

## PRESENTATION TO THE 2009 CACOLE CONFERENCE

By Roger Salhany, Q.C.

I was born and grew up in Cornwall, what was then a small town, now a city, south of here, on the St. Lawrence River in the late 30's and early 40's.

Each year, the high school drama club usually put on a Gilbert and Sullivan Operetta. My older sisters, who often sang in the Operettas, would occasionally drag me along to the performance. I suspect it was to instil a little culture in me and to get me away from the baseball diamond where I spent most of my time. I even got to like some of them.

I remember one particular Operetta - the Pirates of Penzance. It is the story of an orphaned young man who is mistakenly sent away by his nursemaid to be trained as a pirate, when, in fact, his guardian instructed his nursemaid to send him to be trained as a pilot.

When, at the age of 21, his apprenticeship is over, he leaves his old comrades. Later, his pirate ship lands at Penzance and the police, aware that the pirates are coming, are sent reluctantly to capture them. There is a song the police sing.

When constabulary duties to be done, to be done  
A policeman's lot is not a happy one

I am reminded of that song almost daily when I pick up a newspaper or turn on the TV to listen to the news.

There is usually a story about how the police have mismanaged this or that investigation, or have used unnecessary force in arresting a suspect. In the last 6 months, the papers and the media have been reporting weekly on the alleged overuse by the RCMP of the taser.

Today is the era of the blog. A newspaper columnist, critical of the police or the justice system, will invite readers to respond to his or her column by e-mail and these comments are recorded on the columnist's website for everyone to read.

The column is usually written by a reporter who feels that it is his or her duty to reveal abuses by the police or the justice system. Sometimes the article is fair and balanced, and some times it is not.

I have taken recently to reading the comments by readers - the blog. What is ironic is that the readers who respond usually remain anonymous. They don't have to give their names, although some do.

Most comments are critical of the police. Occasionally there are some that suggest that the victim of the alleged attack is lucky he wasn't killed, as he should have been.

I believe it is that anonymity that gives readers the impetus to vent their anger on the police. We live in an era of what is called "transparency". Twenty-five years ago, criticism of the police

by the media, even criticism of politicians, particularly the sex lives of American presidents, was a no-no. Today everyone is fair game, particularly the police.

Even judges are no longer immune from criticism by the press. At one time, newspapers were fearful of criticizing a judge because of the threat of contempt proceedings. No longer. Nor should they be.

Some people feel that we have gone too far in attacking the police. They believe that such criticism results in loss of respect for law and order.

Others claim that unless we carefully scrutinize police conduct, our liberties will be in peril.

And so I repeat "When constabulary duties to be done, to be done, A policeman's lot is not a happy one."

I am a great believer in the "Freedom of the press", a freedom guaranteed by section 2 of the Charter of Rights and Freedoms.

However, I am also a believer in the freedom of a responsible press - one that ensures that comments made about the police are fair and balanced.

Yet, without the criticism of the police conduct in the investigation of Derek Harvey Zenk by the media, it is unlikely that the Manitoba Taman Inquiry, which I was asked to conduct as commissioner, would have occurred. That inquiry exposed what I considered was an investigation destined to fail from the beginning.

I say destined to failure because of the restraints placed on the Winnipeg Professional Standards Unit that was assigned to conduct the investigation.

The background was this:

Shortly after 7:00 am on February 25, 2005, Crystal Taman, a 40-year old married mother of three was driving her small yellow convertible in the passing lane on the Perimeter Highway that circles the outskirts of Winnipeg and had stopped at red light at the intersection behind another car.

As the light was changing, a Dodge Dakota truck plowed into the back of her car propelling it into the car in front of her. She was instantly killed.

The driver of the truck was a constable with the Winnipeg Police Service. He had never applied his brakes before the collision. His speed at the moment of impact was estimated to be 40-50 km per hour.

The accident occurred within the jurisdiction of East St. Paul, a small community on the edge of Winnipeg. The accident was investigated by the Chief of the East St. Paul Police Force and 3 other officers of their eight member police force.

Soon after arriving at the scene, the Chief, who had been a former sergeant with the Winnipeg Police Service, recognized the truck driver as someone he knew and had worked with. Upon arriving at the scene, he put the driver in a police cruiser and left him there for over 40 minutes without advising him of his right to counsel or attempting to determine whether his condition was affected by the consumption of alcohol.

Later at the police station, the driver refused to provide a breath sample. It was immediately apparent that the investigation had been botched from the beginning.

The driver of the truck was charged with a series of driving offences, including refusing to provide a breathalyzer sample, criminal negligence causing death, impaired driving causing death and dangerous driving causing death.

His lawyer entered into a plea bargain with the Crown, who was another Winnipeg lawyer retained as independent counsel because of a potential conflict, since the driver was a police officer.

The plea bargain provided that the driver would plead guilty to dangerous driving causing death in return for a conditional sentence of 2 years less a day and no driving restrictions.

The judge who heard the case was the Chief Provincial Judge of Manitoba. He was not happy with the bargain and told the lawyers so. After several adjournments, the judge, feeling bound by precedent, reluctantly accepted the bargain and imposed the sentence recommended.

Although the driver knew enough not to provide a breath sample, he testified later before me that he had no recall of the events leading up to the accident, except feeling the impact and a panic feeling to stop his truck. He claimed that this was due to post traumatic stress disorder although he had no medical evidence to back this up. He was seen by a psychologist who reported that "his thought processes were logical, rational and coherent although repeatedly self-condemning".

As you can appreciate, the family of Crystal Taman was devastated and the newspapers and media took up their cause. The result was the Taman Commission which completed hearings in August last year and I submitted my report at the end of September.

I made 14 recommendations in that Report all of which were accepted by the Attorney General of Manitoba. The one recommendation which I wish to discuss with you and give you my reasons for making it is as follows:

That the Minister of Justice give consideration to creating a provincial special investigative unit independent of all police enforcement agencies in Manitoba for the purpose of investigating any alleged criminal activity of a member of a police service.

On April 14th last, the Manitoba Minister of Justice introduced a new Police Act creating an independent provincial special investigative unit and setting out who shall be members of that unit.

No sooner was the news of this Act released when attacks came from within the province, and outside the province from the press and the Ontario Ombudsman.

I will deal with those attacks, but let me deal first with the reasons for my recommendation.

As I said, the investigation of this accident was conducted by the Chief of the East St. Paul Police Service and three other officers and was botched by them from the very beginning. It was like a scene out of a "Keystone cops" comedy.

The Chief decided reluctantly to bring in the Winnipeg Professional Standards Unit to conduct a background investigation in order to find out where the driver was the night and morning before the accident. The Professional Standards Unit's main function is to investigate regulatory breaches by officers of the Winnipeg Police Service.

It turned out that the driver had been partying the night before with two dozen members of his shift that had finished at around 11.00 p.m. All of them had gone to their usual watering hole, a nearby restaurant-bar they frequented. Apparently, this was a monthly practice for the officers to wind down after their shift.

After the Bar closed at around 2.30 a.m., 9 of the officers accepted the invitation of one of the sergeants at the party to continue the party at his home in the country. His wife and children were away. Around 6:30 in the morning, all but two officers had left to go home. Remaining was the sergeant homeowner, an officer who had planned to stay the night and the officer who drove the truck that killed Crystal Taman.

Although invited to stay over, that officer decided to go home. This would be shortly before 7:00 a.m.

A short time later the accident happened and Crystal Taman was dead.

The Professional Standards Unit did not have to accept the request to investigate. But they did--and in doing so committed all the mistakes that should and would not be committed by police officers investigating a crime committed by a civilian.

In making the comments that I now propose to make, I want to stress that the PSU officers who conducted the investigation, did so with the highest integrity.

They were simply hamstrung by the system set up to investigate fellow officers.

1. The first problem with the investigation was that investigators felt that they had to conduct the questioning with balance. The Chief investigator for the PSU put it this way:

"In Professional Standards, it has to be a balance. Because one of the things that I was told that we are not - let me just think about the right way to word this. In order - we basically had four stakeholders that we were serving, in the sense of our duties; that

being the citizens of Winnipeg, the City, the service, and our members. So we had to make sure that there was a balance, that we did things the right way, to maintain credibility with all those groups. It is difficult to do the work if you don't have credibility."

As I said in my report, "there can be no successful investigation if an investigator is required to balance several interests when questioning witnesses. There can be no compromise when a witness is questioned by an investigator. The goal of the investigator must be to obtain the truth.

The only restriction upon an investigator is to ensure that the constitutional rights of the witnesses are not jeopardized. A successful investigator can never be a prisoner of compromise that is not imposed as a matter of law."

2. The second problem was that the Unit Investigators approached their task assuming that everyone was telling the truth. Here were 24 officers who had been drinking the night and morning before the accident and were being asked about how much one of their colleagues had been drinking prior to the accident. Surely, the Unit Investigators should have known that they would be reluctant to tell on a fellow officer. It was naive to think otherwise.
3. The third concern about the method of questioning police officers was the reluctance to press the officers "too hard" when being interviewed.

As the Chief PSU investigator said in his evidence,

"I found in my experience is that it's a balance on how hard you press officers in interviews. Because typically, if you press too hard, you get to a certain point, and what happens is one of three things; they either sit back and cross their arms and look at you and don't say anything else, or they repeat the same answer over and over again, and they fall into the I don't know, I don't recall."

Ironically, even though the investigators did not press "too hard" to avoid getting answers like - "I can't recall" - that is exactly the answer they received from all 2 dozen officers they interviewed.

All 2 dozen officers suddenly suffered from memory loss.

None remembered seeing how much their colleague who drove the truck that evening had to drink.

They left the impression that although they were in his company for over 6 hours, they didn't see what or how much he had to drink.

Finally, their method of questioning occasionally telegraphed the answer they wanted from the officer being questioned.

Listen to this:

Investigator: What did Derek look like, his physical appearance when he left?

Witness: To mine?

Investigator: Yeah? *Did he look like he was fatigued? I understand there was a lot of overtime --.*

Investigator: Okay. *So I guess it is safe to assume that Derek was probably feeling the same thing, you know, he had been beaten up all night too. He didn't sleep while he was at you house?*

Witness: No, that's correct.

Investigator: And from what we have seen, there is nothing - first of all, there is no complaint that there was a big raunchy party going on and a big shift, and that's certainly not the case. On your behalf we can tell people that's not the case. And no other complaint from anybody has come forth.

Investigator: Can you tell what he had to drink that evening?

Witness: No idea, actually, I believe it was beer, but I don't know.

Investigator: Okay. *And you know what, as everybody gets talking and stuff and we get busy with our conversation, would you have been in a position to say how many beverages he had that evening?*

Witness: No. I'm kind of quiet and I was speaking more to my field trainer and the other guys on my shift. So it was really more distant from the all kinds of chatter.

At the Public Inquiry, two dozen officers testified before me that they had some vague recollection of seeing their colleague that evening - but could say little about what he was doing or drinking.

In the end, what did the officers in, was that the bar records produced by the restaurant and the admissions made by the officers as to the amount of alcohol each had personally consumed (which they said was just a few beers or a shot or two of liquor) established that a great deal of alcohol and beer had been consumed throughout the evening. Only one officer was prepared to admit that he had had too much.

It was clear to me, and everyone else, including the press, that the investigation conducted by the Professional Standards Unit was totally ineffective. There was universal condemnation of their work.

As I said, I was and am still satisfied that they were trying to do their best. Yet what was also

clear was that they were incapable because of their position and the constraints placed upon them by the Union contract so that they could never ever conduct an effective investigation if called upon to do it again.

Which brings me to the two points that I wish to make today.

The first is that, in my opinion, no profession or group is ever capable of fairly and effectively investigating its own. I say that about any profession, whether police officers, lawyers, doctors, dentists, financial advisors, real estate agents, politicians and yes, even judges.

Many of these groups do have boards and investigative bodies to police their members. While they claim, and honestly believe, that they are doing their work, I am of the view that they are unable to do so effectively.

Why do I say that? I can't answer that question any better than a former police psychologist for the RCMP. You may have read in the Globe and Mail his letter to Mrs. Dziekanski, the mother of the Polish immigrant who was tasered several times in the Vancouver Airport.

He is quoted as saying this in regard to the RCMP policing itself:

"It is a psychologically unsophisticated idea to believe that the RCMP can investigate itself. When I say this, I am not questioning anyone's integrity. I am stating a fundamental principle of human behaviour. Human beings are highly subjective organisms. We don't like to see things that make us look bad".

I concur in that view after 45 years as a defence lawyer, prosecutor and judge.

The second point that I want to make is that, even if the police, or any professional group were capable of effectively investigating itself, the public would still not accept the results of that investigation.

Moreover, every time the police conduct their own investigation and exonerate one of their own, it fuels disbelief and disrespect of the police.

It was for these reasons that I recommended that there be a provincial special investigative unit independent of all police enforcement agencies in Manitoba for the purpose of investigating any alleged criminal activity of a member of a police service in the province.

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Now I know that there are many people, especially police officers, who do not agree with that view. They feel that an independent unit will only reduce and hamper effective police work.

We might ask ourselves, why is there such resistance by Police Forces to being investigated by an Independent Investigative Unit?

I think that resistance had come from three sources.

A. The first is the Chief of Police.

Chiefs of Police say that it is their responsibility to supervise their officers. It is not easy for a Chief to give up that power to an independent unit.

However, we are not speaking about supervision of their force. - - We are speaking about investigating an officer or officers who have allegedly done something that mayor may not be questionable.

Moreover, a Chief who insists that he or she has the right to investigate one of their own fails to realize that they are in a conflict situation.

Why do I say that.

- 1) First of all, a Chief's loyalty to his or her officers makes that chief totally ineffective in reaching a balanced conclusion.
- 2) Secondly, a chief will feel that criticism of a member of the force by an outside unit will reflect adversely on him or her.

The Chief will have no control over the nature and depth of that criticism. By conducting his or her own investigation, the Chief is able to exercise control over that criticism. That control is taken away when it is given to an independent unit.

B. The second resistance comes from the Police Union.

The Union, quite understandably, feels it speaks for its members and that there should not be any outside interference by an independent body. The Union feels that it is its duty to protect their members. To protect their members, the Unions often put into their contracts conditions that make it very difficult to conduct an effective investigation of an officer's conduct.

This was clearly the case with respect to the Winnipeg Police Union Contract. Under their contract, officers were entitled to notice, to pick the time when they would be subject to questioning and the right to legal counsel. Although the officers were not being investigated, they insisted on exercising their full rights.

C. Thirdly, resistance comes from the officers themselves.

They simply don't feel that an independent body is capable of understanding what they have to put up with as police officers in today's world.

That feeling is perfectly understandable.

I don't understand what stresses police officers face in their work.

I don't understand what an officer faces when he or she is arresting a suspect, or is facing a suspect who is armed, or is overacting in a tense or dangerous situation.

Their response is very simple. Who are you to judge me? You were not there. You do not know, nor are you capable of understanding what danger I was facing at the time.

There is also a resistance from a fourth source - the provincial governments. Instead of taking the lead, as is the responsibility of governments, provincial governments have waited until there has been such a strong public outcry that they can not delay further. An example was the Taman Inquiry recommendations and the introduction of a new Police Act.

But not all provincial governments have responded to public complaints. Quebec and British Columbia continue to sit on the sidelines notwithstanding the unusual number of police shootings and in-custody deaths of civilians.

In British Columbia, the RCMP continues to investigate itself notwithstanding complaints by the public.

Although there is a Commission for Public Complaints that investigates complaints against the RCMP, and I have no doubt that the Commission attempts to conduct their investigations effectively and with balance, there are many who doubt that their findings are unbiased and believe that they favour the police.

The conclusions reached in the reports by the Commission in the shootings and killing of Kevin St. Arnaud and of Ian Bush, are probably correct and balanced. However, there are many who are convinced the conclusions were biased in favour of the RCMP.

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How will the creation of an independent unit affect the police officer in his or her work? - Some years ago, judges were asked how would they feel if TV cameras were placed in their courtroom. The response was mixed. The main resistance by some judges was that there would be an independent public watching over them. Their conduct and performance in the courtroom would be scrutinized carefully.

When I heard their responses, I remembered many years earlier in the early 80's when I was first appointed to the bench and was asked to become, and did become, a police commissioner for a nearby city.

At one of our meetings, the Chief of Police announced that he was using certain funds to buy a video camera for educational purposes. When I suggested that he buy another one and put it in the interrogation room so that suspects could be videotaped when being interrogated, his jaw dropped. He didn't think it was a good idea.

At the time I told him that eventually, videotapes of confessions would become mandatory and he might as well be a pioneer in his field. I don't know whether he ever did.

It was clear to me why he did not want a video camera in the interrogation room. I had been a Federal prosecutor for half a dozen years and often refused to introduce an admission by an accused if I felt that it was not completely voluntary.

Twenty years later in 2001, the Ontario Court of Appeal held that unless a satisfactory explanation is offered by an interrogating officer why a recording device was not used when questioning a suspect, a judge is entitled to presume that the confession was not a voluntary one.

The irony of this is that once a videotaped confession is seen by a judge, rarely will it be excluded as involuntary. It is all there before the judge who can see how the interrogation was conducted. Of the videotaped confessions I saw as a judge, I was amazed how polite the officers were and how effective they were.

In my view, the knowledge by police officers that their conduct may be scrutinized by an independent investigative unit should and will have a restraining effect on police officers who have a tendency to use excessive force.

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Creating a provincial independent investigative unit is not without its problems. If public perception concerns are to be respected, then the thorny issue facing governments is this - from where should the members of this investigative unit be drawn?

From where Manitoba will draw its members?

Clearly, officers from the same force should not be investigating their own members. Investigators must come from outside that force.

For example, members of the Professional Standards Unit of the Winnipeg Police Service come into the unit for a fixed period and then go back to their regular duties in their own department or another department.

This is obviously not a good practice. How can an investigating officer conduct a competent and balanced investigation of a fellow officer knowing that he or she will eventually have to return to the force and may have to work with that officer or others who may have supported the officer?

In many cities in the United States, the investigative unit called Internal Affairs is drawn from members of the police force. But once they go into Internal Affairs, they stay there until retirement. An Internal Affairs officer never returns to general police duty.

Some commentators have suggested that investigators should come from not only outside the force but from another province. It is the only way that the public can be assured that the investigation will not be tainted by bias. In my view this is unrealistic.

In Ontario, the SIU investigators come from both civilian and police backgrounds. Although

there have been complaints about the Ontario SIU, by and large their investigations have been accepted by the public. I suspect that Manitoba will follow Ontario's lead.

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Throughout my address to you today, I have stressed the importance of public perception. Some of you may think that I am overly concerned about what the public thinks.

There are some people, who are understandably concerned, that too vocal criticism of the police will cause the public to lose respect for the force and this will only cause anarchy - the kind that occurs in some other countries.

Unfortunately, we too often forget that a true democracy does not depend and should never depend upon the raw power of the state.

The success of a democracy depends upon the respect that citizens have for their government institutions and the belief that those institutions will act in the best interest of all of its citizens.

The police forces of this country, federal, provincial and municipal, are one of the most important institutions in this country.

If police forces are to be effective instruments of law and order in Canada, then they must have the confidence of its citizens that they will always act competently and honourably in the investigation of crime by any citizen.