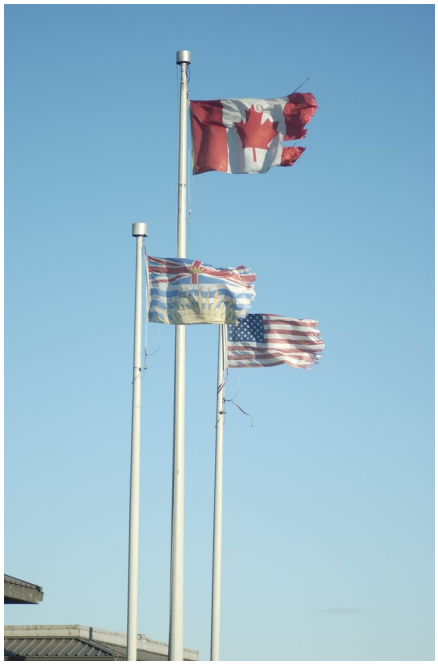
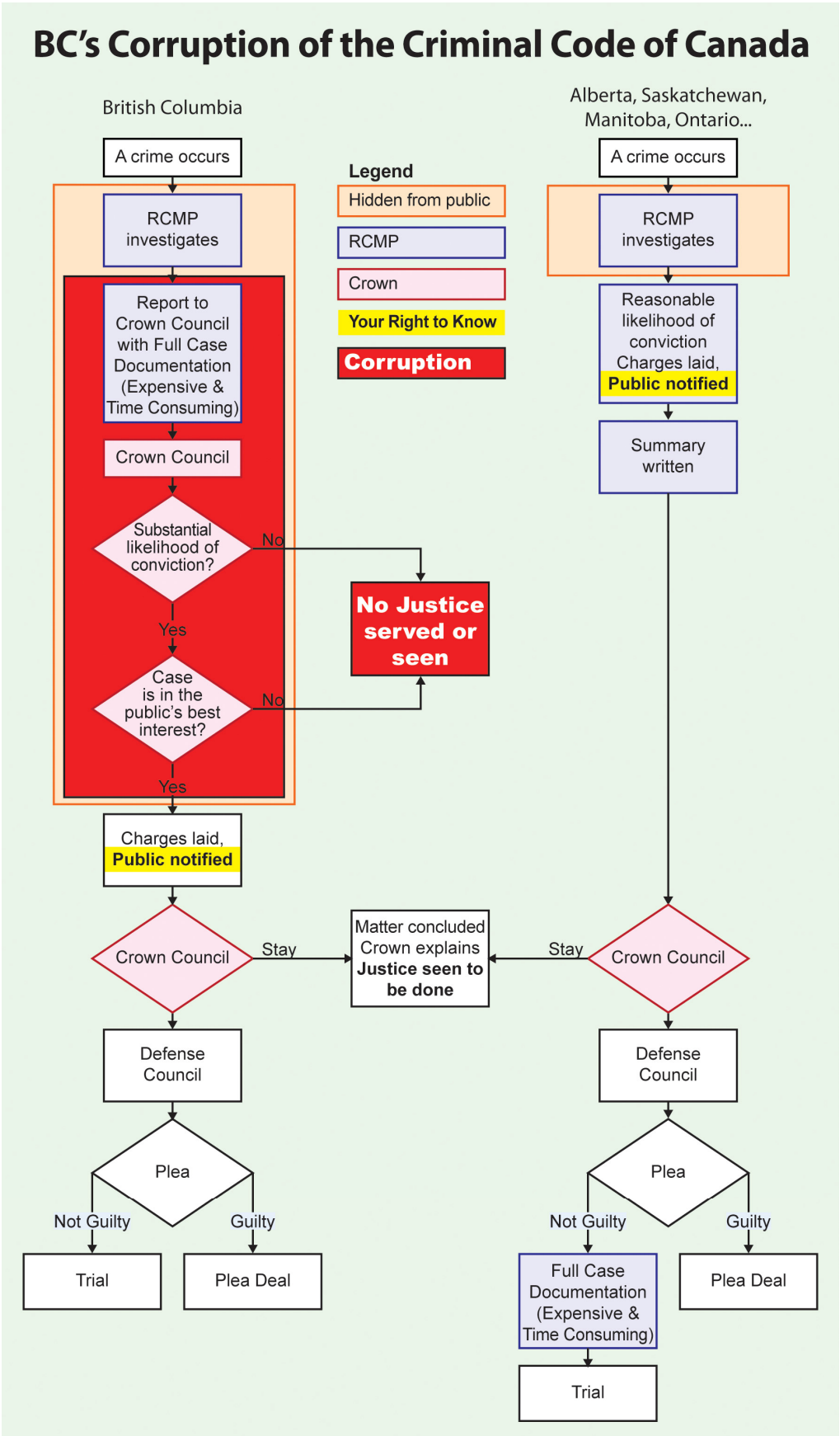
BC's Charge Approval Process must go



A message from Doug Stead on BC's corruption of Canada's criminal code

May 2009



Introduction and Executive Summary

I have been tilting hard at this particular windmill for the last 10 years. Since even before then, I have been in contact with every SolGen, AGen and Premier provincially as well as their Federal counterparts regarding this BC corruption of the Criminal Code of Canada. Obviously I have not had much success to date, but as changing the DNA of government is a marathon, not a sprint, I take a very long view.

One case in BC where I can prove the Charge Approval Legislation in BC perverted the course of justice is the Tashie Case on Vancouver Island in early 2002. A sexual predator using the internet was not going to be charged, as recommend by the police, because the Crown decided it would not allow the police to lay the charge. The point here is that the laying of the charge is also the point at which the public has the right to know. Yet when I made the investigation public on a CKNW talk show it became a public issue, and suddenly charges were approved and the predator was convicted. Point being: For Justice to be done the crime must be seen, and the Charge Approval system hides it.

The current government is tired of hearing from me on this issue. I have also met with the leader and several of the NDP MLAs on this issue, but over 60 days later they haven't got back to me with what their policy is on the issue.

From a political perspective, the BC Crown Counsel Act has the advantage of allowing the AG to quietly control, using unelected and unaccountable bureaucrats, its costs to provide Justice. The way this works is simple: the AG sets the number of courts and judges (closed court rooms) and then Crowns have to triage crime to fit the restricted resources. There is no underpinning legislation that allows a province to modify Federal legislation, such as what has been done here in BC with the Criminal Code of Canada. I think that you would agree with my opinion that Justice is a core service to the people.

An egregious example of how this unique BC legislation gerrymanders the Canadian justice system is the wrongful death of native Frank Paul. I believe that charges were not approved in the death of Frank Paul back in 1998, and this is why: because the Crown of the day deemed it 1) "NOT in the public's best interest." There exists clear video proof of the officers dragging Frank Paul out of the building while he was incapacitated and leaving him in an alley to freeze to death, but the case was never brought to court even with that evidence being present, and so the officers involved were never even charged and the public never notified of what had happened.

As you are probably aware, the AG and the Crown Counsels are fighting tooth and nail against Judge Williams Davies' order to the Crown Counsels to explain why no charges were approved. Whereas in the rest of Canada the only test applied, and applied only by the police as provided in the CCC legislation, is the "REASONABLE likelihood of conviction by a jury of peers".

This, I think, is also part of the reason no charges have gone forward in the YVR death of a brand new immigrant at the hands of four RCMP. I am not picking on police here, rather I am trying to show what happens when Justice is a hidden process. In actual fact, my main concern is the tens of thousands of child sexual exploitation cases here in BC for which the Crown has secretly allowed predators to avoid accountability.

This is a REALLY big issue to me -- protecting children from sexual abuse and bringing sexual predators to justice. I would be generally pleased to see a change in government, but my experience is that once either side has power, the chance to fix an obvious no-brain problem gets put aside due to cost and political expedience.

You may recall that I ran back in 2001 as an independent against the current Mayor of Coquitlam. The issue was then and is still the Crown Counsel Act. Of course in that election, my only sign read, "Don't Even Think About Voting for Me" and I garnered less then 200 votes. I suspect they were from very close to the entire demographic of illiterates that walk among us.

I didn't change my behavior then, when the current Mayor of Coquitlam had concerns about vote splitting, and I will continue to do what I deem best to achieve my cause. Mark my words, better protection of children is going to be an issue in the coming election. Diane Thorne, Mike Farnworth and Carol James all understand my issue. For that matter so does Ian Black, Harry Bloy and Rich Colman, Wally Oppal and Emperor Gordo.

I will be happy to talk about how my actions may play out, and how they may help or hinder those involved in a "very tight race". Please understand that my view in this is IDEAS plus WORDS equal BEHAVIOR. I expect no quarter and I will give none as I pursue my ideals. Should I run in my home constituency as an independent, it will be to achieve my ends in child protection, period, end of story. Whatever I do in this regard, I will take away some votes; those votes will come from people seeing and agreeing with my vision in protecting children. Melodramatic as it may sound, that my participation may affect the election's outcome is called democracy.

Briefing Notes on the Charge Approval System

The Criminal Code of Canada is Federal legislation. In it, police clearly are given the authority and mandate to investigate crime AND lay charges. This is how it works everywhere in Canada except BC and MB. Both these jurisdictions enacted regulation that interfere with police authority as set out in the Criminal Code of Canada. Interestingly enough both BC

and NB brought in this gerrymandering soon after police in both locations did their jobs and laid charges against sitting Provincial MLAs.

There is no underpinning legislative authority which allows Provincial Legislators to do what BC and NB have done, that effectively bar police from swearing charges out unless they have been pre-approved by a Provincial Crown prosecutor.

The effect of what the BC government has done here is to use appointed civil servants to circumvent the Criminal Code of Canada, keeping the public from seeing justice being done. This is due to the fact that the public only has a right to know after a charge has been sworn.

In all the other jurisdictions except BC and NB, the Provincial Crown Prosecutors can stay charges, but they do it after the charge has been laid, with the harsh light of public knowledge seeing who has been charged with what.

Here in BC, the Provincial Crown Prosecutor intervenes prior to the laying of charges. This does two very bad things; first, it circumvents the public's right to know and see what is happening and second, it allows the politicians to effectively gerrymander the justice system by not proceeding with charges for the reason of "not in the public's best interest" which can mean anything, but mostly means the Provincial Crown Service doesn't have proper funding to proceed with expensive cases such as child exploitation, let alone the government employee who embarrasses the sitting government.

A Brief History of Charge Approval in British Columbia

Prior to 1974, lawyers employed by municipalities carried on prosecutions in British Columbia. In 1974, the Government of British Columbia established a Crown Counsel system and brought the prosecution of criminal charges under the auspices of the Ministry of the Attorney General.

In the late 1970's in New Westminster and Burnaby the practice arose of having charges approved by Crown Counsel prior to their being laid. This was followed in the April, 1982, with Vancouver being included in that practice. Until September, 1983, the standard for charge approval was the existence of some evidence upon which a reasonable jury, properly instructed, could convict. That standard was changed in September, 1983, to the current two-pronged one: is there a substantial likelihood of conviction and, if so, is it in the public interest to proceed with the prosecution?

There does not appear to be any record of there being any public discussion of the adoption of the Charge Approval Process nor of the adoption of the Charge Approval Standard prior to those changes being made.

Some later examination of these practices was made. In December, 1988, Mr. Justice Hughes, then the Deputy Attorney General, released his report entitled "Access to Justice: The Report of the Justice Reform Committee" (the Hughes Report). That report concluded that charge approval ought to remain with Crown Counsel. In order to address the many reported difficulties from the system, the Hughes Report also recommended an appeal procedure which made the Deputy Attorney General the final arbiter for charge approval. That procedure remains largely unchanged.

The Charge Approval Process was again subject of inquiry in 1990 when the government of the day appointed the then-Ombudsman, later Deputy Attorney General, Steven Owen, Q.C., to conduct the Discretion to Prosecute Inquiry. The resulting report was released in November, 1990. This inquiry canvassed the various positions advocating for and against the Charge Approval Process. The report concluded, in the absence of critical examination, that the Process ought to continue but be based on a modified charge approval standard. The recommended standard was to change the first fork of the test to the existence of a 'reasonable likelihood of conviction'. The Ministry of the Attorney-General has never adopted that recommendation.

The British Columbia Association of Chiefs of Police provided written briefs in both 1988 and 1990 which strongly argued in favour of abandoning the Charge Approval Process.

The Police Position on the Charge Approval System

To maintain consistency, the Owen Report will also be used to articulate the positions advanced by the police in 1990. The five positions put forth were:

1. Erosion of Police Independence
2. Minor Offences
3. Potential for Abuse
4. Usurping the role of the Judiciary
5. Bureaucratic Efficiency

It has been the consistent position of all members of the British Columbia Association of Chiefs of Police that the Charge Approval Process ought to be abandoned and that British Columbia ought not be the sole jurisdiction in the English speaking world burdened by the 'substantial likelihood of conviction' test for charge approval.

1. Erosion of Police Independence

The basis of this argument lies in the history of the development of the English common law. As the modern representatives of the public, the police have both the right and the duty to lay a charge where there are reasonable and probable grounds to believe an offence has been committed by identifiable person(s). This position expressly recognizes the concurrent right and duty of Crown Counsel to independently determine whether a charge should be prosecuted.

The traditional and usual system, whereby police lay charges, ensures that the police are accountable to the public for the quality of their investigations and the objectivity of their decisions to lay charges. It is the fact that the Information is a public document that assures those outcomes. The Charge Approval Process does not allow that accountability.

By moving the charge approval consideration off of the public stage, both the police and Crown are tainted by a process that is not transparent and that opens the process to questions of bias and impropriety. In reality, entire classes of offences are not being prosecuted. This shows up in at least two places.

Firstly, criminals know that the likelihood of prosecution for breach of probation and fail to appear offences is so remote that they flout the law and do so with impunity. These are by no means the only offences so affected.

Secondly, the police don't expend resources investigating what the Crown won't prosecute - and the public has learned not to report crimes that the police won't investigate.

The police independence argument is rooted in the position accepted by the vast majority of jurisdictions in Canada and around the world. The duties and prerogatives of the Crown are only engaged once a charge has been laid and not before. Recognition of the legitimacy of this position is found in case law (Campbell v. Attorney General of Ontario (1987), 31 CCC (3d) 289). The Marshall Commission of Inquiry has endorsed this position by recommending that:

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.

When one recalls that the Marshall Inquiry was examining one of the worst examples of a system gone wrong, this is a very strong, informed and compelling endorsement for the police to retain charge approval.

Additionally, the position of the police is mandated by legislation. As noted above, both the Criminal Code and the Crown Counsel Act of B.C. set out the basis of the police position. Conversely, the advocates for a Charge Approval Process can cite no case law, no Inquiry, no legislation nor any public discussion and acceptance of their position.

2. Minor Offences

The basis of this argument cannot be put more succinctly or aptly than in the words of the Owen Report:

... 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.

One need only invoke the names of Penticton and Parksville to recognize the continuing truth of these remarks. The successes achieved by the New York Police Department in reducing the crime in that city stand in stark contrast to Vancouver's Downtown Eastside.

3. Potential for Abuse

This argument re-iterates points made above in relation to the essentially private nature of the Charge Approval Process. In the absence of an Information there is no public accountability and the decision making and propriety of police and Crown action is open to question. Indeed, the very need for the Decision to Prosecute Inquiry was a belated and expensive response to the public demand for accountability.

4. Usurping the Role of the Judiciary

There are two prongs to this argument in the Owen Report, while a third is found in the Criminal Code.

First, the initial test in the charge approval standard, the 'substantial likelihood of conviction', requires Crown Counsel to make determinations of matters of law. To the extent that those matters may not be settled or that they rely on the weight to be placed on particular elements of evidence means that the Crown is usurping the role of the Judiciary.

Secondly, the various factors going to consideration of the public interest are precisely those normally encountered in discussions of sentencing principles. That consideration should be at the end of the criminal justice process, not at its invocation.

Thirdly, the Criminal Code provides for the preliminary hearing of many indictable offences. The standard of certainty demanded by the Code and to be determined by a Judge is decidedly less than a 'substantial likelihood of conviction'.

5. Bureaucratic Efficiency

This argument is founded on a Charge Approval Process which requires the police to prepare the full RTCC, forward it through some form of supervision process to Crown Counsel and then, after approval, back to the police for the Information to be sworn. This system results in significant delays prior to a charge being laid and process issuing. This concern has been heightened, since the Owen Report, in the developing case law around unreasonable delay.

This process gives rise to an interesting illustration of Crown Counsel picking and choosing what it does. The approving Crown Counsel is in precisely the same position as the Court Liaison Officer when it comes to laying a charge - having access to precisely the same information. Crown have determined the form of the charge, Crown have determined the content of the charge, Crown have determined the sufficiency of the evidence and Crown have approved the charge. One has to ask why Crown doesn't lay the Information?

Analysis and Examples

Statistical Analysis

As observed above, a number of the putative benefits of the Charge Approval Process are amenable to statistical proof. Those statistics are uniquely available to the Ministry of the Attorney General. Some relevant statistical data is also available from Statistics Canada. However mining that information is costly in terms of both time and money.

The statistics presented above provide prima facie support for the position of the police.

Since the Charge Approval Process and its corollary, the 'substantial likelihood of conviction', are uniquely the creation of the Ministry of the Attorney General and since British Columbia now has a twenty year history of that process, a call for the Ministry to statistically validate its claims is entirely reasonable.

Cost Analysis

The Charge Approval Process is initiated by a police officer putting together a full Report to Crown Counsel - in other jurisdictions this is commonly referred to as a Court Brief. This is an extensive report including all evidence, statements, records and other relevant items. In contrast, a simple Prosecutor's Information Sheet, or similar form, is used when police lay charges. That form includes all relevant information sufficient to enable a Judge to sentence an accused in the event of a guilty plea. It is only in the event of a not guilty plea that an officer would submit the full Court Brief. Since the majority of matters are disposed of by guilty plea, considerable savings in police resource costs are realized when a full court brief is not required for all instances where police contemplate a charge.

In the Charge Approval Process, Crown Counsel are required to review 100% of proposed charges. In the police-based process, Crown are only required to consider those charges where Not Guilty pleas have been entered. By far, most criminal charges result in guilty pleas. Again, the police-based process represents savings, this time to the Crown Counsel office.

Other Considerations

In addition to the points of view and arguments considered above, a number of issues have arisen in the recent past. The impact and importance of those issues in relation to the Charge Approval Process do not seem to have been examined elsewhere in any cohesive fashion.

Police Accountability Regimes

Since Stephen Owen, Q.C. examined this issue, there has been considerable development of regimes which insure the public accountability of police services. While that development has not always been smooth, all members of the British Columbia Association of Police Chiefs welcome the opportunity to demonstrate by transparent and open processes by which their respective services are fully accountable to the public they serve. Both the Royal Canadian Mounted Police Act and the Police Act of British Columbia contain effective provisions for accountability. Perhaps more importantly, the courts have taken on a highly active role under the auspices of the Charter in assuring the probity of police actions.

That the product of police service -- the decision to lay a criminal charge -- has been removed from the police completely frustrates those accountability regimes. That the actual decision is taken in private, absent any public discussion or record, runs entirely counter to public expectations.

The Jane Doe Implications

In this well-known Ontario case, Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al. , 39 O.R. (3d) 487 the police were held to be liable to the victim of a sexual assault where the police ought to reasonably have notified the public of a suspect's pattern of behaviour. Two consequences flow from that decision in respect to charge approval.

In the case where Crown declines to approve a charge that the police have advanced, the duty to warn arises. That duty to warn is triggered by a standard of belief well below that of reasonable and probable grounds. The police are then obligated to make a public warning about a person that the Crown declines to prosecute. This certainly serves neither Crown nor police well. That this situation has not yet arisen is most likely because the police are not generally aware of the fact that the duty to warn is not extinguished by the decision of the Crown not to lay charges.

The second implication revolves around the liability aspect of Jane Doe. Should subsequent harm be caused to a member of the public from the actions of an individual who Crown has declined to charge, and the police have not warned the public, it is probable that the Courts would find the police liable. Given the clear duty of the police to exercise their discretion in respect of laying a charge (see Campbell and Marshall Inquiry discussion above), the likely finding of the Court would be that the police unnecessarily fettered its discretion, notwithstanding the Charge Approval Process. Also unconsidered by the Courts to this point is the liability of the Crown in that situation. Having exercised a discretion that they do not have by law, do they then assume the liability?

The Convenience Argument

The argument has been encountered that changing back to the police-based process would cause great inconvenience. This argument is founded on the fact that there is now a twenty year history with the Charge Approval Process in British Columbia and during that period business practices have been developed around that process. Any return to the police having charge approval would disrupt those systems.

Two arguments are available to refute that position. Firstly, in no way can a case be made that the effective functioning of the criminal justice system should be predicated on either convenience or inertia. Secondly, it is in no way certain that reverting to the police-based system will do anything other than enable the police to do more police work, enable the Crown to do more prosecuting - and more fully inform the public about what is really going on.

The 24 Hour JP Centre

In April, 2001, Court Services Branch of the Ministry of the Attorney General unilaterally imposed this centre on both Crown and Police. The Chief Judge of the Provincial Court has mandated the Centre to deal with search warrant, remand and related matters formerly dealt with by Court Registry JP's and by stipendiary JP's. Existing Sitting JP's and Provincial Court Judges are prohibited from dealing with those matters absent exceptional circumstances. All dealings are by fax and/or phone. Crown Counsel have taken the position that matters being dealt with by the Centre will not be supported by their offices. Consequently the police have been forced into greater roles in areas of greater complexity than the decision to lay a charge. Neither the Courts nor Crown are troubled by that development. The police are deeply troubled by any number of systemic concerns with the new regime, including their ability to deal adequately with the new responsibilities. Recently a Court arrived at its usual adjournment time with many matters still on the docket. The interesting solution to this situation by the Judge was to simply close court and leave to the lone police officer in attendance the responsibility of dealing with the remaining matters by way of the telephone and the JP Centre.

Court Closures

With the closing of 24 of the existing 69 courthouses, Crown Counsel are now removed from many more communities than before. The ability to make 'public interest' distinctions on charge approval for communities with which they are not familiar will further exacerbate the existing difficulties with those decisions. Abandoning the Charge Approval Process alleviates this condition as the police do remain in those communities.

A Reduction in Crown Counsel

Announced with the Court closures was the reduction in Crown Counsel. This reduction affects both the number of ad hoc Crown and the number of staff Crown. The delays currently experienced in charge approval will worsen. The daily experience of Crown Counsel being unfamiliar with the file they are prosecuting will worsen. Abandoning the Charge Approval Process alleviates both of these conditions.

Support for Restorative Justice Initiatives

There is growing appreciation for the effectiveness of using Restorative Justice concepts in place of, or in support of, the current criminal justice system. This development is similar to the acceptance of alternate dispute resolution mechanisms in business disputes and of mediation in family law matters. The inability to determine with certainty that a charge will be laid acts as an obstacle to the police more widely implementing Restorative Justice practices.

Function Creep

This problem has been noted by a number of experienced policemen. In some cases, Crown Counsel are attempting to exercise a role more consistent with that of a U.S. District Attorney in trying to direct and supervise active police investigations. This is an almost inevitable progression from a Crown-based charge approval system. When the police are not required to ultimately make the decision on the adequacy of their investigation to support a charge it is inevitable they will shy away from being responsible for decisions during the investigation and allow the Crown to occupy that field.

Conclusion and Recommendations

In light of the foregoing, it is respectfully submitted that:

1. The Charge Approval Process contravenes existing case law.
2. The Charge Approval Process contravenes the principle of police independence.
3. The Charge Approval Process contravenes the requirements of the Criminal Code.
4. The Charge Approval Process contravenes the principles of public accountability.
5. The Charge Approval Process has no legislative validity.
6. The Charge Approval Process adds costs and no benefits to the criminal justice system.
7. The Charge Approval Process acts as an active impediment to dealing effectively with the reality of scarce resources and to adopting innovative and effective community policing and Restorative Justice measures.
8. British Columbia must immediately abandon the Charge Approval Process.

Sincerely,

Doug Stead