DISCRETION TO PROSECUTE INQUIRY

COMMISSIONER'S REPORT

(Volume One — Report and Recommendations)

Stephen Owen
Inquiry Commissioner

November 1990

Province of British Columbia

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Province of
British Columbia

STEPHEN D. OWEN, *Commissioner*

DISCRETION TO PROSECUTE INQUIRY

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November 1990

The Lieutenant Governor in Council
Province of British Columbia

Under Orders in Council No. 621 dated April 18, 1990, No. 1015 dated June 28, 1990, and No. 1276 dated August 27, 1990 I was appointed Inquiry Commissioner under Part 2 of the Inquiry Act. I was to inquire into and report on certain matters concerning the discretion to prosecute in British Columbia, with specific reference to the decision not to prosecute William E. Reid with respect to the awarding of a grant under the Growth and Opportunities B.C. Grants Program to the Semiahmoo House Society, and to subsequent related decisions and actions.

I am pleased to advise you that this Inquiry has been completed, and to submit my Report, as attached.

Respectfully,

Stephen Owen
Inquiry Commissioner

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CHAPTER I

INTRODUCTION

A. Terms of Reference

On April 18, 1990, Order in Council No. 621 established this Commission of Inquiry and set the Terms of Reference as follows:

> The matters to be inquired into and reported on are the process and procedure followed by the Ministry of Attorney General in deciding that William E. Reid would not be prosecuted with respect to the awarding of a grant under the Growth and Opportunities B.C. Grants Program to the Semiahmoo House Society and, in particular, to inquire and report on:
>
> (a) the correctness and adequacy of the process applied in making that decision;
>
> (b) the objectiveness and good faith with which this process was applied;
>
> (c) the presence, if any, of external influence affecting the outcome of the decision;
>
> (d) the correctness of the Attorney General not to be involved, directly or indirectly, in the decision;
>
> (e) the correctness of the general practice, followed in this case, of not publicly disclosing information and events that are considered in deciding not to prosecute a citizen;
>
> (f) the integrity with which the decision was made.

On June 28, 1990, Order in Council No. 1015 amended the Terms of Reference by deleting the requirement that the Commissioner report "on or before June 30, 1990". This was necessary because of the unavoidable delay to the Inquiry caused by the intervening initiation of criminal proceedings against Mr. Reid by the Opposition Justice Critic, Moe Sihota.

On August 27, 1990, Order in Council No. 1276 further amended the Terms of Reference

as follows:

> Further matters to be inquired into and reported on are:
>
> (a) the appropriateness of the Deputy Attorney General of British Columbia referring to the Deputy Attorney General of Alberta the issue of whether or not to prosecute Stuart (Bud) Smith, Q.C. on allegations of attempting to obstruct justice as a result of intercepted and recorded telephone conversations between Mr. Smith and others;
>
> (b) the appropriateness of the Deputy Attorney General of British Columbia referring to the Deputy Attorney General of Alberta the issue of whether or not to prosecute persons on allegations of criminal conduct arising from the interception, recording and disclosure of certain telephone conversations; and
>
> (c) the appropriateness of the Deputy Attorney General of British Columbia applying the criterion of public interest in deciding not to prosecute persons on the recommendation of the Deputy Attorney General of Alberta in response to the referral described in paragraph (b).

Copies of Orders in Council No. 621, 1015 and 1276 are included in Chapter VII of this Report.

B. Ombudsman as Commissioner

A brief comment should be made on the role of a Commission of Inquiry, and the appointment of the Ombudsman for British Columbia as Commissioner. The purpose of such a Commission is to inquire into and make recommendations to government on the questions set out in the Terms of Reference. In this case, these questions deal with the fairness and appropriateness of that part of the administration of justice by provincial officials that relates to the decision to lay criminal charges. A Commission has advisory status and not executive power; it has the authority to investigate and report, but not to issue orders.

This role is similar to that set out in the *Ombudsman Act*, except that the Ombudsman has jurisdiction to look into all matters of administration within the authority of provincial ministries and agencies, without being restricted by any Terms of Reference. However, in British Columbia, the Ombudsman's jurisdiction has traditionally been interpreted not to include the authority to review the exercise of prosecutorial discretion. As such, the Terms of Reference in this Inquiry extend the normal jurisdiction of the Ombudsman.

Ombudsman investigations can be initiated on the complaint of an individual, on the Ombudsman's own initiative, or at the request of the Legislature. Neither the provincial cabinet nor the Attorney General have the authority to direct the Ombudsman to inquire into a particular matter. In this case, the Ombudsman was requested by the Attorney General to act as Commissioner in this Inquiry. In considering whether to act on this request, the Ombudsman paid particular attention to the fact that it is commonplace for judges to fulfil the role of Inquiry Commissioner without any actual or apparent impact on their impartiality as judges. This is the same situation for an Ombudsman.

C. Inquiry Officials

The Inquiry is deeply indebted to Commission Counsel, Bryan Williams, Q.C. and Donald Sorochan, for the comprehensive and efficient presentation and testing of the evidence before this Inquiry. The opportunity for the public to judge directly the circumstances surrounding the decision not to prosecute Mr. Reid, the private prosecution initiated by Mr. Sihota, and the disclosure of the taped Smith telephone conversations was greatly enhanced by their professional efforts. Also, Commission Secretary, Keith Hamilton, provided invaluable service to the efficient conduct of the public hearings and the preparation of this report.

D. Establishing Jurisdiction

In accordance with the terms of Section 10 of the *Inquiry Act*, the Commissioner swore the following oath of office:

> I, Stephen Owen, swear that I will truly and faithfully execute the powers and trust vested in me by His Honour, the Lieutenant Governor in Council, under the *Inquiry Act*, according to the best of my knowledge and judgement. So help me God.

In accordance with Section 11 of the *Inquiry Act*, Notice of the Appointment of the Commissioner, of the purpose and scope of the Inquiry, and of the time and place of holding the first meeting was published in the provincial Government Gazette and in the Vancouver Sun, Vancouver Province and Victoria Times Colonist daily newspapers. In addition, a news release was circulated to all community newspapers in the province containing similar notice.

Copies of the oath and notices are included in Volume 2 of this Report.

E. Parties of the Inquiry and Public Hearings

The parties who sought and obtained standing before the Inquiry were as follows:

Party	Counsel
Ministry of the Attorney General	Malcolm Macaulay, Q.C./ H.J. Rusk
Royal Canadian Mounted Police	Frank Haar, Q.C.
Moe Sihota	Terrance La Liberte
Stuart (Bud) Smith, Q.C.	Thomas Braidwood, Q.C.

Public hearings were held in Vancouver on May 4, May 22, August 27, 28, 29, 30, and September 5 and 7. In the course of the public hearings, the following witnesses attended and gave sworn testimony before the Inquiry:

Hon. E.N. Hughes, Q.C.	Moe Sihota
Robert Wright, Q.C.	William Stewart
Richard Peck, Q.C.	Ernest Quantz
A.G. Henderson	Stuart (Bud) Smith, Q.C.
John Hall, Q.C.	Inspector E.C. MacAulay

In addition, public submissions were presented to the Inquiry on September 5 and 7 by the following:

Royal Canadian Mounted Police	Deputy Commissioner D.K. Wilson
B.C. Association of Chiefs of Police	Chief Constable Robert Stewart
B.C. Civil Liberties Association	Dr. John Dixon
Surrey-White Rock Liberal Association	Wilfred L. Hurd
Canadian Bar Association, B.C. Branch, Criminal Section	Peter Leask, Q.C.

Throughout the Inquiry hearings, the public and news media had open access to the proceedings, including the opportunity for video and audio recording.

F. Precipitating Events

The administration of justice in British Columbia has been under considerable suspicion because of the unprecedented series of events during the past year involving, in turn:

- The resignation of William E. Reid as Provincial Secretary in the Provincial Cabinet on September 22, 1989 following concerns raised publicly with respect to his awarding of a grant under the Growth and Opportunities B.C. Grants Program to the Semiahmoo House Society.

- The special investigations by the Auditor General and the Comptroller General into the administration by Mr. Reid of the Growth and Opportunities B.C. Grants Program.

- The RCMP investigation of Mr. Reid and others, recommending that Mr. Reid be prosecuted under s.122 of the *Criminal Code* for breach of trust by a public officer.

- The decision of the Assistant Deputy Attorney General, Criminal Justice Branch, William F. Stewart, that Mr. Reid should not be prosecuted for breach of trust by a public officer or for any other criminal offence.

- The appeal by the RCMP of that decision to the Deputy Attorney General, E.N. (Ted) Hughes, Q.C., and his final decision not to prosecute Mr. Reid.

- The public challenge of this decision by the Leader of the Opposition, Michael Harcourt and the Opposition Justice Critic, Moe Sihota.

- The commissioning of this Inquiry into the process applied in deciding not to prosecute Mr. Reid.

- The initiation of a private prosecution against Mr. Reid by Mr. Sihota.

- The decision of the Attorney General, Stuart (Bud) Smith, Q.C. not to intervene in the private prosecution or to enter a stay of proceedings.

- The public statements by Mr. Smith and Mr. Sihota regarding disclosure of information and documents related to the prosecution of Mr. Reid.

- The withdrawal of the private prosecution by Mr. Sihota.

- The disclosure by Mr. Sihota to the Legislative Assembly and the news media of taped telephone conversations between Mr. Smith and others.

- The resignation of Mr. Smith as Attorney General.

- The referral by Mr. Hughes to Neil McCrank, Deputy Attorney General of Alberta, of the decision whether anyone should be prosecuted for attempting to obstruct justice or for intercepting, recording and disclosing telephone conversations contrary to the *Criminal Code*.

- The decision by Mr. Hughes that the prosecution of persons named by Mr. McCrank as facing a substantial likelihood of conviction for the unlawful disclosure of private communications, was not in the public interest.

- The broadening of the Terms of Reference of this Inquiry.

G. The Administration of Criminal Justice in British Columbia

This Inquiry was not established to review the conduct of William E. Reid. That has already been the subject of an inquiry by the Comptroller General, an investigation by the RCMP, and detailed consideration by the Attorney General's Ministry. Rather, this Inquiry has been commissioned to review and report on the integrity of the decisions made with respect to Mr. Reid, and the adequacy of the general discretion to prosecute process in British Columbia. These matters became of serious concern in this province because of the public suspicion that Mr. Reid may have received special treatment because of his influence with government. Although these suspicions proved to be unfounded with respect to Mr. Reid, they pose a serious threat to the integrity of our justice system and their cause must be addressed.

The rule of law in a democracy requires the public's ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of our justice system can cripple it. Perception becomes reality when suspicion of injustice is allowed to fester. The system must be capable of quickly and convincingly resolving any such doubts.

This is why the Reid prosecution case is so important. It is not enough to know now that the system worked fairly. The adversarial nature of our political system and its apparent proximity to the administration of justice will inevitably raise questions of potential interference in criminal investigations involving political or other influential figures. The public inquiry process is not an efficient solution to the individual cases which will arise. The system itself must be capable of demonstrating its integrity on an ongoing basis.

The challenge of the fair and effective administration of criminal justice is to achieve the proper balance between independence from political interference and accountability to the political process for the investigation and prosecution of crime. This challenge is complicated in Canadian jurisdictions because of the dual role of the Attorney General both as a member of Cabinet and as the senior person responsible for the administration of justice. In British Columbia, the importance of achieving the appropriate balance between independence and accountability in the administration of criminal justice is amplified by the often aggressively partisan nature of the political relationship between the Government and Opposition, exemplified over the past two years by the bitter exchanges between the former Attorney General, Bud Smith and the Opposition Justice Critic, Moe Sihota. In this atmosphere, public confidence in the impartiality of the administration of justice is more difficult to sustain.

While this Inquiry has heard evidence and opinion of the potential for real or perceived improper influence in the investigation and prosecution of sensitive political cases, it has heard no evidence of a general problem. Indeed, the indication is that the system in general operates with integrity, professionalism and public confidence. Therefore the adjustments that this Inquiry has been invited to recommend to deal with the systemic vulnerability in political or other sensitive cases, are targeted at those cases only and not at the system as a whole.

As is discussed and recommended in this Report, the application of a single standard for the charging and prosecution of all individuals is an important aspect of equal justice. However, achieving equal justice sometimes requires the application of a special process to take into account the special circumstances of an individual or situation. A potential for real or perceived improper influence in the investigation or prosecution process is such a situation. To give the public confidence that decisions in political and other sensitive cases are being made according to the same standards as other cases, it is reasonable for a special process to be instituted. At present, all such cases are sent outside the Attorney General's Ministry to a private criminal lawyer for review and recommendation as to whether charges should be initiated. Such recommendations are almost always accepted by the Attorney General's Ministry and private counsel is also hired to conduct the prosecution.

The recommendation in this Report for the appointment of a special prosecutor with decision-making authority would formalize this arrangement and strengthen the independence of the decision-making process from real or perceived political or other improper interference. Accountability would be maintained through the residual responsibility of the Attorney General to intervene in the public interest and on the public record. Analysis and detailed recommendations are set out in Chapter V. This Report also deals with the need for explicit, mandatory and legislated conflict of interest policy for officials holding positions of public trust; charge approval standards and process; and the

public disclosure of information where a decision not to charge is made.

Two realities emerge clearly from the evidence before this Inquiry. One is that criminal justice in British Columbia is administered with integrity and professionalism by the officials of the Attorney General's Ministry; the other is that partisan politics in this province create the potential for real or perceived improper interference with the administration of criminal justice in political and other sensitive cases. The objective of this Inquiry is to address the specific systemic vulnerability which has been exposed in this case.

Note: Page references in this Report refer to the transcript of the Discretion to Prosecute Inquiry proceedings. Exhibit references in this Report refer to exhibits filed during the Discretion to Prosecute Inquiry proceedings.

CHAPTER II

THE PROSECUTORIAL PROCESS IN BRITISH COLUMBIA

A. The Constitutional Framework

Under Canada's Constitution the Parliament of Canada has exclusive authority to legislate in relation to the criminal law and to procedure in criminal matters (*Constitution Act, 1982*, s. 91(27)).

Each province, on the other hand, has exclusive authority to legislate in relation to the administration of justice in its province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction (s. 92(14)).

The *Criminal Code* of Canada, RSC 1985, c. C-46 was enacted by the Parliament of Canada under the power given to it by s. 91(27) of the *Constitution Act*.

B. The *Criminal Code* Procedure

1. Compelling an Accused's Appearance in Court

The criminal law is an enormously powerful weapon available to the state, to protect the public and to preserve law and order. It is to be used sparingly; not to redress private wrongs between individuals, but only to respond to wrongs against the state or the public at large.

The circumstances in which a person may be searched, detained or arrested, or have premises searched or property seized are carefully specified in the *Criminal Code* and other Acts of Parliament. Similarly, the *Criminal Code* prescribes with some precision the circumstances in which a person may be formally charged with a criminal offence and compelled to appear before a Court to answer to a charge.

There are *pre-charge* and *post-charge* procedures by which a person may be compelled to appear in Court.

a. Pre-charge procedures - a peace officer may, instead of arresting, issue an Appearance Notice, alleging that the person named in it committed a specified offence, and requiring that person to attend Court on a specified date. Appearance Notices are used for less serious indictable offences, summary conviction offences and for "hybrid" offences (those which may be prosecuted by indictment or by summary

conviction, at the Crown's option): s. 496.

Alternatively, a senior peace officer may issue a Promise to Appear or a Recognizance in circumstances where the person was initially detained but that detention can no longer be justified: s. 498(1).

Section 505 requires that, as soon as practicable after an Appearance Notice, Promise to Appear or Recognizance has been issued, an Information be laid before a justice relating to the offence. A justice who considers that a case is made out shall confirm the Appearance Notice, Promise to Appear or Recognizance and endorse the Information accordingly. It is this act of confirmation which validates the charge and compels the person (now an accused) to appear in Court.

b. *Post-charge procedures* - in many cases the process of compelling a person to attend Court is not initiated until after the person has been formally charged with the offence. Section 504 states that "Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice".

Under section 507(1) a justice who receives such an Information shall, where a case is made out, issue a summons directing the accused to attend Court to answer to a specified charge, or issue a warrant for the accused's arrest.

It is only when the justice "issues process" by issuing a summons or warrant that the accused is compelled to attend Court to answer to the charge.

2. First appearance, election and plea

At the accused's first appearance in Court a variety of things might happen, depending on the nature of the offence and the accused's status. If the accused is in custody the Court will decide whether to release the accused on bail or make a detention order. If the accused is charged with a "hybrid" offence the Crown will elect whether it is proceeding by indictment or by summary conviction.

If the offence is an indictable one in respect of which the accused has an election as to mode of trial, the Court will ask the accused to elect whether he or she wishes to be tried by a Provincial Court judge without a jury, by a Supreme Court judge without a jury or by a Court composed of a Supreme Court judge and jury. If the accused elects to be tried either by a judge without a jury or by a Court composed of a judge and jury, a preliminary inquiry will be held before a Provincial Court judge to determine whether there is enough evidence against the accused to warrant putting

the accused on trial.

It is open to the accused, at any stage in the proceedings, to enter a plea of guilty to the offence charged.

If the accused is charged with a summary conviction offence or with a less serious indictable offence with respect to which no election is available, the Court will fix a date for trial in the Provincial Court.

3. Preliminary Inquiry

A preliminary inquiry is a legal proceeding conducted before a Provincial Court judge at which the Crown leads evidence respecting the offence. The defence is entitled to cross-examine Crown witnesses and to call defence evidence. When all the evidence has been taken the Court shall, "if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial": s. 548(1)(a). If the Court is of the opinion on the whole of the evidence that no sufficient case is made out to put the accused on trial, the Court shall discharge the accused: s. 548(1)(b).

In *United States of America v. Sheppard* (1976) 30 CCC (2d) 424, the Supreme Court of Canada discussed the test which a Court should apply in determining whether or not to commit the accused for trial. Ritchie, J., for the majority, stated that test as:

> whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

4. Trial

At the conclusion of the case the accused is entitled to be acquitted unless the Crown has proved the accused's guilt beyond a reasonable doubt.

It is important to have an understanding of the criminal process contemplated by the *Criminal Code,* when considering the charge approval process used in British Columbia. One aspect of this procedure which is highlighted by the above summary is the ascending tests which are applied as the accused progresses through the different stages in a criminal proceeding. They can be summarized as follows:

- *issuing an Appearance Notice, Promise to Appear or Recognizance, or laying an Information:* the person must believe, on reasonable grounds, that an offence has been committed;

- *a justice "issuing process" by confirming the Appearance Notice, Promise to Appear or Recognizance, or by issuing a summons or warrant:* the justice must consider that a case for issuing process is made out;

- *committal for trial following a preliminary inquiry:* the Court must decide whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

- *trial:* the Crown must prove the accused's guilt beyond a reasonable doubt.

C. The Role of the Police and Crown Counsel

It is universally agreed that the principal role of the police is to investigate crime and that the primary role of Crown Counsel is to prosecute accused persons in the Courts.

However, considerable disagreement develops at the point at which these 2 roles interface: who makes the decision whether an accused will be charged?

Until recently, the practice in British Columbia paralleled that in most other Canadian and Commonwealth jurisdictions. The police investigated the offence and, where satisfied that there were reasonable and probable grounds to believe that the accused had committed an offence, the investigating officer would attend before a Justice of the Peace and swear an Information. A Justice of the Peace who was satisfied that a case had been made out would issue process, compelling the accused to attend Court to answer to the charge.

Prosecutors would, usually before the accused's first Court appearance, review the file and determine whether there was sufficient evidence to warrant proceeding with the charge. It appears that the test applied by Crown Counsel was whether there was some evidence upon which a reasonable jury, properly instructed, could convict. That is the test currently applied by a Provincial Court judge in deciding whether, on a preliminary inquiry, to commit the accused for trial. If Crown Counsel was not satisfied that this test had been met, a stay of proceedings would be entered and the prosecution was terminated.

The charge approval process now in place in British Columbia is the product of a decade of evolution. The first step in that process began in 1974 when the Ministry of the Attorney General established a provincial Crown Counsel system. Prosecutors until then had been employed or retained by municipalities; they now came under the jurisdiction of and

accountable to the Ministry, and most became employees of the Ministry.

In the late 1970's a charge approval process was instituted in Burnaby and New Westminster; it was instituted in Vancouver in April 1982. This process, discussed in detail below, introduced a significant change to the way in which charges were processed. The police, rather than swearing an Information themselves, would prepare a Report to Crown Counsel, who would decide whether a charge would be laid. If the Crown approved the charge, a designated police officer would appear before a Justice of the Peace and swear the Information.

When the charge approval process was first introduced, it appears that the test applied by the Crown was the same one which had been used by municipal prosecutors under the old regime; was there some evidence upon which a reasonable jury, properly instructed, could convict?

In September 1983 in Vancouver (earlier in some other British Columbia jurisdictions), the test was revised to the present 2-prong standard: is there a substantial likelihood of conviction and, if so, is it in the public interest to proceed with the prosecution?

British Columbia's charge approval process is an administrative policy of the Ministry of the Attorney General; it is not reflected in Provincial legislation and does not affect the procedures set out in the *Criminal Code*. It has, since its inception, engendered considerable debate between the Ministry and the police authorities, the latter being strongly of the view that the *Criminal Code* and the common law clearly establish their right to lay criminal charges, and that the decision to do so is a separate event from the decision of Crown Counsel to commence a prosecution.

D. The Charge Approval Process in British Columbia

In British Columbia 12 municipalities maintain their own police forces. In all other areas of the Province the RCMP contracts with the Provincial Government to provide policing services. In the case of municipal forces, the senior police officer is the Chief Constable. In the case of the RCMP the senior officer in British Columbia ("E" Division) is the Deputy Commissioner, and the senior officer in each detachment is the Officer-in-charge.

When the police conclude, upon completion of an investigation, that a charge is warranted, they prepare a Report to Crown Counsel which, ideally, should include:

a. a comprehensive description of the evidence supporting each element of the suggested charge(s);

b. where the evidence of a civilian witness is necessary to prove an essential element of the charge (except for minor offences), a copy of that person's written statement;

c. necessary evidence check sheets;

d. copies of all documents required to prove the charge(s); and

e. a detailed summary or written copy of the accused's statement(s).

That Report is forwarded to the local Crown Counsel office. In the vast majority of cases a senior prosecutor in that office (designated as charge approval counsel) reviews the Report and makes a decision whether a charge will be approved. In Vancouver, for example, 5 Crown Counsel in the Provincial Court office at 222 Main Street work full time on charge approval. (p. 269)

In some cases, the decision whether or not to prosecute is made by Regional Crown Counsel. In Vancouver, for example, Regional Crown Counsel decides in cases where allegations have been made against a police officer, in commercial crime cases, in some environmental matters, in high profile cases and in cases involving prominent individuals. (p. 269-270)

Occasionally, Regional Crown Counsel will consult with the Assistant Deputy Attorney General, Criminal Justice Branch, not in the sense of getting the latter's approval but to ensure that the right process has been followed and nothing has been missed out. (p. 270-272)

At whatever level the charging decision is made, the prosecutor applies the Ministry's 2-prong test, which is described in the 1989 Crown Counsel Policy Manual (Exhibit 41) as follows:

1. Substantial Likelihood of Conviction

   In determining whether a charge should be laid, counsel must first conclude that it is likely that there will be a conviction after considering all relevant matters including the likely defence, if it is apparent. There must be significantly more than just a prima facie case.

2. Public Interest

   Counsel must next determine whether the public interest dictates a prosecution. Hard and fast rules cannot be imposed and flexibility in decision

making at the local level is essential if the Ministry is to respond to the legitimate concerns of each community.

There are, however, a number of factors counsel should consider in assessing the public interest in a prosecution:

(a) the nature and seriousness of the allegations;

(b) the personal circumstances of the accused, including his or her criminal record;

(c) the likelihood of achieving the desired result without a Court proceeding, including an assessment of the available alternatives to prosecution;

(d) the harm caused to the victim, if any; and

(e) the cost of a prosecution compared to the social benefit to be gained by it. This will include considerations such as the degree to which this offence (as opposed to this offender) represents a community problem which cannot be effectively dealt with otherwise.

Based on the information supplied, the prosecutor will either reject or approve the charge. Rejection may be for one of 3 reasons. First, the prosecutor may conclude that there is not a substantial likelihood of conviction. Second, he or she may conclude that, even though the substantial likelihood of conviction prong of the test is met, it is not in the public interest to prosecute the individual. Third, the prosecutor may conclude that more information is required before a final charging decision can be made.

If the Report is returned for more information it is noted accordingly, and the reasons for returning it are provided to the investigative agency in the "Comments" section of the Report.

If the prosecutor decides that no charge will be approved, the Report is noted accordingly, the reasons for that decision are provided in the "Comments" section of the form and the entire Report to Crown Counsel is returned to the investigative agency. When a Report to Crown Counsel is returned, the investigative agency is responsible for the continued conduct of the file.

When the charge is approved, the prosecutor records that decision on the form, identifies which charges are approved, the number of witnesses which are required, the estimated

length of the Crown's case, gives any relevant victim impact statement instructions and makes several other notations. The file is then returned to the police force's Crown liaison officer who swears the Information before a Justice of the Peace who, if satisfied that a case is made out, issues process.

The Canadian Bar Association, B. C. Branch's written submission to the Inquiry included statistical information respecting the disposition of Reports to Crown Counsel from the Vancouver Police Department:

Crown Charge Approval in Vancouver

	New Reports	Reports Returned to V.P.D.	Resub-mitted Reports	No Charge	Diversions	Approval
1984	6,718	1,822 (27%)	1,975	808 (12%)	458 (7%)	4,916
1985	6,156	1,687 (27%)	1,846	635 (10%)	298 (5%)	4,664
1986	6,669	2,049 (31%)	2,048	984 (15%)	434 (7%)	5,193
1987	8,685	2,936 (34%)	2,877	1,224 (14%)	450 (5%)	6,599
1988	11,118	1,791 (16%)	1,785	1,033 (9%)	577 (5%)	8,834
1989	10,630	989 (9%)	994	886 (8%)	459 (4%)	9,277

Mr. Peter Leask, Q.C., in his oral submission to the Commission on behalf of the Canadian Bar Association, B.C. Branch, made the following explanatory observations about the statistics:

- **reports returned to Vancouver Police Department** - between 1984 and 1987 these accounted for 27 - 34% of all new reports to Crown Counsel, and is persuasive evidence of 2 things. First, the Crown does not make a final charge/no charge decision upon initial review of the police report. Second, a significant percentage of cases need further investigation before an accurate assessment can be made as to whether there is a substantial likelihood of conviction.

In 1988 and 1989 the percentage of reports returned to the police dropped to 16% and 9% respectively. This was the direct result of an internal police policy change, whereby supervising N.C.O.'s now review and countersign an investigating officer's report before it is forwarded to Crown Counsel. The police department has, in effect, taken over some of the quality control function formerly exercised by the Crown.

- **resubmitted reports** - the number of reports returned to the police does not equate with the number of reports resubmitted to Crown Counsel; indeed in some years the latter is higher. This discrepancy is explained on the basis that some returned reports are never resubmitted to the Crown, and that the back and forth flow of reports often extends into the next calendar year, making annual statistical reports somewhat arbitrary.

- **no charge** - this column is the best indicator of the percentage of cases in which the Crown has concluded that there is not a substantial likelihood of conviction. Between 1984 and 1989 it ranged between 8% and 15%. It is reasonably rare for a "no charge" decision to be based on the second prong (public interest) of the charge approval test.

- **diversions** - between 4% and 7% of cases which have passed the substantial likelihood of conviction test are diverted by Crown Counsel out of the formal criminal justice system before a charge is laid. Most of these diversions arise from Crown Counsel's application of the public interest prong of the charge approval test.

- **approval** - the Table would suggest that if one took the number of "new reports" for any given year, deducted the "reports returned to V.P.D.", added on "resubmitted reports" and then deducted "no charges" and "diversions", the product should equal the number shown in the "approval" column. In fact it does not, and is apparently explained on the basis that many reports which enter this system turn out to be charges over which the federal Crown has jurisdiction, such as narcotics offences. These files are referred to the Department of Justice.

E. Reviewing Crown Counsel's Decision Not To Charge

In October 1987 then Attorney General Brian R. D. Smith, Q.C. appointed a Justice Reform Committee, chaired by Deputy Attorney General E. N. Hughes, Q.C. The Committee held public hearings throughout the province, and received numerous written submissions. Its report, *Access to Justice: The Report of the Justice Reform Committee*, was published in December 1988.

The Committee concluded that "the authority to decide what charges will be laid must remain with the Attorney General or his agent - Crown Counsel" (p. 80), but recognized that:

> the police should have some recourse when they strongly disagree with a decision not to prosecute. The investigating police authority should be able to have that decision reconsidered at a more senior level in the Crown office.

The Committee recommended that:

> A Chief Constable or officer in charge of a police detachment who is dissatisfied with a Crown Counsel decision not to lay a charge, should have the right to have that decision reviewed by Regional Crown Counsel and ultimately the Deputy Attorney General. (p. 81)

That recommendation was adopted by the Ministry, as reflected in the *Crown Counsel Policy Manual* (Exhibit 41):

> **Quality Control - Charge Approval - Police Appeal Regarding Crown Decision**
>
> Inherent in the charge approval process is an invitation to the police to discuss reasons for rejection of a charge with counsel who rejected the charge. It is, therefore, the responsibility of the police to contact the Administrative Crown should they wish to discuss reasons for rejecting a charge. While protocols with the police may be developed at the local level, each Crown Counsel office should be the initial focus for police concerns.
>
> A Chief Constable or Officer in Charge of a detachment who disagrees with a decision not to lay a charge and who disagrees with the attempts to resolve the matter at the local level, may ask Regional Crown Counsel for a review of the decision. Regional Crown Counsel shall ensure that such a review occurs and advise the senior officer of his decision.
>
> A Chief Constable or Officer in Charge of a detachment who disagrees with that decision may ask the Assistant Deputy Attorney General to review the decision and, if asked, the Assistant Deputy Attorney General will review the matter and advise the senior officer of his decision.
>
> In addition to the foregoing, a Chief of Police or Deputy Commissioner of the RCMP in the province may appeal a charge approval decision directly to the Deputy Attorney General, but only if the situation is urgent or a matter of significant public

interest or public policy.

Mr. Peter Leask, Q.C., in his oral submission to the Commission on behalf of the Canadian Bar Association, B.C. Branch, advised that in Vancouver the Charge Approval Crown Counsel and the Vancouver Police Department Crown Liaison officers meet once every 2 weeks to discuss ongoing concerns. In the 12 months ending June 1990 they reviewed approximately 24 cases in which the Crown had refused to approve charges recommended by the police. In approximately half of those cases the review process resulted in the Crown approving charges, most frequently because of new information being brought to Crown Counsel's attention. (p. 1243)

F. The Role of Ad Hoc Crown Counsel

Approximately 420 people work for the Criminal Justice Branch of the Ministry of the Attorney General. Of that number, 240 are lawyers, of which 46 are government employees and the balance (194) are employed on full-time contracts ranging from 1 to 5 years.

In addition, the Branch retains lawyers in private practice to give legal opinions or to prosecute specific cases. These are referred to as *ad hoc* Crown Counsel. The Branch turns to *ad hoc* Crown Counsel in 2 situations. First, if the volume of work at any given time exceeds what the staff prosecutors can handle, cases are referred out. Second, if the nature of the offence or the identity of the potential accused might give rise to a public perception that the Branch is biased in favour of or prejudiced against the potential accused, the file is assigned to outside Counsel. (p. 786-788)

When *ad hoc* Crown Counsel are retained to give a legal opinion as to whether a charge should be approved, that opinion constitutes a recommendation only, and the Branch reserves the right to make the final decision. It is very unusual for the Branch not to accept and act on the outside counsel's recommendation.

G. The Debate As To Whether The Police Or The Crown Should Make Charging Decisions

The only Canadian jurisdictions in which Crown Counsel makes the decision whether a charge will be laid are British Columbia, Quebec and New Brunswick. In all other provinces and territories the police lay the Information, after which the Crown decides whether it will proceed with the prosecution.

In British Columbia there is an on-going debate between the police and the Crown as to which body ought to make the initial charging decision. The case for the police making that decision has been most forcefully advanced by the B. C. Association of Chiefs of Police (the

body which represents all municipal police forces and RCMP detachments in the Province), in its May 6, 1988 brief to the Justice Reform Committee and its May 1990 brief to the Discretion to Prosecute Inquiry.

1. The Police's Case Against the Charge Approval Process

The Association cites 5 criticisms of the charge approval process:

a. Erosion of police independence

The Association submits that at common law and under the *Criminal Code* any member of the public who on reasonable grounds believes that a person has committed an offence may swear an Information and, if the Justice of the Peace considers that a case has been made out, shall issue process compelling the accused to attend Court to answer to the charge.

In modern times the role of the public in investigating crime and laying charges has been assumed by the police; they are given special investigatory powers and, like the public, have the right to swear an Information. In fulfilling this role, the police act as representatives of the community (surrogate citizens).

A fundamental element of this regime is openness; if there are reasonable grounds to believe that a crime has been committed a charge is made publicly by swearing an Information, and the accused is required to answer that charge publicly in open Court.

This regime recognizes that, while there may be reasonable grounds to believe that a crime has been committed, it may not be appropriate for the charge to proceed, and there is no dispute that Crown Counsel, as agents of the Crown and as officers of the Court, ought to exercise prosecutorial discretion in deciding which cases ought to proceed to trial. If the Crown decides to abandon a prosecution then it must do so publicly, by entering a stay of proceedings on the Court record.

This division of responsibility is recognized by caselaw (*Campbell v. Attorney General of Ontario* (1987) 31 CCC (3d) 289 (Ontario High Court)) and was approved by the *Royal Commission on the Donald Marshall, Jr., Prosecution* in Recommendation 37 (Volume 1, p. 288):

> We recommend that:
>
> (a) police officers be informed in general instructions from the Solicitor

> General that they have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid.

The publicity which this regime guarantees is what keeps the criminal justice system honest, and assures that every citizen, from whatever station in life, is treated equally.

For it to work, the police must be totally free from any direct or indirect political influence or control, and must retain the right to lay charges where reasonable grounds exist. It is this independence which ensures that crimes are investigated honestly, and it is the police's power to lay charges which ensures that the process remains open to public scrutiny.

This historical division of responsibility between the police and Crown Counsel recognizes the critical balance which is needed to ensure that the police's investigation of crime is done impartially, honestly and openly, and that Crown Counsel exercise their valid prosecutorial discretion, as officers of the Court, to ensure that only meritorious cases proceed to trial.

The charge approval process has eroded that balance in 2 ways. First, by indirectly influencing police investigations and thereby jeopardizing police independence. For example, when Crown Counsel routinely decline, on "public interest" grounds, to prosecute classes of offences such as causing a disturbance, obstruction of justice, mischief, assaulting a peace officer and minor assaults and thefts, this results in police frustration and a decision that it would be futile to investigate such offences in the future. Thus, the charge approval process influences which crimes will be investigated and enforced.

Second, by influencing police investigations and independence privately. The charge approval process is done before any public document such as an Information exists, and is done in the privacy of the Crown Counsel office, where the victim, the media and the public have no access to the decision-making process. There is no public accountability of the decision to terminate the case before charge.

b. Minor offences

The Association submits that the charge approval process has resulted in minor offences, such as nuisance, petty theft, vandalism, drunkenness and rowdyism seldom being prosecuted. While it is understandable that the Crown places higher priority on more serious offences such as murder and robbery, the frequency with which

minor offences are not prosecuted has 3 negative consequences. First, the victim and the public generally experience disenchantment with the criminal justice system. The public most frequently comes into contact with the criminal justice system through "minor" community crimes, and they often have to retreat from their lawful enjoyment of public facilities such as beaches and parks because of the rowdiness and illegalities of others.

Second, this selective enforcement of the law fosters a disrespect for the law; citizens who are in other respects law-abiding question why they should obey the law if others, who do not, suffer no consequences for their illegal conduct.

Third, this attitude actually promotes crime; minor criminal offenders who see that the law is not enforced will recommit such offences and progress to more serious criminal activity. The Kelowna Regatta and Victoria Swiftsure disturbances are recent examples. The policy of refusing to prosecute minor or nuisance crimes is shortsighted. The Association sees this as Crown Counsel supporting the Law Reform Commission of Canada's proposal to de-criminalize many minor offences. This is a problem in that there are no alternative dispositions available and, in the mind of the offender, this breeds impunity.

c. Potential for abuse

In *Attorney General of Nova Scotia v. McIntyre* (1982) 26 CR (3d) 193, Chief Justice Dickson of the Supreme Court of Canada stated:

> Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. (p. 210)

The Association submits that the great value of the former system (whereby the police swear Informations and the Crown preserves the right to exercise prosecutorial discretion to enter a stay of proceedings) is that it is open, and there is a paper trail available to the public to question the appropriateness of the Crown's conduct in terminating the prosecution.

The fundamental weakness of the charge approval process is that the entire process is private; there is no Information, and hence no publicly-accessible paper trail, and the decision not to charge is done privately, without written reasons and without public accountability. This yields 2 negative consequences. First, the victim, the police and the media do not know what considerations went into the decision not to prosecute. Second, it creates a private process where impropriety can occur. The privacy of the charge approval process excludes the checks and balances which was

integral to the former system.

The obligation on Crown Counsel to report back to the police when a charge is rejected, and the resulting appeal process which that report may trigger, is not an adequate response to these concerns. First, there is no system in place to ensure that there is a report back, in every "no charge" case, or that the reasons for the rejection are fully set out. A peace officer who does not hear back from the Crown assumes that the charge was approved and that, because the officer was not called to testify, the accused has pled guilty. In many cases just the opposite has occurred; the charge has been rejected, a lesser offence has been approved or the Crown and defence have negotiated a guilty plea. This lack of accountability also creates the potential for impropriety.

Second, even if the Report to Crown Counsel is returned to the police with reasons, there is no *public* document available for review, and no questioning of the decision to confirm its probity.

Third, the Crown may, improperly, approve lesser charges, leading to a guilty plea.

d. Usurping the role of the judiciary

The Association submits that in applying the "substantial likelihood of conviction" prong of the quality control test, the Crown may have to make judgments respecting complex legal issues, and issues with respect to which the law is not clear.

Similarly, in applying the "public interest" prong of the test, the Crown weighs public policy issues such as the nature and seriousness of the offence, the personal circumstances of the accused and the harm, if any, to the victim.

In both respects, these decisions invade the role of the judiciary. Privacy, and the absence of independent review of these decisions, compound the concern respecting the potential for abuse.

e. Bureaucratic inefficiency

Finally, the B.C. Association of Chiefs of Police submits that under the charge approval process the Report to Crown Counsel is routed through the police force's Crown Liaison Officer to the Crown's charge approval prosecutor, then (if approved) back to the police's Crown Liaison Officer who attends on the Justice of the Peace to swear the Information. This process is inefficient in that it often results in a delay of weeks before the charge is finally sworn and process is issued, and it requires

additional staff in both the police and Crown Counsel offices.

The Association recommends the abolition of the charge approval process, and a return to the former system. If that view does not prevail, then the Association calls for 4 reforms to ensure public accountability:

1. in *every* case where a charge recommended by the police is not approved, the Report to Crown Counsel should be returned to the police, outlining exactly why the charge was not approved or why a lesser charge was approved;

2. the victim, police, media and the public generally should have access to reasons why a charge was rejected or reduced;

3. Crown Counsel policy should clearly state that the police have the right to swear an Information, subject to the Crown's right to enter a stay of proceedings; and

4. there should be an annual audit of each charge approval office to ensure that the charging process is being administered fairly.

In their testimony, both Chief Constable Stewart of the Vancouver Police Department and Deputy Commissioner Wilson, Commanding Officer of the RCMP in British Columbia, affirmed that, regardless of the Crown's charge approval process, they reserved the right in appropriate cases to swear an Information, notwithstanding the Crown's decision not to proceed with a charge.

2. The Crown's Case In Favour of the Charge Approval Process

The case for retaining the present charge approval process was made in testimony by Mr. Bill Stewart, Assistant Deputy Attorney General, Criminal Justice Branch, and in written submissions by the B. C. Branch of the Canadian Bar Association and by Mr. A. G. Henderson, a senior Vancouver criminal lawyer.

The charge approval process, as it is known in British Columbia, has 2 elements; the decision whether a person will be charged is made by Crown Counsel, and that decision is made on the basis of whether there is a substantial likelihood of conviction and, if so, whether it is in the public interest to prosecute. Both elements are inextricably connected, and the relative merits of the charge approval process cannot properly be assessed by studying each in isolation.

Put in concrete terms, the police and Crown Counsel are equally capable of deciding whether they reasonably believe that a person has committed a crime, and there is no

obvious reason why, if that is the test to be employed, the Crown ought to take over the role historically exercised by the police. The only rationale for having the Crown make these decisions is because the decision-making process calls for the exercise of special skill and knowledge possessed only by the Crown. It is only when the "substantial likelihood of conviction" test is introduced that Crown Counsel's unique qualifications become relevant.

Approaching the issue from that perspective, there are 4 major arguments militating in favour of a charge approval process which were presented to the Commission:

a. It is more fair to the accused

Advocates of the charge approval process submit that a fundamental tenet of our criminal justice system is that it is conviction-driven; that is, decisions whether to prosecute are made on the basis of the likelihood of *conviction*, not on the basis of whether the suspect *committed* the offence. This is a critical distinction. One of the consequences is that police investigations are private, not only to facilitate the investigation of crimes but also to protect suspects.

The philosophical difference of opinion between the police and Crown Counsel is at what point along the "likelihood of conviction spectrum" the prosecutorial process ought to become public. The police, as discussed above, would make the process public once they believed, on reasonable grounds, that the accused has committed an offence. Crown Counsel, on the other hand, would preserve confidentiality until satisfied that there is a substantial likelihood of conviction.

Keeping investigations private until this higher threshold has been met is essential, if we are to be fair to the potential accused, since the public declaration that a person has been charged with an offence is almost as damaging to that person as any subsequent finding of guilt. The personal trauma, shame and damage to the person's reputation is caused once the publication of a charge is known, and it is unlikely that such damage can be reversed through fair reporting of subsequent events or even an acquittal.

Further, the cost of defending oneself against a criminal charge can be enormous, and one ought not to be put to that expense except when the Crown's case is strong.

Thus, the prosecutorial process ought not to become public, through the swearing of an Information, until it is clear that there is a substantial likelihood of conviction.

b. It ensures that only those cases where there is a high likelihood of conviction proceed

Applying the substantial likelihood of conviction test requires a knowledge of:

i. substantive law - for example, which *Criminal Code* offence is appropriate to a given set of facts, and what must the Crown prove for any given offence?

ii. procedure - for example, are there time limits within which the prosecution must be commenced, and is special consent required before an Information is sworn?

iii. admissibility and sufficiency of evidence - for example, does the Crown have evidence available to prove each element in the offence, and will the accused's "confession" pass the test of voluntariness?

iv. constitutional rights - for example, have any of the accused's rights guaranteed by the *Charter of Rights and Freedoms* been violated and, if so, what are the consequences?

v. legal analysis - for example, how is the Court likely to decide unsettled legal issues?

All these issues must be understood and weighed, before a decision can be made whether there is a substantial likelihood that the accused will be convicted. Crown Counsel, because of their legal training and practical courtroom experience, are best qualified to make those judgments.

Thus, a charge approval process ensures that individual accuseds are thrust into the criminal justice system only when there is a substantial likelihood of conviction, and the system itself is not burdened down with cases where conviction is unlikely.

c. It is more efficient

Advocates of the charge approval process submit that there are several benefits to the Crown screening charges at the pre-charge stage. First, if further investigation is necessary, it can be undertaken without publicity. Second, when the investigation is complete, the Crown will be able to identify the most appropriate charge to lay, thereby avoiding the problem of laying inappropriate multiple counts, over-charging, or charging the wrong offence and having to substitute a new Information at a later date in Court.

Third, Crown Counsel will be able to provide full disclosure of the Crown's case to the defence at an early stage in the proceedings and, assuming a strong set of facts, this will facilitate pre-trial guilty pleas.

d. It is more objective

Advocates of the charge approval process submit that a peace officer who has expended a considerable amount of time and energy investigating an offence will likely believe that the case is strong, whereas a prosecutor reviewing a Report to Crown Counsel is more capable of evaluating the strengths and weaknesses of the case in an objective manner.

The advantage of a charge approval process is that it permits this objective review to take place before the process becomes public.

CHAPTER III

THE DISCRETION TO PROSECUTE - AN INTER-JURISDICTIONAL COMPARISON

A. INTRODUCTION

Any discussion of the discretion to prosecute raises some fundamentally important issues respecting the integrity of the criminal justice system. That being so, it is not surprising to discover that numerous other jurisdictions, in Canada and abroad, have examined these issues in considerable detail. This Commission has benefitted immensely from the research literature, published reports and legislative materials which are available.

Three public documents have been particularly helpful:

- *The Attorney General, Politics and the Public Interest*, by John Ll. J. Edwards (Sweet & Maxwell, London), 1984;

- *Royal Commission on the Donald Marshall, Jr. Prosecution*, published by the Province of Nova Scotia, December 1989, particularly Volume 5: "Walking the Tightrope of Justice: an Examination of the Office of the Attorney General"; and

- *Controlling Criminal Prosecutions: The Attorney General and The Crown Prosecutor*, Law Reform Commission of Canada Working Paper 62, Ottawa, 1990.

We can learn a great deal by examining how other jurisdictions have addressed these issues. There is, not surprisingly, a high degree of consensus on the key issues which need to be addressed, but some might be surprised at the variety of responses which jurisdictions have chosen. This suggests that there may not be any one ideal solution, and that any jurisdiction's prosecutorial discretion regime will inevitably take into account a variety of local practices, circumstances and priorities.

Nevertheless, an inter-jurisdictional survey is instructive, as a means of identifying the options available and presenting the relative advantages and disadvantages of each.

B. SWEARING THE INFORMATION

Section 504 of the *Criminal Code* permits anyone who, on reasonable grounds believes that a person has committed an indictable offence, to lay an Information in writing and under oath before a justice. That event triggers the criminal justice system into action, and if the

justice in due course issues process, the accused must attend Court to answer to the charge.

Thus, the act of swearing an Information is a pivotal point in the criminal process. As discussed in detail in Chapter II, there is a longstanding debate between the police and Crown Counsel communities as to which of them ought to make the decision whether a charge will be laid. There are three possibilities:

1. The Police Make the Decision

In all Canadian jurisdictions other than British Columbia, Quebec and New Brunswick, the police decide whether an Information will be sworn, applying the *Criminal Code's* "reasonable grounds to believe" test.

If the justice issues process, Crown Counsel will review the file and exercise their prosecutorial discretion as to whether the prosecution will proceed.

2. Crown Counsel Makes the Decision

In the 3 jurisdictions referred to above, Crown Counsel receives reports from the police authorities and, based on their assessment of the legal and factual issues involved, decides whether to approve charges. In the event that the charges recommended by the police or different or lesser charges are approved, the normal practice is for a police officer to swear the Information before a justice "on information and belief".

3. The Police Make the Decision After Consultation With Crown Counsel

In Working Paper 62 the Law Reform Commission of Canada recommends that:

> Police officers should continue to have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment and subject to the Crown's right to terminate the prosecution.
>
> Before laying a charge before a justice of the peace, the police officer shall obtain the advice of the public prosecutor concerning the facial and substantive validity of the charge document, and concerning the appropriateness of laying charges ....
>
> When seeking the advice of the public prosecutor, the police officer shall advise the prosecutor of all the evidence in support of the charge and all the

> circumstances of the offence, and the prosecutor shall where appropriate advise the police officer either that the evidence is not sufficient to support a conviction for the charge, or that a different charge or no charge would be more appropriate in all the circumstances.
>
> Where it is impractical to have the charge examined by the public prosecutor, or if the public prosecutor advises against proceeding with the charge, the peace officer nevertheless may lay the charge before a justice of the peace. In such cases, the peace officer must provide reasons to the justice of the peace explaining why it is impracticable to have the charge examined, or if applicable, must disclose that the public prosecutor has advised against the laying of the charge.

The Law Reform Commission's expectation was that only in unusual circumstances would a peace officer decide to lay a charge despite the contrary advice of a prosecutor. In the normal course of events peace officers would be expected to recognize the superior expertise of prosecutors regarding the sufficiency of evidence and other factors. That fact, plus a peace officer's exposure to a civil action for malicious prosecution would result in them acting against the prosecutor's advice only when they had good reason to do so.

C. THE TEST TO BE APPLIED IN DECIDING WHETHER TO PROCEED

Regardless of whether the police formally swear the Information in the first instance without Crown approval, all jurisdictions agree that Crown Counsel, as officers of the Court, have a duty to exercise prosecutorial discretion in deciding whether the prosecution should proceed. The test which the Crown applies, however, varies from jurisdiction to jurisdiction. Exhibit 95, a Ministry of Attorney General memorandum dated August 24, 1990, reports on a survey of most Canadian jurisdictions as to the test applied; it can be summarized as follows.

In British Columbia, as discussed in Chapter II, the Crown first decides whether there is a substantial likelihood of conviction and, if so, whether it is in the public interest to proceed with the prosecution.

In Alberta, there is not a clearly articulated test for use in routine cases. In commercial crime and other high-profile prosecutions the test is "reasonable expectation of conviction".

In Saskatchewan the Crown applies a "reasonable and probable grounds" test, similar to that applied by the police. They also consider the public interest. A higher test of "probable

conviction" is applied in commercial crime cases because of the expense and complexity of such prosecutions.

In Manitoba the Crown asks whether or not a reasonable likelihood of conviction exists and, if so, whether it is not contrary to the public interest to proceed. The Crown describes this test as at least slightly higher than that applied by a justice.

In Ontario the Crown determines whether there are reasonable and probable grounds based on admissible evidence, and whether it is in the public interest to continue the prosecution. Their test focusses on whether there is a legal, as opposed to a factual, impediment to proceeding.

In Quebec the "reasonable and probable grounds" test is applied, which is comparable to s. 504 of the *Criminal Code*. The public interest is considered, at least to the extent that the prosecution will not be frivolous, vexatious or malicious.

In New Brunswick it is a reasonable prospect of conviction, which is considered to be higher than the *Criminal Code* standard. The public interest is always considered.

In Nova Scotia the Crown determines whether there are reasonable and probable grounds to proceed, which is comparable to the *Criminal Code* test. The Crown is implementing, at least in pilot projects, post-charge screening as recommended in the Donald Marshall Royal Commission Report.

In Prince Edward Island a "reasonable and probable grounds" test is applied, with attention focusing on legal impediments rather than factual deficiencies. A test of "substantial likelihood of conviction" is applied in commercial crime cases, because of the complexity and expense involved.

In Newfoundland the Crown determines whether there is a probability of conviction; if there is, the Crown then reviews 9 enumerated public interest factors, in deciding whether the prosecution should proceed.

In Great Britain the Director of Public Prosecutions has stated that the test normally applied is whether or not there is a reasonable prospect of a conviction; whether, in other words, it seems rather more likely that there will be a conviction than an acquittal. This has become known as the "51 per cent" rule. An even higher standard is applied if an acquittal would or might produce unfortunate consequences, such as an increase in sales of a book found not to be obscene, or if the trial is likely to be abnormally long and expensive and the offence is not especially grave. (See Edwards, *The Attorney General, Politics and the Public Interest*, p. 414).

The Law Reform Commission of Canada, in *Controlling Criminal Prosecutions: The Attorney General and The Crown Prosecutor*, recommended that prosecutorial guidelines should be published, and should include 5 factors:

1. whether the public prosecutor believes there is evidence whereby a reasonable jury properly instructed could convict the suspect;

2. if so, whether the prosecution would have a reasonable chance of resulting in a conviction;

3. whether considerations of public policy make a prosecution desirable despite a low likelihood of conviction;

4. whether considerations of humanity or public policy stand in the way of proceeding despite a reasonable chance of conviction; and

5. whether the resources exist to justify bringing a charge. (pp. 159-160).

The Commission equates the first factor with the *prima facie* test applied by a Provincial Court judge in determining whether to commit an accused for trial following a preliminary inquiry, and describes the second factor as falling somewhere between the *prima facie* test and the "51 per cent" rule. This characterization permits the prosecutor to engage in some weighing of the evidence and some assessing of credibility.

The third factor allows for the commencement of a prosecution even when there is not a reasonable likelihood of success, if public policy reasons favour bringing the charge. With respect to the fourth factor, the Commission enumerates 13 examples of considerations which might result in a prosecutor not proceeding, notwithstanding a reasonable chance of conviction.

The fifth factor recognizes that there is a cost attached to prosecutions; in some cases an expensive prosecution may not be warranted to obtain a nominal penalty, whereas in other cases a large expenditure of funds might be essential to deal with a complex commercial crime or drug conspiracy.

D. THE RANGE OF ADMINISTRATIVE STRUCTURES

There is a variety of options available, when it comes to choosing an administrative structure for the prosecution of criminal offences. Many factors go into the decision-making process; volume of cases, geography, local practice and tradition. But underlying this exercise is a concern to balance the 2 competing interests of professional independence and public

accountability. Prosecutors must be free to make charging and prosecutorial decisions free from even the slightest hint of political interference, but at the same time they must be accountable publicly for their decisions and conduct, through the political heirarchy. Balancing these 2 competing interests has led to a variety of administrative structures, 4 of which will be summarized here.

1. The Crown Counsel Model

All Canadian jurisdictions except Nova Scotia have a Crown Counsel regime, of which British Columbia's Criminal Justice Branch is a fairly well developed example. The British Columbia scheme is described in detail in Chapter II.

The distinctive feature of a Crown Counsel system is that the chain of command works upward within the Attorney General's Ministry itself, culminating with the Assistant Deputy Attorney General in charge of the Criminal Justice Branch, who is in turn accountable to the Deputy Attorney General and the Attorney General.

Advocates of the Crown Counsel model point to its quality of public accountability, whereas critics observe that its position "within the Ministry" increases the risk of political interference in decision-making.

2. The Director of Public Prosecutions Model

Some jurisdictions which find the Crown Counsel model too susceptible to political interference, or who fear a public perception to that effect, have opted for a Director of Public Prosecutions ("DPP"). The most well-known examples of a DPP regime are England and Wales, the Republic of Ireland, the State of Victoria (Australia), the Commonwealth of Australia and Nova Scotia.

The principal advantage of a DPP system is that it moves the entire criminal prosecutions branch outside the Ministry of the Attorney General and away from the chain of authority which, in a Crown Counsel system, leads ultimately to the Attorney General personally. Staff prosecutors report directly to the Director, who is insulated from Ministry supervision or influence by a number of administrative mechanisms.

The Law Reform Commission of Canada's Working Paper 62 includes a very informative description of the major DPP systems, and one is impressed with the extent to which each scheme differs. Every jurisdiction has obviously crafted its own version of the DPP to fit its own concerns and peculiar circumstances.

The essential elements of a DPP system include the following:

1. **Appointing body or individual** - in Victoria State and the Commonwealth of Australia the DPP is appointed by Cabinet, while in Ireland the Cabinet appoints following a recommendation from a 5-person committee including the Chief Justice and the Chairman of the General Council of the Bar. In England the Attorney General appoints.

2. **Term of appointment** - in England the DPP is not appointed for a specific term and thus, impliedly, may serve until retirement age. In Ireland, the DPP's term is fixed by the Prime Minister. In Victoria State the DPP is appointed until age 65, whereas in the Commonwealth of Australia the appointment is for a specific term not to exceed 7 years.

3. **Grounds for removal** - each jurisdiction specifies different grounds for removal, including violation of the law, inefficiency, misbehaviour, physical or mental incapacity and non-disclosure of interests.

4. **Removing body or individual** - the Cabinet may remove the DPP in the Commonwealth of Australia, but only when that action is affirmed by Parliament, in Victoria. In Ireland Parliament may remove the DPP, but only after receiving a report from the Chief Justice, a judge of the High Court and the Attorney General. In England the same rules which govern the removal of civil servants apply to the DPP.

5. **Salary and pension** - in England and Ireland the government fixes the DPP's salary and pension, whereas in the Commonwealth of Australia the salary is set by the Remuneration Tribunal and the pension parallels the civil service pension. In Victoria State, the DPP receives the same salary and pension as a Supreme Court judge.

6. **Degree of independence** - in England the DPP is under the superintendence of the Attorney General, and the DPP is expected to inform the Attorney General in advance of the major, difficult and more important (from a public interest point of view) matters, so that should the need arise the Attorney General is in the position to exercise his or her ultimate power of direction.

   In Ireland the DPP is independent in the performance of his or her functions; indeed the legislation prohibits the Attorney General from communicating with the DPP or the Director's staff for the purpose of influencing criminal proceedings. The Attorney General and the DPP are required to consult from time to time concerning the functions of the Director.

In the State of Victoria the DPP has virtually complete structural independence; although responsible to the Attorney General for the due performance of his or her functions under the legislation, this responsibility does not affect or derogate from the DPP's authority in respect of the preparation, institution and conduct of criminal proceedings.

In the Commonwealth of Australia the DPP is subject to such directions or guidelines as the Attorney General, after consultation with the Director, gives or furnishes to the Director in writing. The directions or guidelines may be general or may relate to a specific case, and must be published as soon as practicable in the *Gazette* and filed with both Houses of Parliament within 15 sitting days, unless the interests of justice require publication to be delayed.

3. The New Zealand Model

Although the Attorney General is nominally responsible for the prosecution of criminal offences, this function has, practically speaking, been taken over by the Solicitor General who, since 1875, has been a permanent, non-political appointee. The result has been an independent prosecution service in which it is accepted that the Attorney General should play no part.

The day-to-day operations of the service are the responsibility of and largely the unhindered domain of the Solicitor General. Although the Attorney General is not prevented from giving directions to the Solicitor General, and is not required to make public any such directions, in practice no such involvement by the Attorney General takes place.

What makes this regime unique is that the prosecution's independence is not grounded in legislation, but in tradition alone. The Solicitor General's office does not exist by statute, and there is no structural independence. Thus, what it gains by accountability it risks losing by inappropriate political control.

4. The American Independent Counsel Model

In 1978 the U.S. Congress passed the *Ethics in Government Act*, which created a mechanism for the appointment of *ad hoc* temporary Special Prosecutors. This legislative initiative originated with the Watergate scandal in 1974-75, from which a deep-seated conviction emerged that the Department of Justice had failed to keep partisan politics and the administration of justice separate. One of the 1982 amendments to the legislation substituted the title "independent counsel" for the expression "special prosecutor".

The independent counsel's powers of investigation and prosecution arise when the activities of senior federal officials such as the President, Vice-President, Cabinet officers, CIA Director and Deputy Director, IRS Commissioner, any Assistant Attorney General, senior officials in the Executive Office of the President or the Chairman or Treasurer of the principal national campaign committees are under investigation.

The Attorney General is required to conduct a preliminary investigation, which may last up to 90 days, whenever he or she receives specific information from a credible source that one of the listed officials may have violated a serious federal criminal law. If the Attorney General finds reasonable grounds to believe that further investigation or prosecution is warranted, he or she must apply to a special division of the U.S. Court of Appeals for the District of Columbia for the appointment of an independent counsel.

The identity and prosecutorial jurisdiction of an independent counsel is not to be made public unless the Attorney General so requests, or unless the Court determines that disclosure of this information would be in the best interests of justice.

The independent counsel has full authority to investigate and prosecute all matters referred to him or her, including conducting proceedings before grand juries, participating in court proceedings, engaging in civil and criminal litigation, conducting appeals, contesting claims of privilege on the grounds of national security and applying to any Federal Court for a grant of immunity.

The independent counsel is required to file periodic reports with Congress and cooperate with the oversight jurisdiction of the House and Senate Judiciary Committees. Before termination of the appointment, the independent counsel must file a report with the Federal Court of Appeal setting forth a description of his or her work, including the disposition of all cases brought and the reasons for not prosecuting any matter within the independent counsel's jurisdiction which was not prosecuted.

An independent counsel may be removed from office, other than by impeachment or conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or other condition that substantially impairs the performance of the independent counsel's duties.

CHAPTER IV

CHRONOLOGY OF EVENTS IN THE REID MATTER

A. Grant to the Semiahmoo House Society ("Semiahmoo")

On June 26, 1989 William E. Reid, then Minister of Tourism and Provincial Secretary, awarded a $277,065 grant from the Growth and Opportunities (GO) B.C. Fund ("GO B.C.") to Semiahmoo.

The public controversy surrounding this grant led to an RCMP investigation and, ultimately, to the appointment of this Commission of Inquiry.

Although the propriety or legality of the making of the grant to Semiahmoo is not within the Terms of Reference of this Inquiry, it is necessary to have a general understanding of the events leading up to the making of the grant in order to appreciate the significance of some of the subsequent events.

Considerable documentary evidence was called before this Inquiry respecting the making of the grant to Semiahmoo. The narrative which follows has been condensed from various exhibits and oral testimony presented to the Inquiry, including: the *Report by the Comptroller General on Growth and Opportunities BC Grants to the Semiahmoo House Society and Administration of the GO BC Program* ("Marson Report"), submitted to the Honourable Howard Dirks, Provincial Secretary on December 12, 1989; legal opinions; and the Report to Crown Counsel.

On July 6, 1987 William E. Reid, MLA for Surrey-White Rock-Cloverdale was appointed Minister of Tourism and Provincial Secretary. In October 1988 the Provincial Government announced a new, three and a half year $162 million program called Growth and Opportunities (GO) B.C. Its purpose was to enrich the quality of life of British Columbians and to build on the strong feeling of pride in B.C. communities by supporting social, cultural, environmental, recreational, health and economic projects in local communities. Grants were to be made from the Lottery Fund to provide financial assistance for a broad range of projects reflecting local priorities.

The program guidelines, published in a GO B.C. brochure, were:

- funding available to a normal level of one-third of a project's total costs, to a maximum of $1 million;

- funding available for one-time capital costs but not for operating costs;
- applicants must have secured ongoing operating funding;
- projects eligible for assistance from established special-purpose capital funding programs are not eligible;
- projects that have received Expo legacy or Jobtrac funding would not be automatically disqualified;
- applicants must provide a financial plan for the project; and
- funds to be paid in instalments, one-third when the contract is let or work done, one-third when the project is half complete, and the final one-third on completion and following submission of an audited statement of expenditures.

Mr. Reid, as Minister of Tourism and Provincial Secretary, was the Minister responsible for the program and gave final approval for all grants made under it.

On March 9, 1989 the City of White Rock signed an application for a GO B.C. grant for a multi-material recycling program. It was received by the Minister on March 21, 1989. It showed an estimated total cost of $164,700, and requested GO B.C. funding of $95,700. It showed that Surrey Food Bank was to be the contractor.

Starting in March, Mr. George Doonan and Mr. Bill Sullivan began developing their own plans to enter the waste recycling business. They intended to use as their corporate vehicle a company owned by Mr. Doonan's wife; on July 14, 1989 the company's name was changed to ECO-Clean. Mr. Doonan had been Mr. Reid's campaign manager during the 1986 Provincial Election, and Mr. Sullivan was a close friend of Mr. Reid and Mr. Reid's daughter.

During March, April and May 1989 there were numerous meetings between and among the various interested parties, including Mr. Doonan and Mr. Sullivan, Mr. Reid and provincial government officials, the City of White Rock and Semiahmoo. It is clear that Mr. Doonan and Mr. Sullivan were eager to develop a multi-material recycling program in the Semiahmoo Peninsula area, and to use that program as a pilot project in the hope of winning further contracts in other communities throughout the Province.

On June 5, 1989 Mr. Doonan and Mr. Sullivan wrote to Mr. Reid requesting $50,000 government assistance toward the research and development of the proposed program. The funds would be used as a 50% contribution toward the cost of an extrusion mould for the

recycling bins.

On June 13, 1989 Semiahmoo applied to GO B.C. for a grant of $7,704, representing one-third of the cost of a proposed computer purchase.

On June 19, 1989 the City of White Rock completed a revised application for a GO B.C. grant for $257,700 for a 3 bin system multi-material recycling program. It indicated that Semiahmoo was to be the recycling contractor.

On June 23, 1989 Semiahmoo prepared a preliminary proposal for a multi-material, single box, recycling program, and submitted it to Mr. Reid's Ministerial Assistant, Mr. Hans Schinz.

On June 26, 1989 Mr. Reid's handwritten instructions were faxed to the GO B.C. office, directing that a grant for $277,065 be made to Semiahmoo for the recycling project. This amount included, but did not disclose, a grant of $50,000 for development of the extrusion mould. The Lottery Branch deemed the City of White Rock's application withdrawn. That same evening Mr. Reid announced at the City of White Rock's Council meeting a computer grant of $23,112 to Semiahmoo, and a grant of $277,065 for the Semiahmoo Community Pride Model Recycling Project. All White Rock officials believed that the City had received the grant.

After the meeting Alanna Hendren, the Executive Director of Semiahmoo, was introduced for the first time to Mr. Doonan and Mr. Sullivan. She was told in Mr. Reid's presence that Mr. Doonan and Mr. Sullivan would be in her office the next day, that she was to give them a purchase order for all the equipment totalling the full amount of the grant, and that 50% funding would be provided on receipt of the purchase order and the balance would be paid when the equipment was received.

After the Council meeting Mr. Reid obtained a large cardboard mock cheque from the trunk of his car and gave it to Ms. Hendren at the curbside, with only Mr. Reid's Ministerial Assistant in attendance.

On July 5, 1989 Ms. Hendren received a telephone call from Mr. Reid's Ministerial Assistant to say that a cheque payable to Semiahmoo in the amount of $138,532 was ready to be picked up. Within half an hour Mr. Sullivan called Ms. Hendren to say that he understood the cheque was available and to ask if he could pick up the cheque to ECO-Clean for the same amount of $138,532. It was picked up and deposited in ECO-Clean's bank account on the same day.

On September 13, 1989 White Rock's City Administrator wrote a memorandum to City

Council outlining the history of the City's grant application and criticizing the awarding of the grant to Semiahmoo.

On September 19 Semiahmoo's Board of Directors discussed the City Administrator's memorandum and a report from Ms. Hendren. It resolved not to be involved in the recycling project, and to so advise Mr. Reid. The next day Semiahmoo, by double registered mail, cancelled its order to ECO-Clean and requested a full refund of its deposit.

On September 20, 1989 the *Vancouver Sun* published a story on the GO B.C. grant paid to Semiahmoo.

On September 22, 1989 Mr. Reid resigned as Minister of Tourism and Provincial Secretary.

On September 25, 1989 ECO-Clean paid the unexpended balance of the deposit funds ($135,496.51) received from Semiahmoo into a law firm's trust account.

B. The Comptroller General's Investigation

On September 26, 1989 Mr. Claude Richmond, Acting Minister of Tourism and Provincial Secretary requested that Mr. Brian Marson, British Columbia's Comptroller General:

1. investigate allegations of irregularities and improprieties with respect to GO B.C. grants paid to Semiahmoo under the authority of the former Minister of Tourism and Provincial Secretary, Mr. Bill Reid, and

2. undertake a comprehensive review and evaluation of the GO B.C. grant program.

Mr. Marson exercised the powers of inquiry given to him under the *Financial Administration Act*, SBC 1981, c. 15, s. 7. He retained Mr. David Hooper, C.A. of Ernst & Young, a recognized expert in forensic accounting, to ensure a strong element of external independence. Mr. A. G. Henderson, a senior criminal barrister and a partner in Davis & Company, was retained to act as Counsel to his inquiry.

All of the people who played a direct part in the grant application, its administrative processing, any meetings to discuss its multi-material recycling implications, the decision to make a grant, and the presentation of the cheque were interviewed by members of Mr. Marson's review team. In addition, interviews were held with others who had knowledge of the grant in order to corroborate and cross-reference the evidence obtained.

Following the audit interviews, all of these individuals were questioned under oath during

hearings conducted on October 10, 11, 12, 27, 30, November 2 and December 4, 1989. The transcript of these hearings fills 7 volumes, totalling 1107 pages.

The investigating team made an extensive review of the documentation supporting the grant application and approval. They also searched for other documentation that would shed light on the way in which the grant was made, and the inter-relationship of the key proponents. Witnesses were served with subpoenas to produce any relevant documents in their possession.

Mr. Marson concluded in part as follows:

> I have concluded that the grant of $277,065 to the Society approved by the Minister, was both irregular in relation to normal program guidelines, and improper, because of the close and undisclosed relationship of the Minister with the principals of ECO-Clean, and the manner in which a $50,000 contribution to the capital costs of ECO-Clean was made ....
>
> Irregularities include the decision by the Minister to make a grant to the Society, even though they had not formally applied for one. The decisions to exceed normal funding guidelines and payment terms, and to make the grant conditional upon ECO-Clean being the supplier of the equipment were also irregular. I also note that ECO-Clean was not officially registered as a company until after the grant was made to the Semiahmoo House Society ....
>
> The evidence suggests that the Minister had an unusually high degree of personal involvement in arranging this grant. The administrators of the GO B.C. program in the Ministry of Tourism and Provincial Secretary did not receive all the documentation until after the grant was made. Throughout the inquiry it was clear that no one but the Minister knew the full scope or detail of his plans for a multi-material recycling project for the Semiahmoo Peninsula. I received no evidence which would suggest that the Minister had brought together all the parties to the project, to discuss its structure or implementation before the grant was made.
>
> The relationship between the Minister and the principals of ECO-Clean was not at arms-length. Doonan was the Minister's campaign manager in the 1986 election; Sullivan has been a close friend of Mr. Reid for about twenty years, and has a close relationship with Mr. Reid's daughter. These close personal relationships were not disclosed by the Minister to his officials or to the other parties during the decision making process. The Minister seemed to be unaware of, or chose to disregard, any impropriety in his dealings with Doonan and Sullivan on these matters. Furthermore, no administrative controls were in place within the Ministry to provide the checks

and balances necessary to ensure that the Minister would exercise his discretionary powers under the GO B.C. Program in a prudent manner, particularly in a situation such as this. It is my view that had these controls been in place, this grant would not have been made in the manner it was.

The inquiry was told that at least $50,000 was included by Mr. Reid in the price of the bins to be purchased from ECO-Clean to assist in the purchase of a mould by that company. Such treatment is, in my mind, improper. It was Doonan and Sullivan's objective that the three bin system be designated by the provincial government as the "system of choice" for all municipalities receiving recycling grants. If the grant had proceeded as approved, ECO-Clean would have been put in the position of being the sole B.C. supplier of the bins required for the three bin stackable system for municipalities in the Province, for an initial period at least. $50,000 of the capital cost of the production mould would have been paid by the Province. Moreover, since there was no written agreement between the government and ECO-Clean, if ECO-Clean chose to buy bins in the U.S. or offshore, rather than manufacture bins in British Columbia, the $50,000 would have become a windfall gain for ECO-Clean ....

Regarding the grant of $23,112.05 to the [Semiahmoo House] Society for computers, I have concluded that it was irregular in relation to normal program guidelines. The Minister approved 100% of the project costs rather than the usual 1/3 allowed by the guidelines. The application submitted by the Society indicated that they were requesting only 1/3 of the total cost or $7,704.02. The Society was surprised to receive the full amount.

Although I do not consider the computer grant award to be improper, I find it unusual that this grant was announced at the White Rock Council meeting, at the same time as the $277,065 grant for the recycling project. That there was confusion as to the beneficiary of the $277,065 was evident from the testimony given at the inquiry. The coincidental announcement of the computer grant at the City Council meeting, and the larger grant for the recycling project, contributed to the confusion surrounding the fact that the grant which had been applied for by the City was to be paid to the Society.

With respect to the Semiahmoo grant, Mr. Marson recommended that:

1. the remaining portion of the approved grant to the Society be withheld;

2. the government initiate action to recover the portion of the grant paid to the Society, and by them to ECO-Clean, that is currently in a trust account held by ECO-Clean's

lawyer; and

3. the City of White Rock's application for a GO B.C. grant be reopened, revised, and given a full review in consultation with City officials.

On December 12, 1989 Mr. Marson delivered his report to Mr. Howard Dirks, the Provincial Secretary.

When Mr. Bill Stewart, Deputy Attorney General, Criminal Justice Branch learned that the Marson report had been delivered to the Provincial Secretary, he telephoned the Deputy Provincial Secretary and asked that the Report not be released to the public, because he feared that its release would prejudice the RCMP investigation. (p. 809)

C. The RCMP Investigation

On September 25, 1989 Deputy Attorney General E. N. Hughes, Q.C., after consultation with the Attorney General Mr. Bud Smith, Q.C., requested the R.C.M.P. to conduct an investigation into whether there was criminal conduct on the part of Mr. Reid in connection with the grant of GO B.C. funds to Semiahmoo (pp. 71 and 990, and Exhibit 30).

Inspector E. C. MacAulay, the Assistant Officer-in-charge of the Vancouver Commercial Crime Section of the R.C.M.P., was placed in charge of the investigation. He had joined the force in 1965, and served for nearly 20 years in various capacities in Ontario before being transferred to British Columbia in 1986. He has an Honours B.A. degree in business administration, a Masters degree in business and a law degree from the University of Windsor. He has been engaged primarily in commercial crime duties since 1971.

Inspector MacAulay commenced his investigation soon after September 25, and in the process of preparing his report reviewed the evidence of certain witnesses contained in Volumes 1 to 6 of the Marson inquiry, stayed in touch with Mr. Marson's investigative staff and questioned relevant witnesses.

On October 18, 1989 Deputy Commissioner D. K. Wilson, Commanding Officer of the RCMP in British Columbia, wrote to Mr. Hughes reporting on the investigation to date, noting that the grant:

> is potentially a fraud against the Corporation of the City of White Rock by REID, DOONAN and SULLIVAN and, if so, it may also amount to a Breach of Trust by Public Officer, *Criminal Code*, R.S.C. 1985, c.C-46, s. 122, on the part of REID.

The report concluded by stating that the "investigation is continuing and you will be

informed of future developments". (Exhibit 32)

On December 12, 1989 the RCMP's Court Brief (Exhibit 15) was delivered to Mr. Robert Wright, Q.C., Vancouver Regional Crown Counsel, along with Volumes 1 to 6 of the Marson Inquiry transcript. The Court Brief contained a 4-page synopsis, a 6-page chronology (taken from the Marson Report), copies of relevant documents and witness statements, and a recommendation that Mr. Reid be charged with breach of trust by a public officer under s. 122 of the *Criminal Code*, and that Mr. Reid, Mr. Doonan and Mr. Sullivan be charged jointly with fraud against the Corporation of the City of White Rock of approximately $257,700.

Inspector MacAulay testified at the Inquiry that there had been no political interference in the way he conducted his investigation. (p. 1100)

Mr. Wright advised Inspector MacAulay that he would review the material himself, consult with Mr. Hughes on the appointment of counsel from outside the Attorney General's Ministry to provide another opinion and consult informally with Mr. Henderson, who had acted as counsel to the Marson Inquiry. (Exhibit 33)

D. Events leading up to the Ministry of the Attorney General's decision not to prosecute anyone arising out of the GO B.C. grant to Semiahmoo

On December 11, 1989 Mr. Stewart wrote to Mr. Wright (Exhibit 5), advising him that the RCMP Report to Crown Counsel respecting Mr. Reid would be forwarded to him shortly, and that Mr. Hughes and he (Mr. Stewart) would like to discuss the file with him prior to any decision being made concerning the laying of any charges.

On December 13 Mr. Wright responded (Exhibit 6) that he had discussed with Inspector MacAulay the case and the need for additional investigation which the latter would carry out in the coming days.

Mr. Wright subsequently asked Mr. M. J. Carstairs, Senior Administrative Crown Counsel in charge of the Commercial Crime Section to review the law and prepare an opinion on the Reid matter. Mr. Carstair's opinion (Exhibit 9) was completed on January 9, 1990.

On January 4, 1990 Mr. Hughes met with Deputy Commissioner Wilson and Mr. F. G. Palmer, Officer in Charge of Criminal Operations for the RCMP in British Columbia. Mr. Hughes advised them that Mr. Wright was in the process of preparing his legal opinion as to the merits of the case and the prospects for prosecution, that all the material was being provided to Mr. Richard Peck, Q.C. a criminal lawyer in private practice for an independent assessment, that both opinions would be provided to Mr. Stewart and that a departmental

position would be taken thereafter as to whether or not prosecution would be undertaken. (Exhibit 36)

On January 8, 1990 Mr. Wright sent to Mr. Peck a copy of the RCMP report, a copy of the Marson report and a copy of Volumes 1 to 6 of the Marson Inquiry transcript. He was asked to conduct a second "independent review of this material for the purpose of providing us with your legal opinion on whether or not the usual charge approval criteria have been met and whether or not a prosecution should issue". (Exhibit 8)

A few days prior to January 17 Mr. Wright provided to Mr. Peck a draft copy of his own legal opinion. (p. 293)

On January 17 Mr. Wright delivered a copy of his own final opinion to Mr. Stewart. (Exhibit 10) He reported that, in addition to the written background materials referred to above, he had discussed the case with Inspector MacAulay, Mr. A. G. Henderson (who expressed his opinion that a charge against Mr. Reid could not be made out (pp. 277 and 396)) and Mr. David Hooper, C.A. Mr. Wright set out a 16-page summary of the facts and a 12-page review of previous Court decisions, in the latter case relying heavily on the legal research done by Mr. Carstairs. Mr. Wright concluded that Mr. Reid ought not to be charged under s. 122, stating in part:

> REID'S behaviour may be characterized as irregular and imprudent but I am unable to discern any real evidence of what I categorize as dishonesty with an intention to obtain or give personal benefit. As previously mentioned it is my view that a charge may be made out without any direct or indirect benefit accruing to the accused. The absence of any evidence of benefit however, in my view, [is] a fact which mitigates against a criminal prosecution. (p. 30)

In reaching that decision Mr. Wright was influenced by Mr. Reid's statements during the Marson Inquiry which, although they could not form evidence in any subsequent legal proceeding, "do provide an interesting answer to the 'other side of the case'". (p.31)

After citing extensively from the transcript, Mr. Wright concluded:

> In essence REID has stated, under oath, that in hindsight he made a mistake because of the perception that he was improperly directing GO BC grant money to his friends. REID has emphatically stated that he had no intention doing any such thing but rather his sole concern was to fast track the recycling grant and have the first pilot project in British Columbia commence in his constituency. Such an explanation, in my opinion, would give rise to a reasonable doubt on the guilt of REID in a criminal forum....

> In short it may be that without reference to the transcripts of the Inquiry a prima facie case of breach of trust has been made out herein. However the statements of the witnesses under oath clearly tells "another side of the story" which is capable of being believed and accordingly the Crown falls short of its responsibility to prove beyond a reasonable doubt, that REID committed and intended to commit a breach of trust.
>
> Accordingly it is my opinion that there is not a substantial likelihood of conviction of REID, DOONAN or SULLIVAN herein and that the standard quality control charge approving standards are not met in this case. (p. 35-36)

In his testimony Mr. Wright agreed that the regularity with which the GO BC grant guidelines were disregarded and the absence of clear conflict of interest guidelines for senior public officials made it much more difficult in this case for the Crown to prove an intention to commit a criminal act. (p. 323)

On January 18, 1990 Mr. Peck delivered to Mr. Wright his 22-page legal opinion (Exhibit 11), in which he reviewed in considerable detail the Court decisions interpreting s. 122 of the *Criminal Code* (breach of trust by a public officer) and its predecessors. He concluded that

> The offence contained in Section 122, then, is one involving a misuse of power entrusted to the official for the advancement of his own personal ends. There need not be any monetary benefit or gain, although the evidence must be capable of demonstrating directly or by inference that the conduct of the accused was aimed at advancing his own personal ends. The conduct, in my opinion, must be something more than mere negligence but does not have to amount to fraud. (p. 5)

After a 14-page review of the relevant facts, Mr. Peck turned to a consideration of whether anyone should be charged with a violation of s. 122. He concluded that the conduct of Mr. Doonan and Sullivan

> is a matter of grave suspicion but falls short of satisfying the objective observer that they were engaged in inducing Reid to act in a manner contrary to Section 122 or in aiding and abetting him to do so. In my view the evidence against them falls short of the test of substantial likelihood of conviction and I accordingly recommend that they not be charged under Section 122 of the *Criminal Code.* (p. 18)

With respect to Mr. Reid, Mr. Peck concluded that he acted

> in a manner that was improper and inconsistent with the high office he held. There

> are aspects of his conduct which were high-handed and other aspects which bear the mark of deceit. The "personal ends" to be achieved were the benefitting of his campaign manager, Doonan, and his daughter's close friend, Sullivan. In my view, there is a substantial likelihood of conviction and I recommend the charge against Reid under Section 122 of the *Criminal Code*.
>
> Were it not for evidence of what I consider amounts to deceitful acts by Reid, I would not recommend a charge in this case, notwithstanding the case law surrounding Section 122. I believe the criminal law must be used with restraint and that the concept of *mens rea* must embrace an element of *mala fides*. Inasmuch as the existing case law and particularly those cases from Quebec indicate that evidence of dishonesty or corruption or deceit is not required for there to be a conviction under Section 122, nevertheless I would not recommend a charge of this nature unless one of those elements was present. (p. 21)

Mr. Peck concluded by stating that inasmuch as he had found the decision to be a most difficult one, Mr. Wright may wish to consider obtaining a second outside opinion.

On January 19, 1990 Mr. Wright, after consultation with Mr. Stewart (p. 812), requested Mr. John E. Hall, Q.C. to provide a legal opinion, and enclosed with his letter the same background materials sent to Mr. Peck, along with copies of Mr. Wright's and Mr. Peck's opinions. (Exhibit 12)

On January 29, 1990 Mr. Hall delivered his legal opinion to Mr. Wright. With respect to the conduct of Mr. Doonan and Mr. Sullivan, Mr. Hall stated in part:

> In a moral sense, I view their participation in this scheme as somewhat more serious than that of the Minister. I think that they could be charged with counselling Reid to commit a breach of trust of his office, but there is precious little direct evidence (as might be expected) and it would be a matter of drawing inferences that they urged Reid to divert the funds from White Rock to Semiahmoo to facilitate their ability to access the funds. Because of the absence of any personal benefit ultimately accruing to them from the funds, I think that the case against them is not a very strong one and bearing in mind its circumstantial nature, I would be of the view that it would be a somewhat speculative prosecution. (p. 5-6)

With respect to Mr. Reid, Mr. Hall stated:

> Undoubtedly there is a prima facie case of breach of trust or misbehaviour in office (and I view misbehaviour in office as the true gravamen of this offence) but as I noted, the Crown cannot in this case prove any personal advantage or benefit

> accruing to Mr. Reid from his activities....
>
> My own analysis of the situation is that there is a fair probability that Mr. Reid would be acquitted by a judge hearing this case - he might well be convicted by a jury who would probably be so offended by his conduct that they wouldn't enter into the niceties of mens rea and personal benefit....
>
> I am inclined to think that it would be a prosecution in which Mr. Reid would have a slightly better than even chance of being acquitted.... I do not see much wisdom in prosecuting Reid, Doonan or Sullivan in this case. The test that I use is whether or not I would want to prosecute the cases and I must say that I would not have overwhelming confidence in charges of counselling against Doonan and Sullivan, or breach of s. 122 against Reid. For these reasons, I do not recommend prosecution in the instant case. (p. 6-7)

On January 30, 1990 Mr. Stewart wrote to Deputy Commissioner Wilson of the RCMP, stating that in his opinion "there is not a substantial likelihood of conviction of Reid, Doonan or Sullivan and I will not approve the laying of any charges under the *Criminal Code* against any of these three individuals". (Exhibit 37)

Mr. Stewart testified that, in arriving at that decision, he reviewed the Marson Report (including Mr. Hooper's report attached to it), the legal opinions prepared by Mr. Wright, Mr. Peck and Mr. Hall, and had discussions with Mr. Wright and Mr. Peck. Mr. Wright had told Mr. Stewart that both Mr. Henderson and Mr. Hooper were of the view that charges were not warranted in this case.(p. 814) He testified that, in reaching his decision, he had not been pressured or interfered with by Mr. Smith, Mr. Reid, the Premier's Office or any other Cabinet Minister. (p. 829)

Mr. Stewart testified that he considered the following factors, in deciding not to prosecute in this case:

- Mr. Marson, although he found Mr. Reid's conduct to be inappropriate and improper, had said nothing in his report to suggest that Mr. Reid's activities were criminal in nature,

- Mr. Wright had concluded that the Crown could not prove deceit against or personal benefit by Mr. Reid,

- Mr. Henderson, who had examined all the relevant parties under oath, had concluded that a prosecution was not warranted,

- the Ministry had available to it the transcript of the Marson inquiry, which enabled counsel reviewing the case to assess the strength of the Crown's case,

- Mr. Peck, although finding deceit, found his decision to be a most troubling one, and recommended that a second outside opinion be obtained, and

- Mr. Hall, recognized as the most experienced counsel in British Columbia respecting s. 122 of the *Criminal Code*, recommended that no charges be laid. (p. 813-819)

Mr. Stewart reported his decision to Mr. Hughes who advised him that he wanted to play no role in the charge approval process so that he could hold himself available for a review, should the RCMP not be satisfied with Mr. Stewart's decision. (pp. 78 and 820)

Mr. Stewart met that afternoon with Deputy Commissioner Wilson and Assistant Commissioner Palmer of the RCMP. He confirmed that the decision not to prosecute had been his, reviewed his decision, advised them that Mr. Hughes had played no part in the decision and advised them that the appeal procedure to the Deputy Attorney General described in the Justice Reform Committee Report was available, should the RCMP not be content with the decision. (p. 820-1)

On February 7, 1990 Deputy Commissioner Wilson wrote to Mr. Hughes (Exhibit 16), expressing disagreement with Mr. Stewart's opinion and requesting that Mr. Hughes review the decision. He attached a memorandum over the signature of Superintendent Fischer, the Officer in charge of the Commercial Crime Section, which was critical of Mr. Wright's and Mr. Hall's opinions and which expressed agreement with Mr. Peck's opinion. Inspector MacAulay testified that he was the author of this memorandum. (p. 1116)

Deputy Commissioner Wilson agreed that a prosecution for fraud was too tenuous and that there was insufficient evidence to prosecute Mr. Doonan or Mr. Sullivan as parties to the offence of breach of public trust, but that the proposed charge against Mr. Reid under s. 122 of the *Criminal Code* deserved further consideration.

On February 12, 1990 Mr. Wright delivered to Mr. Stewart a 6-page memorandum (Exhibit 18) responding to Inspector MacAulay's critique of the earlier legal opinions. He concluded by stating:

> In summary I urge considerable caution to you in accepting the overly simplistic legal views set out in the letter from the R.C.M.P. It is quite clear that they do not have a sophisticated view of the law surrounding Section 122 and they are attempting to overly simplify an area of the law that is complex and an area that does not have great volumes of reasoned judgment. We should not be embarking on a prosecution

in order to tidy up the law on Section 122. (p. 6)

Mr. Hughes reviewed the 3 legal opinions and other relevant documents, and immersed himself in the "legal niceties" of the law surrounding s. 122. By Sunday, February 11 he concluded that he needed more help and guidance, and convened a meeting of Ministry staff and outside counsel who had been involved in the case. (p. 86-7)

That meeting took place on February 13, 1990. Those present were Mr. Hughes, Mr. Stewart, Mr. Wright, Mr. Henderson, Mr. Peck and Mr. Hall. Mr. Hughes said that he had called the meeting in order to get the best possible legal advice. The meeting lasted 2 and a half hours and involved a thorough discussion of the facts of the case, the law surrounding s. 122 and "a free-flowing exchange of ideas by everyone present". (p. 824) At the end of the meeting Mr. Hughes thanked everyone for their participation, but gave no indication of what his decision would be. (p. 826)

On February 14, 1990 Mr. Hughes told Mr. Smith where things were at, that he (Mr. Hughes) had this problem and that he was dealing with it. They agreed that the decision was for Mr. Hughes to make. Mr. Hughes testified:

> I told him that he would have to tell his colleagues if they ask him that we are not going to be stampeded or rushed into this. We are going to arrive at a proper decision, at a proper way, at a proper time. (p. 96)

On February 20, 1990 Mr. Wright sent to Mr. Peck and Mr. Hall a supplementary statement (Exhibit 22) taken the day before from the Executive Director of the GO BC program, and asked whether the statements contained in it affected in any way their earlier legal opinions.

On February 22, 1990 each counsel replied in writing (Exhibits 26 and 27) that the new evidence did not change his opinion.

On February 23, 1990 Mr. Hughes wrote to Deputy Commissioner Wilson (Exhibit 28). After summarizing the steps taken in his review, he stated:

> Giving great weight and consideration to the unanimous view of my senior advisors within government and the majority opinion of the senior experienced counsel engaged from the outside bar, I have concluded that the first test [substantial likelihood of conviction] has not been met. Dishonesty, deceit and corruption are in this instance speculative at best and the inappropriate and unacceptable process and procedure followed by Reid cannot be used to substitute for dishonest, deceitful or corrupt conduct. On balance I am not satisfied of the existence of a substantial likelihood of conviction and therefore I decline to engage the criminal law process

against Reid. (p. 3)

Mr. Hughes hand-delivered that letter to Mr. Wilson and Mr. Palmer that afternoon. The reaction "was not one of pleasure, but one of acceptance". The RCMP believed that Mr. Reid should be charged, but they accepted Mr. Hughes' decision and would not lay their own Information. (p. 99-100) In his testimony Deputy Commissioner Wilson expressed the view that the procedure followed in this case was "a flawed process [that] was managed with great integrity". (p. 1138)

That same afternoon Mr. Wright and Mr. Stewart prepared a draft press release (Exhibit 29) announcing the decision not to prosecute Mr. Reid. Mr. Stewart gave it to Mr. Hughes with his recommendation that Mr. Hughes give it to the media. Mr. Hughes responded that Mr. Smith had advised him that he (Mr. Smith) wanted to make the announcement. (p. 828) Mr. Stewart regretted that decision because Mr. Smith had played no role in the case up to that point. (p. 828)

Apparently Mr. Smith himself made the announcement that there would be no prosecution. (p. 222-3)

E. Events leading up to the private information being sworn

Mr. Sihota testified that he first learned of the Reid matter on September 20, 1989, when he read an article in the *Vancouver Sun*. He learned from subsequent news reports that Mr. Reid resigned as Minister of Tourism and Provincial Secretary (on September 22), and that Acting Provincial Secretary Mr. Claude Richmond requested Mr. Marson to conduct an inquiry (on September 26). In mid-December Mr. Sihota learned that the Marson Inquiry report had been completed on December 12. (p. 473-4)

Mr. Sihota testified that on or about February 23, 1990 he read in the *Vancouver Sun* that the Cabinet had, on that date, discussed the Reid matter. That was the date on which Mr. Hughes had informed the RCMP that Mr. Reid would not be prosecuted. Mr. Sihota made inquiries but was unable to determine whether Mr. Smith was present during the Cabinet discussion of the Reid matter. (pp. 475, 480)

On February 27, 1990 Mr. Howard Dirks, the Provincial Secretary held a press conference at which he released the Marson Report (including Mr. Hooper's report) and apparently made available from the Sergeant at Arms' office the report prepared by Mr. Morfitt, the Auditor General. (p. 474-8) Mr. Sihota testified that his own exchange with the media immediately after Mr. Dirk's press conference led him to believe that Mr. Dirks had referred only to the Morfitt Report, which he believed was less critical of Mr. Reid than was

the Marson Report. (p. 477-8) He later testified that he had, during an adjournment in the Inquiry, learned from a journalist that this was not so and that Mr. Dirks had in fact released the Marson Report at his press conference but, without first giving reporters an opportunity to read it, asked if they had any questions on it. (p. 530-1)

Mr. Sihota testified that he became aware of statements made by Premier Vander Zalm sometime after the release of the Marson Report on February 27 to the effect that "we've had Mr. Marson look at the matter, we've had the Auditor General's report, and we've had the RCMP investigate the matter, what more do you want?" (p. 476) He drew the inference from these statements, and believed that others would also, that Mr. Reid had done nothing wrong; that Mr. Vander Zalm "was using the RCMP investigation as somehow evidence of the fact that Mr. Reid's behaviour had been investigated and he had been exonerated or excused". (p. 481)

Mr. Sihota testified that Mr. Dirks' manner of releasing the Marson Report, the fact that the government received it on December 12, 1989 and did not release it until February 27, 1990, the fact that the Cabinet reportedly discussed the Reid matter on February 27 and the Premier's public statements referred to above all triggered in his mind a suspicion that the Cabinet probably had some kind of "damage control" in place to try to deal with the issue. (pp. 479-480 and 532-539) In cross-examination Mr. Sihota conceded that, in retrospect, the Cabinet discussion of the Reid matter on February 27 and the delay in making the Marson Report public until after the decision not to prosecute Mr. Reid had been made were not suspicious circumstances. (p. 674-5)

On or about March 8 Mr. Peter Firestone, a Victoria lawyer called Mr. Sihota. They had attended law school together, and had worked fairly closely together during that time. Mr. Sihota knew Mr. Firestone to be a good legal researcher who had done well in his criminal law practice and had a good reputation in acting for both the Crown and the defence. The 2 met, and Mr. Firestone expressed the view that Mr. Reid had violated s. 122 of the *Criminal Code*, that the available evidence would lead to a conviction and that a private prosecution ought to be considered. (p. 485-6)

In the days following, Mr. Sihota spent 2-3 days in the Legislative Library researching s. 122 and the Reid facts. He then asked Mr. Barry Grannary, a Vernon lawyer who does both Crown and defence work, to look at the caselaw and give him his views, and he had Mr. Dan Thachuk of the NDP research department look into the matter as well. Mr. Thachuk had practised criminal law in Alberta, first in private practice and then for the Attorney General's Ministry, first in general prosecutions and then for 3 years in special prosecutions. (p. 487)

Mr. Sihota testified that Mr. Grannary did not have a copy of the Marson Report, and he

did not know whether Mr. Firestone had one. (p. 683-5) Nevertheless, after talking to these people and conducting his own research, he concluded that there was a "significant probability" that Mr. Reid would be convicted. (p. 488) He was satisfied that he had a sufficient pool of factual information to reach that conclusion. (p. 688)

On about March 18 or 19 Mr. Sihota received a telephone call from an informant stating that the RCMP had recommended that Mr. Reid be charged, that people were upset internally that the recommendation had not been acted upon, that the RCMP had appealed the decision and that there was internal concern that the appeal had been unsuccessful. (pp. 483 and 643)

In cross-examination by Mr. Braidwood, Mr. Sihota described the informant as a source that communicated with him from time to time about matters pertaining to the RCMP, and stated "I am not going to name the person". (p. 542) When cross-examination resumed the next day, Mr. Sihota testified that "I do not know the person, it's an anonymous source, who will not leave a message". (p. 642)

On March 20 Mr. Michael Harcourt, Leader of the Official Opposition, and Mr. Sihota held a press conference. After referring to the Marson and Morfitt Reports, Mr. Harcourt stated "it's become clear that the Government is determined to stonewall on this matter.... After reviewing the *Criminal Code*, the case law and very extensive discussions with prominent lawyers in the Province, it is our belief that there is sufficient evidence to warrant the laying of charges pursuant to Section 122 of the *Criminal Code*". (Exhibit 53)

Mr. Sihota then summarized the law respecting s. 122 and the facts in the Reid case which he believed warranted a prosecution, adding:

> On the basis of these facts and the case law which I have outlined, it is my view that there is sufficient evidence here to warrant the laying of charges. However, not content exclusively with my interpretation of it and I have taken the liberty of discussing this matter further, double checking it and triple checking it, with prominent defence and Crown counsel in British Columbia. And their view is consistent with mine.
>
> Now as a result, it is our view that should the Attorney General arrive at a position that is contrary to our view, it is my intention to attend at a Justice of the Peace, most likely here in Victoria, and swear a private information and trigger the laying of charges in this case.... [I]f the Attorney General does not proceed with the laying of charges, we will proceed with the laying of charges.

Mr. Harcourt then stated:

> I think the point at which British Columbians are at right now on this matter is that everybody is frustrated with the Government's attempts to sweep this matter under the carpet and it's not satisfactory to the people of British Columbia.

Later that day Mr. Stewart, at the instructions of Mr. Smith, met with the media and answered their questions. (p. 829-30) Mr. Sihota testified that he learned from newspaper accounts of that exchange that the RCMP had recommended that charges be laid, that the case had been reviewed independently by outside counsel and that there was a difference of opinion among the lawyers as to whether or not charges should be laid. (p. 484)

In the following days Ministry officials became very concerned about the perception which might have been left with the public, following the March 20 Harcourt/Sihota press conference, respecting the role played by the Criminal Justice Branch and by Mr. Hughes, in deciding not to prosecute Mr. Reid. On March 23 Mr. Stewart sent a letter to Mr. Hughes (Exhibit 93) enclosing a draft speech (Exhibit 94) which the Attorney General might consider giving, to clarify the allegations against Mr. Reid and the process followed by the Ministry in reviewing the case. In Mr. Stewart's words, "we must ensure that the integrity of the Crown Counsel office is preserved from any political interference". The draft speech set out in considerable detail the steps taken by the Ministry in reviewing the case, culminating in Mr. Hughes' decision that Mr. Reid would not be prosecuted.

On the same day Mr. Stewart advised Mr. Smith of the Ministry staff's proposal that Mr. Hall be retained as independent counsel, with instructions to contact Mr. Sihota and Mr. Harcourt to determine whether they would provide him with any further evidence or legal opinions in their possession in support of their position that criminal charges were appropriate. Mr. Hall would determine, based on such new information, whether Mr. Reid should be charged. Mr. Smith expressed a positive reaction to the proposal, but suggested that rather than hold a press conference as proposed by Mr. Stewart, a letter be sent to Mr. Sihota and Mr. Harcourt. (Exhibit 93, p. 2)

On March 24 Mr. Hughes wrote to Mr. Smith (Exhibit 46), confirming that he (Mr. Hughes) had made the final decision not to prosecute Mr. Reid, but that public statements made during the previous 3 days suggested that the decision was tainted by the appearance of coverup. He went on:

> That is a serious allegation that undercuts the very foundations of the criminal justice system in this province and, surely, must shake public confidence in that system.... I have decided that the responsible course is to recommend that you forthwith have a Judicial Inquiry constituted to investigate in a <u>public forum</u> the process giving rise to the decision made in this instance.

On March 26 Mr. Smith sent a letter to Mr. Harcourt (Exhibit 45), setting out the "Hall proposal" suggested by Mr. Stewart on March 23.

On April 2 Mr. Sihota responded to Mr. Smith's letter (Exhibit 43). He expressed the view that:

> the people of British Columbia now understand the police have reasonable and probable grounds to believe that Mr. Reid abused his public trust ... and may have committed an indictable criminal offence.
>
> Since you have chosen not to prosecute Mr. Reid, I am left to assume that you have evidence exculpating Mr. Reid. I take it that evidence was somehow ignored by the RCMP. If so, I believe it is in the public interest to know what that evidence is. I therefore invite you to tell me.

He then asked Mr. Smith to provide him with copies of the RCMP report and the various legal opinions, and concluded by stating:

> I am confident that it is your desire to remove any doubt with respect to this matter, and therefore, I trust that you have no objection to the sharing of this information with myself in my role as a Member of the Legislature.

Mr. Sihota testified that he wrote the letter in his capacity as justice critic in the hope that Mr. Smith would, perhaps by way of a private meeting in the Attorney General's office, share the requested information with him. Had he known at that time that Mr. Hughes had made the final decision not to prosecute Mr. Reid, he said he would not have proceeded further. (pp. 497-9)

Mr. Smith testified that he did not interpret Mr. Sihota's letter as seeking a private, rather than a public, exchange of information. He believed that Mr. Sihota would have known by that time that Mr. Hughes and not he had made the decision not to prosecute Mr. Reid, and that it would be improper for the Attorney General to turn over RCMP files to any MLA, as it would infect the criminal justice system with politics. (pp. 999-1002)

Mr. Smith was reminded of his statement in the Legislature on April 25, 1989 (Exhibit 97) that:

> I know the member [Mr. Sihota] was out this morning at the time I said this, and I know he would want me to share with the House that I extended to him, as critic for this portfolio, the opportunity to work cooperatively with me where he considers it appropriate.... and there were some ... assurances that he could avail himself of my

> office and our support staff for the supply of facts about matters that may be of concern to him.

Mr. Smith testified that if Mr. Sihota had asked, he would have referred him to Mr. Hughes to answer questions as Mr. Hughes saw them to be appropriate. (p. 1008)

On April 10 Mr. Hughes, Mr. Edwards (Assistant Deputy Attorney General, Legal Services Branch) and Mr. Stewart worked on a draft letter of reply to Mr. Sihota's April 2 letter which they, in consultation with Mr. Smith, finalized in the late afternoon (Exhibit 44) and which was delivered to Mr. Sihota on April 11. (p. 836) Mr. Smith refused to release the RCMP report and the legal opinions to Mr. Sihota, as they "may unnecessarily damage the reputations of persons not charged with offences or prejudice the right to a fair trial of those who are". He referred to the established role of Crown Counsel to review the results of the investigation and to determine whether charges are appropriate, applying the 2-prong test of substantial likelihood of conviction and the public interest. He added:

> The Deputy Attorney General, the Assistant Deputy Attorney General for the Criminal Justice Branch, Regional Crown Counsel for Vancouver, and the majority of senior private counsel consulted have concluded that there was not a substantial likelihood of conviction against Mr. Reid....
>
> I cannot understand on what basis you feel you are entitled to review and presumably second guess the process followed in this or any other case. The duty to make these decisions rests, as it should, with disinterested professionals, not with members of the Legislature.
>
> It is imperative that the justice process operates free from even a mere perception of political interference. Practice and convention in this Province have long excluded the Attorney General from personally demanding, receiving or reviewing reports to Crown Counsel or Criminal Justice files. I agree with this practice. In my view, the public must be protected from any Attorney General interfering in the charging process by examining files and reviewing charging decisions.
>
> To comply with your request would require that I instruct Ministry officials to release the file to you and this I am not prepared to do. With the knowledge that the Attorney General does not receive Criminal Justice files, I would think you would agree that no M.L.A., including the Opposition Justice critic, should have access to these files....
>
> An Attorney General must not, except in the clearest and most compelling of exceptional circumstances, become involved in a review of charging decisions.

> Intervention by the Attorney General is only appropriate in instances such as when the integrity of Ministerial officials has been brought into question. This is not a case falling into the exceptional category. For me to become involved, therefore, would set a dangerous precedent, one that would interfere with and compromise the integrity and independence of the whole charging process.

On April 11 the Reid matter was debated in the Legislature (Exhibit 49), during which Mr. Sihota stated:

> Let me put the issue directly before you, Mr. Speaker, and all members of the House so they understand what the issue is. The issue is very straightforward; it is whether, in cases involving the potential criminal wrongdoing of a minister, those decisions should be made privately and quietly in the backrooms of the office of the Attorney General or whether they should be made openly and publicly in court where justice can be seen to be done. (p. 8962)

Several minutes later Mr. Harcourt entered the debate, quoting from Mr. Smith's April 10 letter:

> 'An Attorney General must not, except in the clearest and most compelling of exceptional circumstances, become involved in a review of charging decisions. Intervention by the Attorney General is only appropriate in instances such as when the integrity of ministerial officials has been brought into question'.

He went on to state:

> This is exactly such a situation. It is exactly in those circumstances that we now request the Attorney General to respond by doing the right thing and responding to the request that we have put forward.

The heated exchange continued, culminating with Mr. Smith rising to make a Ministerial Statement. The Hansard record states:

> HON. MR. SMITH: I seek the floor to make a very brief ministerial statement.
>
> Moments ago the Leader of the Opposition stated that the integrity of ministry officials is in question, in reference to the Ministry of the Attorney General. I can only conclude, Mr. Speaker, that he is referring to the integrity of the individuals who are involved very much in the decision that was taken. Therefore, Mr. Speaker, because individuals such as the Hon. Ted Hughes, the Deputy Attorney General; Mr. Bill Stewart, the Assistant Deputy Attorney General for the province of British

> Columbia; Mr. Robert Wright, the regional Crown Counsel in Vancouver; Mr. Ace Henderson, who is on contract to the Ministry of Provincial Secretary; Mr. John Hall, on retainer to the Ministry of the Attorney General; and Mr. Richard Peck, on retainer to the Ministry of the Attorney General.... None of these individuals deserves to have those statements made or implied. If you wish to sully me, then you may feel free. Do not sully people of their integrity.
>
> I therefore advise the House, Mr. Speaker, that I will convene a public inquiry into the process that was undertaken and the competence and the integrity of every single individual who was involved, and I will invite any citizen to seek status at that inquiry to ask the questions they want and to cross-examine anyone else whom they haven't themselves called.
>
> MR. HARCOURT: The Attorney General is once again going off on a wild goose chase. He totally misconstrued my reference. It is not to his ministerial officials that I am referring, and he won't even stay to listen to this comment. I this it's important that he hear this comment. He's walking out on us now, Mr. Speaker, because he doesn't want to hear the truth on this matter as I put it forward.
>
> I said that the integrity of ministerial officials.... The ministerial officials we are talking about here are with the Ministry of Provincial Secretary, and that is who I referred to throughout my remarks. I have never at any time referred to the integrity of people like John Hall, Ace Henderson, Bob Wright or Ted Hughes - many of whom I have known for my 20 years at the bar and have the greatest respect for.

On April 18, 1990 the Cabinet passed Order in Council No. 621, appointing Stephen Owen as a sole commissioner under the *Inquiry Act* to inquire into and report on or before June 30, 1990 on the matters set out in the Terms of the Commission attached to it.

The Commission held its first public hearing on May 4, 1990. After establishing jurisdiction, Mr. Owen made an opening statement, followed by an opening statement by Commission Counsel, Bryan Williams, Q.C. The Inquiry was then adjourned until May 22, 1990 at which time the Commission would commence hearing evidence.

F. The private prosecution

On March 23, 1990 Mr. Stewart asked Mr. Hal Yacowar, the Criminal Justice Branch's Director of Policy and Legal Services, to determine the Ministry's policy respecting private prosecutions. Mr. Yacowar responded on April 12, 1990 (Exhibit 54), by stating that, although there was no written statement of policy, his research satisfied him that the present

policy could be summarized as follows:

A. In relation to indictable offences:

1. The Attorney General will not permit a private prosecution to proceed;

2. If a private Information is laid:

(a) if, after review and application of the usual charging criteria, the matter is worthy to be prosecuted, only an agent of the Attorney General will intervene to conduct the prosecution; and

(b) if, after review and application of the usual charging criteria, the matter is not worthy of prosecution, an agent of the Attorney General would intervene to enter a stay of proceedings.

The policy was the same for summary conviction cases, except that "there may be exceptional circumstances in which a private prosecution occurs. In such cases, perhaps one case every 3-5 years, the person who swears the Information prosecutes the case or obtains his own counsel".

On May 18, 1990 Mr. Sihota appeared before a Justice of the Peace in Vancouver and swore an Information (Exhibit 90) alleging that Mr. Reid had committed an offence contrary to s. 122 of the *Criminal Code*. The Justice of the Peace adjourned his hearing until May 28, 1990, to consider the material filed by Mr. Sihota. Mr. Sihota testified that the decision to lay a private Information was his own personal decision, reached without any consultation with the NDP caucus. (p. 777-8)

On May 22, 1990 the Commission reconvened. After hearing submissions by counsel, Commissioner Owen adjourned the Inquiry to June, 4, 1990 (the date previously set for continuation), on the basis that proceeding in the interim might be seen as an interference with the Justice's decision-making process or might prejudice the rights of Mr. Reid as a potential accused. (p. 38)

On the same day, Mr. Wright wrote to Mr. Stewart (Exhibit 55), citing case law upholding the validity of s. 579(1) of the *Criminal Code*, which gives the Attorney General the power to direct the clerk of the Court "to make an entry on the record that the proceedings are stayed at his direction". He expressed the view that a stay of proceedings should be entered to preserve the integrity of the criminal justice system, unless "the Attorney General felt bound by political restraints from interfering". He suggested that Mr. Hall be retained, with

instructions to speak to Mr. Sihota and to determine whether or not he had grounds or evidence which would meet the Crown's test of substantial likelihood of conviction. If such grounds existed, Mr. Hall should be given complete discretion to take over the prosecution; if they did not, Mr. Hall should enter a stay of proceedings.

On May 23 Mr. Stewart wrote to Mr. Hughes (Exhibit 92), outlining the options available to the Crown, should the Justice of the Peace issue process. They included:

1. the Attorney General could decide not to intervene and allow Mr. Sihota or counsel retained by him to conduct a private prosecution;

2. the Attorney General could intervene to assume conduct of the prosecution and either:

    a. enter a stay of proceedings through the Deputy Attorney General, or

    b. retain outside counsel (Mr. Hall or another counsel not yet involved in the matter) to determine, after reviewing any further information provided by Mr. Sihota, whether the prosecution should proceed (in which case that counsel would take charge), or a stay of proceedings should be entered.

Mr. Stewart recommended the "Hall" option.

On May 24, 1990 Mr. Firestone wrote to Mr. Sihota (Exhibit 83), accepting the retainer to conduct the private prosecution. He observed:

> it is my view that there is a "two-tier" system of justice in this province: one for the rich and one for the poor. From my perspective, this prosecution is not politically motivated but is motivated by a profound sense of injustice in that the rich are treated one way and the poor another.

On about May 24 Mr. Stewart received a telephone call from Mr. Rob Anderson, a Vancouver lawyer who, to Mr. Stewart's knowledge, was assisting Mr. Peter Butler, Q.C. in the defence of Mr. Reid. This was to be the first of 3 calls he would receive from Mr. Anderson during the next 3 weeks. Mr. Anderson said he wanted the Ministry to intervene to enter a stay of proceedings, that his office was developing an abuse of process argument and he offered to send a copy to Mr. Stewart, who told him that it would be premature to do that. (p. 841)

On May 25 Mr. Anderson wrote to Mr. Stewart, enclosing a number of press clippings respecting Mr. Sihota's private prosecution of Mr. Reid. Mr. Stewart filed these materials

away. (p. 842)

On May 28 the Justice of the Peace issued a summons to Mr. Reid, requiring him to appear in Provincial Court on June 12.

On May 29 Mr. Stewart wrote to Mr. Hall (Exhibit 57), asking him to review the material filed by Mr. Sihota with the Justice of the Peace and advise whether, had he been in possession of that material in the first instance, his opinion that Mr. Reid not be prosecuted would have been different. On the same day Mr. Stewart told Mr. Smith that he had received from Mr. Anderson copies of news clippings respecting the private prosecution. In response to a suggestion from Mr. Smith that Mr. Stewart ought to send Mr. Anderson materials from the Ministry's files, Mr. Stewart responded that it would be improper for him to send Mr. Anderson anything or give him any instructions.

On June 1 the Owen Commission issued a news release announcing that the Inquiry would not be re-opened until the Attorney General decided whether to allow the criminal charge laid against Mr. Reid by Mr. Sihota to proceed.

On June 6 Mr. Hall responded (Exhibit 58) to Mr. Stewart's letter of May 29, advising him that neither Mr. Sihota nor Mr. Harcourt had contacted him following Mr. Smith's March 26 letter, that there was nothing new in the material Mr. Sihota had filed with the Justice of the Peace and that he would not change his recommendation that Mr. Reid not be charged. On the issue of the private prosecution Mr. Hall noted that the charge laid in this case (under s. 122) possessed a somewhat amorphous quality that makes the analysis of substantial likelihood of conviction

> a much more difficult process. There is in these sorts of cases an element of the crime being in the eye of the beholder in that one person may find a set of facts to be sufficient to mobilize criminal prosecution while another may view the matter as not a situation that requires prosecution.
>
> ... I think the present case is one, where the matter is not sufficiently clear that I would feel confident in recommending at this stage that a stay of proceedings must be entered....
>
> My recommendation, therefore, is that the Ministry not be involved in this prosecution at this stage, but that no bar should be placed in the way of the Informant relative to the Information that is presently before the Court.

On June 8 Mr. Stewart sent a 7-page letter to Mr. Smith (Exhibit 59) entitled "Suggested points to incorporate into remarks to be made by the Attorney General at the time of

announcing his position with respect to the prosecution initiated by Mr. Sihota against Mr. Reid". The position advocated in the memorandum was that the Attorney General would not enter a stay of proceedings, but that should Mr. Sihota wish to carry forward with his prosecution he must do so as a private prosecutor without any intervention on behalf of the Crown.

Mr. Smith decided (p. 1013) and on June 11 announced that he would not enter a stay of proceedings, and that he would not intervene in the private prosecution by Mr. Sihota. On the same date Mr. Sihota announced that Mr. Firestone would act as the private prosecutor.

On June 12 Mr. Smith and Mr. Stewart had a telephone conversation which was, unknown to them at the time, intercepted and recorded. A transcript of the conversation was made public by Mr. Sihota on July 11 and that publication led to Mr. Hughes' referral to the Deputy Attorney General of Alberta, Mr. Neil McCrank, of the issue of whether any criminal charges ought to be laid. In Mr. McCrank's August 22, 1990 opinion (Exhibit 77), he divided the telephone conversation into 7 parts:

1. queries and critical comments about Mr. Firestone,

2. comments about Mr. Firestone's alleged ambition,

3. questions about Mr. Sihota appearing as a witness on an abuse of process hearing,

4. more discussion about Mr. Firestone,

5. the unexplained "gap",

6. discussion about media coverage of an event the previous evening that Mr. Smith was involved in, and

7. end of conversation.

On the same day Mr. Reid made his first appearance in Provincial Court, and his case was adjourned to July 17, 1990 in Disclosure Court.

On June 13 Mr. Firestone sent letters to Mr. Marson, Mr. Hughes and the RCMP (Exhibits 60 and 61, and p. 926), requesting voluntary production of the RCMP report, relevant exhibits and transcripts from the Marson Inquiry. He made reference to the powers under the *Criminal Code* to obtain a search warrant or a subpoena, but hoped that such proceedings would not be necessary.

On the same date Mr. Ernie Quantz, Director of Operations in the Ministry's Criminal Justice Branch, had discussions with Mr. Marson, the RCMP and Mr. Wright, and it was tentatively agreed that Mr. Wright would coordinate the Provincial Government's response to Mr. Firestone's request. (p. 925-7)

On June 14 Mr. Firestone wrote to Mr. Sihota (Exhibit 84), describing how he saw the case proceeding. He stated in part:

> I have been of the view from moment one that this was a meritorious prosecution for administration of justice reasons. I think it is wrong for friends of the government to have the "no substantial likelihood of conviction test" be applied because it simply looks wrong.

He then described the steps he had taken to obtain documents from the provincial government, the RCMP and the Commission itself. He stated:

> To summarize, while I am hopeful that the prosecution will fly, I may very well come to you within the next two or three weeks and simply say that there has been insufficient cooperation. At that stage I may very well recommend that the charge be withdrawn by virtue of the lack of cooperation by the Government of British Columbia. I honestly believe, and I am confident, that this will not happen. However, I have to recognize that if the Government wishes to put roadblocks in my way, it can. In my view, if Stephen Owen refuses to cooperate, through his counsel Don Sorochan, and the RCMP refuse to cooperate, then my hands will be tied.

On June 14 Mr. Stewart asked Mr. Quantz to have someone research the issue of whether or not a subpoena could issue at this point in the proceedings for the production of documents in Disclosure Court. (p. 929)

On about June 15 Debi Pelletier, a reporter with Canadian Press contacted Mr. Sihota respecting the taped telephone conversations involving Mr. Smith and others. (Exhibit 78, p. 3) Mr. Sihota testified that Ms. Pelletier came to his office, told him what she knew (by that time she had a composite tape of the conversations), and that Mr. Sihota was going to be "set up" on this prosecution. (p. 520)

On June 19 Mr. Quantz met with Mr. Hughes and Mr. Stewart, and he was instructed to act as coordinator for the Provincial Government in turning over information and documents to Mr. Firestone. They were concerned that this case might set a precedent which could haunt them in future cases, and they wanted to develop a formalized mechanism. There was agreement that the Ministry would require Court authorization, and then the information and documents would be turned over right away. (p. 932)

Later that day Mr. Hughes and Mr. Firestone talked by telephone, and Mr. Firestone agreed to meet with Mr. Quantz to discuss his request for documents. (Exhibit 62). Mr. Hughes then told Mr. Quantz of his conversation with Mr. Firestone and that he should proceed on the basis of their meeting earlier that day. (p. 932)

On June 20 Mr. Firestone attended at Mr. Quantz's office at 8:00 a.m. Mr. Quantz said that the requested information was in the hands of a number of agencies and that his role was to act as coordinator, to facilitate Mr. Firestone's getting of the information. He explained the Ministry's general policy against releasing confidential information, but that in this case the Ministry would release the documents in response to a subpoena. The Crown was prepared to attend Court with Mr. Firestone and make a joint submission for the issuance of a subpoena and upon its issuance the Ministry would immediately gather the material together and give it to him. They discussed the 1989 Alberta Queen's Bench decision in *R. v. Gingras*, which Mr. Quantz cited as authority for the proposition that a subpoena *duces tecum* (for documents only) is available in criminal law. Mr. Firestone was aware of the decision but had as yet been unable to obtain a copy. (p. 938) He expressed concern that the subpoena route might give the defence the opportunity to make a collateral attack, leading ultimately to a ruling that the documents were inadmissible. (p. 939)

Mr. Quantz then raised, on his own initiative and without specific instructions, an alternative procedure whereby the documents could possibly be released on Mr. Firestone's professional undertaking with 3 conditions:

1. Mr. Firestone would only seek to obtain information which he believed was relevant to the prosecution,

2. Mr. Firestone would release this information only to the defence as part of the Ministry's policy of full disclosure or in Court as part of his prosecution, and

3. at the conclusion of the case and any resulting appeals Mr. Firestone would immediately return all of the information to the Ministry. (pp. 940-1)

Mr. Quantz testified that *ad hoc* prosecutors are bound by implied undertakings of this nature when they accept files from the Ministry, but he felt that the undertaking ought to be reduced to writing in this case because Mr. Firestone was taking his instructions from a private Informant, not the Ministry. (p. 941)

Mr. Firestone said that he could not immediately respond to that idea, and would need to obtain instructions from Mr. Sihota. Mr. Quantz agreed to obtain and send to Mr. Firestone a copy of *R. v. Gingras*. Mr. Firestone said that before a formal response would come he would need to have both options in writing from Mr. Hughes. (p.943)

In the early afternoon Mr. Firestone telephoned Mr. Quantz and said that he had no instructions on the proposals and that he required a letter from Mr. Hughes, preferably by the next day, concerning the proposal on the subpoena. He said that, upon receipt of that letter, things would move very quickly. (p. 946) Mr. Firestone made no mention of the proposal on the undertaking. (p. 945) In his testimony Mr. Sihota stated that he had instructed Mr. Firestone to request from Mr. Quantz a letter on the subpoena issue (p. 700)

Mr. Quantz inferred from that conversation that the informant was looking for a way to discontinue the private prosecution on the basis that the prosecution was being frustrated by the Ministry not giving him the information they required. He testified that he drew that inference from the following factors: in the morning Mr. Firestone had wanted a letter on both options, but by the afternoon he wanted a letter only on the subpoena option; he stated that things would move very quickly upon receipt of the letter; and he had not yet read *R. v. Gingras*. (p. 948)

Mr. Quantz then reported his conversation to Mr. Hughes, and recommended that the letter to Mr. Firestone include both the subpoena and undertaking options, because he feared that if the subpoena option was rejected "it would cause harm to the criminal justice system and we would be viewed as we were trying to block that prosecution". (p. 949)

That evening Mr. Quantz prepared, at Mr. Hughes' request, a memorandum (Exhibit 63) on the statutory duty of the Attorney General to supervise all criminal prosecutions. He stated in part:

> Where a legitimate concern exists in the mind of the Attorney General that the private informant or prosecutor may have an ulterior motive in proceeding with the prosecution the Attorney General would meet his statutory obligation by requiring a court order (subpoena) before releasing confidential information to the private prosecutor. The requirement for a subpoena is justified for two reasons:
>
> 1) it provides a judicial officer (judge or justice) the opportunity to review the request for information thereby ensuring that the requested information is necessary for a legitimate prosecution; and
>
> 2) it provides a mechanism for a potential witness to challenge the subpoena in superior court thereby obtaining a further judicial review on the issue of whether the requested information is required to support the prosecution.

He added that if the subpoena option is not available, a less desirable option would be to release confidential information only on a personal undertaking from counsel for the informant, and he listed 4 conditions which should attach to the undertaking.

Early in the morning of June 21 Mr. Quantz and Mr. Stewart met, and agreed that the letter to Mr. Firestone ought to include both options. (p. 951) They then went together to see Mr. Hughes, who read Mr. Quantz's memorandum, and then stated that Mr. Smith was not supportive of the undertaking option at that time. Mr. Hughes expressed the view that the release of the documents should be "clothed with the authority of the Court". At Mr. Hughes' instruction Mr. Quantz and Mr. Stewart prepared 2 draft letters, one setting out the subpoena option alone (Exhibit 64) and the other setting out both options. (Exhibit 65) Mr. Hughes presented the 2 letters to Mr. Smith, who instructed that they proceed with the subpoena option only and that the question of the undertaking was to remain confidential. At Mr. Smith's instruction the following paragraph was added:(pp.161-2, 953 and 1016-8)

> If you determine to decline this proposal and have some alternative suggestion to make, please communicate it to us before taking any other action and we will give immediate attention to it.

Mr. Hughes hand-delivered the letter (Exhibit 64) to Mr. Firestone in the afternoon. (p. 158)

On June 21, apparently in the morning before going to Court, Mr. Firestone dictated a letter to Mr. Sihota (Exhibit 86), enclosing a draft proposal to Mr. Hughes. Mr. Firestone stated in part:

> It is my view that we should respond to Hughes and not simply break off negotiations because it may appear that we were bargaining in bad faith which, of course, is not true. But for appearances sake, a response is probably necessary.

On the same date Mr. Firestone wrote another letter to Mr. Sihota (Exhibit 85) headed "Draft - for discussion purposes only". It is not clear whether this letter was drafted before or after Mr. Firestone received Mr. Hughes' letter (Exhibit 64), although Mr. Sihota acknowledged in cross-examination that it was apparently drafted before Mr. Firestone received Mr. Hughes' letter. (p. 703) Mr. Firestone stated in part:

> I am being denied access to these materials for no good legal reason, as far as I can determine. There is nothing stopping the Attorney General of British Columbia, the senior law enforcement officer of the province, from cooperating with me as a private prosecutor....

He then recommended that Mr. Sihota withdraw the charge against Mr. Reid for 3 reasons:

1. in Mr. Firestone's opinion he had been obstructed as a prosecutor, by Mr. Smith and Ministry officials stating that they would not cooperate with the private prosecutor

without a Court order,

2. without the cooperation of the Attorney General and his Ministry, Mr. Firestone's job as a private prosecutor was impossible. In his view the suggested subpoena power was useless because a judge can only issue a subpoena to a witness to bring documents at the date set for the hearing, which would preclude advance preparation. The spectre of having to obtain and execute a search warrant against Ministry offices was totally unpalatable to him as a lawyer, and totally unnecessary. Either procedure would be open to collateral attack by the defence, and

3. the RCMP have refused to cooperate. Even if they cooperated with a subpoena, the subpoena power in terms of advance preparation would be useless.

Mr. Firestone's letter then went on:

> It is my recommendation, which has been accepted by you, that the charge against Mr. William Reid be withdrawn. You have given me those instructions and I am currently in the process of couriering to the Courthouse in Vancouver, and to counsel for Mr. Reid, a letter indicating that the charge against Mr. Reid is hereby withdrawn.

It is not clear from the correspondence or from the transcript whether Mr. Sihota had in fact given those instructions to Mr. Firestone prior to this letter being drafted, or whether the letter reflected only Mr. Firestone's anticipation of receiving such instructions sometime later.

On June 22 Mr. Sihota and Mr. Firestone discussed the offer contained in Mr. Hughes' letter (Exhibit 64). They concluded that the offer was not satisfactory, was perhaps even in ways hollow and did not amount to much, because the subpoena would be open to collateral attack by the defence, might result in protracted and expensive litigation to the Supreme Court of Canada and, in Mr. Firestone's opinion, the subpoena would not afford the private prosecutor access to the documents in advance of the trial date. Mr. Firestone told Mr. Sihota of Mr. Quantz's alternate suggestion that the documents be turned over on Mr. Firestone's undertaking. Mr. Sihota testified that at the time he did not feel comfortable with that idea, because he didn't know what was in the documents or the conditions of the undertaking. In cross-examination Mr. Sihota conceded that he erred in not pursuing the undertaking option with more vigour. (p. 597) Mr. Sihota instructed Mr. Firestone that the subpoena option would not be acceptable. (p. 507-510)

Mr. Sihota testified that he read Mr. Firestone's draft letter of June 21 (Exhibit 85) and on June 22 decided to withdraw the private prosecution, for 3 reasons:

1. because the prosecution was untenable, for the reasons set out in Mr. Firestone's letter,

2. because of Mr. Firestone's urging that Mr. Sihota had a duty, if the difficulty in obtaining the documents was going to preclude a prosecution, to advise Mr. Reid as soon as possible, and

3. cost; the New Democrat caucus had approved a budget of $15,000 for the private prosecution, and Mr. Sihota was concerned that procedural wrangling might well increase the cost significantly above that limit. (pp. 512-514)

Mr. Sihota testified that at this time he was aware of some of the information on the taped telephone conversations involving Mr. Smith and others and the generalities of the attack, and probably had listened to some of the tapes, but that information did not influence him in deciding to withdraw the private prosecution. (pp. 510-512)

On the same day (June 22) Mr. Quantz, who was on vacation, called Mr. Firestone to inquire whether he could be away on June 25, the day they had discussed for attending Court to seek the subpoena. Mr. Firestone advised him that his presence in Court on that date would not be necessary. (pp. 955-6)

On June 26 Mr. Sihota received the tapes of the recorded telephone conversations. (p. 510)

On June 27 Mr. Firestone sent a letter to Mr. Sihota (Exhibit 88), recommending that the private prosecution be withdrawn. The letter is substantially the same as his draft letter of June 21 (Exhibit 85), and sets out the same reasoning that led him to make that recommendation.

On the same date Mr. Firestone wrote to Mr. Hughes (Exhibit 66), advising him of that recommendation. He stated that he took on the case on the understanding that he was a "prosecutor" within the meaning of s. 2 of the *Criminal Code*, and that as such and as an officer of the Court there was no need to require a Court order before relevant documents were disclosed to him. He stated that, from his reading of *R. v. Gingras,* a Supreme Court judge may have power to issue a subpoena *duces tecum*, but only after witnesses testified at a hearing, and the case did not permit the kind of summary procedure suggested in Mr. Hughes' letter. In response to Mr. Hughes' statement in his June 21 letter that "if you determine to decline this proposal and have some alternative suggestion to make, please communicate it to us before taking any other action and we will give immediate attention to it", Mr. Firestone stated:

> I simply write to indicate that it is quite clear to me from the position taken by the

Attorney General's Ministry that I will not get these materials without a Court order of some kind which, as I have stated herein, is unnecessary in my opinion.

On the same day (June 27) Mr. Sihota announced publicly that he was withdrawing the private prosecution. He testified that, although the decision to do so had been made on Friday, June 22, and Mr. Firestone urged him to make the announcement without delay, he was unable to do so on Monday, June 25 because of Legislative commitments or on Tuesday, June 26 because of constituency business. (p. 515-6)

G. Publication of the taped telephone conversations

On June 26, 1990 Mr. Sihota received the tapes of the recorded telephone conversations and, over the next 2 days, had them transcribed. (p. 618)

He fully reviewed the tapes and transcripts on June 28 and, because of several concerns, called Mr. Glen Orris, Q.C. a senior Vancouver criminal lawyer. Mr. Orris was leaving on a trip, so he referred Mr. Sihota to Mr. Barry Long, another Vancouver lawyer. Mr. Sihota asked Mr. Long to advise him whether, in his opinion, the interception of these telephone conversations violated s. 184(1) of the *Criminal Code.*

Mr. Long researched the issue over the weekend. He met with Mr. Sihota on July 3 and offered a preliminary opinion that he did not think that the interception of the conversations violated the *Criminal Code.* (p. 619)

On July 5 Mr. Long delivered a written opinion to Mr. Sihota. Mr. Sihota testified that he was satisfied with Mr. Long's opinion respecting the Smith/Sinclair conversation, but was not satisfied with his opinion respecting the Smith/Stewart conversation. (p. 620)

On July 6 Mr. Sihota met with Mr. Orris, Mr. Long (and apparently Mr. Thachuk) in Vancouver. They discussed the obstruction of justice charge at length, but were divided on whether Mr. Smith had committed an offence. Mr. Sihota and Mr. Orris felt that the evidence fell short, while Mr. Long and Mr. Thachuk were satisfied that the conduct had crossed the line. They all agreed that the issue was close. (p. 621) Both Mr. Orris and Mr. Long assured Mr. Sihota that in their opinion the interception of the Smith/Stewart conversation did not constitute an offence (p. 622)

On July 6, 1990 the Owen Commission issued a news release announcing that the Inquiry would resume on July 17, 1990.

Mr. Sihota then personally researched the law on the nature of the communications,

obstruction of justice and his Parliamentary responsibilities relating to contempt of Parliament. He testified that he spent nearly all day on July 9 researching the contempt issue, and satisfied himself that Mr. Smith's conduct amounted to contempt of Parliament. (pp. 617 and 622)

On July 10 Mr. Sihota had a further discussion with Mr. Long about his written legal opinion. (p. 622)

By July 10 Mr. Sihota had decided to raise the issue in the Legislature, but wanted to give Mr. Hughes advance notice; at about 4:00 p.m. he telephoned Mr. Hughes (p. 624), who was out at a meeting. (p. 169)

On July 11 at about 9:20 a.m. Mr. Hughes returned Mr. Sihota's call, but Mr. Sihota was not available. (p. 169)

During that morning Mr. Sihota drafted a letter to Mr. Hughes (Exhibit 67), stating in part:

> I am writing to you in confidence and with the expectation that you will not share the foregoing with the Attorney General.
>
> Today in the Legislature I will be rising on a matter of privilege. During the course of my motion of privilege, I will establish that the Attorney General violated the independence and impartiality of his office by tampering in the administration of justice relating to the Reid affair. In particular, I will demonstrate that the Attorney General discussed with a person who he knew to be in direct contact with defence counsel ways in which to embarrass the private prosecutor [in] the proceeding involving the member for Surrey-White Rock-Cloverdale. Further, I will demonstrate that the Attorney General discussed with this individual strategies as to cross examination of the informant and offered to provide information upon which the informant could be cross examined.
>
> In addition, I will demonstrate that the Attorney General then took an affirmative step to contact a reporter and seek to have that reporter make public information which the Attorney General thought would embarrass the private prosecutor.
>
> Actions of the Attorney General raise questions as to whether the provisions of the *Criminal Code* relating to obstruction of justice have been violated.

Mr. Sihota asked Mr. Hughes to attend at his office immediately after his motion of privilege was made in the Legislature, so that Mr. Sihota could fully brief him and provide him with the evidence in his possession.

Mr. Sihota testified that at 2:10 p.m., while he was in the Legislative chamber, he received confirmation that his letter to Mr. Hughes had been personally delivered. (pp. 625 and 762-3) According to Mr. Hughes' testimony, he received the letter at 2:34 p.m. (p. 171)

Mr. Sihota noticed that Mr. Smith was not in the Legislative chamber, and summoned a Page to deliver to Mr. Smith's office a package he had prepared, consisting of a covering letter and the text of the statement he was about to give in the Legislature. He instructed the Page to advise Mr. Smith's office that Mr. Sihota wanted Mr. Smith to see this material immediately. The Page subsequently returned, confirming that the package had been delivered. (pp. 626 and 763-5)

Mr. Sihota had also prepared a package for Premier Vander Zalm, consisting of the transcripts of all the intercepted telephone conversations. He wanted Mr. Vander Zalm to be aware that the material was not exclusively in Mr. Sihota's hands, and to be aware of the full scope of the conversations so that he would be guided in his public response and in his private dealings with Mr. Smith. (p. 627) He had arranged with 2 colleagues, Mr. Rose and Mr. Gabelmann, to send a note to Mr. Vander Zalm asking for a meeting immediately after Mr. Sihota's statement in the Legislature, to deliver the package and discuss its contents. (pp. 627-8)

Mr. Sihota rose in the Legislature at about 2:25 p.m. on a matter of privilege. (Exhibit 68) He tabled the text of the comments he intended to make, together with the transcript of the Smith/Stewart and Smith/Sinclair telephone conversations. He quoted excerpts from the conversations which, in his opinion, established a *prima facie* case against Mr. Smith of contempt of Parliament, and concluded by saying:

> It is my submission that the totality of the material that I have forwarded to you demonstrates on a prima facie basis that the Attorney General violated the standard of independence and impartiality expected of him with respect to this prosecution involving a colleague of his. In so doing, the Attorney General not only offended the integrity of his office, but also brought the administration of justice into disrepute.
>
> Accordingly, it is my view that the Attorney General should resign.

Mr. Sihota testified that he released in the Legislature the text of 2 of the telephone conversations on the basis of advice he had received from the NDP House Leader that under the rules of Parliament he had to establish an evidentiary basis for a charge of contempt of Parliament. (pp. 661 and 665-8)

Mr. Hughes listened to part of Mr. Sihota's statement by means of a telephone-speaker box connection with the Minister's office, and then spent some time considering whether it was

appropriate for him to meet with Mr. Sihota.

In the meantime, Mr. Sihota had concluded his statement at about 2:40 p.m. (Exhibit 68, p. 10863), and he left the Legislature. Outside, he met Mr. Evan Lloyd, the Opposition Communications Director, who told him that Mr. Hughes had not yet arrived and would not arrive for awhile. Mr. Sihota accepted Mr. Lloyd's suggestion that they conduct the press conference first, and then meet with Mr. Hughes. (pp. 628-9)

After concluding that it was appropriate for him to meet with Mr. Sihota, Mr. Hughes walked over to the Opposition Wing, arriving between 3:00 and 3:20 p.m. (Exhibit 69, page 2, and Transcript, p.175.) He was met by Mr. Harcourt, and waited in Mr. Harcourt's office until Mr. Sihota returned from the press conference at about 3:45 p.m.

Mr. Sihota gave Mr. Hughes the tapes of all the intercepted conversations and the corresponding transcripts, but made the point that he had released in the Legislature and to the media only those tapes which were relevant to the allegation of obstruction of justice. He told Mr. Hughes that he had discussed the wiretap law with Mr. Orris and Mr. Long, and would provide Mr. Hughes with a copy of Mr. Long's written opinion. (Exhibit 69)

Mr. Hughes then went to the office of the Deputy Minister to the Premier, Mr. David Emerson, and met with him and Mr. Gerry Lampert. He outlined in a general way what had transpired in Mr. Sihota's office, but was careful not to get into matters of law. He told Mr. Lampert (after Mr. Emerson had left) that it would be inappropriate for him (Mr. Hughes) to give Mr. Lampert access to the tapes or transcripts he had received from Mr. Sihota, and that if Mr. Lampert wanted access he ought to contact Mr. Rose. (Exhibit 69, pp.3-4)

At 4:40 p.m. Mr. Hughes returned to his office. He returned a telephone call to Mr. Smith, during which Mr. Smith identified the "Mr. X" in the Smith/Stewart telephone conversation as Mr. Stewart, the Assistant Deputy Attorney General. (Exhibit 69, p. 4)

Later that afternoon Mr. Hughes met with Mr. Edwards, Mr. Stewart, Mr. Quantz and Mr. Yacowar to discuss these new developments. Mr. Hughes and Mr. Stewart agreed that it would be impossible for the latter to remain as Assistant Deputy Attorney General until matters were clarified. Mr. Hughes requested Mr. Yacowar to assume that position. The group discussed what steps should be taken to investigate Mr. Sihota's allegations. Mr. Hughes left the meeting at about 7:00 p.m., to meet with Mr. Smith. (Exhibit 71)

At 7:25 Mr. Hughes met with Mr. Smith in the latter's office. Mr. Hughes observed Mr. Smith to be depressed and despondent. Mr. Hughes advised Mr. Smith of Mr. Sihota's allegation of obstruction of justice. Mr. Smith responded that such a serious allegation required immediate police investigation and that he (Mr. Smith) intended to inform the

Premier that he would, because of the police investigation, resign as Attorney General. (pp. 1024-5) Mr. Hughes told Mr. Smith that he had no alternative but to place the matter in the hands of the RCMP for investigation and he expressed his own personal opinion that Mr. Smith would have to stand down as Attorney General. (Exhibit 71)

At about 9:30 p.m. Mr. Hughes met again with Mr. Edwards, Mr. Stewart and Mr. Quantz. They discussed how the investigation ought to proceed, and the fact that Mr. Hughes would need a legal opinion as to whether or not there was evidence warranting criminal charges against Mr. Smith for obstructing justice. They were concerned that most of British Columbia's senior criminal counsel were already involved in the case, and that the nature of the allegations made it imperative that the decision whether or not to prosecute must be absolutely credible. Mr. Hughes canvassed the possibility of using a Deputy Attorney General from another province and he ultimately settled on Mr. Neil McCrank, the Deputy Attorney General of Alberta. (Exhibit 71, and Transcript, pp. 184-5)

At about 10:15 p.m. Mr. Hughes reached Mr. Sihota by telephone, and obtained Mr. Sihota's permission to make public his July 11 letter (Exhibit 67) which had been headed "Personal and Confidential". (Exhibit 71, p. 3)

On the morning of July 12 Mr. Hughes called Acting Deputy Commissioner Palmer and requested that the RCMP invstigate Mr. Sihota's allegations. He also called Mr. McCrank and obtained his consent to assume responsibility for deciding whether or not charges should be laid. (Exhibit 71, p. 3)

At 10:00 a.m. the Legislature reconvened, and Mr. Smith rose and informed the House that he had submitted his resignation as Attorney General. (p. 186)

At 10:45 a.m. Mr. Hughes met with Mr. Emerson, Mr. Lampert and Mr. Edwards. He declined to advise them what action he intended to take, stating that he wished to announce it at the press conference and that he wanted to be in a position to say that he had had no discussions with his masters in the Legislative Buildings. He met Mr. Vander Zalm in the corridor "and we both sort of said we had an important and serious job on our hands and we just had a firm exchange of understanding between us that we each were doing our job the best we could and no specifics of what I was there for or what I was going to do next was raised by either the Premier or by me". (Exhibit 71, p. 4)

At 11:00 a.m. Mr. Hughes convened a press conference. (Exhibit 70) He read out his March 24, 1990 letter to Mr. Smith (Exhibit 46) in which he had requested that a judicial inquiry be ordered, and assured the public that there were steady hands of honour and integrity at the helm of the justice system of the province and that it was a fair, equal and impartial system administered without fear or favour of any kind.

He then recounted the events of the preceding day, and announced that an RCMP investigation had been commenced. The resulting Report to Crown Counsel would be delivered directly to Mr. McCrank, the Deputy Attorney General of Alberta. Mr. McCrank would, applying the standard charging policy in British Columbia, recommend whether charges should be laid, and "I will follow those recommendations". He confirmed that he had taken this course of action without any consultation with anyone in government. He added that the Ministry was looking into the legality of telephone conversation interceptions which had occurred in this case.

In his testimony Mr. Hughes confirmed that he did not discuss with either Mr. Smith or Mr. Vander Zalm his decision to refer the matter to Mr. McCrank. (p. 194)

That afternoon Mr. Russell Fraser, then Solicitor General, was sworn in as Attorney General.

At 4:00 p.m. Mr. Hughes met with Acting Deputy Commissioner Palmer in Vancouver and turned over the evidence he had received from Mr. Sihota. Mr. Palmer stated that the RCMP would, of its own initiative, be investigating the issue of the telephone conversation interceptions. (Exhibit 71, pp. 4-5)

On July 13, 1990 the Owen Commission issued a news release announcing that the Inquiry would not resume until the criminal investigation of alleged obstruction of justice by former Attorney General Bud Smith was concluded.

On July 17 the Executive Committee of the Attorney General's Ministry discussed the obstruction and interception investigations which were underway. It was agreed that Mr. Hughes and Mr. Edwards would encourage the RCMP to conclude the obstruction investigation as soon as possible. The Committee had before it a legal opinion of Ministry solicitor Gillian Wallace, apparently concluding that the recording and publication of the telephone conversations did not constitute an offence. The Committee discussed whether Mr. McCrank should be engaged on this aspect of the case, and they wrestled with the propriety of providing a copy of Ms. Wallace's opinion to Mr. McCrank. Mr. Hughes was satisfied that Mr. McCrank would put it to proper use, but appreciated that taking such action might be perceived as an attempt to influence him. (Exhibit 72, pp. 1-2)

That afternoon Mr. Hughes and Mr. Edwards met at RCMP Headquarters in Vancouver with Deputy Commissioner Wilson, Assistant Commissioner Palmer and Chief Superintendent Sebastian (who was in charge of the investigation). Mr. Hughes urged that the obstruction investigation be concluded with dispatch. He stated that he would be sending to Mr. McCrank a copy of the standard charging policy. He provided the RCMP with a copy of Mr. Long's legal opinion respecting the telephone conversation interceptions, and orally

summarized Ms. Wallace's opinion. The RCMP appeared to concur with Mr. Hughes idea that, if the RCMP prepared a Report to Crown Counsel on the interception issue, that issue ought also to be referred to Mr. McCrank. (Exhibit 72, p. 3)

On July 20 Mr. Hughes wrote to Mr. McCrank (Exhibit 73), confirming the referral to him of the charging decision on the allegations of obstruction of justice. He also raised the possibility that the interception issue might be referred to him later. He confirmed that the Report to Crown Counsel on the obstruction investigation would be sent to him directly by the RCMP, and that he should communicate directly with Chief Superintendent Sebastian if anything further was required. He said that he would be forwarding to Mr. McCrank the Ministry's analysis of the legal issues bearing on the interception issue, for assistance in dealing with the variety of legal questions that could be before him. He confirmed that Mr. McCrank was to apply the standard charging policy in effect in British Columbia, and that "Your charging decisions will be final and we will comply with whatever recommendations you make". (p. 3)

On August 1 Mr. Hughes wrote again to Mr. McCrank (Exhibit 74), enclosing a copy of legal opinions by Ms. Wallace and Mr. James Jardine of the Criminal Justice Branch, on the issue of possible criminality arising from the interception and taping of conversations. He confirmed the Ministry's wish that Mr. McCrank render charging decisions on the interception issue should the RCMP report deal with that aspect.

On August 22 Mr. Hughes and Mr. Yacowar flew to Edmonton and met with Mr. McCrank and 2 of his Ministry officials. They received Mr. McCrank's first opinion dealing with the issue of obstruction of justice (Exhibit 77) which was, at that time, in final form. (p. 197) They discussed with Mr. McCrank his second opinion on the issue of interception, which had not yet been completed, and Mr. McCrank identified some of their problems and concerns relating to applying, from Alberta, the British Columbia public interest test. (pp. 198 and 264-5)

Mr. McCrank's first opinion (Exhibit 77) is 23 pages long. It commenced with a recitation of his terms of reference, the investigative and assessment procedure he followed, the chronology of events leading up to the telephone conversations and their content. He then discussed the law relating to the offence of attempt to obstruct justice, set out in s. 139(2) of the *Criminal Code* as follows:

> Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

He analysed in turn the 3 undefined elements of the offence:

1. **obstruct, pervert or defeat** - these words must be given their literal meaning, and one should have no difficulty in applying their meaning in a given set of facts;

2. **course of justice** - in *R. v. Spezzano* (1977) 34 CCC (2d) 87, the Ontario Court of Appeal ruled that this expression included not only a judicial proceeding but also a contemplated prosecution, notwithstanding that no decision to prosecute had been made.

Mr. McCrank found that there was clearly a contemplated prosecution in this case, having regard to the police investigation and the opinions as to whether charges should be laid. He also concluded that a judicial proceeding existed, having regard to the fact that Mr. Smith had not entered a stay of proceedings in Mr. Sihota's private prosecution.

Thus, it was clear that the conduct in question here was in relation to the "course of justice".

3. **attempts in any manner** - in *R. v. Graham* (1985) 20 CCC (3d) 210, the Ontario Court of Appeal ruled that the Crown must prove not only that the accused had an *intention* to pervert the course of justice, but also that what he did had a *tendency* to have that effect. The Supreme Court of Canada dismissed an appeal: [1988] 1 SCR 214.

However, in *R. v. Hearn and Fahey* (1989) 48 CCC (3d) 376, the Newfoundland Court of Appeal ruled, in a case where the conduct of the accused could not legally have affected the outcome of the trial, that the Crown need prove only an *intent*.

Mr. McCrank proceeded on the assumption that, whichever authority was ultimately upheld, the Crown must prove an intent to obstruct, pervert or defeat the course of justice, and he turned to the evidence to see whether such an intent could be proved in this case.

He quoted excerpts from the Smith/Stewart conversation as follows:

Smith:	He says you guys used to use him and he's a friend of uh Murray's.
Stewart:	He is, but Murray fired him off a case because he wasn't any good, that was a, uh, that Frisbee case, that was that murder on a cruise ship.
Smith:	Yeah.
Stewart:	And he couldn't handle the pressure, didn't do any work and so uh, Dennis fired him and uh, put Ernie on the case and uh the guy almost had a nervous breakdown.
Smith:	How can we get that out?

Stewart: (Laughter, etc.)

Smith: We could do anything we want now.

Mr. McCrank drew the following inferences about Mr. Smith's intent:

1. The comment "How can we get this out?" must be read in the context in which it was made, and Mr. McCrank referred to the considerable speculation within the legal community of B.C. as to who Mr. Sihota and Mr. Harcourt had been referring to at their March 20 press conference as "prominent defence and Crown Counsel in British Columbia" that had reviewed the Reid facts and had agreed that charges were warranted, and who Mr. Sihota would retain to conduct the private prosecution.

   He concluded that the statement:

   > shows nothing more than an intention on the part of Mr. Smith to set the public record straight on the experience and abilities of Mr. Firestone. The most reasonable inference one can draw is that it is Mr. Smith's intention to deal with an issue between two political parties as opposed to interfering with the course of justice.

2. The comment "We could do anything we want now" is less clear and remains unexplained, but:

   > it seems to relate to the earlier comments on Mr. Firestone's experience and abilities and as such since his character was put in issue by positive comments it is, in his mind, fair game to point out the negative aspects also. This would again not manifest itself as an intention to interfere with the "course of justice".

3. Mr. Stewart's statements about Mr. Firestone's alleged ambition do not show any evidence of an intention on the part of Mr. Smith or indeed Mr. Stewart to commit a criminal act.

4. Mr. Smith's expressed interest in seeing Mr. Sihota cross-examined on an abuse of process application, and his suggestion that Mr. Reid's defence counsel be made aware of public pronouncements made by Mr. Sihota show that Mr. Smith was interested in the Reid proceedings, but his declared intention to ensure that "public statements" by Mr. Sihota are brought to the Court's intention does not constitute an attempt to obstruct justice.

Mr. McCrank then examined the Smith/Sinclair telephone conversation and Mr. Smith's statement, after alluding to Mr. Firestone's experience, abilities and alleged ambition, that "So, if someone could get onto that, they've got the story of the year." Mr. McCrank concluded that:

> The clear intention on the part of Mr. Smith in calling his source in the media must have been to encourage the public dissemination of both parts of this conversation....
>
> Once again, it is clear, in my view, that Mr. Smith's intention is to counter earlier public statements made by Messrs. Sihota and Harcourt about prominent Defence and Crown Counsel in the Province of British Columbia. There is no evidence that Mr. Smith intends to engage in any activity one could ordinarily associate with an attempt to obstruct justice.

Mr. McCrank went on to say that, if the Crown must also prove that the accused's conduct had a tendency to pervert the course of justice, the available evidence in this case would fail, as it is questionable whether comments on the experience and abilities of a prosecutor at this early stage in the process, or the attempt to make defence counsel aware of public pronouncements by the Informant indicate such a tendency.

Finally, Mr. McCrank referred to the September 1989 telephone conversation between Mr. Smith and his wife, in which he stated that Mr. Reid's activities were "dumb" but not "unlawful". Since it is accepted by all members of the investigative and prosecution teams that Mr. Smith had no involvement in Mr. Hughes' decision not to prosecute Mr. Reid, Mr. McCrank concluded that these expressions of personal opinion do not provide any evidence of an intention to obstruct justice.

Mr. McCrank concluded that "there are no grounds for proceeding with charges of attempt to obstruct justice against Mr. Smith or anyone else", and neither was s. 122 (breach of trust by a public officer) applicable; if Mr. Smith had intended to misuse his public office in this way, he could have intervened in the private prosecution to enter a stay of proceedings.

On August 23 Mr. McCrank delivered to Mr. Hughes his second opinion, dealing with the interception and disclosure of the telephone conversations. The 18-page report begins with a review of the relevant chronology and evidence, followed by a lengthy analysis of the law on "private communications". The 2 *Criminal Code* offences under examination in the opinion are:

> **Interception of communications**
>
> s. 184(1) Every one who, by means of any electro-magnetic, acoustic, mechanical or

other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Disclosure of information

s. 193(1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Mr. McCrank dealt first with the meaning of "originator" and "private", as follows:

1. **originator** - applying the Supreme Court of Canada's decision in *Goldman v. The Queen* [1980] 1 SCR 976, a *communication* involves the passing of thoughts, ideas, words or information from one person to another, whereas a *conversation* includes an interchange of a series of separate communications. Thus, the originator of a communication is the person who makes the remark or series of remarks, whether or not he or she is the one who initiated the conversation (in this case, the telephone call).

2. **private** - for a communication to be private, it must pass both a subjective and objective test. Under the subjective test the originator must subjectively demonstrate an expectation that the communication will not be intercepted. Under the objective test, it must be shown that the circumstances of the communication, on reasonable grounds, justify the subjective expectation that the communication will not be intercepted. On this latter test, Mr. McCrank favoured the more narrow of the 2 possible interpretations, that is whether a reasonable person, *knowing what the originator of the communication knows*, would expect that the communication would be free from interception. In doing so, he relied on *R. v. Nin* (1985) 34 CCC (3d) 89 (Quebec Court of Sessions) and *R. v. Rodney* (1984) 40 CR (3d) 256 (BCSC).

Mr. McCrank then applied that interpretation of the law to the Smith/Sinclair, Smith/Smith

and Smith/Stewart telephone conversations, and concluded as follows:

1. **Smith/Sinclair and Smith/Smith conversations** - a Court could go either way on whether the parties to these conversations had an expectation that their communications would not be intercepted (the subjective prong of the test), but a reasonable person, knowing that Mr. Smith was speaking from a radio telephone, would not have a reasonable expectation that his or her communication would not be intercepted (the objective prong). Thus, these communications were not "private" within the meaning of Part VI of the *Criminal Code*.

2. **Smith/Stewart conversation** - a Court would undoubtedly find that Mr. Stewart had a subjective expectation that his communications would not be intercepted (the subjective prong of the test). Further, the circumstances known to Mr. Stewart would lead a reasonable person to believe that an ordinary and secure telephone conversation was taking place, giving a reasonable expectation that his or her communications would not be intercepted (the objective prong). Thus, communications originated by Mr. Stewart constitute "private" communications under Part VI.

Mr. McCrank then enumerated the essential ingredients of the offence of intercepting a private communication, and concluded that the Crown must prove the following:

1. a communication,

2. the communication was private,

3. the private communication was intercepted,

4. the interception was done wilfully, and

5. the interception was accomplished by means of an electro-magnetic, acoustic, mechanical or other device.

Mr. McCrank concluded that the mental element (*mens rea*) in this offence required the Crown to prove 2 things. First, that the accused acted *wilfully* in intercepting the communication, and second, that the accused acted either intentionally or *recklessly* in adverting to whether the communication was private. He stated:

> in order for the Crown to prove that Mr. Graves unlawfully intercepted private communications originated by Mr. Stewart to Mr. Smith the Crown would be required to satisfy the Court that Mr. Graves, during the time he recorded the

conversation between Messrs. Stewart and Smith, knew it was likely that this conversation would contain private communications.

Before he disclosed the contents of the conversation to Ms. Pelletier, Mr. Graves would have had the opportunity to hear the conversation in its entirety and consider whether any of the statements made provided evidence as to the subjective or objective expectations of privacy of the two parties. Because the offence of unlawful interception would have occurred at the very moment Mr. Graves picked the conversation up on his scanner he would have had no opportunity to consider the contents before the actus reus was complete. In my opinion, it would be very difficult for the Crown to establish that Mr. Graves, at the very moment of interception, realized it was likely that the conversation contained private communications. As a result, I do not believe the offence could be proved.

Mr. McCrank then enumerated the essential ingredients of the offence of disclosing a private communication, and concluded that the Crown must prove the following:

1-5. the same ingredients as set out above,

6. any part, or the substance, meaning or import of the private communication were used or disclosed or the existence of the private communication was disclosed,

7. the disclosure was made wilfully, and

8. neither the originator nor the intended recipient of the communication consented to the interception or disclosure of the communication.

Mr. McCrank viewed as possible accuseds Mr. Graves (for disclosing the interceptions to Ms. Pelletier), Ms. Pelletier (for disclosing the interceptions to Mr. Sihota), Mr. Sihota (for disclosing the interceptions to the media) and the media (for publicizing Mr. Sihota's disclosure at the press conference). He concluded that, while Ms. Pelletier and the media may technically be guilty of the offence, their's was a minor breach and it would not be in the public interest to prosecute them. In Ms. Pelletier's case, she disclosed only to Mr. Sihota, and it would be crucial to the Crown's case to have her available as a Crown witness. In the media's case, they "were simply publicizing further the information released to the public domain by Mr. Sihota".

Mr. McCrank concluded that Mr. Graves and Mr. Sihota had committed an offence for disclosing the private communications made between Mr. Stewart and Mr. Smith. In reaching that opinion, he stated:

> both Mr. Sihota and Mr. Graves must have known that it was likely that [Mr. Stewart] was speaking over a hard wire telephone and was unaware that the conversation was being transmitted over the airwaves. When Messrs. Sihota and Graves wilfully disclosed the entire conversation they were exhibiting recklessness as to whether the conversations disclosed included a private communication.

He then turned to the charging guidelines used in British Columbia (Exhibit 41); is there a substantial likelihood of conviction and, if so, does the public interest require a prosecution of the accused? He was satisfied that:

> Upon an application of the law as I understand it to all of the available evidence, which I have reviewed in detail, it is my opinion that if Mr. Sihota and Mr. Graves are charged with unlawfully disclosing private communications there is a substantial likelihood of a conviction resulting.

Finally, he considered the 5 factors of the public interest test:

1. **the nature and seriousness of the allegations** - Mr. Graves' interceptions were not isolated and random, but part of a long and concentrated pattern of eavesdropping on Mr. Smith, and were serious indeed. Mr. Sihota's disclosure involved dissemination to the entire country through the news media. Mr. Long's opinion was not unqualified, but served rather to put Mr. Sihota on notice that certain of the communications might [sic] be private.

2. **the personal circumstances of the accused** - Mr. McCrank did not comment specifically on this factor.

3. **the likelihood of achieving the desired result without a court proceeding, including an assessment of the available alternatives to prosecution** - Mr. McCrank felt it impossible for him, in Alberta, to apply this criteria, as one "would have to be intimately familiar with all of the available alternatives to prosecution in British Columbia to make that assessment.

4. **the harm caused to the victim** - a number of people, including Mr. Firestone and Mr. Stewart, suffered great damage to their reputations as a result of the disclosures made by Mr. Graves and Mr. Sihota.

5. **the cost of a prosecution compared to the social benefit to be gained by it. This will include considerations such as the degree to which this offence (as opposed to this offender) represents a community problem which cannot be effectively dealt with otherwise** - Mr. McCrank felt it impossible for him to apply this criteria, as it

required an intimate familiarity with the Province. He added:

> It may be that you would want to take into consideration the general knowledge of the public at this time as to what is a private communication and whether, by advising the public of the law to be applied henceforth to the disclosure of such communications that would be a proper alternative to prosecution given the problem represented in the community by this offence.

Mr. McCrank concluded, and recommended, that a prosecution against Mr. Graves and Mr. Sihota for unlawfully disclosing private communications between Mr. Stewart and Mr. Smith would be in the public interest, subject to a determination of factors 3 and 5 above, which he was unable to assess.

On August 23 Mr. McCrank delivered to Chief Superintendent Sebastian of the RCMP a draft charge prepared against Mr. Graves and Mr. Sihota (Exhibit 79).

On August 24 at 10:30 a.m. Mr. Hughes convened a press conference at which he made public Mr. McCrank's recommendation that there were no grounds for proceeding with charges of attempt to obstruct justice against Mr. Smith or anyone else. Mr. Hughes stated that he accepted Mr. McCrank's recommendation. He released copies of Mr. McCrank's first opinion (Exhibit 77), subject to the deletion of 9 lines on page 6, which might impact unfairly on an individual not in government.

That day Mr. Hughes reviewed, with Ministry officials (pp. 311-2 and 961-2), Mr. McCrank's second opinion dealing with interception and disclosure of the telephone conversations, and decided what action he would take. At about 4:00 p.m. he telephoned the new Attorney General Mr. Fraser and told him what he was going to do. Mr. Hughes testified that Mr. Fraser's reaction was "since I (Mr. Hughes) was satisfied I was doing what was right, that it had his blessing". (p. 201)

At 5:00 p.m. Mr. Hughes convened a second press conference. He announced Mr. McCrank's conclusion that Mr. Stewart had a reasonable expectation that his conversation with Mr. Smith was private, that consequently its disclosure constituted an offence and that there was a substantial likelihood of conviction against "certain individuals" arising out of its disclosure. Mr. McCrank had, however, declined to decide whether the public interest required a prosecution, necessitating Mr. Hughes making that decision.

Mr. Hughes referred to the third public interest factor, the likelihood of achieving the desired result without a Court proceeding, and stated that in his view the public interest was best served by declining to prosecute anyone, and by recommending to the Premier that the Terms of Reference of the Discretion to Prosecute Inquiry be broadened (Exhibit 1B) to

include an examination of the process followed in his decision not to prosecute. He believed that a prosecution would delay the Inquiry, creating horrendous uncertainty within the criminal justice system. He added that the RCMP accepted his decision.

He then referred to the fifth public interest factor, whether this alleged crime can be effectively dealt with by advising the public of the state of the law and how it will be applied henceforth. He noted that this area of the law involves considerations of new types of cellular technology that were not in place at the time these sections of the *Criminal Code* were enacted. In his view the disclosure of the telephone intercepts in this case, serious as they were, do not strike at the very foundation of the criminal justice system of the province in the way that the allegations of cover-up in the Reid decision and of obstruction of justice do. He put the public on notice that, in the future, the interception and/or disclosure of such conversations may result in criminal prosecution. He concluded by stating:

> it is most important that the administration of criminal justice be returned to a firm footing in the province with the restoration of public confidence the paramount consideration. This is best achieved by immediately proceeding with the Owen Inquiry on its expanded mandate.

Mr. Hughes did not make public the text of Mr. McCrank's second opinion.

On August 24 the Owen Commission issued a news release announcing that the Inquiry would resume on August 27, 1990.

CHAPTER V

ANALYSIS AND RECOMMENDATIONS

A. The Decision not to Prosecute William E. Reid

The evidence is clear, uncontradicted and acknowledged by all directly interested parties, including Mr. Sihota and the RCMP, that the final decision not to prosecute Mr. Reid was made by Mr. Hughes without any political or other improper influence or interference at any stage. His decision followed exhaustive research and review by specialists in criminal law employed in senior positions with the Attorney General's Ministry or retained from private practice on this case. The final decision was made following the multi-stage appeal process between the RCMP and the Attorney General's Ministry which was implemented by the Ministry as recommended by *Access to Justice,* the 1988 report of the Justice Reform Committee.

The decision was accepted by the Commanding Officer of the RCMP in British Columbia, Deputy Commissioner D.K. Wilson, although he did not agree with it. He testified that if he had believed that the decision was corrupt in any way, he would have initiated a prosecution of Mr. Reid in spite of the Deputy Attorney General's decision.

There is no evidence that any person, including RCMP officers, Attorney General's Ministry officials and private lawyers retained for this case acted with anything but integrity, independence and professionalism in performing their respective duties regarding the process leading to the final decision of Mr. Hughes not to prosecute Mr. Reid. In addition, all of the evidence supports the conclusion that former Attorney General Bud Smith played no part whatsoever in that decision-making process. In short, the system worked fairly, effectively and as intended. However, the widespread public suspicion that this was not so is a major concern that this Inquiry must address.

The decision not to prosecute, even as it has been shown to have been made with professionalism and integrity, remains unsatisfactory to a section of the public. Contributing to this is the conclusion of the Comptroller General:

> ... that the grant of $277,065 to the Society approved by the Minister, was both irregular in relation to the normal program guidelines, and improper, because of the close and undisclosed relationship of the Minister with the principals of ECO-Clean, and the manner in which a $50,000 contribution to the capital

costs of ECO-Clean was made.

Adding to the public unease is the knowledge that the RCMP formed the strong opinion that Mr. Reid should be charged with breach of public trust under section 122 of the *Criminal Code* of Canada; and the opinion of Mr. Peck that Mr. Reid had acted "in a manner that was improper and inconsistent with the high office he held" and that there were "aspects of his conduct which were high-handed and other aspects which bear the mark of deceit", causing Mr. Peck to conclude that there was a substantial likelihood of conviction. Also, despite not having "overwhelming confidence" in charges of breach of section 122 against Mr. Reid, Mr. Hall found the matter to be a close call and Mr. Reid to have

> acted improperly, as I think clearly emerges on the report of the Comptroller General. Hopefully, the release of that report may ensure that he is not put back into a position where he can abuse public trust and confidence in the way he did in this case.

A major factor in the decision not to charge Mr. Reid is the strict threshold standard of "substantial likelihood of conviction" applied in charge approval in British Columbia. The consequences of this strict test are not well understood by the public, and perhaps even by much of the legal profession, and this, no doubt, adds to the public unease. This issue is discussed in detail in section D, below.

It is understandable that there may be a public sense of frustration that if actions such as Mr. Reid's do not now amount to a breach of public trust, then the law should be changed so that they do in future. While this Inquiry is not mandated to review the adequacy of the federal *Criminal Code*, there is an aspect of section 122 that requires discussion from a British Columbia perspective.

A major factor in the opinions recommending against prosecution of Mr. Reid was the difficulty of proving some dishonesty, fraud or deceit arising from his actions, although this may not be strictly necessary for a breach of public trust to have been committed. Determining whether Mr. Reid's intentions were criminal under section 122 is very difficult where the standards of appropriate behaviour are unclear. The Comptroller General stated in his report, at page 5:

> Furthermore, no administrative controls were in place within the Ministry to provide the checks and balances necessary to ensure that the Minister would exercise his discretionary powers under the GO B.C. program in a prudent manner, particularly in a situation such as this. It is my view that had these controls been in place, this grant would not have been made in the manner

it was.

In his testimony before this Inquiry, Mr. Wright agreed that the regularity with which the GO B.C. grant guidelines were disregarded and the absence of clear conflict of interest guidelines for senior public officials made it much more difficult in this case for the Crown to prove an intention to commit a criminal act. As well, Mr. Peck commented on the difficulty of determining criminal intent under section 122 given the absence of clear and mandatory conflict of interest guidelines in B.C., and given the broadly stated and discretionary nature of the GO B.C. guidelines. In his report, the Comptroller General recommended amendments to the *Lottery Act* and procedures, and to the GO B.C. guidelines to clarify and strengthen grant criteria, documentation and accountability.

Recommendation #1

That the *Lottery Act* and GO B.C. guidelines be strengthened in line with the Comptroller General's recommendations, and that government policy regarding conflicts of interest for cabinet ministers and other public officials be explicit, mandatory and contained in legislation, so that criminal intent and breach of public trust under section 122 of the *Criminal Code* can be more clearly determined in future.

B. Private Prosecution

This Commission's original Terms of Reference for this Inquiry were drawn up before Mr. Sihota initiated his private prosecution of Mr. Reid, and therefore do not refer to it directly. However, they refer generally to the adequacy of the decision-making process regarding prosecutions in this province, and specifically to the decision regarding Mr. Reid. This decision-making process was extended by the initiation of the private prosecution in that the Attorney General's Ministry then had to decide whether to intervene either to stay, take over or allow the prosecution to continue in private hands. Having made the latter decision, the Attorney General's Ministry then had to make the decision on how to deal with access to prosecution documents. The Attorney General was involved in these decisions and his degree of involvement was an issue to be addressed in the original Terms of Reference, as was the disclosure of information. For these reasons, it is necessary for this Inquiry to consider the decision-making process regarding the private prosecution as part of its Terms of Reference.

Section 504 of the *Criminal Code* gives the right of "any one who, on reasonable grounds, believes that a person has committed an indictable offence" to lay an

information before a justice of the peace and thus to institute a criminal proceeding. Section 2 of the *Criminal Code* defines a "prosecutor", when the Attorney General does not intervene, as the person who institutes the proceeding. Therefore, any individual, including a police officer, has the right to institute criminal proceedings on reasonable grounds. However, the Attorney General under section 579(1) has the power in all criminal proceedings to intervene and direct a stay in the proceedings, or to intervene and take over the conduct of the prosecution.

The power of an individual citizen or police officer to initiate a prosecution on reasonable grounds is an important safeguard in our society against real or perceived corruption in Crown prosecution decisions. Its major importance is that it places into public view the decision-making process. If charges are to be stayed or withdrawn, then this will be done in public. As well, it seems that a judge has the power to reject a stay of proceedings where the Attorney General can be shown to have acted with "flagrant impropriety" or "bias" or had "abused the law": *Campbell v. AG Ontario* (1987) 35 C.C.C. (3d) 480 (Ont. C.A.) and *AG Quebec v. Chartrand* (1987) 59 C.R. (3d) 388 (Que. C.A.).

While individuals are certainly the victims of crime, our tradition is that crimes are seen to have been committed against society as a whole, and therefore the Crown, in the name of society, takes responsibility for the prosecution. Where the power of the criminal process is engaged by a private citizen against an accused, it is questionable whether it is ever necessary or appropriate for that individual to continue to conduct the prosecution. If, on review by Crown counsel, the case against an accused meets the standard criteria for prosecution, then the Crown should intervene and take over the responsibility. These are Crown functions performed in our joint name for our joint benefit. A private individual should not be left to wield prosecutorial power or to bear the expense of doing so. The evidence before this Inquiry that the private prosecution was being financed by a political party is also of serious concern because it gives the appearance of partisan politics entering into the prosecutorial system. As well, the prosecutorial function necessarily involves access to all police reports and other investigation documents, and for the reasons set out below (section E), it is not appropriate for these to come into private hands.

Alternatively, if a review of the evidence and law by Crown Counsel leads to the conclusion that the standard criteria are not met, then the Crown should intervene to enter a stay of proceedings. If this is not done, then it leads to the application of different standards for the prosecution of different individuals, which is contrary to our notions of equal justice. However, because section 504 applies the lower test of "reasonable grounds to believe that a person has committed an indictable offence",

compared to the "substantial likelihood of conviction" test under the Crown's charge approval process, the potential for public confusion and suspicion arises. Therefore, where the Crown intervenes to stay proceedings initiated under the lower test by the police or a private individual, on the basis of no substantial likelihood of conviction, then adequate reasons should be provided to the police, private prosecutor or public, as appropriate, to explain the standard applied and the inadequacy of the evidence to meet it. The issue of reasons and public disclosure is discussed in section E, below.

On May 18, 1990 Mr. Sihota swore an information under section 504 to initiate criminal proceedings against Mr. Reid, which led to a summons being issued by a justice of the peace on May 28. At the time Mr. Sihota took this step, he was aware of a letter from Mr. Smith to Mr. Harcourt dated March 26 (Exhibit 45), whereby Mr. Smith invited Mr. Harcourt to make opinions and evidence in Mr. Harcourt's possession available for review and reconsideration by Mr. Hall. This opportunity was not taken. At the time Mr. Sihota initiated the private prosecution, he had also been informed that the Crown decision not to prosecute Mr. Reid had been made by "disinterested professionals", including the Deputy Attorney General, the Assistant Deputy Attorney General for Criminal Justice, the Regional Crown Counsel for Vancouver and a majority of senior private counsel consulted, on the basis that there was not a substantial likelihood of conviction. (Exhibit 44) In testimony to this Inquiry, Mr. Sihota said that he has a high regard for Mr. Hughes, respects his judgments and that if he had known that the decision was his he would not have proceeded as he did. (p.499) He did know this as of April 10 and yet he did proceed with his private prosecution.

Having said this, it is important to note that Mr. Smith's letter of April 10 suffers from political rhetoric. It is regrettable, at least in hindsight, that Mr. Smith did not specifically detail the sequence of events leading up to the final decision, stating clearly who gave opinions, what their recommendations were, how the file progressed through the Ministry's chain of command and how Mr. Hughes, after consultation with Messrs. Stewart, Wright, Peck, Hall and Henderson, made the final decision on the ground that, in his opinion, there was not a substantial likelihood of conviction.

There is a significant difference between Mr. Smith's vague posturing in his April 10 letter and the admirably thorough and objective assessment which emerged during the Inquiry. Perhaps a clear and concrete accounting of the process to Mr. Sihota on April 10, without disclosing any confidences, might have avoided the subsequent unfortunate events.

At the time of the private prosecution, Mr. Sihota was also aware of the

commissioning of this Inquiry, which had formally opened on May 4, and was to commence hearing evidence on the whole decision-making process related to the Reid prosecution issue on May 22. The swearing of the private information on May 18 effectively postponed this public Inquiry's examination of the very matters with which Mr. Sihota expressed concern. In these circumstances, it is difficult to understand Mr. Sihota's decision to initiate a private prosecution at this time. This Inquiry was required by its original Terms of Reference to report by June 30, 1990. If improprieties were identified by this Inquiry, then an obvious consequence would be that the decision not to prosecute Mr. Reid would be reconsidered. If no impropriety was found, Mr. Sihota would know why the non-prosecution decision had been made; and if he still did not agree with it, or with the Inquiry's findings, he could proceed with a private prosecution at that time. It is relevant that Mr. Sihota testified that he believes in a single standard for charge approval, and that he agrees with that standard being substantial likelihood of conviction. (pp.488 - 491) Mr. Sihota's decision to initiate the private prosecution at this stage is inconsistent with his later concern for treating the accused fairly by dropping the private prosecution when faced with possible delays or impediments in receiving the documents. (p.512)

In his letter to Mr. Sihota dated April 10, 1990 (Exhibit 44), Mr. Smith said:

> An Attorney General must not, except in the clearest and most compelling of exceptional circumstances, become involved in a review of charging decisions. Intervention by the Attorney General is only appropriate in instances such as when the integrity of Ministerial officials has been brought into question. This is not a case falling into the exceptional category. For me to become involved, therefore, would set a dangerous precedent, one that would interfere with and compromise the integrity and independence of the whole charging process.

Mr. Smith did become involved in the decision on whether to intervene in the private prosecution against Mr. Reid commenced by Mr. Sihota. The Crown policy regarding private prosecutions of indictable offences (Exhibit 54) was that:

1. The Attorney General will not permit a private prosecution to proceed;

2. If a private Information is laid:

   (a) if, after review and application of the usual charging criteria, the matter is worthy to be prosecuted, only an agent of the Attorney General will intervene to conduct the prosecution; and

(b) if, after review and application of the usual charging criteria, the matter is not worthy of prosecution, an agent of the Attorney General would intervene to enter a stay of proceedings.

In a memorandum to Mr. Stewart dated May 22 (Exhibit 55), Mr. Wright stated the following regarding the staying of a private prosecution where a substantial likelihood of conviction was not considered to exist:

> The only reason that I can determine that a stay of proceedings would not be entered in this private prosecution is if the Attorney felt bound by political restraints from interfering. I understand that is a real concern. However, in my view, the traditional role of the Attorney requires that steps be taken to protect the integrity of the criminal justice system.

Despite the Ministry policy and Mr. Wright's recommendation, Mr. Smith decided (p.1013) and on June 11 announced that he would not enter a stay of proceedings, and that he would not interfere in the private prosecution by Mr. Sihota. Central to this decision was said to be the concern for public confidence in the criminal justice process, which could be affected by staying a private prosecution commenced by the Opposition justice critic. While this may be a valid concern, the decision not to intervene also responds to "political restraints" referred to by Mr. Wright. While it might be quite appropriate for an Attorney General to consider non-partisan political issues, in the sense of the broad public interest, it is fundamentally important for him or her to separate out any partisan political considerations. Given the intense partisan debate that was going on over the Reid prosecution matter, such separation was especially important.

While perhaps superficially responding to the public need for confidence in the criminal justice system by not staying the private prosecution, the decision caused a deeper problem. In his testimony, Mr. Smith, along with all of the criminal law specialists who gave evidence, expressed the view that the standard for determining whether a prosecution goes forward should be the same for everyone. (p.1056) The result of his decision not to intervene to stay was to allow a prosecution to continue based on a different standard of charge approval from that which is generally applied.

If the single charge approval standard for all is an important element of equal justice, then Mr. Smith should not have allowed the private prosecution to proceed. He should have supported his Ministry's decision that the single threshold standard had not been met and intervened to stay the charges. The concern regarding the public confidence in the integrity of the criminal justice system should have been dealt with

by the Attorney General taking personal responsibility for the decision and publicly explaining the reasons for it. It is relevant here, too, that this Inquiry had already been established by Mr. Smith to give the public that very confidence for which he says he was concerned. Allowing the private prosecution to proceed not only resulted in the accused being treated by a different standard and therefore unfairly, but also further delayed the public's review of the process through this Inquiry.

Once the decision not to intervene in the private prosecution had been made, the focus then shifted to the issue of providing the private prosecutor with documents in the Crown's possession which would assist in the prosecution.

Mr. Sihota and his lawyer should have gone to disclosure court on June 25, if they were genuine in their belief that Mr. Reid should be prosecuted. The June 21 letter from Mr. Hughes to Mr. Firestone (Exhibit 64) made it abundantly clear that the Attorney-General's Ministry was intent on assisting the private prosecution's access to the necessary documents. The disclosure court date was imminent and the marginal cost of proceeding to this stage would have been small. If indeed a "collateral attack" was to be mounted by Mr. Reid's lawyers, that would have been evident on that date and the concerns of cost and delay could have been assessed with some accuracy. At the very least, Mr. Firestone or Mr. Sihota should have responded to Mr. Hughes' offer to consider other ideas; and the most obvious one should have been to offer a solicitor's undertaking in the terms discussed between Mr. Quantz and Mr. Firestone on June 20.

Whatever the reason for withdrawing the private prosecution on June 27, Mr. Sihota now had the tapes of the Smith conversations, and was in the process of determining whether they could or should be disclosed to the Legislature. He testified (779) that he saw the matters as distinct, in that the private prosecution dealt with suspected breach of trust by Mr. Reid and the tapes with suspected obstruction of justice by Mr. Smith. He said that it was not his purpose in withdrawing the private prosecution to be free to pursue Mr. Smith in the Legislature without the restriction of speaking of a matter which was before the courts. He said that this was not a concern because he believed he could have persuaded the Speaker that they were separate matters. It is difficult to understand the separation given that the suspected Smith obstruction was of the Reid prosecution.

As a final matter regarding the private prosecution, the findings of the Interim Report of this Inquiry dealing with the actions of the senior Attorney General Ministry officials should be restated. The evidence is clear and uncontradicted that the actions taken and recommendations made by Mr. Hughes, Mr. Stewart and Mr. Quantz

(a) leading to Mr. Smith's decision that the Ministry would not interfere or enter a stay of proceedings in the private prosecution of Mr. Reid, and

(b) leading to Mr. Smith's decision to require a subpoena for disclosure of the Crown's case to the private prosecutor

were made in good faith and were consistent with their administrative responsibilities.

Recommendation #2

1) **That the right under section 504 of the *Criminal Code* of individual citizens, including police officers, to initiate criminal proceedings by laying an information before a justice of the peace swearing reasonable grounds to believe an indictable offence has been committed is an important residual safeguard against real or apparent corruption in the administration of criminal justice, and should not be frustrated in any way by provincial Crown officials; however**

2) **That the prosecution of an indictable offence should not be left in private hands. Where a private prosecution has been initiated, the Crown should intervene to take over the conduct of it. The Crown should then apply its standard charge approval criteria and process to determine whether the prosecution should be stayed or continued. This is necessary to ensure that a single standard of charge approval is applied and that prosecutorial power is exercised only in the public interest.**

C. Taped Telephone Conversations

This Inquiry was commissioned, by its extended Terms of Reference, to review and report on the appropriateness of the referral to Mr. McCrank of the prosecution decisions regarding obstruction of justice alleged against Mr. Smith and the interception, recording and disclosure of telephone conversations between Mr. Smith and others.

As indicated in the Interim Report of this Inquiry, the referral decision was made by Mr. Hughes, after consultation with senior Attorney General's Ministry officials. The evidence is clear and uncontradicted that this decision was made without any improper political influence or interference by Mr. Smith or anyone else. There is no evidence that any officials in the Ministry acted with anything other than the

public interest and the integrity of the administration of justice in mind. Indeed, Mr. Hughes' prompt and decisive action on July 12 should have given the public confidence that, despite the many unsettling issues surrounding the taped conversations, the administration of justice was secure in his hands, and that any wrongdoing would be impartially uncovered and dealt with.

The unauthorized interception or disclosure of private communications is unlawful; it is also repugnant. An essential ingredient of democracy is a respectable degree of personal privacy. Generally, an important part of our individual freedom is the ability to over-react, to play-out our emotions and to develop and test our personal standards within the security of our private relationships. We must as individuals feel free to express our thoughts, feelings and motivations in privacy to those we trust, even if our comments might constitute bad taste, unprofessionalism or stupidity. We should not generally be judged publicly for thoughts which we express privately. Few judges, clergy, doctors, lawyers, or others in positions of professional responsibility would meet the required professional standard if judged on their private communications. The law protects this freedom.

However, there are important limits. If the person with whom we place our confidence doesn't keep it, then we must suffer the misplaced trust and the exposure. If our private communications indicate improper intentions or breach legal confidences, then the law makes exceptions to the general restrictions on interception and disclosure, and sets out a process to be followed. An important dividing line in this issue of private communications is where they are action oriented and the action is improper. For example, on a charge of conspiracy the conversation itself is an offence if it demonstrates an intention to act illegally.

In the case of the taped Smith conversations, the sincere and understandable concern of Mr. Sihota was that the statements of Mr. Smith to Mr. Stewart and to Ms. Sinclair were action oriented and were intended to obstruct justice.

Mr. McCrank was asked to review and make the charging decision on the obstruction of justice question and he has decided that there are no grounds for proceeding. The role of this Inquiry is not to review that decision. However, the recorded comments of Mr. Smith do indicate an intention to publish unflattering information about Mr. Firestone, and that is of concern. Regarding Mr. Smith's comments about Mr. Firestone, Mr. McCrank states:

> The most reasonable inference one can draw is that it is Mr. Smith's intention to deal with an issue between two political parties as opposed to interfering with the course of justice. (Exhibit 77)

Regarding Mr. Smith's comments about Mr. Firestone to Ms. Sinclair, Mr. McCrank states:

> Once again, it is clear, in my view, that Mr. Smith's intention is to counter earlier public statements by Messrs. Sihota and Harcourt about prominent Defence and Crown Counsel in the province of British Columbia. (Exhibit 77)

While Mr. Smith's comments may or may not be evidence of an intention to obstruct justice, they certainly indicate his intention to act politically. The dual role of an Attorney General in being a minister of the Government with political responsibility, and also being the official responsible for the independent administration of justice in the province, provides direct accountability to the Legislature and the public for the impartial administration of justice decisions. However, it also places severe constraints on an Attorney General. He or she must never allow partisan political actions to mix, or appear to mix, with the responsibility for the administration of justice. In this case, the political interest in publicly countering earlier Opposition claims was an inappropriate mix of the roles because it related to a case that was proceeding before the criminal courts. The recommendations for a special prosecutor process in section F, below, address the difficulty of separating the political and administration of justice roles of an Attorney General in political or other sensitive cases.

Mr. Stewart's comments were determined by Mr. McCrank to be "private communications" within the meaning of the *Criminal Code*. That has important implications for his decision on the likelihood of conviction of those responsible for disclosing Mr. Stewart's remarks, discussed below in this section. Because the remarks have been disclosed to the public and have added to the public unease with the impartiality of the administration of justice in British Columbia, on balance, they should be dealt with here in the public interest.

First, Mr. Stewart's remarks do not seem to be action oriented in any way. They merely pass information relevant to a case which is of undoubted interest to Mr. Smith. However, when Mr. Smith replied: "How can we get that out?" and "We could do anything we want now", these ought to have alerted Mr. Stewart to Mr. Smith's possible intention to disclose the information for inappropriate purposes. Mr. Stewart, as the senior provincial official in the Criminal Justice Branch, should have immediately distanced himself from the intention and counselled against it, as he had done on May 29 when Mr. Smith suggested giving Mr. Anderson news clippings from the Ministry's files respecting the private prosecution (pp.844-6). Instead, he continued to provide Mr. Smith with further information about Mr. Firestone.

The nature of the conversation between Mr. Stewart and Mr. Smith was clearly jocular and this raises another important issue. It is predictable that people who work closely together on a daily basis and who are professional contemporaries might become friendly and thus have such conversations. However, this must be measured against the importance of senior public administrators not being affected in their decisions and actions by partisan political considerations. This is true throughout the public service, but is of particular importance in the administration of justice. However, the reality of such relationships developing and the difficulty in avoiding them are strong arguments in favour of a special process for prosecution decisions involving people with political influence, as recommended in section F below.

The expanded Terms of Reference of this Inquiry require a consideration of the appropriateness of applying public interest criteria in deciding not to prosecute persons for alleged criminal disclosure of the taped telephone conversations. Mr. Hughes, on Mr. McCrank's recommendation, considered two public interest criteria:

(1) what alternatives to the prosecution are available in British Columbia? and

(2) can this alleged crime be effectively dealt with by advising the public of the state of the law and how it will be dealt with henceforth? (Exhibit 80)

Regarding the first criterion, Mr. Hughes determined that this Inquiry, with its expanded Terms of Reference, could deal more expeditiously with the issues of fundamental public concern, and would be delayed for a prolonged period during criminal proceedings. Therefore, Mr. Hughes decided that it was a preferred alternative to prosecution. This Inquiry was able to commence hearing sworn evidence within three days of that decision and to complete the public hearings within two weeks. This process allowed the public to hear and judge directly the circumstances of the decision not to charge Mr. Reid, the private prosecution initiated by Mr. Sihota, and the interception and disclosing of the taped telephone conversations of Mr. Smith. This was undoubtedly in the public interest and an appropriate consideration for Mr. Hughes in deciding whether or not to initiate criminal proceedings against those named by Mr. McCrank.

Regarding the second public interest criterion, in stating publicly that he had decided against prosecution, Mr. Hughes also stated:

> I am today letting the public of this province know that, in the future, the interception and/or disclosure of such conversations may result in criminal

prosecution. (Exhibit 81)

Mr. Hughes did not make Mr. McCrank's decision letter on possible disclosure prosecutions public, but left it to this Inquiry to decide to what purpose it should be put. For the second criterion to be met, it is necessary for the public to have access to Mr. McCrank's second decision letter. (Exhibit 78). The complex facts and law in this case, together with the public speculation surrounding whom Mr. McCrank was considering charges against and for what actions, mean that the public simply cannot appreciate "the state of the law and how it will be dealt with henceforth" without knowing the details of the letter.

It is important to emphasize, as is dealt with in greater detail below in Section E, that in general the identity of people whom a decision has been made not to charge, should not be disclosed. However, given the fundamental public concerns surrounding this case, and the unfairness due to the public speculation of possible recommended charges against Ms. Pelletier, which were not recommended, an exception is appropriate. Release of Mr. McCrank's second letter also makes it no longer necessary to delete the last nine lines on page 6 of his first letter. (Exhibit 77)

With regard to the prosecution of Mr. Sihota, Mr. McCrank stated:

> The disclosure by Mr. Sihota of the conversation between Mr. Stewart and Mr. Smith was not the passing along of this information to one or two individuals but involved dissemination to the entire country through the news media... A number of people, including Messrs. Firestone and Stewart, suffered great damage of their reputations as a result of the disclosures by Messrs. Graves and Sihota.

As with Mr. Smith's planting of the Firestone story with a news reporter, Mr. Sihota's actions in disclosing the taped telephone conversations have a political context. It is another example of the bitter political relationship between Mr. Smith and Mr. Sihota and the aggressively partisan politics practised in this province. This is important to this Inquiry because it again emphasizes the need for a special process to deal with criminal allegations involving politically influential people.

Recommendation #3

That in recognition of the fundamental importance of the separation of politics from the administration of justice, and given the dual role of the Attorney General as both a politician and the senior justice administrator in the province, a special prosecutor

process should be instituted for political or other sensitive cases, as set out in Recommendation #9 below.

D. The Exercise of Prosecutorial Discretion in British Columbia

The relationship between the police and Crown Counsel is defined by the process by which charging decisions are made. Fundamental to the impact of this decision-making process is the standard applied in approving the laying of charges. Where there is disagreement between the police and Crown Counsel in a particular case, there must be a respectful and constructive process for making a final decision. Finally, where the police not only disagree with the final decision of the Attorney General's Ministry, but believe that it is corrupt in some way, then they must have an independent opportunity to bring the matter before the courts for public disposition. These four elements of the exercise of prosecutorial discretion will be discussed in turn in this section.

1. Charge Approval Process

The charge approval process applied in British Columbia is described in detail in Chapter II, and its strengths and weaknesses as argued by the Attorney General's Ministry and the B.C. Association of Chiefs of Police are also set out there.

At its simplest, the police argue that the charging decision is the last step in an investigation and therefore a police responsibility. Conversely, the Attorney General's Ministry argues that it is the first step in a prosecution, and therefore a Crown Counsel responsibility. Central to the police argument are the safeguards provided by police independence and public accountability. Central to the Attorney General's Ministry's argument are fairness to individuals and the integrity of the prosecution process. The police and the Attorney General's Ministry each support their respective views with principled and reasoned arguments.

The current charge approval process in British Columbia has evolved over many years. It was not adopted in haste to replace a fundamentally flawed system; nor is it now recognized as being without limitations. Both police approval and Crown Counsel approval processes are used successfully in various other jurisdictions. The choice of process, therefore, is one of relative merit and not of absolutes.

Regarding independence, it is not obvious that police are any more independent from the Solicitor General than Crown Counsel are from the Attorney General. The British tradition, as stated by Lord Denning in the *Blackburn* case is basically that the duty of a police officer to investigate is owed to the public at large and not to the

Executive Branch of Government:

> No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him what to do. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [1968] 2 Q.B. 118 at 136 (C.A.)

However, police in Canada today are governed by statute. As pointed out recently by the Law Reform Commission of Canada:

> Police officers are placed within a bureaucratic structure, taking direction from superior officers who, importantly, are responsible for their supervision and discipline. Their superiors in turn are located within the hierarchy of governmental authority, and are ultimately accountable to a responsible minister. The challenge within such a system is the maintenance of the proper degree of independence consistent with the appropriate measure of accountability. (Law Reform Commission of Canada Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*)

If the police do exercise their authority independent from the Solicitor General and the Executive Branch, how then are they accountable to the public? Are they any less susceptible than Crown Counsel to political or other improper interference in making a decision not to charge an individual. Despite the high tradition of public service of both the police and Crown Counsel in our society, neither group is immune from negligence or impropriety among its individual members.

A police recommendation to Crown Counsel that a charge be laid under the current British Columbia process must be either approved or countered with reasons. Both the police and Crown Counsel are involved; a process exists for discussion and appeal. Finally, if the police suspect corruption or impropriety in the process, they have a residual right to lay an information under section 504 of the *Criminal Code*, and thereby to ensure public accountability. However, this Inquiry has heard evidence of some confusion and inconsistency in the application of this process, and this Report should make the respective rights and responsibilities under the process perfectly clear. These elements are discussed below.

Short of suspected corruption or impropriety in the process, an individual who is not going to be prosecuted because the standard test for prosecution has not been met should not be charged. The stigma and expense to the individual, and the extra

burden on a court system that is already under great pressure, are unwarranted.

The Attorney General, through Crown Counsel, makes the decision on whether a prosecution should proceed. This makes sense for the many reasons set out in Chapter II, including the complexity surrounding the choice of charge, *Charter* considerations, and questions of the admissibility and sufficiency of evidence. It is also reasonable and efficient that in most cases this should include the charging decision.

Clearly, Crown Counsel review and advice on the sufficiency of the investigatory evidence is crucial, whoever makes the charge decision. In Working Paper 62, the Law Reform Commission recommends that the police continue to make the charge decision, but only after obtaining the advice of the public prosecutor. This differs from the Law Reform Commission's earlier proposals in Working Paper 15, *Criminal Procedure: Control of the Process*, which proposed that the prosecutor's consent to the form of charge should be necessary, and that the prosecutor should have the authority to change the charge.

The Law Reform Commission recognizes that in most cases the police and Crown Counsel, following consultation, will not disagree on the charging decision. It also recognizes that there are dangers which are equally well protected against by both systems. In now recommending charge approval as a police decision, but following mandatory consultation with Crown Counsel, it is suggesting a modification to the process of sole police charging discretion operating in the federal system and in all provinces except British Columbia, New Brunswick and Quebec. There is no compelling evidence before this Inquiry to suggest that the process of Crown Counsel approval of charges in British Columbia is unprincipled or inefficient, or does not operate appropriately in the great majority of cases. On balance, there is insufficient evidence of concern or problem to support a recommendation that general charge approval authority be returned to the police in British Columbia.

The Canadian Bar Association brief to this Inquiry provides some data to suggest that the experience with the charge approval process in Vancouver since 1984 has been constructive. Over time, the proportion of referrals back to Crown Counsel has decreased significantly, suggesting that the process is having a remedial impact on the investigatory evidence and proposed charges being submitted by the police. This should be studied carefully to ensure that it does not merely reflect the police not bothering to send certain charges to Crown Counsel because of past continued rejection. The suggestion of the police that audits of charge approval offices be conducted is a good one. Regular police/Crown Counsel liaison meetings and the careful collection and analysis of charging data is an important check on the

effectiveness of the system.

An important factor when considering whether the police or Crown Counsel ought to make the charging decision is the standard to be applied. If it is merely the section 504 "reasonable grounds" standard, then it would normally not matter whether the decision was made by the police or Crown Counsel. The application of this test involves the assessment of investigatory evidence to determine whether reasonable suspicions have been raised. However, the complexity of the charge decision increases as the threshold standard becomes stricter along the possibility/probability/substantial likelihood/beyond a reasonable doubt spectrum. The application of the substantial likelihood standard used in British Columbia, which Deputy Commissioner Wilson and Inspector MacAulay both said they agreed with for charge approval, involves the assessment of a likely judicial outcome, which Crown Counsel are better qualified to make. This begs the question as to whether the standard is so strict that it in fact infringes on the judicial role, with the effect of possibly excluding cases from prosecution which should be put to a court for decision. This aspect is discussed below.

The police have raised several other important concerns which must be addressed. One is that where a police report to Crown Counsel results in rejection or amendment of the recommended charges, the report always be returned to the police with full reasons for the rejection or amendment. While Attorney General's Ministry policy requires this to be done, the police say that it does not always happen. Clearly, it must invariably happen if the process is to include constructive liaison between the two agencies. An important aspect of this process is the advice given to the police officer by Crown Counsel concerning additional evidence that should be sought. This referral back and liaison process should lead, over time, to a greater absolute number of convictions, and not merely a higher conviction rate, because the investigatory evidence and charging precision should be improved. Otherwise, charges which proceed without such improvement may simply lead to dismissals or acquittals.

The concern expressed by the B.C. Association of Chiefs of Police that Crown Counsel are systematically screening out minor crimes for prosecution should be examined carefully. If this is so, and if there is no adequate diversion program to meet the public interest in protecting against an increase in such criminal activity, then this would be a serious failure in the administration of justice. The suggested careful tabulation and audit of charge approval data should indicate clearly if this is occurring.

Obviously, a close and respectful working relationship between police and Crown

Counsel is necessary, whoever makes the final charge decision. Essential elements of this will be effective communication by Crown Counsel of the reasons for any rejection or amendment of charge recommendations made by the police; accurate and complete collection and analysis of charge approval data; and regular, frequent police/Crown Counsel liaison to discuss standards and patterns of charge approval and criminal activity in the community.

Recommendation #4

That the charge approval process in British Columbia, which treats the charging decision as the first step in the prosecution and therefore the responsibility of Crown Counsel, is a principled and reasonable one which should not be changed. However, to ensure accountability and effectiveness, Crown Counsel must refer back to the police every Report to Crown Counsel in which a charge recommended by the police is rejected or a lesser charge is approved, with complete written reasons for Crown Counsel's decision. The Attorney General's Ministry and police in British Columbia should introduce a management information system which ensures that this takes place, and which provides for the collection and analysis of charging data. Regular and frequent liaison between police and Crown Counsel is necessary to review specific charging decisions and general charging patterns on a community and province-wide basis.

2. Charge Approval Standard

Details of the two-pronged test of substantial likelihood of conviction and the public interest applied in charging decisions in British Columbia are set out in Chapter II, as are descriptions of the different standards of proof for the laying of an information under section 504 (reasonable grounds to believe), for committal to trial following a preliminary inquiry (admissible evidence which could, if believed, result in a conviction), and for a finding of guilt at trial (beyond a reasonable doubt).

In most jurisdictions in Canada, where the police make the charging decision, the standard used is the "reasonable grounds" test set out in section 504. However, even in these jurisdictions, Crown Counsel must then decide whether a prosecution should proceed or whether the charges should be stayed. The Law Reform Commission, in its Working Paper 62, discusses the "prima facie" test used to determine whether there is evidence on all essential points of a charge which, if believed by the trier of fact and unanswered, would warrant a conviction; and also a "fifty-one percent" test to determine whether it is more likely than not that there will be a conviction. Some Canadian provinces, while leaving the charge approval decision to the police, apply a test for prosecution of "probability of conviction" (Newfoundland), or "reasonable

expectation of conviction" (Alberta, in commercial crime cases). The Law Reform Commission recommendation in Working Paper 62 is that the appropriate test is that a prosecution should have a "reasonable chance of success". The Commission interprets this test as lying between the prima facie test, which does not allow for assessing the sufficiency of the case in overcoming defence evidence, and the fifty-one percent test, which requires the higher "probability" of conviction. Whatever the usefulness of this exercise in semantics, it is evident that the "substantial likelihood of conviction" test is the strictest applied for charge approval in any Canadian jurisdiction.

While "substantial" may be defined simply as being "of substance rather than an illusion", it is clearly interpreted much more significantly as it is used in British Columbia charging decisions. It is interesting to note that while Inspector MacAulay agreed that substantial likelihood of conviction was the appropriate threshold test to apply for charging decisions, he thought that it was interpreted by Crown Counsel to mean a "virtual certainty" of conviction. While Mr. Hall and Mr. Stewart testified that they saw no difference between "reasonable" and "substantial" likelihood of conviction, Mr. Hall also said in his legal opinion (Exhibit 13) that he would not have "overwhelming confidence" in the charges against Mr. Reid even though he thought there was a prima facie case established. This suggests the application of a very strict standard. Mr. Henderson said that "reasonable likelihood" might be a lower test than "substantial likelihood". To him, the most important feature of the test was the focus on conviction, rather than merely on committal for trial. (pp.415 - 416)

It should be noted that the Reid case is a difficult one for testing the general appropriateness of the charge approval standard. First, it is unusual in that the authorities had access to the extensive testimony given to the Marson Inquiry. As such, those considering the charges had an ability to consider the sufficiency of the evidence against Mr. Reid with much more precision than is possible in most cases. Second, the uncertainty as to the elements of an offence under section 122 and the difficulty in assessing a criminal intent due to the absence of strict GO B.C. and conflict of interest guidelines in British Columbia, make this a particularly awkward case.

It is clear that evidence cannot be effectively weighed until it is tested, under oath, in court through cross-examination and against contrary evidence. It is also clear that as any charge approval process requires a stricter standard of likelihood of conviction, it becomes necessary to assess and weigh the evidence with increasing precision. At some level of strictness, the standard will begin to intrude on the role of the court. The B.C. Association of Chiefs of Police says this is now occurring with the "substantial likelihood" standard for charge approval as it is applied by Crown

Counsel in British Columbia. The evidence and opinion heard by this Inquiry indicates that this is a realistic concern. The use of a "reasonable likelihood" standard as a threshold test could clarify the intention of the Attorney General's Ministry and safeguard against an unwarranted intrusion into the role of the court. If, as some experts testified, "reasonable" and "substantial" are synonymous, then they need not be concerned with an amendment. For others, it would clarify the objective of the policy.

The second stage of the charge approval process in British Columbia is the application of public interest criteria. This consideration is only to be applied after the threshold standard concerning likelihood of conviction has been met, and then only to decide against charges being proceeded with in the public interest. The criteria are similar to those applied in other jurisdictions in making decisions not to proceed with otherwise justifiable charges or prosecutions, and there is nothing before this Inquiry to suggest that they should be changed.

However, one aspect of the public interest test should be emphasized. All witnesses before this Inquiry were adamant that a single threshold standard, which must be met before charges are proceeded with, is essential to ensure that all persons are treated with equal justice. This means, for example, that it would not be appropriate to apply a public interest criterion as a reason to charge a person in a position of public trust, where the threshold likelihood of conviction standard had not first been met. While the opinion in this province seems unanimous on this "equal justice" concept, it is interesting to note that the Law Reform Commission in Working Paper 62 recommends that consideration should be given to prosecution in some special cases on public interest grounds despite a low likelihood of conviction. While the commentary on this point is unconvincing, it seems that at least one aspect of the reasoning for using a general test of "reasonable chance" of conviction, described by the Law Reform Commission as being less than a "probability" of conviction, is that it gives the flexibility to prosecute matters which are of significant concern to the community, yet which carry a low probability of conviction.

The evidence before this Inquiry strongly supports the current British Columbia policy of applying public interest consideration only after the threshold standard is met, in the interests of equal justice. However, the Law Reform Commission analysis does support a change from "substantial" to "reasonable" likelihood of conviction in order to give more flexibility to proceed with charges for offences of grave public concern that, for example, involve evidentiary complications such as in sexual assault and child sexual abuse prosecutions.

Recommendation #5

1) **That a 2-stage test for charging decisions in British Columbia be maintained;**

2) **That the first stage, applicable in all cases, require Crown Counsel to be satisfied that there exists a reasonable likelihood of conviction; and**

3) **That the second stage, applicable only if the first stage has been met, permit Crown Counsel to apply public interest criteria in determining not to proceed with the prosecution.**

3. Appeal by Police

In recommending that Crown Counsel retain responsibility for making the charging decision, the Justice Reform Committee recognized the need for a formal appeal system whereby the police, at successively more senior levels, would be able to appeal charging decisions, with the Deputy Attorney General making the final decision. The Justice Reform Committee appeal process has now been implemented in British Columbia, and was first used in its entirety in the Reid case. The evidence before this Inquiry established that the process worked exactly as it was intended. It was respectful, informed, at progressively more senior levels, and ended with the final no-charge decision being made by the Deputy Attorney General in good faith and without political or other improper interference. While Deputy Commissioner Wilson testified that he believes that charge approval should be a police function, and that he did not agree with the decision not to charge Mr. Reid, he did use the appeal process and did accept the final decision of Mr. Hughes. It is important to be able to bring finality to any decision-making process. The evidence before this Inquiry demonstrates the effectiveness of the current appeal process for charging decisions, with the final decision being taken by the senior non-political official responsible for the administration of justice in British Columbia.

Recommendation #6

That the appeal process recommended by the Justice Reform Committee and adopted as Attorney General's Ministry Policy should be maintained as an effective process for ensuring a full discussion between police and Crown Counsel, and for the disciplined and cautious consideration of disputed issues, resulting in a final decision by the Deputy Attorney General.

4. Residual Police Authority

Deputy Commissioner Wilson holds the opinion regarding the decision not to charge Mr. Reid that a "flawed process was managed with great integrity".(p.1138) However, notwithstanding the charge approval and appeal processes now in place which leave final decision-making in the hands of the Attorney General's Ministry, Deputy Commissioner Wilson asserts the residual right of the police to lay an information under section 504 of the *Criminal Code*, in cases where corruption in the decision-making process is suspected. This is a fundamentally important safeguard against actual abuse and bolsters public confidence that an independent route to the criminal process exists against the possibility of official corruption or impropriety.

In the Reid case, it is central to the assessment of the integrity of the Attorney General's Ministry decision not to charge Mr. Reid that Deputy Commissioner Wilson and the R.C.M.P. sensed that no corruption influenced the decision not to charge in this case. Accordingly, although they do not agree that charge approval should be a Crown Counsel decision, and they did not agree that there was no substantial likelihood of conviction of Mr. Reid for breach of public trust, they did not exercise their residual authority to initiate charges themselves.

Recommendation #7

That the charge approval process guidelines and police procedures should explicitly recognize that, although the general responsibility for making charge decisions in British Columbia lies first with Crown Counsel and finally, following an appeal by the police, with the Deputy Attorney General, the police have the independent, residual right to lay an information under section 504 of the *Criminal Code*, and the responsibility to do so, where they have reason to believe that there has been corruption or impropriety in any part of the decision-making process.

E. Public Disclosure of Information

The Terms of Reference for this Inquiry directly raise the question of what information should be released to the public when a decision is made not to prosecute a suspect.

First, the situation of a decision not to prosecute, where there is no public knowledge of the police investigation, should be distinguished. There seems to be no justification for any public discussion of such a situation. The matter is not in the public domain and therefore a perception of injustice should not arise. The actual proper administration of justice should be ensured by the independent interaction of

the police and Crown Counsel, supplemented by a special prosecutor process, as recommended in the next section, for cases of potential real or perceived improper influence in prosecution decisions.

However, where the general public or the victim of an alleged crime knows that a police investigation has taken place, the potential for perceived improper influence or any otherwise unjust decision can arise. In such situations, it should first be said that it is never appropriate to disclose a police report or other sensitive investigation documents to the public when a decision not to prosecute has been made. Such reports necessarily may contain creative speculation and unsubstantiated suspicions or allegations. Police investigation requires the testing of all possible leads or theories and the accurate recording of them. Where a prosecution proceeds, the matters that become public before a Court do so following the application of strict rules of evidence and are then subject to severe testing against cross-examination and contrary evidence. These processes work to protect accused persons from unfairness and to assist the Court towards the most reasonable conclusion. Without these constraints, no such information should become public. It would be an even greater injustice for this disclosure to happen where a decision was made that a prosecution was not appropriate, either because it did not meet the standard threshold test or because it was otherwise not in the public interest.

However, for a case that is not necessarily of wide public interest but is of great personal concern to the victim or other significantly interested person, it is only reasonable that adequate reasons for not proceeding with the prosecution be given to that person by Crown Counsel. Otherwise, feelings of grave personal injustice and doubt in the integrity of the criminal justice system can understandably arise. Such decisions should include information about the standard that was applied to reach the decision and enough details of the shortcomings in the case to allow the person to understand why it is reasonable not to prosecute.

For high profile cases of non-prosecution such as the Reid matter, which involved the potential for real or perceived improper influence in the administration of justice, and where the police investigation has become publicly known, then a clear statement of the reasons for not prosecuting should be made to the public so as to maintain confidence in the integrity of the system. Again, this should not include detailed, speculative information which has not been limited or tested by criminal court procedures, such as would be included in a police report. However, the reasons should be adequate to give the public confidence in the process and yet save the investigated person from the stigma of unsubstantiated suspicions. Where the standard threshold test for prosecution is met but a decision is made not to prosecute, in the public interest, the reasons for this should be fully explained to the

public where it is already public knowledge that a criminal investigation had occurred or a prosecution decision was being considered.

If the special prosecutor process recommended below is implemented, then it is appropriate for the special prosecutor to make the public announcement of why a prominent person, already known to have been investigated, is not to be prosecuted. Otherwise, it would seem reasonable for either the police or Crown Counsel to make the public announcement, depending on the stage of the process that the decision was made, and who made it. If the decision not to proceed further with an investigation or not to recommend charges to Crown Counsel was made by the police, then it would seem most appropriate that they explain their reasons. If, on the other hand, the police recommended charges and Crown Counsel decided against a prosecution, Crown Counsel would be the most qualified to provide the reasons.

Public Disclosure of Information Filed in this Inquiry

On the opening of this Inquiry on May 4, 1990 the filed Exhibits were given to the lawyers representing parties with official standing before the Inquiry on the condition and on their undertaking that they only be used for the purposes of the Inquiry and remain otherwise confidential. They were to remain so until the Commissioner had an opportunity to consider the Term of Reference regarding the appropriate level of disclosure of information where a decision not to prosecute had been made.

An important task for this Inquiry is to decide the appropriate level of public disclosure for the Exhibits filed with it. These fall into several categories and should be considered separately, as follows:

(a) The Police Report to Crown Counsel and Related Documents

These documents were referred to briefly during the Inquiry by Inspector MacAulay, who was their author. The references were for the purpose of identifying the investigation process and the contacts between the police and the Attorney General's Ministry. The references did not deal with matters of substance regarding Mr. Reid and the GO B.C. investigation. For the reasons mentioned above, it would be inconsistent with the rights of persons not before the criminal courts to make such documents public. It should not happen as a general rule, and there is nothing in the circumstances of this Inquiry which support an exception for these reports.

(b) The Marson Transcripts

The transcripts of the evidence taken under oath by the Comptroller General, Brian Marson, during his Inquiry under the *Financial Administration Act*, were filed as Exhibits with this Inquiry. They were not quoted from during this Inquiry, although they were referred to in detail in the legal opinions on whether or not to charge Mr. Reid. The evidence in the Marson transcripts comes from interviews with individuals who had direct knowledge of the matters concerning the GO B.C. grant to Semiahmoo, including Mr. Reid, Mr. Sullivan and Mr. Doonan, who were the subject of the contemporaneous RCMP investigation. These individuals were compelled to give evidence because of subpoenas issued by the Comptroller General under the powers given to him under the *Financial Administration Act*. No one of them heard the evidence given by any other, nor did they have the opportunity to cross-examine or otherwise challenge what any other witness said. The inquiry was not a criminal investigation and section 13 of the *Charter of Rights and Freedoms* prohibits the evidence taken from being used to incriminate the witness in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence. This protection exists precisely because the witnesses were not on criminal trial and did not have the protections available that would be available under the criminal process.

The type of inquiry conducted by the Comptroller General is very different from a court process, and indeed from this Inquiry. It was a confidential and wide-ranging type of investigation which could well gather suggestions, allegations and suspicions which could be highly prejudicial to individuals who have no ability to challenge the evidence or otherwise to defend themselves. As such, for reasons similar to those affecting a police report, the transcripts of such inquiries should not be made public as a whole. However, the Comptroller General, with the assistance of a private criminal lawyer, Mr. A.G. Henderson, and an experienced forensic accountant, Mr. David Hooper, came to conclusions and made recommendations as a result of this process. These were supported by references to evidence contained in the transcripts and they are reported on in a document which was made public on February 27, 1990 and also was filed as an Exhibit to this Inquiry and referred to in this report.

(c) The Legal Opinions

The legal opinions on the appropriateness or otherwise of prosecuting Mr. Reid and others provided by Mr. Wright, Mr. Peck, Mr. Hall and

Superintendent Fischer were referred to and quoted from extensively in this Inquiry, and the lawyers who wrote them were examined and cross-examined in detail on them. In normal circumstances, these opinions would be subject to solicitor-client privilege and could only be made public with the client's consent. However, the Attorney General's Ministry has waived any such privilege for the purposes of this Inquiry. There is some real value in the public having access to these opinions in this very exceptional case, because of the widespread suspicion that arose and the complexity of the issues dealt with. Therefore, although it is not recommended that lawyers' opinions generally be made public as part of the reasons provided for not prosecuting a person, these opinions will be made public in this case.

For the reasons noted in section C, above, it is also appropriate, in the exceptional circumstances of this case, to make the unedited legal opinions of Mr. McCrank available to the public.

(d) Correspondence, Minutes, Memos and Attorney General Ministry Policy Documents

These documents were filed as Exhibits and they relate directly to the decision-making processes and incidents being examined under the Terms of Reference of this Inquiry. They were also considered extensively in the testimony and in this report. They are an important part of the record of this Inquiry and should be made public.

Recommendation #8

1) **Where a decision not to prosecute has been made, and the public is not aware of the police investigation, there should be no public disclosure relating to the case.**

2) **Where a decision not to prosecute has been made, and the public, a victim or other significantly interested person is aware of the police investigation, it is in the public interest that the public, victim or other significantly interested person be given adequate reasons for the non-prosecution, by either the police or Crown Counsel.**

3) **Police reports, other sensitive investigative documents and legal opinions should not be made public where a decision not to prosecute has been made.**

F. Special Prosecutor

The challenge of the fair and effective administration of criminal justice is to achieve the proper balance between independence from political interference and accountability to the political process for the investigation and prosecution of crime. This challenge is complicated in Canadian jurisdictions because of the dual role of the Attorney General as a member of Cabinet and the chief legal advisor to the Government, and also as the senior person responsible for the administration of justice. In British Columbia, the importance of achieving the appropriate balance between independence and accountability in the administration of criminal justice is amplified by the often aggressively partisan nature of the political relationship between the Government and Opposition, exemplified over the past two years by the bitter exchanges between the former Attorney General Bud Smith and the Opposition Justice Critic Moe Sihota. In this atmosphere, public confidence in the impartiality of the administration of criminal justice is more difficult to sustain.

The rule of law in a democracy requires the public's ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of our justice system can cripple it. Perception becomes reality when suspicion of injustice is allowed to fester. The system must be capable of quickly and convincingly resolving any such doubts.

This is why the Reid prosecution case is so important. It is not enough to know now that the system worked fairly. The adversarial nature of our political system and its apparent proximity to the administration of criminal justice will inevitably raise questions of potential interference in criminal investigations involving political and other influential figures. The public inquiry process is not an efficient solution to the individual cases which will arise. The system itself must be capable of demonstrating its integrity on an ongoing basis.

The particular systemic vulnerabilities exposed in this case make it unrealistic to expect that an Attorney General and an Opposition justice critic could be depended on simply to discuss and resolve in private questions regarding a sensitive political case. Nor would it be appropriate, for the reasons set out by Mr. Smith in his letter to Mr. Sihota of April 10, 1990 (Exhibit 44), for an Attorney General to share police investigative material and legal opinions on a specific case with another politician, whether in Government or Opposition.

As described in Chapter III, other Commonwealth jurisdictions have appointed a Director of Public Prosecutions with statutory responsibility for all criminal justice decisions, independent from the Attorney General and the Executive Branch of

government.

In response to the Marshall Commission Report, and in recognition of widespread problems with the administration of criminal justice in that province, the Nova Scotia government has recently established the Office of the Director of Public Prosecutions. In addition, the Law Reform Commission of Canada in its Working Paper 62 recommends a Director of Public Prosecutions system for federal matters.

A Director of Public Prosecutions is typically distinct from the current Assistant Deputy Minister for Criminal Justice in British Columbia by not being appointed or potentially rewarded or disciplined by the Attorney General; and the public prosecutors in turn are directly responsible to the Director, with hiring, discipline and promotion coming from the Director rather than ultimately from the Attorney General. The Director is typically appointed through a special Cabinet or Legislative process; is accountable directly to the Legislature; and is appointed for a specific term or given tenure, but is not subject to dismissal without just cause.

The adoption of a Director of Public Prosecutions system does not necessarily require a total restructuring of the administration of criminal justice, but merely a realignment of lines of authority. However, it would be a major change to the current system in British Columbia, which should not be made in the absence of clear evidence that it is not now working. While this Inquiry has heard evidence and opinion of the potential for real or perceived improper influence in the investigation and prosecution of sensitive political cases, it has heard no evidence of a general problem. Indeed, the indication is that the system in general operates with integrity, professionalism and public confidence. Therefore, the adjustments that this Inquiry has been invited to recommend to deal with the systemic vulnerability in political or other sensitive cases, are targeted at those cases only and not at the system as a whole.

As has been discussed and recommended in this report, the application of a single standard for the charging and prosecution of all individuals is an important aspect of equal justice. However, achieving equal justice sometimes requires the application of a special process to take into account the special characteristics of an individual or situation. A potential for real or perceived improper influence in the investigation or prosecution process is such a situation.

To give the public confidence that decisions in political and other sensitive cases are being made according to the same standards as other cases, it is reasonable for a special process to be instituted. At present, all such cases are sent outside the Attorney General's Ministry to a private criminal lawyer for review and

recommendation as to whether charges should be initiated. Such recommendations are almost always accepted by the Attorney General's Ministry, and private counsel is also hired to conduct the prosecution.

The recommendation in this section for the appointment of a special prosecutor with decision-making authority would formalize this arrangement and strengthen the independence of the decision-making process from real or perceived political or other improper interference. Accountability would be maintained through the residual responsibility of the Attorney General to intervene in the public interest and on the public record, as discussed below.

Despite the opinion of Mr. Peck that a private lawyer who provides an opinion to the Attorney General's Ministry stating that a prosecution proceed, should not personally conduct the prosecution, the balance of opinion and reasoning is to the contrary. Mr. Peck's concern was that a private lawyer might recommend, or be perceived to recommend, a prosecution in order to make work for himself or herself. On the contrary, the senior level of private lawyers looked to for criminal prosecution opinions and prosecutions by the Attorney General's Ministry is such that they (1) are not in need of work and (2) are likely working for a reduced fee when doing Crown work. Further, as indicated by Mr. Hall, the knowledge that a lawyer will be conducting the prosecution personally gives a valuable sense of realism to his or her analysis and recommendation.

With respect to the danger that engaging outside counsel for these types of decisions and prosecutions might cause a different standard or manner of analysis for cases involving prominent people than from the ordinary process applied by career Crown Counsel, this does not seem to be borne out by the British Columbia experience. Private ad hoc counsel are regularly retained to give opinions and conduct prosecutions for a variety of reasons, including the need for special expertise, the appearance of independent decision-making, and periodic inadequate staffing levels. The fact in British Columbia is that the private lawyers retained on such occasions are totally familiar with the Crown process, often having worked as Crown Counsel previously in their careers, and are unlikely to apply different standards or tests than career Crown Counsel.

A major concern with respect to a special prosecutor system is the question of accountability. In our system of democracy, accountability for Executive Branch decisions is provided through the political process overseen by the Legislative Branch. In order to ensure that this ultimate accountability continues for a special prosecutor, any such special process should explicitly provide that the right of the Attorney General under the *Criminal Code* (section 579(1)) to intervene and either stay or

take over a prosecution continues to apply. However, where any such intervention takes place, or where any direction is given or is attempted to be given by the Attorney General to the special prosecutor, then this should be done in writing and should be made public through publication in the official *Gazette* and through presentation to the Legislature. Such written direction should also include reasons adequate for the public to understand the basis for it.

Regarding the general decision-making and conduct of prosecutions by the Criminal Justice Branch, it should be clearly set out in government policy that the Attorney General can give general instruction to the Assistant Deputy Minister for Criminal Justice and to the Branch regarding criminal prosecutions, but these should be set out in writing and available for public review. It should also be clear in government policy that the Attorney General may, in the interests of ensuring accountability for prosecution decisions and actions, give direction on a specific case, but that such instruction should be in writing and published in the official *Gazette* and placed before the Legislature at the earliest opportunity. Such publication of instructions on an individual case, either to Crown Counsel or a special prosecutor, may and should be delayed where earlier publication might interfere with the conduct of a criminal investigation or prosecution.

A special prosecutor process for British Columbia would give added actual and apparent independence to decisions involving the investigation and prosecution of crimes involving persons of particular influence. The most obvious cases would involve suspicions regarding cabinet ministers, senior public officials, and police officers, or persons in close relationships to them. The focus of the concern is the proximity of a suspect to the decision-making process and therefore the potential for real or perceived improper influence on it.

To address effectively the need for actual and apparent independence from improper influence, the appointment of a special prosecutor for a specific case should not be made solely by the Attorney General's Ministry. The Treasurer of the Law Society is the senior official of the legal profession in British Columbia, with responsibility for ensuring that the public interest is protected in all matters involving the practice of law. The Treasurer also has access to knowledge of the expertise and standing of members of the private criminal Bar. The appointment of a special prosecutor for a specific case by the joint decision of the Treasurer and the Deputy Attorney General would give added public confidence in the appropriateness of the appointment. Involving the Deputy Attorney General rather than the Attorney General would be consistent with the general policy that the Attorney General should not be involved in the decisions involving individual cases, and would leave the Attorney General available to intervene, under the *Criminal Code* authority

(section 579(1)) to hold the system accountable to the Legislature in the public interest in any specific case.

Recommendation #9

1) **That a special prosecutor be appointed in all cases where there is a significant potential for real or perceived improper influence in the administration of criminal justice because of the 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.**

2) **That the special prosecutor be a senior criminal lawyer in private practice in British Columbia, appointed for a specific case jointly by the Treasurer of the Law Society of British Columbia and the Deputy Attorney General.**

3) **That the role of the special prosecutor be to liaise with the police during the investigation; to make the charging decision; to lay the information and conduct the prosecution where this decision is made; and to provide adequate reasons to the police, the victim or other significantly interested person, and the public, as appropriate, where the decision not to prosecute is made.**

4) **That the Attorney General retain the right to intervene, conduct or stay any case for which a special prosecutor has been appointed and have the responsibility to do so where appropriate in the public interest; but that any such intervention or direction to a special prosecutor must be made public and that full written reasons for the direction or intervention must be published in the official *Gazette* and placed before the Legislature at the earliest appropriate opportunity.**

CHAPTER VI

SUMMARY OF RECOMMENDATIONS

Recommendation #1

That the *Lottery Act* and GO B.C. guidelines be strengthened in line with the Comptroller General's recommendations, and that government policy regarding conflicts of interest for cabinet ministers and other public officials be explicit, mandatory and contained in legislation, so that criminal intent and breach of public trust under section 122 of the *Criminal Code* can be more clearly determined in future.

Recommendation #2

1) That the right under section 504 of the *Criminal Code* of individual citizens, including police officers, to initiate criminal proceedings by laying an information before a justice of the peace swearing reasonable grounds to believe an indictable offence has been committed is an important residual safeguard against real or apparent corruption in the administration of criminal justice, and should not be frustrated in any way by provincial Crown officials; however

2) That the prosecution of an indictable offence should not be left in private hands. Where a private prosecution has been initiated, the Crown should intervene to take over the conduct of it. The Crown should then apply its standard charge approval criteria and process to determine whether the prosecution should be stayed or continued. This is necessary to ensure that a single standard of charge approval is applied and that prosecutorial power is exercised only in the public interest.

Recommendation #3

That in recognition of the fundamental importance of the separation of politics from the administration of justice, and given the dual role of the Attorney General as both a politician and the senior justice administrator in the province, a special prosecutor process should be instituted for political or other sensitive cases, as set out in Recommendation #9 below.

Recommendation #4

That the charge approval process in British Columbia, which treats the charging decision as

the first step in the prosecution and therefore the responsibility of Crown Counsel, is a principled and reasonable one which should not be changed. However, to ensure accountability and effectiveness, Crown Counsel must refer back to the police every Report to Crown Counsel in which a charge recommended by the police is rejected or a lesser charge is approved, with complete written reasons for Crown Counsel's decision. The Attorney General's Ministry and police in British Columbia should introduce a management information system which ensures that this takes place, and which provides for the collection and analysis of charging data. Regular and frequent liaison between police and Crown Counsel is necessary to review specific charging decisions and general charging patterns on a community and province-wide basis.

Recommendation #5

1) That a 2-stage test for charging decisions in British Columbia be maintained;

2) That the first stage, applicable in all cases, require Crown Counsel to be satisfied that there exists a reasonable likelihood of conviction; and

3) That the second stage, applicable only if the first stage has been met, permit Crown Counsel to apply public interest criteria in determining not to proceed with the prosecution.

Recommendation #6

That the appeal process recommended by the Justice Reform Committee and adopted as Attorney General's Ministry Policy should be maintained as an effective process for ensuring a full discussion between police and Crown Counsel, and for the disciplined and cautious consideration of disputed issues, resulting in a final decision by the Deputy Attorney General.

Recommendation #7

That the charge approval process guidelines and police procedures should explicitly recognize that, although the general responsibility for making charge decisions in British Columbia lies first with Crown Counsel and finally, following an appeal by the police, with the Deputy Attorney General, the police have the independent, residual right to lay an information under section 504 of the *Criminal Code*, and the responsibility to do so, where they have reason to believe that there has been corruption or impropriety in any part of the decision-making process.

Recommendation #8

1) Where a decision not to prosecute has been made, and the public is not aware of the police investigation, there should be no public disclosure relating to the case.

2) Where a decision not to prosecute has been made, and the public, a victim or other significantly interested person is aware of the police investigation, it is in the public interest that the public, victim or other significantly interested person be given adequate reasons for the non-prosecution, by either the police or Crown Counsel.

3) Police reports, other sensitive investigative documents and legal opinions should not be made public where a decision not to prosecute has been made.

Recommendation #9

1) That a special prosecutor be appointed in all cases where there is a significant potential for real or perceived improper influence in the administration of criminal justice because of the 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.

2) That the special prosecutor be a senior criminal lawyer in private practice in British Columbia, appointed for a specific case jointly by the Treasurer of the Law Society of British Columbia and the Deputy Attorney General.

3) That the role of the special prosecutor be to liaise with the police during the investigation; to make the charging decision; to lay the information and conduct the prosecution where this decision is made; and to provide adequate reasons to the police, the victim or other significantly interested person, and the public, as appropriate, where the decision not to prosecute is made.

4) That the Attorney General retain the right to intervene, conduct or stay any case for which a special prosecutor has been appointed and have the responsibility to do so where appropriate in the public interest; but that any such intervention or direction to a special prosecutor must be made public and that full written reasons for the direction or intervention must be published in the official *Gazette* and placed before the Legislature at the earliest appropriate opportunity.

CHAPTER VII

APPENDICES

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

DISCRETION TO PROSECUTE INQUIR
EXHIBIT # 1
DATE: May 4, 19

Order in Council No. 621 , *Approved and Ordered* APR. 18.1990

Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that

1. A commission be issued under Part 2 of the *Inquiry Act* appointing Stephen Douglas Owen as a sole commissioner to inquire into and report on or before June 30, 1990 on the matters set out in the Schedule to this order.

2. Consent is given to the sole commissioner to appoint clerks and stenographers as he considers necessary for conducting the inquiry, and to pay them at the rate or salary that is equivalent to the rate or salary paid to employees in similar positions in the public service.

3. To assist in achieving the objectives of the inquiry, the sole commissioner may appoint or retain research assistants and professional advisers as he considers appropriate.

4. The entitlement to reimbursement of travel related expenditures of the sole commissioner shall be equivalent to the entitlement to reimbursement of travel related expenditures as set out for Group III in Treasury Board Order 88, the entitlement to such reimbursement of persons appointed as retained pursuant to section 4 of this order shall be as set out for Group II of that order and the entitlement to such reimbursement of other employees of the commission of inquiry shall be equivalent to the entitlement of the other employees as set out for Group I in that order.

5. Subject to appropriation, approval is given to government to pay all expenses incurred by the sole commissioner in the inquiry and which are considered necessary by the sole commissioner for the proper carrying out of his duties.

Provincial Secretary

Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section:- Inquiry Act, sections 8 and 17

Other (specify):-

April 12, 1990

690 / 90/13/ejk

SCHEDULE

TERMS OF THE COMMISSION

The matters to be inquired into and reported on are the process and procedure followed by the Ministry of Attorney General in deciding that William E. Reid would not be prosecuted with respect to the awarding of a grant under the Growth and Opportunities B.C. Grants Program to the Semiahmoo House Society and, in particular, to inquire and report on:

(a) the correctness and adequacy of the process applied in making that decision;

(b) the objectiveness and good faith with which this process was applied;

(c) the presence, if any, of external influence affecting the outcome of the decision;

(d) the correctness of the Attorney General not to be involved, directly or indirectly, in the decision;

(e) the correctness of the general practice, followed in this case, of not publicly disclosing information and events that are considered in deciding not to prosecute a citizen;

(f) the integrity with which the decision was made.

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 1015 , *Approved and Ordered* JUN 28 1990

DISCRETION TO
PROSECUTE INQUIRY
EXHIBIT # 1A
DATE: Aug 27/90

Lieutenant Governor

Executive Council Chambers, Victoria 27 JUN 1990

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that section 1 of Order in Council 821, approved and ordered April 18, 1990 is amended by deleting "on or before June 30, 1990".

Provincial Secretary

Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section: Inquiry Act, sections 2 and 12

Other (specify):

June 28, 1990

//// /90/13/jd

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. *Approved and Ordered*

DISCRETION TO PROSECUTE INQUIRY
EXHIBIT # 1 B
DATE: Aug 27/90
KDH

Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the Terms of Reference set out in the Schedule to order in council 621, approved and ordered April 18, 1990, be amended by the addition of the following paragraph:

"Further matters to be inquired into and reported on are

(a) the appropriateness of the Deputy Attorney General of British Columbia referring to the Deputy Attorney General of Alberta the issue of whether or not to prosecute Stuart Basil Smith, Q.C. on allegations of attempting to obstruct justice as a result of intercepted and recorded telephone conversations between Mr. Smith and others;

(b) the appropriateness of the Deputy Attorney General of British Columbia referring to the Deputy Attorney General of Alberta the issue of whether or not to prosecute persons on allegations of criminal conduct arising from the interception, recording and disclosure of certain telephone conversations; and

(c) the appropriateness of the Deputy Attorney General of British Columbia applying the criterion of public interest in deciding not to prosecute persons on the recommendation of the Deputy Attorney General of Alberta in response to the referral described in paragraph (b)."

Provincial Secretary

Presiding Member of the Executive Council

This part is for administrative purposes only and is not part of the Order.

Authority under which Order is made:

Act and section: Inquiry Act, s.s. 2, 3 and 17

Other (specify):

August 24, 1990

A. WITNESSES WHO TESTIFIED UNDER OATH AT THE INQUIRY

Name	Title	Transcript Reference
Edward N. Hughes, Q.C.	Deputy Attorney General Victoria, B.C.	Vol. 3, pp.52 - 266
Robert H. Wright, Q.C.	Regional Crown Counsel, Ministry of Attorney General Vancouver, B.C.	Vol. 3, pp.267 - 329
Richard C.C. Peck, Q.C.	Robertson, Peck, Thompson Barristers & Solicitors Vancouver, B.C.	Vol. 4, pp.332 - 386
Alexander G. Henderson	Davis & Company Barristers & Solicitors Vancouver, B.C.	Vol. 4, pp.387 - 422
John E. Hall, Q.C.	DuMoulin Black Barristers & Solicitors Vancouver, B.C.	Vol. 4, pp.424 - 470
Moe Sihota	M.L.A. Esquimalt-Port Renfrew Constituency	Vol. 4, p.472 - Vol. 5, p.779
William F. Stewart	Assistant Deputy Attorney General Criminal Justice Branch Victoria, B.C.	Vol. 5, pp.780 - 917
Ernie Quantz	Director of Operations Criminal Justice Branch Ministry of Attorney General Victoria, B.C.	Vol. 6, pp.921 - 980

Name	Title	Transcript Reference
Bud Smith, Q.C.	M.L.A. Kamloops Constituency	Vol. 6, pp.980 -1092
E.C. MacAulay	Inspector, Commercial Crime Royal Canadian Mounted Police Vancouver, B.C.	Vol. 6, pp.1092-1135
D.K. Wilson	Deputy Commissioner Royal Canadian Mounted Police Vancouver, B.C.	Vol. 6, p.1135 - Vol. 7, p.1178

B. WITNESSES WHO MADE ORAL SUBMISSIONS TO THE INQUIRY

Name	Title	Transcript Reference
Robert Stewart	Chief Constable Vancouver Police Department	Vol. 7, pp.1179-1205
John Dixon	President B.C. Civil Liberties Association	Vol. 7, pp.1205-1227
Wilfred Hurd	Surrey-White Rock Provincial Liberal Association	Vol. 7, pp.1227-1237
Peter Leask, Q.C.	Vancouver Criminal Justice Section Canadian Bar Association, B.C. Branch	Vol. 7, pp.1238-1264
David Garnet McKenzie	Galiano Island, B.C.	Vol.7, pp.1265-1274

C. WRITTEN SUBMISSIONS CONSIDERED BY THE COMMISSION

Alexander G. Henderson, Vancouver, B.C.

Ken Berg, Aldergrove, B.C.

Eddy Schubert, Port Coquitlam, B.C.

B.C. Association of Chiefs of Police

Surrey-White Rock Provincial Liberal Association

Royal Canadian Mounted Police

Anonymous, Vancouver, B.C.

Virginia Shull, Powell River, B.C.

Vancouver Criminal Justice Section, Canadian Bar Association, B.C. Branch

B.C. Civil Liberties Association

New Westminster Bar Association

David Garnet McKenzie, Galiano Island, B.C.

Murray Stark, Courtenay, B.C.

Bryan Williams, Q.C., Commission Counsel

Malcolm MacAulay, Q.C., Counsel for the Attorney General of British Columbia

Frank R. Haar, Q.C., Counsel for the R.C.M.P.

Thomas R. Braidwood, Q.C., Counsel for Bud Smith, Q.C.