



November 13, 2012

Lindsay Lyster  
President  
British Columbia Civil Liberties Association  
900 Helmcken Street 2<sup>nd</sup> Floor  
Vancouver BC V6Z 1B3

Dear Ms. Lyster:

Your letter of October 24, 2012, addressed to the Honourable Shirley Bond, Minister of Justice and Attorney General, has been forwarded to me for a response. As Assistant Deputy Attorney General, I am responsible for the Criminal Justice Branch within the Ministry of Justice, including the conduct and supervision of criminal prosecutions in British Columbia.

Thank you for taking the time to express your concerns about the need for independence in the charge assessment function as it relates to allegations against police officers. I agree with you that independence is of fundamental importance, not only in these cases, but in every case that comes to the Criminal Justice Branch for charge assessment. In deciding whether to approve charges and proceed with a criminal prosecution, a prosecutor must at all times remain independent of the investigating agency, the victim and the accused. A prosecutor is duty bound to be impartial and objective in the assessment of evidence, as well as the determination on whether there is a substantial likelihood of conviction. These are constitutionally entrenched values that the Criminal Justice Branch takes very seriously and strives to respect in all aspects of its role.

In your letter, you request that the Attorney General "refer" the charge assessment involving Robert Wright to a special prosecutor. Under the Crown Counsel Act, R.S.B.C. 1996, c.87, it is the Assistant Deputy Attorney General for the Criminal Justice Branch that appoints special prosecutors when doing so is "considered in the public interest". As noted by Stephen Owen in the "Special Prosecutor Review" that he conducted in 2010, a special prosecutor is generally only appointed "where there is a significant potential for a perceived or real improper influence in prosecutorial decision making". The charge assessment in the Robert Wright case was completed by a senior Deputy Regional Crown Counsel from outside the region in which the complaint arose, and approved by his Regional Crown Counsel. The Deputy Regional Crown Counsel had no existing or previous working relationship with the police officer or the R.C.M.P. detachment in question, and I see no

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Ministry of Justice

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indication other than that he made an impartial and objective assessment of the investigative file in reaching the conclusion that he did. As Mr. Owen specifically noted in his Review, Crown Counsel are "highly skilled and dedicated professionals and there is no evidence of anything but excellence in their work". Their charge assessments are, at law, presumed to be made in good faith.

The Branch has updated its policy on files involving allegations against police officers (POL 1). The update reflects our appreciation of and commitment to independence in the charge assessment function. This policy was approved by the Branch's Management Committee after careful consideration of the recommendations made by Commissioner William H. Davies, QC in the Inquiry into the death of Frank Paul. A copy of the policy is attached for your perusal. Criminal Justice Branch policies are available to the public.

Since your letter, the BC Civil Liberties Association (BCCCLA) has publicly requested that the Criminal Justice Branch disclose material that formed part of the Report to Crown Counsel received from the New Westminster Police Department. The Branch is not in a position to do so. An investigative report, including the evidence gathered by police and submitted with the report, remains the property of the investigating agency. Reports to Crown Counsel are provided to the Branch for the purpose of charge assessment, conducting a prosecution if a charge is approved, and disclosure to the accused person once a prosecution has been initiated. In accordance with Branch policy, third party requests for disclosure of this material should be directed to the original investigating agency. A copy of the relevant Branch policy is attached to this letter (DIS 1.1).

When issuing a Clear Statement, the Criminal Justice Branch does not release and/or set out the entirety of the information or material that was included in the Report to Crown Counsel, or its details. When exercising its discretion in this regard, the Branch seeks to reasonably balance the need to publicly provide an explanation of a charge assessment, with the privacy rights of suspects, complainants and other potential witnesses or affected parties. The Branch appreciates the importance of transparency, but also recognizes and must comply with its statutory obligation to protect individual privacy interests. Each case is unique and the amount of information that can or should reasonably be included in a Clear Statement will depend on the circumstances.

According to recent media reports, the BCCCLA has asserted that the charge assessment in this case was "heavily" based on an expert who provided "secret testimony" to the Branch. I wish to correct this misapprehension. Like the other pieces of evidence and material gathered by police, the report on use of force that was reviewed by Deputy Regional Crown Counsel during the charge assessment process formed a part of the investigative package that was provided to the Criminal Justice Branch by the New Westminster Police Department. The Branch did not arrange for the report, or retain someone to provide it. Nor was the report "secret". The report was prepared by Sgt. Brad Fawcett of the Vancouver Police Department, obtained by the investigating agency and submitted to the Crown with the other material. This is consistent with usual process. Moreover, as indicated in the Branch's Statement, the Sergeant's opinion on use of force was only one part of the evidence considered by the Criminal Justice Branch and not seen as determinative, one way or the other. As you can appreciate, assessing whether there is a substantial likelihood of conviction on criminal charges requires an assessment and appreciation of the investigative file as a whole.

In this case, the evidence of the force expert consisted of the report which he had prepared, supplemented by additional information which he provided to Deputy Regional Crown Counsel. The Deputy Regional Crown Counsel ultimately concluded that the expert's evidence was equivocal on whether the force used by the officer was excessive. In light of the equivocation, and the other evidence considered in its entirety, it was determined there was no substantial likelihood of establishing beyond a reasonable doubt that the degree of force was unlawful. I appreciate that following the incident at the Terrace detachment, Mr. Wright was left suffering from a permanent brain injury. This is a tragic situation and understandably it has had a significant, most unfortunate impact on Mr. Wright and his family. However, as I understand it, the medical evidence in the investigative file indicates that the bleeding in Mr. Wright's brain was likely caused by a medical condition. As such, the severity of his physical state post-incident cannot be used by the Criminal Justice Branch as evidence to support a finding of excessive force.

If this matter went to trial, it would not be enough for the prosecution to show that an officer "probably" used excessive force. As you know, the Crown's burden of proof in a criminal trial is a stringent one to safeguard the constitutionally entrenched presumption of innocence. The prosecution would have to establish that the force was excessive beyond a reasonable doubt. Any doubt arising on that issue, whether from the Crown's case or from the officer's version of events (should he give evidence), would at law fall to the benefit of the accused.

Thank you, again, for writing with your concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Joyce DeWitt-Van Oosten". The signature is written in a cursive, flowing style.

M. Joyce DeWitt-Van Oosten, QC  
Assistant Deputy Attorney General  
Criminal Justice Branch