



*Manitoba
Department of Justice
Prosecutions*

Guideline No. 5:COU:1

Policy Directive

Subject: Appointment of Independent Counsel

Date: May 2009

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 is responsible for the assignment of cases to independent counsel. However, the Assistant Deputy Attorney General may delegate this task or matters relating to the supervision of independent counsel. Therefore, when a case in this category arises, the Crown Attorney is expected to refer it to the Assistant Deputy Attorney General (or delegate) as soon as possible.

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 Assistant Deputy Attorney General (or delegate) along with a recommendation as to whether independent counsel should be appointed. The Assistant Deputy Attorney General (or delegate) 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 Assistant Deputy Attorney General (or delegate) 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 Assistant Deputy Attorney General (or delegate) 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 Assistant Deputy Attorney General (or delegate) 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 Assistant Deputy Attorney General (or delegate) 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 Assistant Deputy Attorney General (or delegate) 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 Assistant Deputy Attorney General (or delegate) will consult with 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 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) Independent prosecutors are required to keep the Department of Justice advised of all significant decisions that they propose to take in connection with the cases they are assigned. This is done solely to keep Department of Justice officials apprised of the status of the case, and to enable the Attorney General or the Deputy Attorney General to give direction as contemplated by “c” of this policy. Independent prosecutors may secure legal assistance from Department of Justice officials who have special expertise in the area being prosecuted on strategies for implementing the decisions that have been taken by independent counsel. However, independent prosecutors should not consult with Department of Justice officials as to the position they will take regarding resolution of the case. In other words, the independent counsel may consult with officials over tactical or legal issues arising in the case but the decision as to how the case should ultimately be resolved must remain with the independent counsel. Should the tactical or legal advice rendered cause the independent counsel to change their position on resolution of the case, this change must be publicly disclosed on the Manitoba Justice website after the trial judge has rendered a verdict in the case or the charge has been stayed. Subject to this policy, independent counsel has full access to all parties within, and all relevant documents and information held by the Department of Justice for the Province of Manitoba. The Assistant Deputy Attorney General (or delegate) shall facilitate contact between the departmental prosecutor and employees 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 may wish to consult with or obtain advice from experienced criminal lawyers on issues that may arise during the prosecution of a case. Manitoba Justice has several independent counsel on retainer at any given time. Independent counsel may consult with these lawyers, or any of them, in order to obtain guidance. Further, as part of their retainer, members of this group are expected to assist when called upon.
- h) 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 Assistant Deputy Attorney General (or delegate) who can facilitate consultation with the Victims Services Branch.
- i) Periodic administrative meetings may be held between the Assistant Deputy Attorney General (or delegate) 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.
- j) 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.