the public or the police, should be referred immediately to Regional Crown Counsel who will discuss the matter with the ADAG.

Discussion

On June 27, 1991, the *Crown Counsel Act* received Royal Assent and came into force. The *Crown Counsel Act* was the culmination of a process which commenced in November 1990 when Commissioner Stephen Owen submitted his Discretion to Prosecute Inquiry Report to government. Commissioner Owen concluded that while criminal justice in British Columbia is administered with integrity, professionalism and public confidence, nevertheless the system itself was vulnerable. Owen then recommended a process to allow for the appointment of special prosecutors to strengthen the independence of prosecutorial decision-making from real or perceived improper influence.

With the passing of the *Crown Counsel Act*, legislation was enacted to provide a more open justice system, one which balanced the need for Branch independence with accountability to the public and the legislature through the Attorney General. For the first time, the function and responsibilities of the Criminal Justice Branch and the roles of the Assistant Deputy Attorney General (ADAG) and Crown Counsel were clearly defined and legislation governed the relationship between the Criminal Justice Branch and the Attorney General.

Under section 5 of the *Crown Counsel Act* the Attorney General (AG) or Deputy Attorney General (DAG) can intervene to direct the ADAG with respect to a specific prosecution or appeal only if such direction is in writing and is published in the *British Columbia Gazette*. Similarly, under section 6, a directive from the AG or DAG concerning Criminal Justice Branch policy on approval or conduct of prosecutions must be given in writing to the ADAG who has a discretion to require publication of the direction in the *Gazette*. Similar provisions exist with respect to directives relating to the Branch's administration.

Yet even with all these safeguards, cases can arise in which the public may still question the integrity of prosecutorial decision-making. For cases in which the ADAG forms the view that there could be significant potential for real or perceived improper influence in the administration of criminal justice, section 7 of the *Crown Counsel Act* authorizes the ADAG to appoint a lawyer from the private Bar as a special prosecutor to carry out a defined mandate with respect to the approval and conduct of a specific prosecution.

Under section 7(4) of the *Crown Counsel Act*, if the AG or DAG or ADAG gives a direction to a special prosecutor in respect of any matter within the mandate of the special prosecutor, that direction must be given in writing and be published in the *Gazette*.

Appointment of Special Prosecutors

Special prosecutors are appointed on a case-by-case basis by the ADAG from a list of senior and experienced practitioners from the private Bar. Most special prosecutors are appointed in cases involving Cabinet Ministers and other senior public or Ministry officials, senior police officers, or persons in close proximity to them. Only the ADAG has the authority, under the Act, to appoint a special prosecutor. All counsel on the special prosecutors list have been jointly approved by the President of the Law Society, the DAG and the ADAG. This joint approval process ensures a consistent high standard is applied to those sensitive cases which are referred to the special prosecutor.

Functions of Special Prosecutors

Applying Branch policies, including the policy on Charge Assessments Guidelines (CHA 1), special prosecutors carry out the charge assessment and, where there is a decision to prosecute, are ordinarily responsible for the conduct of the ensuing prosecution and any subsequent appeal. Special prosecutors also make the decision as to whether to notify professional organizations, employers or other groups that charges against their members or employees have been proposed in a Report to Crown Counsel, pursuant to the policy entitled Professional Organizations – Charges Against Members (PRO 1). (Any notification will be done by the Headquarters Office).

The Branch facilitates responses to the media or other interested parties concerning decisions made by special prosecutors.

Appendix 4

People Interviewed by Stephen Owen

	Name	Title	Date
1	David Loukidelis	Deputy Attorney General	May 13, 2010
2	Michael de Jong Q.C.	Attorney General	May 13, 2010
3	Robert Gillen Q.C.	Assistant Deputy Attorney General	May 21, 2010
4	Hon. E.N (Ted) Hughes Q.C.	Former Deputy Attorney General	May 21, 2010
5	Hon. Ernie Quantz	Provincial Court Judge	May 25, 2010
6	Dirk Ryneveld	Former Police Complaints Commissioner	May 28, 2010
7	John Waddell Q.C.	Past President, Law Society	May 28, 2010
8	Glen Ridgway Q.C.	President, Law Society	May 28, 2010
9	Richard Peck Q.C.	Special Prosecutor	June 1, 2010
10	Christopher Considine Q.C.	Special Prosecutor	June 2, 2010
11	Robert McDiarmid Q.C.	Past President, Law Society	June 2, 2010
12	Gail Barnes	Special Prosecutor	June 3, 2010
13	Gary Bass	Deputy Commissioner, RCMP	June 3, 2010
14	Janet Winteringham Q.C.	Special Prosecutor	June 3, 2010
15	George Macintosh Q.C.	Special Prosecutor	June 4, 2010
16	Mike Farnworth	MLA, Solicitor General Critic	June 11, 2010
17	Dennis Murray Q.C.	Special Prosecutor	June 11, 2010
18	Hon. Patrick Dohm	Associate Chief Justice, BCSC (Ret.)	June 11, 2010
19	Jim Chu	Chief Constable, VPD	June 11, 2010
20	Leonard Krog	MLA, Attorney General Critic	June 11, 2010
21	Keith Hamilton Q.C.	Policy Counsel, Dziekanski Inquiry	June 17, 2010
22	John van Dongen	MLA, Government Whip	June 17, 2010
23	Terence Robertson Q.C.	Special Prosecutor	June 18, 2010
24	Brian Smith Q.C.	Former Attorney General	June 21, 2010
25	Len Doust Q.C.	Special Prosecutor	June 22, 2010

