Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador

Introduction

The prosecutorial discretion of the Attorney General of Newfoundland and Labrador must be exercised independently and in an objective and consistent fashion. The requisite independence is protected through a number of safeguards. The consistency required in the exercise of discretion is controlled through public guidelines contained in this Guide Book of Policies and Procedures.

The Criminal Division (also referred to as *Public Prosecutions*) constitutes an integral part of the Department of Justice and Public Safety. It is comprised of regional Crown Attorneys' Offices throughout the Province and the Special Prosecutions Office, which are all accountable to the Office of the Director of Public Prosecutions.

The Attorney General of Newfoundland and Labrador (who is usually the Minister of Justice and Public Safety) is responsible for carrying out varied duties involving or related to the prosecution of offences. Broadly speaking, the Criminal Division performs the criminal litigation responsibilities of the Attorney General. Prosecutions and prosecution related functions are conducted by Crown Attorneys. Crown Attorneys with the Criminal Division also provide advice and support to the Minister regarding relations with the Federal Public Prosecution Service of Canada (PPSC) and other provincial prosecutions services. Crown Attorneys further provide advice and support in terms of the development and implementation of prosecution policies.

The Director of Public Prosecutions (DPP) for Newfoundland and Labrador and their team of Crown Attorneys are responsible for carrying out the prosecution of criminal and regulatory matters on behalf of the Attorney General who acts for her Majesty the Queen (or "the Crown"). The Office of the Director of Public Prosecutions provides legal advice to all law enforcement agencies and government departments with law enforcement responsibilities.

Tradition and case law require political independence for the Attorney General in the conduct of prosecutions. However, the Attorney General/ Minister of Justice and Public Safety remains accountable to the House of Assembly for the manner in which his or her functions are conducted.[1] The

[1] See also in this Guide Book materials related to "Crown Attorney's Independence and Accountability in Decision Making".

following principles have emerged as a result of the need to satisfy the requirement for both independence and accountability.

1. Prosecutors and counsel acting on behalf of, or assisting the Attorney General, have no more authority than that which the Attorney General has provided them; they are subject to review as determined by the Attorney General and are required to act in accordance with the Attorney General's instructions and guidelines as set out in this Guide Book.

2. In order to avoid any suggestion of political interference, the Attorney General will rarely intervene in the carrying out of day-to-day operations of Public Prosecutions.

Functional Responsibility within the Department of Justice

The Director of Public Prosecutions is the only member of the Criminal Division who is also a member of the Executive. The Director of Public Prosecutions has been given functional responsibility over the manner in which prosecutions are carried out on behalf of the Attorney General and Minister of Justice. The DPP must answer directly to the Deputy Minister and then to the Attorney General / Minister with respect to the manner in which they exercise that functional responsibility.

The Assistant Director of Public Prosecutions is responsible to the Director for such tasks and duties as may be assigned by the Director from time to time. These may include special projects and the management of complex prosecutions as well as policy and advisory functions.

Senior Crown Attorneys are responsible, at the regional level, for the manner in which the prosecution function is carried out by Crown Attorneys under his or her supervisory or managerial control.

The Relationship between the Director of Public Prosecutions and Senior Crown Attorneys

Functional responsibility is a term that includes functional authority. It means establishing policies and guidelines, giving direction, advice, assistance and guidance. It also means having a say in how resources are allocated and re-allocated to provide for a proper service level. Functional responsibility is the primary tool to ensure integrated and coordinated standards of prosecutorial excellence will be provided and maintained.

The Director of Public Prosecutions also known as the Assistant Deputy Minister (Criminal Division) or ADM (Criminal Division) provides functional direction, advice and assistance to those in the Department of Justice and Public Safety, who discharge direct prosecution functions or prosecution related activities.

However, the day-to-day exercise of the functional responsibility of the Director of Public Prosecutions in any region is delegated to the Senior Crown Attorney who is:

- responsible for ensuring that the prosecution resources within the region are deployed so that the prosecution responsibilities of the Attorney General are fulfilled;
- accountable to the Director of Public Prosecutions - ADM (Criminal Division) for ensuring directly that all counsel in their region are exercising the prosecutorial discretion of the Attorney General independently and in accordance with the guidelines contained in the Guide Book.

It is recognized in this context that the Director of Public Prosecutions- ADM (Criminal Division) has the authority:

- to intervene personally in a local matter. In practice, however, the exercise of this authority should be relatively infrequent;
- to participate actively, in partnership with Senior Crown Attorneys, in the allocation of resources for the performance of the prosecution function;
- to develop prosecution policy guidelines and directives as required in order to ensure that the highest standards are maintained and that prosecutorial excellence is achieved for the people of Newfoundland and Labrador.

Purpose of the Guide Book

The Guide Book includes directives and policies of Public Prosecutions that relate to decision making by Crown Attorneys in the course of prosecuting criminal cases. The policies and directives are, in essence, the instructions of the Attorney General to his agents, the Crown Attorneys. Cumulatively, they are the principal device through which the Attorney General strives to achieve the level of consistency necessary to ensure fair and equal treatment of all citizens involved in prosecutions or affected by prosecutorial decisions.

The Guide Book serves two main purposes. First, it is a convenient vehicle through which to distribute and consolidate the policies which have been developed for the guidance of Crown Attorneys. It helps to ensure that the current policies are readily available to the Crown Attorneys who must utilize them on a daily basis.

A second purpose of the Guide Book is to enhance transparency. The contents of this Guide Book are public documents. Accused persons, victims and the public are entitled to be informed about the basis upon which important decisions in the criminal process are made. Such transparency helps to foster public confidence in the administration of justice and engenders respect for the decision makers.

Interpretation and Use

The directives and policies contained in this Guide Book do not endeavor to cover all aspects of the criminal process. Some issues are not addressed; other issues are more comprehensively covered. Though a policy may be drafted in a comprehensive manner, it is impossible to anticipate the infinite variety of circumstances that may arise in the course of criminal proceedings. There will often be gaps between the ambit of the policies and the reality encountered by Crown Attorneys. Accordingly, it is essential that readers and users of the Guide Book understand and remember the context in which these policies are applied. This requires an appreciation of the Crown Attorney's proper place in the criminal process, and an understanding of the fundamental role of a Crown Attorney.

The fact that Crown Attorneys are accountable to their superiors for the exercise of discretion in the criminal process and that there is an expectation

of compliance with policy directions should not cause Crown Attorneys to be fearful of making difficult decisions. Only a small number of policies eliminate options or demand consultation with a Senior Crown Attorney before decisions are made.

It is important for all Crown Attorneys to understand that to neglect or avoid making a necessary decision can be as harmful to the administration of justice and the public interest as making a decision that may later be contested as incorrect.

Just as the failure to exercise available discretion can be destructive, so too would be the blind application of stated policies. Prosecuting, even by experienced counsel, requires careful analysis of issues, as well as consultation. The policies and directives outlined in this Guide Book are not rules meant to substitute for reasonable judgment. Criminal law requires that people be treated as individuals in unique situations, and policies are not intended to distort this approach. Crown Attorneys must carefully consider criminal cases one at a time, and the particular nuances of each case must be reflected in the decision making process. This is an imperative of professional decision making.

Discretion implies that a range of reasonable options exist; therefore Crown Attorneys are entitled to assume that their decisions will be supported by their supervisors whenever the decision that is made falls within the range of reasonable options. It is clearly recognized that the effective functioning of the criminal justice system depends on flexible decision making at the local level by qualified professionals with the necessary support and resources.[2]

[2] See Recommendation #18 of the *Lamer Report (2006)* Office of the Queen's Printer NL.

Independence of the Attorney General in Criminal Matters

Foundation

The role of the Attorney General in the prosecution of crime derives from the Royal Prerogative. In *R. v. Wilkes* Chief Justice Wilmot of the Court of Common Pleas explained the constitutional basis for this role:

> *By our Constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society. As indictments and informations, granted by the King's Bench, are the King's suits, and under his control; informations, filed by His Attorney General are most emphatically his suits, because they are the immediate emanations of his will and pleasure.*[1]

Since then there has been a steady expansion of the responsibilities of the Attorney General.

All decisions to prosecute, terminate proceedings or launch an appeal must be made in accordance with established legal criteria. Two important principles flow from this proposition:

1. Prosecution decisions may take into account the public interest,[2] but must not include any consideration of the political implications of the decision.

2. No investigative agency, department of government or Minister of the Crown may instruct pursuing or discontinuing a particular prosecution or undertaking a specific appeal. These decisions rest solely with the Attorney General (and his or her counsel). The Attorney General must for these purposes be regarded as an independent officer, exercising responsibilities in a quasi-judicial manner, similar to that of a judge.

The absolute independence of the Attorney General in deciding whether to prosecute and in making prosecution policy is an important constitutional

[1] (1768), 4 Burr 2527; 97E.R. 123 at p.125; more recently see *R v. Charlie* (1998), 126 C.C.C. (3d) 513 (B.C.C.A.) at para 32.

[2] See also Chapter 6 of this Guide Book: "The Decision to Prosecute", respecting the test to be applied when deciding to institute or continue criminal proceedings.

principle in England, Canada and throughout the Commonwealth. As the Supreme Court of Canada stated in *Law Society of Alberta v. Krieger*[3]: "It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions." In 1925, Viscount Simon, Attorney General of England, made this oft-quoted statement:

> *I understand the duty of the Attorney-General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney-General, as head of the Bar, is satisfied that the case for prosecution lies against him. He should receive orders from nobody.*[4]

However, it is quite appropriate for the Attorney General to consult with Cabinet colleagues before making significant decisions in criminal cases. Indeed, sometimes it will be important to do so. The proper relationship between the Attorney General and Cabinet colleagues (and, thus, between Crown Attorneys and government departments) was best described by the Attorney General of England, Sir Hartley Shawcross (later Lord Shawcross) in 1951:

> *I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.*
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> *In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of*

[3] [2002] SCC 65.
[4] L.L1.J. Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 215.

> *particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.*
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> *Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.*[5]

This statement, known as the "*Shawcross principle*", has been adopted by Federal and Provincial Attorneys General in Canada.

In dealing with a case, the Attorney General of Newfoundland and Labrador is unquestionably entitled to obtain information and advice from whatever source they see fit, including their colleagues in Cabinet.[6] The course of action which they adopt in a particular case must be their decision. The Attorney General does not act on directions from his or her colleagues, other members of the House of Assembly or anyone else in discharging their duties in the enforcement of the law. On the other hand they must, of course, be prepared to answer in the House for what they do.[7] These principles are well known and established not only in all provinces of Canada, but in the United Kingdom and everywhere that the system of Parliamentary democracy exists.[8]

The Attorney General acts in a quasi-judicial capacity when he or she decides whether or not to conduct prosecutions. The Attorney General does not take orders from the government regarding the decision to prosecute in any case. In limited political circumstances, such as in cases of sedition[9], the Attorney

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[5] U.K., H.C. Debates, vol. 483, cols. 683-84, (29 January 1951).
[6] Canada, H.C. Debates, vol. 4 at 3881 (17 March 1978).
[7] It is an important function of the Director of Public Prosecutions to ensure that the Attorney General is well briefed in this regard.
[8] The statement was attached as an appendix to Canada, Senate Debates, 28 Elizabeth II at 126 (18 October 1979). See also 110-115.
[9] Sedition is defined as the incitement of resistance to or insurrection against lawful authority.(Merriam-Webster

General may seek the opinion of the appropriate ministers, but should not receive instructions.[10]

Expressions of these principles have not been confined to Attorneys General. The judiciary has supported them[11], as have leading authorities on the role of the Attorney General.[12]

Although the Attorney General can become involved in decision-making in relation to individual criminal cases, such a practice would leave the Minister vulnerable to accusations of political interference. Accordingly, it is traditional to leave the day-today decision-making in the hands of the Attorney General's Agents (the Crown Attorneys). The Minister is entitled to be advised on the status of all cases, including high profile or sensitive matters. The Attorney General is entitled to receive reports on the handling of a particular case and may request such information where a related question has arisen in the House of Assembly. Ultimately the Attorney General is entitled to make a decision in individual cases, but for the reasons given it should be a rare event involving a matter of significant importance to the public interest.

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[10] Canada, Senate Debates, 28 Elizabeth II at 113 (18 October 1979).

[11] *R.* v. *Smythe* (1971), 3 C.C.C. (2d) 98 at 110 and 112, aff'd at 122, further aff'd by the Supreme Court of Canada at 3 CCC (2d) 366, esp. at 370; *Gouriet* v. *Union of Post Office Workers*, [1977] 3 All E.R. 70 (H.L.); *Re Saikaly and the Queen* (1979), 48 CCC (2d) 192 at 196 (Ont. C.A.); *Re M and The Queen* (1983), 1 CCC (3d) 465 at 468 (Ont H.C.); *R.* v *Harrigan and Graham* (1976), 33 C.R.N.S. 60 at 69 (Ont. C.A.); *The Royal Commission on Civil Rights in the Province of Ontario* (Chief Justice McRuer, Chairman) (1968) Report No. 1 at 933-4; *Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Policy* (Mr. Justice D.C. McDonald, Chairman) (1981) at 509.

[12] J. Ll.J. Edwards, *Law Officers of the Crown*, supra, note 4; J. Ll.J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell), 1984); P.C. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986), esp. at 290-300; *Royal Commission on the Donald Marshall, Jr Prosecution*, vol V., "Walking the Tightrope of Justice: An Examination of the Office of the Attorney General", a series of opinion papers prepared by J.Ll.J. Edwards (1989), esp. at 128-146; Law Reform Commission of Canada, Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), esp. 8-14.

Duties and Responsibilities of Crown Attorneys

Introduction

This section of the Guide Book describes the duties and responsibilities of Crown Attorneys during the conduct of criminal litigation. The term "*Crown Attorney*" as used in this part and throughout the Guide Book, is meant to refer to lawyers employed by the Department of Justice and private practice lawyers employed as agents acting on behalf of the Attorney General of Newfoundland and Labrador.[1]

Obligations during the Conduct of Criminal Litigation

The responsibilities placed on Crown Attorneys as legal officers of the Crown flow from the special obligations of the Attorney General. As a result, Crown Attorneys are subject to certain ethical obligations which may differ from those of defence counsel.[2] The Crown Attorney occupies a dual role as minister of justice and advocate. There is a tension between these two roles which, at first blush, is difficult to accommodate in an adversarial system. However our constitution has long granted prosecutors a special status distinct from that of a mere opponent at trial.[3]

The Attorney General and his or her agents are vested with very substantial discretionary powers.[4] Public interest considerations require Crown Attorneys to exercise judgment and discretion which go beyond functioning simply as advocates.[5] Counsel appearing for the Attorney General are considered "*ministers of justice*"; functioning more as a part of the judicial system than as proponents of a cause.[6] Fairness, moderation, and dignity should

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[1] The policies, procedure and directives set out in the Guide Book apply equally to lawyers in private practice who are employed as agents to act as Crown Attorneys.

[2] See also: Marc Rosenberg, *The Ethical Prosecutor*, a paper presented at the 1991 Federal Prosecutors' Conference, and *Re Skogman and The Queen* (1984), 13 C.C.C. (3d) 161 (S.C.C.), which holds that Crown counsel are in a different position from the ordinary litigant, for they represent the public interest in the community at large. See also the section in this Guide Book related specifically to the subject of the "Conduct of Criminal Litigation".

[3] M Proulx & D. Layton, *The Prosecutor*: in Ethics and Canadial Criminal Law.

[4] See *The Ethical Prosecutor*, note 2.

[5] *Re Skogman and The Queen,* note 2.

[6] *Boucher v The Queen* (1954), 110 C.C.C. 263 at 270 (S.C.C.): "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is

characterize the conduct of Crown Attorneys during criminal litigation.[7] This does not mean that counsel cannot conduct vigorous and thorough prosecutions.[8] Indeed, vigour and thoroughness are important qualities in Crown Attorneys. Criminal litigation on the part of the Crown, however, should not become a personal contest of skill or professional pre-eminence.[9]

The conduct of criminal litigation is not restricted to trial in open court. It also encompasses the prosecutorial authority exercised by Crown Attorneys in all of their duties. This includes, for example: the decision to prosecute, referring an alleged offender to an alternative measures program,[10] disclosure, the right to stay or terminate proceedings, electing the mode of trial, granting immunity to a witness, preferring indictments, joining charges and accused, consenting to re-elections, and consenting to the transfer of charges between jurisdictions. A Crown Attorney's obligation to ensure the integrity of the prosecution continues throughout the litigation process.[11]

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alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." See also the the discussion of role of Crown counsel by former Supreme Court Justice Peter de C. Cory, in The Inquiry Regarding Thomas Sophonow (2001), at p.39. See as well the *Lamer Report (2006)* Office of The Queen's Printer NL, for an important application of this principle to three cases in this province.

[7] *Ibid.*

[8] The Supreme Court has said that vigorous Crown advocacy is "a critical element of this country's criminal law mechanism": *R. v. Cook* , [1997] 1 S.C.R. 1113 at para.21; 114 C.C.C. (3d) 481 at 489 (S.C.C.). Note however the comments and recommendations of Commissioner Lamer in his Inquiry pertaining to three cases (*Lamer Report (2006)*) regarding the proper limits of Crown Advocacy and attendant dangers of overzealousness.

[9] *Boucher v The Queen*, [1955] S.C.R. 16 at 23-24; 110 C.C.C. 263 at 270 (S.C.C.); *R.* v. *Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 at 289 (Ont. C.A.): "By reason of the nature of the adversary system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill, and vigour. Indeed, the public is entitled to expect excellence in a Crown prosecutor... But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice..."

[10] See also in this Guide Book materials related to "Youth Diversion".

[11] See, for example, *R.* v. *Ahluwalia* (2000), 149 C.C.C.(3d) 193 (Ont. C.A.), where Crown counsel was criticized for having failed to investigate an allegation that a Crown witness had committed perjury at the trial.

Both in and out of court, Crown Attorneys exercise broad discretionary powers. Courts generally do not interfere with this discretion unless it has been exercised for an oblique motive, offends the right to a fair trial or amounts to an abuse of process. Accordingly, counsel must exercise this discretion fairly, impartially, in good faith and according to the highest ethical standards. This is particularly so where decisions are made outside the public forum, as they often have far greater practical effect on the administration of justice than the public conduct of Crown Attorneys in open court.[12]

In the conduct of criminal prosecutions, Crown Attorneys have many responsibilities. The following are among the most important:

The duty to ensure that the responsibilities of the Attorney General are carried out with integrity and dignity

Crown Attorneys can discharge this duty:

- by complying with applicable rules of ethics established by the Law Society;
- by exercising careful judgment in presenting the case for the Crown, deciding which witnesses to call, and what evidence to tender;
- by acting with moderation, fairness, and impartiality;
- by not discriminating on any basis prohibited by s. 15 of the *Charter*;
- by adequately preparing for each case;
- by maintaining an appropriate, arms-length relationship with government departments and investigative agencies (such as the RNC or RCMP);[13] and

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[12] See *The Ethical Prosecutor*, note 2. See also: *Cunliffe and Bledsoe* v. *Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560 (B.C.C.A.): It is extremely important to the proper administration of justice that Crown Attorneys be aware of and fulfill their duty to be fair. See also *Lamer Report (2006)*, Office of the Queen's Printer NL.

[13] See also in this Guide Book materials related to "The Independence of the Attorney General in Criminal Matters" (Chapter 2) and "The Relationship between Crown Attorneys and the Police"(Chapter 5).

- by conducting plea and sentence negotiations in a manner consistent with the policies and procedures set out in this Guide Book.[14]

The duty to be fair and to appear to be fair

Crown Attorneys can discharge this duty:

- by not discussing matters relating to a case with the presiding judge without the participation of defence counsel;

- by not dealing with matters in chambers that should properly be dealt with in open court;

- by avoiding personal or private discussions with a judge in chambers while presenting a case before that judge;

- by refraining from appearing before a judge on a contentious matter when a personal friendship exists between a Crown Attorney and the judge.

- by preparing disclosure in accordance with the policy set out in this Guide Book;[15]

- by bringing all relevant cases and authorities known to Crown Attorneys to the attention of the court, even if they may be contrary to the Crown's position;

- by refraining from expressing personal opinions on the evidence, including the credibility of witnesses, in court or in public;

- by being conscious of the factors that can lead to wrongful convictions, such as false confessions and mistaken eyewitness identification;

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[14] See also Chapter 13 Guide Book "Resolution Discussions" as well as an important discussion of this concept as it has been applied to the policies in this Guide Book related to the "Termination of Proceedings" in **Directive #4** of "Conduct of Criminal Litigation". This procedure was recommended by the *Lamer Report (2006)*, Office of the Queen's Printer NL.

[15] See also Chapter 10 of this Guide Book "Disclosure".

- by carefully guarding against tunnel vision, overzealous/overreaching advocacy by maintaining professional and objective relationships with investigative agencies, victims, the media and/or special interest groups. [16]

- by remaining open to alternative theories put forward by the defence;

- by not expressing personal opinions on the guilt or innocence of the accused in court or in public;

- by asking relevant and proper questions during the examination of a witness and by not asking questions designed solely to embarrass, insult, abuse, belittle, or demean the witness. Cross examination can be skillful and probing, yet still show respect for the witness;

- by respecting the court, defence counsel, the accused, and the proceedings while vigorously asserting the Crown's position; and

- by never permitting personal interests or partisan political considerations to interfere with the proper exercise of prosecutorial discretion.

Inflammatory Remarks and Conduct

As part of the duty to be fair, Crown Attorneys are obliged to ensure that any comments made during jury addresses are not inflammatory. Whether an address will be held to be inflammatory is determined by looking at the number and nature of the comments, and the tone of the address. While ultimately, the test (on appeal) is whether the objectionable comments are seen to have deprived the accused of his or her right to a fair trial, Crown Attorneys are held to a higher standard.

The Attorney General of Newfoundland and Labrador and his or her agents have very substantial discretionary powers. Crown Attorneys must bear in

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[16] "Tunnel vision" has been defined as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information." Ontario. Commission of Proceedings Involving Guy Paul Morin. Toronto: Queen's Printer, 1998, Vol.1, p.601. (The "Kaufman Report.") See also the *Lamer Report (2006)*, Office of The Queen's Printer NL and notes 6 and 8.

mind that the opportunity to damage the reputation of the administration of justice is always present[17].

The general principles governing Crown jury addresses have been referred to by Fish J.A. (as he then was) of the Québec Court of Appeal in *R.* v. *Charest* (1990), 76 C.R.(3d) 63:

> *The principles which emerge from Boucher, Vallières and other leading cases ... may be summarized as follows. Crown counsel's duty is not to obtain a conviction, but "to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime" ... The Crown should press fully and firmly every legitimate argument tending to establish guilt, but must be "accurate, fair and dispassionate in conducting the prosecution and in addressing the jury" ... It is improper for Crown counsel to express his or her opinion as to the guilt or innocence of the accused ... or as to the credibility of any witness. Such expressions of opinion are objectionable not only because of their partisan nature, but also because they amount to testimony which likely would be inadmissible even if Crown counsel had been sworn as a witness ... Crown counsel should not advert to any unproven facts, even if they are material and could have been admitted as evidence. Applicable principles of law should be left for the judge to explain; when reference to the law is necessary for the purpose of making an argument, the law should be accurately stated.*
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> *The principles are well known. Their application, of course, is a function of the nature and number of comments made in each case, of the specific language used and of the overall tone of counsel's address. The likely effect of any corrective action taken by the trial judge must also be considered. Ultimately, the conclusive test is whether the objectionable comments are seen to have deprived the accused of his right to a fair hearing on the evidence presented at trial.* [citations omitted throughout]

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[17] See *The Ethical Prosecutor*, note 2.

The kinds of comments and conduct that have been found to be "inflammatory" (and thus render the trial unfair) can be divided into six categories:

- Expressions of personal opinion
  - including opinions on: issues in the case; on the honesty and integrity of police witnesses; that he or she does not believe the accused; or that the accused is guilty.[18]

- Negative comments about the accused's or a witness's credibility or character
  - Such comments may include excessive reference to the accused's criminal record, native country, likelihood of being a liar, excessive use of sarcasm or exaggeration in referring to the accused or defence witnesses.[19]

- Observations or statements of fact not supported by the evidence
  - These situations tend to be ones in which a Crown Attorney misstates the evidence in a way which impugns the accused's character.[20]

- Appeals to fear, emotion, prejudice or religious belief
  - These comments are often *in terrorem*[21] arguments in which Crown Attorneys urge a jury to protect society from the accused,

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[18] See, for example: *R.* v. *Michaud*, [1996] 3 S.C.R. 3; *R.* v. *McDonald* (1958), 120 C.C.C. 209 (Ont.C.A.); *R.* v. *Murphy* (1981), 43 N.S.R. (2d) 676 (C.A.); *Moubarak* v. *R.*; *Elzein* v. *R.*, [1982] Que.C.A. 454; *R.* v. *B. (R.B.)* (2001), 152 C.C.C. (3d) 437 (B.C.C.A.); *R.* v. *Swietlinski*, [1994] 3 S.C.R. 481.

[19] See, for example: *Pisani* v. *The Queen*, [1971] S.C.R. 738; *Tremblay* v. *The Queen* (1963), 40 C.R. 303 (Que.C.A.); *R.* v. *Romeo*, [1991] 1 S.C.R. 86; *R.* v. *Charest* (1990), 76 C.R.(3d) 63 (Que.C.A.); *R.* v. *C. (R.)* (1999), 137 C.C.C. (3d) 87 (B.C.C.A.); *R.* v. *Davis* (1995) 108 W.A.C. 81 (B.C.C.A.); *R.* v. *Sheri* (2004), 185 C.C.C.(3d) 155 (Ont.C.A.).

[20] See, for example: *Grabowski* v. *The Queen*, [1971] S.C.R. 738; *Emkeit* v. *The Queen*, [1974] S.C.R. 133; *R.* v. *Huback* (1966), 48 C.R. 252 (Alta. C.A.); *R.* v. *Sutherland* (1996), 112 C.C.C.(3d) 454 (Sask.C.A.); *R.* v. *Peavoy* (1997), 34 O.R.(3d) 620 (C.A.); *R.* v. *Khan* (1998), 126 C.C.C.(3d) 353 (Man. C.A.).

[21] *In terrorem* is loosely translatd to mean "in fear" or "by way of threat"

who is portrayed in very unflattering terms.[22]

- Negative comments about counsel for the accused
  - On occasion, Crown Attorneys have suggested that defence counsel have used improper tactics, presented illegal evidence or made other comments designed to portray defence counsel as being untrustworthy.[23]

- Inappropriate language, tactics, and conduct in general

  - Characterizations of the accused as a liar, excessive use of sarcasm, ridicule or derision, use of biblical references and irrelevant authority, are proscribed.[24] Inappropriate tactics include:

    - Failing to disclose to the court all the circumstances surrounding the obtaining of statements from the accused;

    - eliciting through a friendly witness a remark that is unsupported by any evidence and continuing to press the point in the presence of the jury during a discussion with the judge;

    - in cross-examination of the accused, while professing to test their credibility, bringing various matters before the jury which have no direct relation to the question of the accused's guilt;

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[22] See, for example: *R.* v. *Labarre* (1978), 45 C.C.C. (2d) 171 (Que.C.A.); *R.* v. *Gratton* (1985), 18 C.C.C.(3d) 462 (Ont.C.A.); *Moubarak*, note 30; *R.* v. *Munroe* (1995), 96 C.C.C.(3d) 431 (Ont. C.A.) aff'd 102 C.C.C.(3d) 383 (S.C.C.); *R.* v. *Pitt* (1996), 109 C.C.C. (3d) 488 (N.B.C.A.), leave to S.C.C. dismissed 112 C.C.C.(3d) vii.

[23] See *Moubarak*, note 30. R. v. *Shchavinsky* (2000), 148 C.C.C. (3d0 400 (Ont.C.A.); *R.* v. *D.(C.)* (2000), 145 C.C.C.(3d) 290 (Ont.C.A.); *R.* v *Siu* (1998), 124 C.C.C. (3d) 301 (B.C.C.A.).

[24] See *R.* v. *Gilling* (1997), 117 C.C.C.(3d) 444 (Ont.C.A.); *Provencher* v. *The Queen* (1955), 114 C.C.C. 100 (S.C.C.); *Richard* v. *The Queen* (1957), 126 C.C.C. 255 (N.B.C.A.); *R* v. *R.R.I.* (1997), 112 C.C.C.(3d) 367 (S.C.C.); [1996] 3 S.C.R. 1124; *R.* v. *Swietlinski*, [1994] 3 S.C.R. 481; *R.* v. *Khan* (1998), 126 C.C.C. (3d) 523 (B.C.C.A.); *R.* v. *Ballony-Reeder* (2001), 153 C.C.C.(3d) 511 (B.C.C.A.) *R v. Drover [2001]N.J. #36(CA)*, *R.v. Bradbury* (2004), 243 Nfld.&P.E.I.R. 1 (NLCA)

- at the conclusion of the evidence given by the accused in his defence, stating in the presence of the jury that the accused will be arrested for perjury;

- improperly presenting evidence to the jury by reading from judgments of the Supreme Court of Canada; and

- raising a "*concoction theory*" with respect to disclosure for the first time in the closing address[25].

Mentoring and Guidance

A dynamic criminal law system which is responsive to the needs of the people of Newfoundland and Labrador requires a professional prosecution service. This can only be achieved if all Crown Attorneys, Senior Crown Attorneys and support staff receive proper resources and training. It is the responsibility of the Director of Public Prosecutions to ensure that these are made available. Mentoring is also important so that less experienced and junior Crown Attorneys can access guidance and assistance in carrying out their vital functions. This is especially so in the critical assessment of cases and observing the proper limits of crown advocacy. Senior Crown Attorneys should establish practices within each office to ensure that this is achieved.[26]

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[25] See *R*. v. *Gilling* (1997), 117 C.C.C.(3d) 444 (Ont.C.A.); *Provencher* v. *The Queen* (1995), 114 C.C.C. 100 (S.C.C.); *Richard* v. *The Queen* (1960), 126 C.C.C. 255 (N.B.C.A.); *R*. v. *R.R.I*. (1997), 112 C.C.C.(3d) 367 (B.C.C.A.).

[26] See *Lamer Report (2006)*, Office of the Queen's Printer NL at p.328 recommendation #11(e).

Summary References on Crown Attorneys' Duties and Responsibilities

Re: Skogman and The Queen, [1984] 2 S.C.R. 93; 13 C.C.C. (3d) 161 (S.C.C.): Crown counsel are in a different position from the ordinary litigant, for they represent the public interest in the community at large.

Boucher v. The Queen, [1955] S.C.R. 16; 110 C.C.C. 263 (S.C.C.): "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done so firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with a greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

R. v. Stinchcombe, [1991] 3 S.C.R. 326; 68 C.C.C. (3d) 1 (S.C.C): The Crown is under a duty at common law to disclose to the defence all material evidence, whether favourable to the accused or not. Transgressions with respect to this duty constitute a very serious breach of legal ethics.

Lemay v. The King, [1952] 1 S.C.R. 232; 102 C.C.C. 1 (S.C.C.): There is a long established rule that the prosecutor has discretion to determine who are material witnesses, and this discretion will not be interfered with unless it was exercised for an oblique motive.

Cunliffe and Bledsoe v. Law Society of British Columbia (1984), 13 C.C.C. (3d) 560 (B.C.C.A.): It is extremely important to the proper administration of justice that Crown counsel be aware of and fulfil their duty to be fair.

R. v. Lalonde (1971), 5 C.C.C. (2d) 168 (Ont. H.C.): The Crown Attorney must be firm while being fair in prosecuting the accused so that the Court will not be duped by defences which are not thoroughly examined in Court. The criminal law leaves to the Crown Attorney many discretions as to whom and what to prosecute, and the conduct of the Crown's case. Our law does not equate a good and fair Crown Attorney with a weak lawyer.

R v. Sugarman (1935), 25 Cr. App. R. 109: It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit

all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done.

R. v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.): The Attorney General reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "*second-guess*" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then and only then should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

CBA Code of Professional Conduct, Chap. VIII, page 29 commentary 7: When engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. He should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and to the extent required by law and accepted practice, he should make timely disclosure to the accused or his counsel (or to the court if the accused is unrepresented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence. The *CBA Code of Professional Conduct* has been adopted by the Law Society of Newfoundland and Labrador.

Crown Attorney's Independence and Accountability in Decision Making

Introduction

The independence of the Attorney General, which is an integral feature of a parliamentary democracy, is firmly entrenched in our legal system, widely respected, and carefully safeguarded.

Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown Attorneys throughout Newfoundland and Labrador.

Crown Attorneys exercise their independence as representatives of the Attorney General of Newfoundland and Labrador. Accordingly, the "*independence*" of Crown Attorneys is a delegated independence.

Crown Attorneys are obliged to make decisions in accordance with the policies of the Attorney General in this Guide Book, and they act under the direction of Senior Crown Attorneys, who are in turn responsible to the Assistant Deputy Minister (Criminal Division) also known as the Director of Public Prosecutions (DPP). However, Crown Attorneys retain a significant degree of discretion in individual cases.[1]

Crown Attorneys, like the Attorney General, are accountable for their decisions. Since the Attorney General is accountable to the House of Assembly and the public[2] for decisions made in his or her name, this may mean that the Attorney General (either personally, or through the DPP), may provide Crown Attorneys with instructions in a particular case, though such situations would be relatively rare.[3]

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[1] Indeed some courts have indicated that policies that completely remove Crown counsel's discretion are improper: see *R.* v. *Catagas* (1977), 38 C.C.C. (2d) 296 (Man. C.A.); *R.* v. *Wood* (1983), 6 C.C.C. (3d) 478 (N.S.S.C., Appeal Division).

[2] The Attorney General and Crown Attorneys may take steps to explain decisions to the public, in order to promote public confidence in the administration of justice: see materials in this Guide Book regarding "Communications with the Media". Canada, Working Paper 62 (l990) at pp. 16-17, 53-59. See also *Vasta v. Clare* (2002), 133 A Crim R. 114 (Qld. S.C.).

[3] See the discussion in *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Ottawa: Law Reform Commission of

Despite exercising a significant degree of independence, Crown Attorneys will engage in consultations.[4] Prosecutorial discretion is not exercised in a vacuum. The exercise of responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators. But, to be clear, the principle of independence means that the Attorney General does not take instructions as to how to exercise discretion. Similarly, Crown Attorneys do not take instructions as to how to proceed, except from those in the line of authority leading to the Attorney General, namely, the Senior Crown Attorney, the DPP and the Deputy Minister of Justice (Deputy Attorney General).

Statement of the Policy

Crown Attorneys are obliged to exercise independent judgment in making decisions. Because their decision-making powers are delegated to them by the Minister of Justice in his or her capacity as Attorney General, Crown Attorneys are subject to the same constraints faced by the Attorney General personally: they are accountable for their decisions, and they must consult where required. Prosecutorial independence is not a license to do as one wishes, but to act as the Attorney General personally would and should act.

Accountability

The Attorney General of Newfoundland and Labrador is accountable to the House of Assembly for decisions taken in his or her name. This form of public accountability is crucial to a system of open justice, and Crown Attorneys acting for the Attorney General must be cognizant of this fact. This explains the need for the Director of Public Prosecutions, aided by the Assistant Director, to ensure that the Attorney General is well briefed and prepared to provide answers to questions that may be posed in the House. The principle of public accountability is most clear in situations where the law has required that some prosecutorial decisions be made by the Attorney General (or Deputy Attorney General) personally.[5]

An equally important form of accountability is internal accountability. All counsel for the Attorney General, whether employees within the Department

[4] See the discussion of this in Chapter 6 of this Guide Book " The Decision to Prosecute" and Chapter 12 "Conduct of Criminal Litigation". (LINKS TO CHAPTERS 6 AND 12)
[5] See for example *Criminal Code of Canada* sections 174(3), 283(2), 319(6) and 754(1)(a).

of Justice, or *ad hoc* agents, are accountable to their superiors for decisions taken.[6] The Department of Justice is organized to foster principled, competent and responsible decision making[7]. One of the goals of the *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* is to assist Crown Attorneys in making the numerous difficult decisions which arise in criminal litigation. In so doing, it sets objective standards against which prosecutorial conduct may be measured.

Individual prosecutors are also subject to a form of public accountability through their membership in the Law Society of Newfoundland and Labrador[8]. Another form of public accountability occurs through judicial review of a prosecutor's actions, for example through the abuse of process doctrine[9], or judicial control of actions which may prejudice fair trial interests, such as inflammatory jury addresses[10].

Further, this *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* is online and available to the public. By referring to the standards and policies within, members of the public have the means to assess the actions of Crown Attorneys in any particular case.

The Delegation of Authority from the Attorney General

As a practical matter, Crown Attorneys exercise most of the functions assigned by the *Criminal Code* to the Attorney General. The Attorney

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[6] See, generally the discussion in D. Stuart, "Prosecutorial Accountability in Canada", in P. Stenning, *Accountability in Criminal Justice*, Toronto: University of Toronto Press, 1995, at pp. 336-339.

[7] See materials in Chapter 3 of this Guide Book on the "Duties and Responsibilities of Crown Attorneys".

[8] Prosecutors across Canada are subject to the disciplinary rules of provincial and territorial law societies for matters of professional conduct: *Krieger v. Law Society of Alberta,* 2002 SCC 65, [2002] 3 S.C.R. 372. See also: The Law Society Act SNL1999 CHAPTER L-9.1 and the *Code of Professional Conduct* of the CBA as adopted by the Law Society of Newfoundland and Labrador.

[9] See materials in Chapter 2 of this Guide Book "Independence of the Attorney General in Criminal Matters".

[10] See materials in this Guide Book regarding "Duties and Responsibilities of Crown Attorneys" and "Conduct of Criminal Litigation".

General delegates these powers to Crown Attorneys, but always retains a discretion to direct that a particular decision be made.

The Deputy Minister of the Department of Justice and Public Safety assigns functional responsibility for the provision of prosecution services to the Director of Public Prosecutions (DPP), who is also an Assistant Deputy Minister (Criminal Division).

As part of his or her functional responsibility, and in partnership with Senior Crown Attorneys, the Director of Public Prosecutions plays a lead role in the allocation of resources for the delivery of criminal litigation services.

Prosecutorial authority is exercised by Crown Attorneys, who are responsible and accountable to the regional Senior Crown Attorneys. The Senior Crown Attorney is, in turn, responsible and accountable to the DPP for the exercise of prosecutorial discretion.

Prosecutions are conducted in accordance with public guidelines contained in the *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador***,** which has been approved by the Attorney General.

Consultation

Just as the Attorney General is well-advised to consult with Cabinet colleagues on certain decisions, so too may prosecutors consult with others. Examples of persons with whom Crown Attorneys can and should consult include police officers or other investigators, government department employees, and Civil Division counsel who may be assigned to give legal advice to a relevant department or agency of government.

The purpose of consultation is to ensure that Crown Attorneys have access to a wide range of viewpoints and information, ensuring that decisions are made with full knowledge of all circumstances. Cabinet colleagues do not dictate litigation positions to the Attorney General; in the same way, neither government department employees nor police officers can dictate to prosecutors that a certain course of action be followed. This does not mean that their views are not entitled to appropriate weight in determining what the public interest demands in particular situations. Their input may be very helpful.

Advising and Consulting Senior Officials and the Attorney General

The Minister of Justice and Attorney General delegates considerable authority to responsible officials. Because Crown Attorneys continue to act in the Attorney General's name, it is important that consultation be undertaken to ensure that senior officials (such as the Senior Crown Attorney, the ADDP and DPP) within the Criminal Division and, if necessary, the Attorney General are made aware of significant developments with major cases or potential problems.

In some cases, senior officials or the Attorney General may direct that a particular course of action be undertaken. This consultation is necessary to ensure consistent decision-making, and that the Attorney General approves of decisions for which he or she is publicly accountable.[11] Further, direction from senior officials also helps avoid the unfortunate situation in which appellate counsel must depart from the position taken by trial counsel.[12]

Crown Immunity

General Principles

Crown immunity advances the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as "*ministers of justice*".[13]

Crown Attorneys generally cannot be sued for actions they take in performing their public duties. There is an exception in any case of wrongful and malicious prosecution.[14] Further, intentional or even negligent actions that violate an accused's constitutional rights may give rise to a cause of action.[15]

Crown immunity also applies to police actions taken against Crown Attorneys. A majority at the Supreme Court of Canada (SCC) has ruled in

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[11] See materials in Chapter 3 of this Guide Book "Duties and Responsibilities of Crown Attorneys" and Chapter 12 "Conduct of Criminal Litigation". (
[12] See *R. v. Barry*, 2004 NSCA 145. See also in this Guide Book "Decision to Appeal".
[13] Ontario (Attorney General) v. Clark, 2021 SCC 18, at para. 28.
[14] *Ibid.* at 35.
[15] Henry v. British Columbia 2015 SCC 24.

Ontario v Clark[16] that Crown Attorneys do not owe legal duties to the police with respect to how they carry out a prosecution. Piercing the immunity of Crown Attorneys to make them accountable to police officers would put them in conflict with their duties of objectivity, independence, and integrity in pursuit of ensuring a fair trial for the accused and maintaining public confidence in the administration of justice.

Allowing police officers to sue prosecutors for decisions they make in the course of criminal proceedings would create risks to the rights of the accused and to prosecutorial independence and objectivity, and would undermine the integrity of the criminal justice system. It would also be fundamentally incompatible with the mutually independent relationship between the police and the prosecutor. The role of the police is to investigate crime; the Crown Attorney's role is to assess whether a reasonable likelihood of conviction exists, as well as whether a prosecution is in the public interest and, if so, to carry out that prosecution in accordance with the prosecutor's duties to the administration of justice and the accused.

Crown Attorneys and police officers have complementary but separate and distinct roles to play in the administration of justice. The relationship between the Crown and police as two separate actors is not hierarchical. Maintaining their respective independence is crucial for the proper administration of criminal justice and to protect against the misuse of both investigative and prosecutorial powers.

Accountability

While the Supreme Court of Canada has affirmed the importance of prosecutorial immunity in general and specifically in relation to police officers,[17] that court has also recognized that absolute immunity for Crown Counsel carries negative policy implications and has thus affirmed two exceptions. These exceptions are the torts of malicious prosecution[18] and wrongful non-disclosure.[19]

An allegation of malicious prosecution requires not only evidence of an absence of reasonable cause for commencing the proceedings but also proof

[16] *Ibid.* at 47.
[17] *Henry supra* note 4.
[18] Nelles v. Ontario [1989] 2 SCR 170.
[19] *Henry supra* note 4.

of an improper purpose or motive.[20] This motive must involve an abuse or perversion of the system of criminal justice to achieve ends it was not designed to serve.[21] As such, this motive would incorporate an abuse of the office of the Attorney General or individual Crown Attorneys.

Allegations of wrongful non-disclosure have a lower requirement of proof than malicious prosecution, and are supposed to represent a remedy for breaches of the Crown's constitutional obligations to provide full disclosure.[22] Allegations of wrongful non-disclosure do not require proof of an improper purpose.[23] Rather, allegations of wrongful non-disclosure are meant to show that the Crown Attorney caused a person harm by intentionally withholding information when they knew, or should reasonably have known, that the information was material to the defense and that the failure to disclose would likely impinge on the ability to make full answer and defense.[24]

[20] *Nelles supra* note 7.
[21] *Ibid.*
[22] *Henry supra* note 4 at 31.
[23] *Ibid.* at 61.
[24] *Ibid.* at 99.

The Relationship Between Crown Attorneys and the Police[1]

Introduction

Police investigate criminal offences and arrange for suspected offenders to appear in court. Crown Attorneys, as agents of the Attorney General, are responsible for fairly presenting the prosecution's case in court. These roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work collaboratively to effectively enforce the criminal law.

This section of the *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* describes the role and responsibilities of the police and Crown Attorneys in the administration of justice. Attention is focused on the following:

- the authority to commence prosecutions, and thereafter, the authority to conduct prosecutions;
- consultations;
- critically assessing or screening cases; and,
- resolving disagreements between police and Crown Attorneys.

It is important to note that the Supreme Court has indicated the Crown and the police are to be given some latitude in deciding how to structure their relationship. In *R. v. Regan*,[2] LeBel J. stated:

> "*Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained*."

[1] While this chapter focuses primarily on the role of the RNC and RCMP, most of the principles discussed apply to peace officers and other investigators generally and can be applied to investigators who derive their powers from other Provincial or Federal statutes.
[2] *R. v. Regan* (2002), 161 C.C.C. (3d) 97 at para. 64.

The remainder of this chapter will examine the specifics of the respective roles of the police and Crown Attorneys, as well as the parameters of necessary and effective cooperation.

The Common Law

Maintaining the independence of the police from direct political control is fundamental to our system of law enforcement. Under the common law, the police could not be directed by the Executive Branch of Government or by the House of Assembly (or Parliament) to start an investigation, much less lay charges. As one former Attorney General said,

> "*No one can tell an officer to take an oath which violates his conscience and no one can tell an officer to refrain from taking an oath which he is satisfied reflects a true state of facts*".[3]

In *R.* v. *Metropolitan Police Commissioner*, *ex parte Blackburn*,[4] Lord Denning described the principle in this way:

> *I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. 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 so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.*

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[3] The Hon. R. Roy McMurtry, "Police Discretionary Powers in a Democratically Responsive Society" (1978), 41 RCMP Gazette no. 12 at 5-6.
[4] [1968] 1 All E.R. 763 at 769 (C.A.).

Statement of Policy – "Pre-Charge" Role of Crown Attorneys and Cooperation with Policing Agencies

The Attorney General of Newfoundland and Labrador, through the Office of the Director of Public Prosecutions, considers that the following policy principles strike the appropriate balance between the role of the police and the role of the Crown Attorney before charges are laid:

Members of investigative agencies such as the Royal Newfoundland Constabulary and the Royal Canadian Mounted Police are entitled to investigate offences and carry out their duties in accordance with the law and general standards, practices and policies established by those agencies. During the investigation, investigators are entitled -- and encouraged -- to consult with Crown Attorneys about the evidence, the offence and proof of the case in court. At the end of the investigation, investigators are again entitled (and strongly encouraged in difficult or complex cases) to consult with the Crown Attorney on the laying of charges. This consultation might include discussions about the strength of the case and the form and content of proposed charges.

Ultimately, however, investigators have the discretion at law to commence any prosecution according to their best judgment, subject to statutory requirements for the consent of the Attorney General, and the authority of the Attorney General to terminate proceedings if charges are laid. However, investigators may not give any undertaking to the accused or counsel for the accused about the conduct of the proceedings (concerning, for instance, conditions of bail, whether the charge will proceed or not) without first consulting the Crown Attorney assigned to the case.

Crown Attorneys and investigative agencies play complementary roles in the criminal process. Both have roles to play before and after charges are laid. This is a substantial departure from past practices in Newfoundland and Labrador where there was, at one time, a general reluctance on the part of Crown Attorneys to become involved with advising the police prior to the laying of charges.

While the involvement of a Crown Attorney is not generally required as a matter of law at the pre-charge stage, it has become increasingly apparent that in many circumstances it may be desirable. Co-operation and effective consultation between the police and Public Prosecutions are essential to the

proper administration of justice. Crown Attorneys can help ensure investigators gather evidence that is admissible and relevant. Later, when deciding whether to prosecute, consultation will often be helpful in assessing the sufficiency of the evidence and the public interest criteria.

Accordingly, Crown Attorneys should be available for consultation during an investigation and before the laying of charges. This will encourage investigators to ask their advice. It may also help to avoid the situation in which a person is charged unnecessarily and is needlessly subjected to the public censure and exposure attendant upon criminal proceedings.

In complex cases, Crown Attorneys may need to work closely with the police in identifying and acquiring relevant and cogent evidence. This does not mean, however, that Crown Attorneys should assume responsibility for work that properly should be done by investigators. At the end of an investigation, the Crown Attorney's role is to provide the investigators with a fair and objective assessment of the strength of the case. In performing this assessment, the Crown must be on guard against the possibility that he or she has been afflicted by "*tunnel vision*", i.e., has lost the ability to conduct an objective assessment of the case through contact with the investigating agency.

During the Course of an Investigation

It is impossible to anticipate all forms of advice that Crown Attorneys are able to give during the course of an investigation. When in doubt whether Crown Attorneys can assist, a senior investigator should contact the Senior Crown Attorney in the Region to determine if assistance is appropriate. Some examples of general advice include:

- advice on limitation periods for the laying of charges and the renewal or extension of court orders;
- advice concerning agents and informers;
- advice as to whether a search warrant is needed in particular circumstances;
- advice as to whether taped interviews should be conducted with witnesses (e.g. "K.G.B." statements) and questions that should be asked to address certain aspects of proof. Crown Attorneys may also review transcripts and videotapes of interviews of key witnesses to provide

input to investigators on the quality and reliability of such persons as Crown witnesses.

Advice Concerning Police Operations

The police have complete autonomy in deciding what and whom to investigate. They also have the discretion to decide how to structure an investigation and which investigative tools to use.

However, prior to undertaking an investigation or in its early stages, investigators may wish to consult with a Crown Attorney for advice and guidance as to how the investigation should be structured to ensure a sustainable prosecution. It is best to make structural decisions early in the investigation, rather than waiting until it is too late to take corrective action. For example, if the operational plan contemplates an investigation of a large criminal organization or complex commercial fraud, it may be prudent to consult Crown Attorneys prior to undertaking the investigation. Decisions can be made early in the investigation that may assist in developing a case that can be put before the courts in an effective manner.

Crown Attorneys must be involved in the rare case of granting immunity from prosecution. Agreements to this effect should be reduced to writing.[5]

Generally, investigators are fully versed in the requirements for obtaining a search warrant. However, investigative agencies often regard consultation with Crown Attorneys as advisable, particularly when dealing with novel situations or potentially high profile searches.

Crown Attorneys can provide advice in obtaining a wide range of warrants and orders, including:

- General warrants[6]
- Tracking warrants
- Dialed number recorder warrants
- DNA warrants
- Production orders

[5] This type of agreement would be exceedingly rare and can be expected to give rise to complex considerations. Consultation with the Senior Crown Attorney is required.
[6] Crown Attorneys will often appear before the Judge in Chambers with the investigator.

The nature of assistance will range from advising if a warrant is needed to assisting in the drafting of an application. Actual drafting of these types of materials by Crown Attorneys should be considered necessary only in the most complex or sensitive of cases. Members of the RNC and RCMP assigned to cases which utilize these investigative tools usually have the expertise necessary to prepare the supporting documents themselves.

Access to Sealed Packets

In some cases, investigators will obtain an order to seal a search warrant and supporting materials. Occasionally, either the subject of the search or the media may apply for access to the sealed materials. Crown Attorneys may appear on those applications.

The decision as to whether the initial sealing order ought to continue or some or all of the information in a search warrant application may be released is made jointly by investigators and the Crown Attorney.

Extensions of the Time the Seized Items May be Detained

As investigations have become more complex, the ability of investigators to conclude a case within the initial three month detention period provided by subsection 490(2) of the *Criminal Code* has become problematic. In many cases, the investigation may continue for a lengthy period after the search is conducted.

The Criminal Code provides for three stages of detention:

- The first three months – ordered by the justice who receives a Form 5.2 Report;[7]
- The next nine month period;[8] or
- A period longer than one year from the date of seizure.[9]

Section 490 allows applications for detention to be made by either a prosecutor or a peace officer. In the vast majority of cases, peace officers are capable of dealing with these applications without the involvement of a Crown Attorney. However, in some cases, the application to extend can be a very

[7] *Criminal Code*, s. 490(1)(b).
[8] *Criminal Code*, s. 490(2).
[9] *Criminal Code*, s. 490(3).

complex proceeding. Protection of ongoing investigations, informers and other related issues might arise. The individual subjected to the search may attempt to use the detention hearing as a means of gaining access to the police file long before charges are laid.

Crown Attorneys can play a role in detention hearings, including:

- Reviewing and providing input into affidavit material prepared by investigators (even where Crown Attorneys may not appear at the hearing);
- Providing advice to investigators concerning the type of information that ought to be detained and that which ought to be returned;[10]
- Appearing on contested hearings, where it is anticipated that complex issues will arise.[11]

Preparation of the Court Brief

The Court Brief is one of the most important documents that an investigator will prepare during the course of an investigation. It is through the brief that an investigator presents the theory of his or her case and demonstrates the evidence that exists to prove that theory.

Crown Attorneys can assist in a number of ways in the preparation of the brief, including:

- Providing advice in the planning stages on how to structure the brief;
- Providing input during the course of an investigation on areas in the brief that need to be improved or addressed; and
- Providing advice on the use of electronic briefs.

[10] The extent to which Crown Attorneys can assist is determined to a large extent by the status of the investigation. If the case is in its early stages, it may be difficult to determine what is relevant and what is not.

[11] Crown Attorneys will appear in most cases where the application is brought in the Supreme Court of Newfoundland and Labrador Trial Division. Where the case proceeds in Provincial Court, a Crown Attorneys' attendance will depend on the nature of the case.

Disclosure Procedures

In all but the most routine cases, the procedure followed in providing disclosure of the case is critical to a successful prosecution. Unless planning and thought is given to developing a disclosure strategy and incorporating it into the operational plan, significant impediments to bringing the case before the court in a timely manner may arise.

Crown Attorneys can assist in disclosure management in a number of ways:

- Providing advice on the general obligations to disclose as set out in case law;
- Providing advice and guidance on the structure of the disclosure process and strategy to ensure that the materials generated and collected by the investigators are in a form that meets prosecution needs and legal requirements;
- Providing advice on issues of privilege (such as police informer privilege [12]) and editing; and
- Providing advice on the scope of disclosure that is required in a particular case.

Interviewing of Witnesses Prior to Charges

Generally, Crown Attorneys do not interview witnesses before charges are filed.[13] Crown Attorneys assess potential evidence by reviewing the material contained in the Court Brief, and in deciding whether the Decision to Prosecute[14] criteria are met. This may include, for example, viewing videotaped statements of witnesses.

However, in some circumstances, it may be appropriate for Crown Attorneys to interview a witness prior to charges being laid. Situations where this might be appropriate include:

- Where the prosecution will depend on witnesses of an unsavoury background, such as police agents and jailhouse informers. Given

[12] See Chapter 30 of this Guide Book regarding "Confidential Informers".
[13] One reason for this is that if the purpose of the interview is to assess the person's credibility, it may be difficult to accurately assess how that person will come across when testifying in the more stressful setting of the courtroom.
[14] See also Chapter 6 of this Guide Book materials: "The Decision to Prosecute".

issues of credibility that arise with witnesses of this type, a pre-charge interview is generally prudent;

- Where the prosecution will depend on witnesses who may be reluctant to testify, given their lack of familiarity with the Courts and the special nature of the alleged offence. For example, where the allegation involves sexual assaults and/or young children, an interview may be appropriate to allow Crown Attorneys to explain the process and the protections for the witness. Here, caution must be used to ensure that the Crown Attorney is not taking on the role of investigator, but is instead, providing the witness with some additional information concerning the court process;[15]
- Where the case involves particularly problematic *Charter* issues that necessitates a closer examination of the evidence; and
- Cases where there is a statutory requirement for the Crown to consent to the laying of charges.[16]

Critical Assessment of Charges

The role of the Crown Attorney in the critical assessment or "*screening*" of charges raises a number of difficult issues. Investigators are clearly entitled to seek and receive legal advice before laying charges. Equally clear is the desirability of an effective working relationship to foster consultation when charges are considered. However, the extent to which the Attorney General can at law prevent the laying of charges, (either due to insufficient evidence or because a particular prosecution is not in the public interest) is not at all clear.

Some authorities argue that it is fundamental to our system of laws that no one can direct an investigator to lay a charge, or to refrain from doing so. Indeed, whether and to what extent the right of "*anyone*" (including a police officer) to lay an information under section 504 of the *Criminal Code* can be confined or abrogated is debatable.[17]

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[15] See also Chapter 22 of this Guide Book materials regarding "Victims of Crime" and the caution to be exercised when interviewing child witnesses.

[16] See also Chapter 4 of this Guide Book materials regarding the "Crown Attorney's Independence and Accountability in Decision Making".

[17] See *A.G. Quebec v. Lechasseur* (1981), 63 C.C.C. (2d) 301 esp. at 307-08 (S.C.C.); and *R. v. Shirose*, [1999] 1 S.C.R. 565.

In practice, however, a form of pre-charge screening or "*charge approval*" occurs in Quebec, New Brunswick and British Columbia. Under these schemes, charges can be laid only if a Crown Attorney reviews and approves them. Four main arguments have been advanced in support of a charge approval process:[18] it is fairer to the accused; it ensures that only cases with a reasonable prospect of conviction will proceed; it is more efficient because fewer mistakes will occur in the laying of charges; and the decision to prosecute is more objective.

On the other hand, opponents of pre-charge screening say that Crown control of the process leads to an erosion of police independence, the making of decisions behind closed doors rather than in open court, and a usurping by Crown Attorneys of the court's role in the criminal trial process.

Statutorily Prescribed Pre-Charge Involvement of Crown Attorneys

In some instances, Crown Attorneys become involved in an investigation because of statutory requirements. These include, but are not limited to:

- Obtaining authorizations for electronic surveillance pursuant to section 186 of the *Criminal Code*;

- Obtaining special search warrants and restraint orders pursuant to sections 462.32 and 462.33 of the *Criminal Code* in respect to suspected proceeds of crime; and,

- Obtaining management orders pursuant to section 490.81 of the *Criminal Code*.

In these situations, Crown Attorneys can assist in preparing the materials necessary to seek such approval and in making the application to court, where applicable.

Post Charge Proceedings

The right and duty of the Attorney General, through the Crown Attorney, to supervise criminal prosecutions once charges are filed is a fundamental aspect

[18] Discretion to Prosecute Inquiry (Stephen Owen, Chairman) (1990), Commissioner's Report at 25. See also Royal Commission into the Prosecution of Donald Marshall, Jr., Inquiry Report, vol. 1 at 232.

of our criminal justice system.[19] Generally, just as peace officers are independent from political control when laying charges, Crown Attorneys are independent from the police in the conduct of prosecutions.[20] The Crown Attorney's independence extends, for instance, to assessing the strength of the case,[21] electing the mode of trial,[22] providing disclosure to the accused,[23] deciding which witnesses to rely on (including decisions about immunity from prosecution)[24] and deciding if the public interest warrants continuing or terminating a prosecution.[25]

Nonetheless, though the prosecutor assumes control of a criminal matter once a charge is before the court, there may still be ongoing contacts between the Crown Attorney and the investigator. On request, police have traditionally accepted the responsibility to carry out further investigations that Crown Attorneys believe are necessary to present the case fairly and effectively in court. Further, Crown Attorneys may consult with police whenever necessary to assist with decisions regarding conditions of bail, termination of proceedings and representations on sentence.

Disagreements between Crown Attorneys and Investigators

Following consultation, investigators and Crown Attorneys will often agree on the charging decision. If they disagree, the issue should be resolved through discussion at successively more senior levels on both sides.

Normally, assessments respecting whether a case should commence or continue should be made at the Crown Attorney level. Access to witnesses, investigators and physical evidence make this a practical reality. Disagreements that are not resolved should be referred to the Senior Crown Attorney and then, if necessary, to the Director of Public Prosecutions.[26]

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[19] *Re Dowson and The Queen* (1981), 62 C.C.C. (2d) 286 at 288 (Ont. C.A.); approved (1983), 7 C.C.C. (3d) 527 at 535-36 (S.C.C.).
[20] See also Chapter 4 of this Guide Book: "Independence of the Attorney General in Criminal Matters".
[21] See also Chapter 6 of this Guide Book: "The Decision to Prosecute".
[22] See also Chapter 15 of this Guide Book: "Elections and Re-elections".
[23] See also Chapter 10 of this Guide Book: "Disclosure"
[24] See Note 11.
[25] See Chapter 6 of this Guide Book: "The Decision to Prosecute", particularly **Directive #4** in Chapter 12 "Conduct of Criminal Litigation".
[26] See also Chapter 2 of this Guide Book: "Independence of the Attorney General in Criminal Matters".

The Decision to Prosecute

Introduction

Deciding whether to prosecute or to terminate proceedings is a crucial step in the prosecution process.

This section explains the criteria for deciding whether to prosecute. The standards outlined were developed over the years by Attorneys General in Canada, in the Provinces and by heads of prosecution elsewhere in the Commonwealth.

Fairness and consistency are important objectives in the process leading to the institution of criminal proceedings.[1] However, fairness does not preclude firmness in prosecuting, and consistency does not mean rigidity in decision-making. The criteria for the exercise of the discretion to prosecute cannot be reduced to something akin to a mathematical formula. The breadth of factors to be considered in exercising this discretion requires the application of general principles to individual cases as well as the exercise of careful, critical judgment.

Statement of the Policy

Crown Attorneys in Newfoundland and Labrador must consider two issues when deciding whether to prosecute:

1. *Whether there is sufficient admissible evidence to justify the initiation or continuation of proceedings; and,*

2. *Whether the public interest is served by the initiation or continuation of a prosecution.*

If a Crown Attorney determines there is insufficient evidence OR that the public interest is not served by a prosecution, then proceedings should be terminated (subject to consultation with a supervisor where policy requires).

This policy is consistent with standards applied by Attorneys General throughout all provinces in Canada and by prosecution agencies throughout

[1] In this section, "criminal proceedings" includes regulatory prosecutions.

the Commonwealth. The strength of this consensus has been recognized by the Martin Committee in Ontario, which stated as follows:

> *It is a fundamental principle of the administration of justice in this country that not only must there be sufficient evidence of the commission of a criminal offence by a person for a criminal prosecution to be initiated or continued, but the prosecution must also be in the public interest.*[2]

Sufficiency of the Evidence

In the assessment of the evidence, a bare *prima facie* case is not enough; the evidence must demonstrate that there is a *reasonable likelihood of conviction*. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law.

The prosecutor is required to find that a conviction is more than technically or theoretically available. The prospect of displacing the presumption of innocence must be real.

A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown Attorneys should also consider any defences that are available to the accused, as well as any other factors that could affect the prospect of a conviction. This would necessarily include consideration of any *Charter* violations that would lead to the exclusion of evidence essential to sustain a conviction.

Crown Attorneys must also zealously guard against the possibility that they have been afflicted by "*tunnel vision*"[3] due to close contact with the investigative agency, colleagues or victims. This may lead to an insufficiently rigorous and objective assessment of the case. The Lamer Inquiry (2006)

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[2] Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (G. Arthur Martin, Chair). Toronto: A.G. Ontario, 1993.

[3] The concept of "tunnel vision" is discussed extensively in: FPT Heads of Prosecution Committee, Report of the Working Group on the Prevention of Miscarriages of Justice, 2005, Chapter 4. This concept was also dealt with at length in the *Lamer Report* (2006) Office of the Queen's Printer NL.

identified "*tunnel vision*" as a significant contributing factor to grave injustices in three notable murder cases. Subsequently, the province of Newfoundland and Labrador implemented reforms and recommendations to address the danger of "*tunnel vision*". Further, there was an independent review of the Office of the Director of Public Prosecutions. This review served as an impetus for changes, many of which are reflected in this Guide Book.

The same evidentiary standard – requiring a reasonable likelihood of conviction – must be applied throughout the proceedings from the time the investigative report is first received until the time of trial. When charges are laid, the test may have to be applied primarily against the investigative report, although it is certainly preferable (especially in borderline and difficult cases) to look beyond the statements of the witnesses. Later in the proceedings, especially after a preliminary inquiry, Crown Attorneys may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and there can never be an assurance that a prosecution will succeed. Nonetheless, counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and to be satisfied at each stage that there continues to be a reasonable likelihood of conviction. If a Crown Attorneys is not so satisfied, proceedings must be terminated.[4]

Critical Assessment of the Strength of a Case

When reviewing a case to determine whether or not there is sufficient evidence upon which to found a prosecution, the following principles and guidelines may be helpful:

- Crown Attorneys may lean towards the admissibility of evidence when the matter is not clear or where there is some uncertainty as to how a court may decide. For example, a statement obtained from the accused

[4] The proper course for terminating proceedings is set out in Chapter 12 of this Guide Book on "Conduct of Criminal Litigation" (**Directive #4**. Pursuant to ss. 579 or 579.1 of the *Criminal Code* charges may also be stayed. However the stay may never be allowed to expire without a judicial determination; the *Lamer Report* (2006), Office of the Queen's Printer NL.

may involve an apparent breach of the *Charter*. If the breach is blatant, the assessment of sufficiency of evidence should proceed on the basis that the Crown cannot use the statement as part of the case. On the other hand, if there is an arguable case in favour of admissibility, the appropriate course would be to assume that the statement will be admissible.

- A reasoned consideration of defenses may also be part of the case assessment. Crown Attorneys should have regard to any defenses which are plainly open to the accused, or which have come to the attention of the prosecutor. It is not necessary for Crown Attorneys to endeavor to anticipate and consider every possible defence, or to accept at face value all information provided by the accused. While Crown Attorneys must consider both the inculpatory evidence and the exculpatory evidence, they may disregard information that he or she has good reason to believe is not reliable.

- Crown Attorneys must consider only the evidence known to be available at the time that the case is being assessed. It would be wrong to base an assessment of the strength of the case on information that investigators hope to uncover in the future, or which might emerge from the accused on the witness stand, depending upon how the trial unfolds.

- When the proposed evidence appears to be voluminous or complex or the applicable law complicated, Crown Attorneys should assume that a jury will understand the evidence and any instructions which will be given on the law. Crown Attorneys must also guard against having their assessment of a case hinge upon dubious generalities such as "*juries always believe children*" or "*juries never convict police officers*".

- When the strength or weakness of the case is not obvious, Crown Attorneys must be prepared to look beneath the surface of the statements made by witnesses. In doing so, it is not intended that the prosecutor usurp the role of the court. Assessments of the credibility or capacity of a witness must be based on objective indicators (e.g. incontrovertible evidence that a witness is mistaken or lying). Assessments of the more nebulous matters such as demeanor, or whether evidence has "*the ring of truth*", may well have to be left to the trial court.

- The decision to prosecute or discontinue is particularly difficult in those cases in which the accused flatly denies the allegations and the case for the Crown consists of the uncorroborated evidence of a single witness. It would be wrong for the prosecutor to automatically reject such a case as not providing a realistic prospect of conviction. If, for instance, the single witness had a good opportunity to observe the events, was able to give a detailed account without unexplainable inconsistencies, had no history of dishonesty or motive to lie, and was not improperly influenced by third parties, it might be open to the prosecutor to conclude that the anticipated evidence provides a reasonable likelihood of conviction. On the other hand, if it is clear, based upon objective indicators within the case, that a reasonable doubt could not be eliminated, then the prosecutor would properly conclude that there was no reasonable likelihood of conviction. Consultation with supervisors and experienced colleagues is recommended when assessing such a case.

- Occasionally, there are cases in which witnesses' testimony conflict, but the variance is not related to any human frailty and will not be resolved through close questioning or assessment of demeanor or personal characteristics. In regard to particular scientific issues, for instance, there may be genuine uncertainty within the scientific community. This will be highly significant when a crucial element in the case for the Crown must be proved by opinion evidence. If several well qualified experts present unequivocal, conflicting opinions based upon identical premises, and the opinions are all prepared with a high degree of professionalism, the prosecutor will probably be obliged to conclude that there is no realistic prospect of eliminating a reasonable doubt. Again, consultation is strongly recommended in such cases. The mere existence of a conflict between experts should not automatically cause proceedings to be terminated. Careful assessment of the nature of the conflict and its impact on the case is required.

A proper, critical assessment of the strength of the case will often involve such questions as these:

a. Are there grounds for believing that some evidence may be excluded?

b. If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?

c. Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?

d. Does a witness have a motive for telling less than the whole truth?

e. Based on objective indicators, what sort of impression is the witness likely to make?

f. How is the witness likely to stand up to cross-examination?

g. If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?

h. If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?

i. Are all the necessary witnesses competent to give evidence?

j. Where child witnesses are involved, are they likely able to give sworn evidence or to give evidence based upon a promise to tell the truth?

k. If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?

l. Where two or more accused are charged together, is there a reasonable prospect of the proceedings being severed? If so, is there sufficient evidence against each accused, should separate trials be ordered?

Public Interest Criteria

If a Crown Attorney is satisfied that there is sufficient evidence to justify the commencement or continuation of a prosecution, it must then be considered whether, in light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.

It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Sir Hartley Shawcross, Q.C., then Attorney General of England (later Lord Shawcross), outlined the following principles which have since been accepted as correct by numerous authorities:

> *It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should … prosecute, amongst other cases: "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest." That is still the dominant consideration.*[5]

The factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued. This does not mean that because the offence is serious a lesser threshold will apply.

The resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases. The corollary is that the available resources should be employed to pursue with due vigour those cases worthy of prosecution[6].

In some cases it will be appropriate for Crown Attorneys to obtain the opinions of an investigative agency or government department when

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[5] U.K., H.C. Debates, vol. 483, col. 681, (29 January 1951).

[6] In this regard, see also set out in Chapter 12 of Guide Book "Conduct of Criminal Litigation". Judges take a dim view of prosecutions they consider inappropriate: see, for example, the comments of Vickers J. in *R*. v. *Wright*, 2002 BCSC 1198. See also *R*. v. *Dosanjh*, 2002 BCSC 25, where it was held not to be an abuse of process for the prosecution to be funded in part by the Insurance Corporation of B.C.

determining whether the public interest requires a prosecution to be commenced or continued. This can, in most instances, be accomplished through discussion with the investigators. Ultimately, however, Crown Attorneys must decide independently whether the public interest warrants a prosecution.[7]

Where the alleged offence is not so serious that it plainly requires criminal proceedings, Crown Attorneys should consider whether prosecution is in the public interest. Public interest factors which may arise on the facts of a particular case include:

a. the seriousness or triviality of the alleged offence;

b. significant mitigating or aggravating circumstances;

c. the age, intelligence, physical or mental health or infirmity of the accused;

d. the accused's background;

e. the degree of staleness of the alleged offence;

f. the accused's alleged degree of responsibility for the offence;

g. the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;

h. whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;

i. the availability and appropriateness of alternatives to prosecution;

j. the prevalence of the alleged offence in the community and the need for general and specific deterrence;

[7] See also Chapter 2 of this Guide Book "Independence of the Attorney General in Criminal Matters". See also *A.G. Québec* v. *Proulx,* [1999] R.J.Q. 398 (C.A.) per LeBel J.A. (dissenting on other grounds); [2001] 3 S.C.R. 9.

k. whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;

l. whether the alleged offence is of considerable public concern;

m. the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;

n. the attitude of the victim of the alleged offence to a prosecution;

o. the likely length and expense of a trial, and the resources available to conduct the proceedings;

p. whether the accused agrees to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;

q. the likely sentence in the event of a conviction; and

r. whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest.

The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case. Public interest is not the same as public opinion. Public interest connotes the notion of enduring public good and order. It also concerns the effect of a decision on other important public policies and institutions. Public opinion implies a more temporary mood or collective feeling influenced by current events or circumstances.

The proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify it. Mitigating factors present in a particular case can be taken into account by the court in the event of a conviction.

Where a decision is made not to commence proceedings, a record must be kept of the reasons for that decision.

In appropriate cases, Crown Attorneys must be conscious of the need to explain a decision not to prosecute to any victim and the investigative agency. Ensuring that affected parties understand the reasons for the decision not to prosecute, and that those reasons reflect sensitivity to the investigative agency's mandate, will foster better working relationships. This approach will encourage reasoned decision making and accountability.

Victims of crime may also feel aggrieved by decisions not to prosecute, so steps may need to be taken to maintain confidence in the administration of justice.[8]

The need to maintain confidence in the administration of justice may also necessitate public communication of the reasons for not prosecuting a particular matter. To ensure that the proper course is followed, Crown Attorneys should consult the section of this Guide Book related to the termination of proceedings titled "Conduct of Criminal Litigation"; **Directive #4** is particularly important.

Public Interest in the Regulatory Context

As noted above, it is appropriate for Crown Attorneys to consider the views of the investigative agency in considering whether prosecution is warranted. This may be particularly important in the case of prosecutions under provincial statutes where the offence provisions serve important regulatory goals. Consideration of what the public interest requires will, necessarily, require consideration of how the regulatory purpose of the statute might best be achieved. If, for example, the relevant regulatory authority has a mechanism for dealing with an alleged offender (such as a compliance program) a Crown Attorney should consider whether that alternative might better serve the public interest than prosecution.

[8] Note that in Great Britain, decisions not to prosecute have been subject to judicial review in recent years: see, for example, *R* v. *D.P.P. ex p. Manning and Another* [2000] 3 W.L.R. 463 (Q.B.), and the cases discussed in M. Burton, "Reviewing Crown Prosecution Service Decisions not to Prosecute," [2001] Crim. Law Rev. 374. See also the policy regarding materials in this Guide Book in Chapter 22 "Victims of Crime". It must be remembered that a Crown Attorney is not the lawyer for the victim.

Irrelevant Considerations

When assessing whether to prosecute, the following issues are irrelevant:

- The race, national or ethnic origin, colour, religion, gender, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;

- The Crown Attorney's personal feelings about the accused or the victim;

- Possible political advantage or disadvantage to the government or any political group or party; and,

- Any possible effect of the decision on the personal or professional circumstances of the Crown Attorney and anyone else responsible for the prosecution decision.

Consultation

Reasonable, competent people can disagree on whether evidence can provide a realistic prospect of conviction. Accordingly, the possibility exists that differing opinions will arise in regard to the need to prosecute or terminate proceedings in the name of public interest. This is frequently a difficult decision and the guidance available to Crown Attorneys is necessarily given in general terms with room for adaptability to unique circumstances. In this decision making process, the experience of other Crown Attorneys is a valuable resource that should be readily utilized. The Law Reform Commission of Canada and Commissioner Lamer determined that the criminal justice system should not be deprived of this experience. Crown Attorneys across Newfoundland and Labrador who are faced with difficult decisions concerning sufficiency of evidence or public interest considerations are strongly urged to consult with Senior Crown Attorneys and experienced colleagues. The need to consult will vary to some extent with the type of case, the experience of the persons involved, and the opportunities for consultation.

The nature of the consultation that needs to occur will also vary with each case. When the decision to be made is clear, the consultation will mostly involve the prosecutor keeping the Senior Crown Attorneys informed of developments. When the factors to be considered are more finely balanced,

there is likely to be a more in-depth discussion, an exchange of views, and perhaps the giving of advice or instructions.

It is not possible to prepare an exhaustive list of cases and situations which should or must involve consultation and team work. Without limiting the general need for consultation in regard to significant and difficult decisions, the following principles are applicable to consultation in the decision to prosecute:[9]

1. Crown Attorneys must consult with their supervisors in regard to the decision to prosecute (or to discontinue prosecution) in any case involving:

   (a) a death, or

   (b) charges against public figures or persons involved in the administration of justice.

2. Crown Attorneys should consult with their supervisors in regard to the decision to prosecute (or to discontinue prosecution) of the following types of cases:

   (a) criminal conduct involving group or organized activity;

   (b) cases expanding the use of particular *Criminal Code* provisions, or which raise novel issues relating to Aboriginal rights or any other legislation, including the *Charter*; and

   (c) cases which have attracted media attention, or which will likely be of public concern when presented in court.

3. Crown Attorneys are strongly encouraged to consult with Senior Crown Attorneys and experienced colleagues in regard to the decision to prosecute all other significant or unusual cases. The determination of whether a case is significant requires judgment by the prosecutor involved. If a lengthy prison sentence appears to be appropriate for the

[9] These considerations and requirements to consult also pertain to plea agreements. See materials in this Guide Book in Chapter 10 "Plea Discussions and Agreements".

criminal conduct, this may be a strong indicator that the matter is significant enough to involve consultation.

Cases with multiple victims, large losses of property or which involve criminal activity at several locations are other examples of cases often considered to be significant.

4. Crown Attorneys are **s**trongly encouraged to consult with Senior Crown Attorneys and experienced colleagues before deciding to prosecute any case in which they are unsure of either the strength of the case or whether the public interest would be served by a prosecution.

The DPP recognizes the need to leave considerable discretion in the hands of Crown Attorneys. However, the DPP, has responsibilities regarding accountability, and therefore occasionally may become directly involved in the decisions arising in extraordinary cases, or may designate senior counsel or Crown Attorneys from the Special Prosecutions Office to consider or handle particular issues. This approach often flows from a need to have decisions of province-wide impact made by those with a province-wide mandate, or the necessity of bringing maximum prosecutorial experience to bear on certain difficult decisions. Such involvement in local decisions will be rare, but it is a necessary phenomenon in any organization with an accountability structure, which discharges a vital public function.

Transparency

Generally, Crown Attorneys should make a note in the prosecution file of any consultations which have occurred in regard to the decision to prosecute or to discontinue a case. A note should also be made of public interest considerations which influenced the decision. It is particularly important that careful notes be maintained concerning the decisions made in the cases wherein consultation is required pursuant to other provisions of this policy statement on the decision to prosecute.

The decision to terminate proceedings after a charge has been laid raises additional considerations. If a charge involves an identifiable victim, the prosecutor has a duty to ensure that the victim is made aware of the rationale for the decision, preferably before any public revelation of the decision is

made. The greater the degree of threat, injury or financial loss to the victim, the greater the obligation on the prosecutor to keep the victim informed.

Where circumstances permit, prosecutors should also discuss the reasons for not continuing with a charge with the investigator. It is possible that a case can be strengthened after first presented to the prosecutor, and, where practical to do so, this opportunity should be provided. In appropriate cases, Crown Attorneys can request additional investigation.[10] If the investigation has been extensive and complete, but it is determined the matter should not proceed due to public interest reasons, Crown Attorneys should still discuss the decision with investigators prior to any announcement of that decision.[11]

[10] This section should be read in conjunction with materials in Chapter 5 of this Guide Book: "Relationship between Crown Attorneys and the Police". The RNC and RCMP have traditionally obliged when such requests have been made.

[11] The proper course for terminating proceedings is set out in this Guide Book in Chapter 10, "Conduct of Criminal Litigation", particularly **Directive #4**.

Prevention of Wrongful Convictions

INTRODUCTION

Crown Attorneys play an important role in the prevention of wrongful convictions. Crown Attorneys assess the evidence in a given case to determine if there is a reasonable likelihood of conviction, and must continue to assess the evidence throughout the litigation process to determine whether to continue with the prosecution.[1] It is thus crucial that Crown Attorneys are aware of the factors and circumstances that have been identified as common in wrongful conviction cases, as well as take all necessary steps within their mandate to help ensure that innocent persons are not convicted.

The primary purpose of this directive is to apprise Crown Attorneys of the factors that have been identified as contributing causes in wrongful conviction cases,[2] to highlight best practices that can assist Crown Attorneys in preventing miscarriages of justice, and to bring to the attention of Crown Attorneys the extensive research in this field. Bearing in mind that all cases are different, the following information is intended to provide general guidance to Newfoundland and Labrador prosecutors.

Wrongful convictions are usually the result of a combination of errors; one or more of the following elements may be contributing factors:[3]

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[1] This directive should be read in conjunction with related Guidebook guidelines and directives, including: The Decision to Prosecute, Duties and Responsibilities of Crown Attorneys, and Relationship Between Crown Attorneys and the Police (Chapter 7, Chapter 3, Chapter 5).

[2] The research regarding the phenomenon of wrongful convictions is voluminous; scholars have found discussion in the legal commentary dating back to the writings of Sir Edward Coke in 1644 in the *Institutes of the Laws of England*, who documented a 1611 case of a wrongful conviction and execution for murder, as well as the writings of William Blackstone a century later. See Bruce P. Smith, "The History of Wrongful Execution," (June 2005) 56 Hastings L.J. 1185 at 1189. The study of wrongful convictions in the modern era begins with the research of Yale law professor Edwin Borchard, who wrote *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*, (Garden City, New York: Yale University Press, 1932). The book has been reproduced by Nabu Public Domain Reprints.

[3] In his 1932 pioneering study, Borchard observed that the causes of wrongful convictions were most often mistaken identification, circumstantial evidence that resulted in incorrect inferences, perjury, or some combination of these factors, *supra* note 2. See more recently two FPT reports that have surveyed the research and include individual chapters on all of the perceived common factors in these cases: The 2005 *Report on the Prevention of Miscarriages of Justice*, FPT Heads of Prosecutions Committee Working Group, 2005 [2005 FPT Report], is available online. The

- Tunnel vision by police and/or the Crown;
- Incomplete disclosure;
- Eyewitness misidentification;
- False confessions, false accusations or perjury;
- Guilty pleas by the factually innocent;
- The false testimony of in-custody informers;
- Faulty or unreliable forensic evidence or expert testimony, including the lack of biological samples suitable for DNA testing; and,
- Conduct of police and Crown Attorneys.

In addition to the above contributing factors, Crown Attorneys should also be aware that the following four "*environmental or predisposing circumstances*" have been identified as fostering wrongful convictions:

- Public pressure to convict in high-profile cases;
- An unpopular defendant, who is a member of a minority group and often perceived as an outsider;

2011 update to this report, *The Path to Justice: Preventing Wrongful Convictions* can be found at https://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/index.html. These are excellent resource documents, which not only include separate chapters on factors recognized as common in wrongful conviction cases, but set out best practices for police and Crown Attorneys. For further reading, see for example Bruce A MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System," (2005) 31 Manitoba L.J. No 3 at 443; Jon B Gould and Richard A Leo, "One-Hundred Years Later: Wrongful Convictions After a Century of Research," (2010) 100 Journal of Criminal Law and Criminology, No 3 at 825; and Samuel R Gross and Michael Shaffer, "Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations," a joint project of the University of Michigan Law School and the Centre on Wrongful Convictions at Northwestern University School of Law. The Registry can be found online. The US-based Innocence Project is also a wealth of information, research and statistics regarding the various mistakes and factors that have consistently played a role in wrongful convictions.

- A legal environment or culture that focuses on winning; and

- The presence of what has been labelled "*noble cause corruption*," the belief that the end justifies the means and that improper practices are acceptable to ensure a conviction because the accused committed the crime.[4]

2. TUNNEL VISION

Tunnel vision by the police, or the Crown, or both, has been identified as a contributing factor in wrongful convictions in Canada and elsewhere.[5]

Experts define tunnel vision as a "*single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information*."[6] Police officers and Crown Attorneys affected by tunnel vision can become so convinced that the correct suspect has been identified and that the theory of the case is correct, that they see only the evidence that supports that theory and ignore facts and information that do not support it.

Crown Attorneys must be mindful of the symptoms of tunnel vision among police officers and other agents involved in the investigation of a case. They must also constantly be cognizant to avoid developing it themselves. One of the greatest safeguards for Crown Attorneys is to bear in mind the key principles regarding the role of the Crown so clearly articulated in the case of *Boucher v The Queen*.[7] In their review of the evidence in a given case, Crown Attorneys must be mindful of their duty to be fair and impartial, and to ensure they review the evidence in an objective,

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[4] See MacFarlane, *supra* note 3 at 435-443.

[5] 2005 *FPT Report, supra* note 3 at c 4 and the 2011 update to c 4. See in particular the paper by Bruce A. MacFarlane, "Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System," released with the 2008 Inquiry Into Pediatric Forensic Pathology in Ontario, "the Goudge Inquiry,". See also Keith Findlay and Michael Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases," (June 2006) University of Wisconsin Law School, Legal Studies Research Paper Series, Paper No 1023 at 291. Recent illustrations of tunnel vision by the police and the Crown can be found in the *2006 Lamer Commission of Inquiry*, Pertaining to the cases of Ronald Dalton, Gregory Parsons and Randy Druken, particularly the case of Gregory Parsons. See also *The Commission on Proceedings Involving Guy Paul Morin*, Toronto: Queen's Printer, 1998.

[6] The Morin inquiry, *ibid*.

[7] [1955] SCR 16. This case is discussed in Chapter 3 "Duties and Responsibilities of Crown Attorneys". See, in particular, the discussion of the Crown's duty to be fair. On the role of Crown Attorneys, see also an excellent article by Robert J. Frater, "The Seven Deadly Prosecutorial Sins," (2002) 7 Can Crim L Rev 209.

rigorous and thorough manner. Crown Attorneys fulfil a gatekeeper function by virtue of the Crown's duty to critically and independently assess the evidence presented by the police.[8]

While Crown Attorneys should, where appropriate, encourage co-operation and early consultation with the police during police investigations, it is crucial that Crown Attorneys understand the distinct and independent role of the Crown vis-à-vis the police.[9] Although the police are responsible for directing the investigation, during the file review, Crown Attorneys should not hesitate to question any perceived shortcomings in the police investigation that relate to the sufficiency of the evidence and impact the prospect of conviction. A fair, independent and impartial review of the file by Crown Attorneys also means remaining open to alternative theories of the case, which may be different from the theory advanced by the police.

Public Prosecutions in Newfoundland and Labrador should also strive to create a workplace atmosphere that encourages questions, consultations and frank discussion and debate among Crown Attorneys as well as an environment that is receptive to the expression of alternative views regarding a case. [10]

During file review and trial preparation, checks and balances through supervision and second opinions should be encouraged. Crown Attorneys with carriage of the file may consider consulting a fellow Crown Attorney who can play the role of a contrarian or devil's advocate. This can be a very useful technique, particularly in more serious cases.

Mentoring should be encouraged regarding various aspects of Crown Attorney's role, such as the importance of the independence of Crown Attorneys vis-à-vis the police, and the appropriate limits of Crown advocacy. [11]

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[8] See the *2005 FPT Report, supra* note 3 at 39. See also the Public Prosecutions Guidebook Chapter 6, "The Decision to Prosecute."

[9] See the Public Prosecutions Guidebook Chapter 7 "Relationship Between Crown Attorneys and the Police."

[10] *2005 FPT Report*, supra note 3 at 40.

[11] Concerns about the nature of Crown advocacy were discussed at length in the Parsons case, which is one of the three cases examined in the Lamer inquiry, *supra* note 5.

3. INCOMPLETE DISCLOSURE

Incomplete disclosure by the police and/or the Crown has been a factor in some wrongful conviction cases in Canada.[12] Crown Attorneys must ensure they fully understand the breadth of their disclosure obligations under the law and that they strictly adhere to them. [13] Crown Attorney's disclosure obligations are discussed in this Guidebook in Chapter 9 "*Disclosure*". Crown Attorneys must remain mindful that the Crown's disclosure obligation continues after conviction, including after appeals have been decided or the time for appeal has elapsed. Consequently, whenever Crown Attorneys receive information suggesting that there may be a reasonable basis to conclude that a miscarriage of justice occurred, this should immediately be reported to the Director of Public Prosecutions to determine any further investigation or action that may be required.

4. EYEWITNESS MISIDENTIFICATION

Eyewitness misidentification is the single most important factor leading to wrongful convictions.[14] Eyewitness misidentification was a key factor in a number of Canadian cases of wrongful convictions.[15] In one American study, eyewitness misidentification, either mistaken or intentional, was a factor in at least 94 per cent of the exonerations for sexual assault, child sexual abuse and robbery.[16]

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[12] 2005 FPT Report, *supra* note 3 at c 11. See also c 11 in the updated version of this report which was released in September 2011. While lack of disclosure played a role in a number of historic cases of wrongful convictions in Canada, such as those of Donald Marshall Jr and of Thomas Sophnow, see more recently the Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007) and the Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008). In the Lamer Inquiry report, *supra* note 5, Lamer identified inadequate disclosure as an issue in two of the three cases examined. See also the discussion of inadequate disclosure as a factor in wrongful conviction cases in Bruce A. MacFarlane, "Convicting the Innocent," *supra* note 3 at 450. This topic is discussed and referenced further in the section on Official Misconduct.

[13] See *R v Stinchcombe*, [1991] 3 SCR 326; *R v MacNeil* (2009), SCJ No 3

[14] Bruce A. MacFarlane, "Convicting the Innocent", supra note 3 at 443 and 447. See also Angela Baxter, "Identification Evidence in Canada: Problems and a Potential Solution," (February 2007) vol 52, No 2, CLQ at 175, and Gross and Shaffer, supra note 3 at 43. See also comments from Justice Rosenberg in *R v Hanemaayer* (2008) OJ No 3087 at para 29 (CA) [*Hanemaayer*].

[15] See e.g. *Hanemaayer*, *ibid*; *R v Henry* (2010), BCCA 462. See also The Inquiry Regarding Thomas Sophonow, (Winnipeg: Manitoba Justice, 2001), *supra* note 12.

[16] Gross and Shaffer, *supra* note 3 at 52.

When the identification of the perpetrator is at issue, Crown Attorneys must assess eyewitness identification evidence carefully, and exercise caution regarding its use, despite its potential value.

The Canadian judiciary has acknowledged the inherent frailties of eyewitness identification evidence, due to the unreliability of human observation and recollection.[17] Honest and confident witnesses, who believe they recall an incident correctly, make convincing witnesses, but they can be wrong. Crown Attorneys must be wary of eyewitness evidence, particularly single-witness identification where there is no corroboration, they must also be attuned to the fact that confidence does not necessarily equal accuracy.

The most reliable eyewitness description of an offender is one given to the police shortly after the event, when the witness's memory is fresh and the description is less likely to be tainted by suggestions from any third-party influences.

Crown Attorneys must keep current regarding developments in this area and familiarize themselves with the relevant case law,[18] as well as the best practices recommended for police forces and prosecutors.

Public Prosecutions in Newfoundland and Labrador has endorsed the following best practices, which are explained in greater detail in the 2011 updated report of FPT Heads of Prosecutions Committee Working Group, *The Path to Justice, Preventing Wrongful Convictions*:[19]

- Assume the identity of the accused is always at issue unless the defence admits it on the record. Timely preparation and a critical review of all of the available

[17] 2005 *FPT Report*, c 5 in particular at p 49, as well as the 2011 update. See *R v Hay*, 2013 SCC 61, where the court discussed eyewitness evidence; the majority held at para 51 that a jury may convict on the basis of a single eyewitness's testimony, notwithstanding the frailties of eyewitness identification, if the witness's testimony could support a finding of guilt beyond a reasonable doubt. See also *R v Sutton*, [1970] 2 OR 358 (CA); *R v Nikolovski* (1996) 111 CCC (3d) 403 (SCC) at 412; *Burke v The Queen* [1996] 1 SCR 474, (1996), 105 CCC (3d) 205 at 224; *R v Hibbert* (2002) SCC 39, [2002] 2 SCR 445 and more recently, *Hanemaayer supra* note 14.

[18] For more information on this important topic, the Public Prosecutions Service of Canada has amassed a plethora of educational materials including training materials that can be provided if requested from the PPSC. In addition, the two FPT HOP reports, *supra* note 3, have chapters on this subject. Finally, the following cases are of particular relevance to prosecutors regarding the circumstances where out of court statements of identification may be admitted for the truth of their contents. See *R v Starr*, [2000] 2 SCR 144 and *R v Tat* (1997), 117 CCC (3d) 481 (ONCA).

[19] A list of best practices and practical suggestions for Crown Attorneys can be found in c 5 of the report at 75-76. See the link to this report at *supra* note 3.

identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial;

- Be wary of the weaknesses associated with certain types of single-witness identifications, e.g. where there was a poor opportunity to observe or no prior contact with the identified person. While not required by law to secure a conviction, corroboration of an eyewitness's identification can overcome deficiencies in the quality of that evidence;

- Be familiar with the identification procedures used by the police force in the case and critically assess the extent to which these procedures are in line with recognized best practices, and how any shortcomings impact the quality of the identification evidence;

- Do not condone or participate in a "show-up" line-up (presenting a single suspect in person to the witness at some point during the pre-trial investigation and asking if the witness recognizes the individual);

- Never show a witness an isolated photograph or image of an accused during an interview; and,

- Always lead evidence of the history of the identification. It is vitally important that the trier of fact be told not only of the identification but all the circumstances involved in obtaining it, i.e., the composition of the photo pack.

5. FALSE CONFESSIONS, FALSE ACCUSATIONS OR PERJURY

Crown Attorneys must remain aware of the fact that individuals sometimes confess to crimes they did not commit.

The Supreme Court of Canada has acknowledged that false confessions are a problem within the criminal justice system,[20] and that innocent people make false confessions more frequently than those unfamiliar with the phenomenon might expect.[21] False accusations and perjury have also been identified as factors in

[20] *R v Oickle*, 2000 SCC 38 at paras 34-45 [*Oickle*].

[21] See Binnie J's dissent in *R v Sinclair*, 2010 SCC 35, [2010] 2 SCR 310. Justice Binnie cites *Oickle*, *supra* note 20, on this point at para 90 of *Sinclair*. (The majority decision in *Oickle* discusses at paras 34-45 academic literature that explores the relationship between modern police interrogation techniques and false confessions.)

wrongful conviction cases. These are particularly common in homicide and child sex abuse cases, [22] although these factors tend to have received less attention in studies and academic literature to date.

In light of the emerging evidence regarding the existence of false confessions, Crown Attorneys must critically assess statements from suspects for reliability and admissibility, and should be particularly cautious when assessing the confessions of certain types of suspects, including the young and the intellectually disabled, [23] who may be particularly receptive to police suggestions and more disposed to falsely confess.[24] Crown Attorneys should also remain cognizant of the various reasons a voluntary confession can be false.[25]

Canadian commissions and inquiries into wrongful convictions have consistently recommended the audio-visual recording of police interviews of chief suspects and witnesses in serious crimes, including the interviews of youthful and other vulnerable witnesses. [26] The Canadian judiciary strongly encourages recording of statements of suspects.[27]

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[22] Gross and Shaffer, *supra* note 3 and 40 and at 53. As discussed in note 2, from the earliest studies of the past century, perjury has been identified as among the common factors cited in these cases but it has not been a focus of the academic literature in this area to date.

[23] There is a growing body of research regarding the particular vulnerability of young persons and other vulnerable groups to falsely confess. See for example Christopher Sherrin, "False Confessions and Admissions in Canadian Law," (2005) 30 QLJ at 601; Kent Roach and Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing," (2009) 42 UBCL Rev at 1; Steven Drizin and Greg Luloff, "Are Juvenile Courts a Breeding Ground for Wrongful Convictions?" (2007) 34 Northern Kentucky Law Review at 257, and the USSC in JDB v North Carolina, 131 S. Ct 2394 (2011).

[24] *Oickle, supra* note 2 at para 42. See also Sarah Burns, *The Central Park Five* (New York: Alfred A. Knopf, 2011), which examines why five black and Latino teenagers falsely confessed to the beating and rape of a female jogger in Central Park.

[25] See for example *Hanemaayer, supra* note 14.

[26] The reliability of statements from youthful witnesses was a major issue in various vases of wrongful convictions in Canada, including the cases of Donald Marshall and David Milgaard. In fact, the Milgaard inquiry report recommended that all statements taken from young persons in major cases, whether as suspects or witnesses, be audio and video recorded. See note 12.

[27] *Oickle, supra* note 20 at para 46. Some lower courts have cited lack of a recording of the interrogation as a significant factor in ruling statements of accused inadmissible on the basis that voluntariness has not been proven. See e.g. *R v Wilson* (2006), 210 CCC (3d) 23, 39 CR (6th) 345, 213 OAC 207 (ONCA); *R v Ahmed* (2002), 170 CCC (3d) 27, 7 CR (6th) 308, 166 OAC 254 and *R v Moore-McFarlane* (2001), 56 OR (3d) 737, 160 CCC(3d) 493, 47 CR (5th) 203, 152 OAC 120.

Crown Attorneys should encourage the police to record statements taken of suspects and witnesses in serious crimes, including those of youthful and other vulnerable witnesses.

6. GUILTY PLEAS

The Canadian judiciary has expressed concern about cases where defendants have plead guilty to serious criminal offences they did not commit in order to avoid the risk of a potentially lengthier sentence if convicted after trial. In such cases, although the guilty pleas were valid in the legal sense,[28] fresh evidence admitted on appeal established that the guilty pleas should be set aside as miscarriages of justice.[29] Crown Attorneys must be fully aware of this risk during plea resolution discussions. Crown Attorneys are bound by relevant guidelines regarding the limits of plea resolution discussions,[30] as well as ethical obligations outlined by the Law Society of Newfoundland and Labrador. Law society rules of professional conduct, as well as those of the Canadian Bar Association, identify the general duties of prosecutors, which include the duty to act fairly[31] and honorably.[32]

7. IN-CUSTODY INFORMERS

Crown Attorneys must be particularly cautious when assessing the evidence of jailhouse or in-custody informers, who are notoriously unreliable witnesses.[33] The

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[28] Section 606 of the *Criminal Code* states that a court may accept a guilty plea only if it is satisfied that the accused is making the plea voluntarily, that he or she understands that the plea is an admission of the essential elements of the offence, and that he or she appreciates the nature and consequences of the pela. The court is not bound by any agreement made between the accused and the prosecutor.

[29] See for example, *Hanemaayer, supra* note 14 at para 18, where Rosenberg J. identified the quandary as a "terrible dilemma" faced by the accused. "[T]he justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence." See also *R v Kumar* (2011), OJ No 618(CA), R *v Sherrett-Robinson* (2009), OJ No 5312 (CA); *R v Brant* (2011), OJ No 2062 (CA) and Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent," (2010) 56 CLQ at 116.

[30] See the Newfoundland and Labrador Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions Chapter 11 "Plea Discussions and Agreements."

[31] See for example the Law Society of Newfoundland and Labrador's Code of Conduct for specific rules and duties relating to the carrying out of prosecutions in the province as well as general rules of conduct.

[32] See also Chapter 3 of the Newfoundland and Labrador Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions, "Duties and Responsibilities of Crown Attorneys."

[33] This section of this directive should be read in conjunction with Chapter 22 of the Guidebook "Jailhouse Informants", particularly where that material concerns information provided by a

use of evidence from in-custody informers (which later turns out to be false) has been a contributing factor in wrongful convictions, both in Canada and elsewhere.[34] Even experienced police officers and prosecutors can be fooled by such witnesses.[35]

A jailhouse or in-custody informant is someone who:

- Allegedly receives one or more statements from an accused;
- While both are in custody; and,
- Where the statements relate to offences that occurred outside of the custodial institution.

The following risks have been associated with eliciting the testimony of jailhouse informants:

- Jailhouse informants are polished and convincing liars;
- All confessions of an accused will be given great weight by jurors;
- Jurors will give the same weight to confessions made to a jailhouse informant as they will to a confession made to a police officer;
- Confessions made to jailhouse informants have a cumulative effect and, thus, the evidence of three jailhouse informants will have a greater impact on a jury than the evidence of one;
- Jailhouse informants rush to testify particularly in high profile cases;
- They always appear to have evidence that could only come from one who committed the offence; and,

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jailhouse or in-custody informer, as well as out-of-custody co-operating witnesses (see Chapter 30 "Confidential Informants"). An in-custody informer, as defined by the Honourable Fred Kaufman, CM, QC, in his report on the case of Guy Paul Morin, supra note 5, vol 1, chapter III, section C at 598, is someone who allegedly receives statements from an accused while both are in custody in relation to offences that occurred outside of the custodial institution. The accused does not have to be in custody for, or charged with, the offences to which the statements relate. This definition does not include informers who allegedly have direct knowledge of the offence independent of the statements of the accused.

[34] 2005 *FPT Report* at 75, and its 2011 update, *supra* note 3. See also the inquires concerning Sophonow, *supra* note 12 and Morin, *supra* note 5 and more recently the Lamer Inquiry, supra note 5 and the Driskell Inquiry, *supra* note 12.

[35] See the Inquiry Regarding Thomas Sophonow, *supra* note 12.

- Their mendacity and ability to convince those who hear them of their veracity make them a threat to the principle of a fair trial and, thus, to the administration of justice.

As a general rule, jailhouse informants should be prohibited from testifying. In rare cases where jailhouse informant testimony is put forward, a jury should still be instructed in the clearest of terms as to the dangers of accepting such evidence.

To tender evidence of a jailhouse informant, a Crown Attorney should conduct an assessment to determine whether such evidence is reliable. The following is a list of reliability indicia:

(a) the motives of the in-custody informant, including;

(i) what they claim motivated cooperation;

(ii) what others believe motivated cooperation and why they believe this;

(iii) any tactical advantages that could be derived from cooperation;

(iv) any consideration or remuneration expected;

(v) any benefits that have been requested, offered, or received in the past or at present for information or testimony;

(vi) any safety measures that have been requested, offered, or received in connection with this testimony; and,

(vii) any pressure from authorities to follow through in court with the evidence;

(b) how the in-custody informant obtained the information, including:

(i) when, where, and how the statement was made;

(ii) how much detail the statement contains;

(iii) whether a record was made of the statement; and,

(iv) whether correctional records establish that such events could have occurred;

(c) how the in-custody informant disclosed the information to the authorities, including:

(i) the circumstances under which the information was given;

(ii) the authorities to whom the information was given;

(iii) whether the authorities made any records of the information given;

(iv) whether the authorities gave a public mischief warning before taking the statement;

(v) whether the authorities used any leading questions during the interview;

(vi) whether any contradictory information was given; and,

(vii) any pressure from authorities to follow through in court with the evidence;

(d) whether the in-custody informant had any opportunity to concoct or collude evidence, including:

(i) their access to sources of information such as media reports, the accused person's, particulars, witnesses to the offence, and any information investigators may have released; and,

(ii) the timing of the disclosure to the authorities, relative to news reports, and the disclosure of particulars;

(e) independent information that confirms the in-custody informant's evidence, including:

(i) whether they have undergone a polygraph examination; and

(ii) whether they have an alibi for this offence;

(f) Independent information that corroborates the in-custody informant's evidence, including:

(i) how his or her evidence relates to other available evidence whether admissible or not;

(ii) whether the information led to the discovery of evidence known only to the perpetrator; and,

(iii) whether the alleged confession matches information held back until after the informant provided it;

(g) the character of the in-custody informant, including:

(i) anything known concerning their honesty, such as any convictions for false pretenses, fraud, or perjury;

(ii) generally, the length of their criminal record, any history of disreputable conduct, any character evidence, the reasons for their current incarceration, and any other background information; and,

(iii) the results of any medical and psychiatric reports available.

(h) any previous disclosures by the in-custody informant, including:

(i) whether he or she has previously claimed to have information useful to the authorities;

(ii) any requests for, or offers of, consideration for information given in the past;

(iii) how reliable any past information was; and,

(iv) the court's assessment of any evidence and testimony previously given; and,

(i) the in-custody informant's safety, including:

(i) a determination of any safety measures that will be required if they testify; and,

(ii) whether such measures are available.

Crown Attorneys must assess the evidence of in-custody informers with the utmost care and be satisfied that the evidence of the informer is credible before calling him or her as a witness. If a Crown Attorney is satisfied that the witness is credible and should be called as a witness for the prosecution, they should prepare a detailed memo for submission to the Senior Crown Attorney. It should include a consideration of all factors noted in this Chapter pertaining to the assessment of jailhouse informants as well as the Crown Attorney's recommendation. If the Senior Crown believes it is an appropriate case for the use of the in-custody informer, the Senior Crown should seek the advice of the Director of Public Prosecutions for a final decision.[36]

[36] See the Newfoundland and Labrador Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions, Chapter 30 Confidential Informants" for a full detailing of policies concerning the use of jailhouse informers, including the factors Crown Attorneys should consider when assessing their credibility and the nature of the relationship between the informer and the police.

8. FORENSIC EVIDENCE AND EXPERT TESTIMONY

Faulty forensic procedures, unreliable science and/or flawed expert opinion testimony have been factors in a number of wrongful conviction cases in Canada.[37] Crown Attorneys, who deal with experts from a diverse range of disciplines, must be cognizant of the risks associated with the use of forensic evidence and expert testimony. Depending on their practice, Crown Attorneys may develop a sound understanding of the domain of various experts with whom they interact routinely. However, the ability to remain current on significant developments in forensic science is a challenge, particularly where novel areas of expertise and science are to be relied upon in specific prosecutions.

Crown Attorneys should not refrain from reliance on a novel scientific theory or technique, provided there is a sufficient foundation to establish the reliability and necessity of these opinions and that the probative value exceeds the potential prejudicial impact. Crown Attorneys must exercise diligence in obtaining and adducing sufficient evidence to meet the factors in support of reliability (e.g., can the theory or technique be empirically validated? Is there a professional association or society offering continuing education to its recognized members? Is there a meaningful certification program? Can the findings be reliably recreated and tested by qualified examiners?) Crown Attorneys must also be satisfied that the evidence will be used for a proper purpose. [38]

Crown Attorneys should also be open to case conferences between Crown and defence experts to try to narrow and/or potentially resolve the scientific issues in a given case.

Ultimately, the key issues Crown Attorneys must consider are the following:

1. The validity of the science;
2. The qualifications of the expert;
3. The quality and validity of the testing procedures;
4. The objectivity and independence of the opinion;

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[37] The Morin and Sophonow inquiries are early Canadian examples of this but see more recently the Goudge Inquiry, *supra* note 5 regarding the role of forensic science and forensic and forensic scientists in the criminal justice system and problems in this area generally. See also *R v Mullins-Johnson*, (2007) OJ No 3978 (CA), where the Court held that the wrongful conviction and 12-year imprisonment of *Mullins-Johnson* for the murder of his niece was the result of a rush to judgement based on flawed scientific opinion.

[38] *R v Mohan*, [1994] 2 SCR 9 continues to be relied upon for its four-part test regarding the admission of proposed expert evidence. See also *R v J-LJ*, [2000] 2 SCR 600, *R v DD*, 2000 SCC 43, [2000] 2 SCR 275 and more recently, *R v Trochym*, [2007] 1 SCR 239 and *Reference re:Truscott*, (2007) 225 CCC (3d) 321 (ONCA).

5. Whether a proper evidentiary foundation can be laid; and,
6. The relevance of the evidence to an issue in dispute.[39]

Crown Attorneys are encouraged to seek out educational opportunities and resources that will enable them to increase their understanding and knowledge of various forensic disciplines, and to keep abreast of the relevant jurisprudence as well as new procedures and developments in the field of forensic science.[40] Crown Attorneys should not hesitate to consult colleagues and superiors, and to seek the support and resources they require in prosecutions involving expert evidence with which they have little professional experience, or in very serious cases where expert evidence is a fundamental component of the case.

Provided Crown Attorneys exercise due care and diligence in presenting the expert opinion by establishing the sufficiency of the factual underpinning supporting it and by keeping the fairness of the trial process in mind, the possibility of a miscarriage of justice arising from the use of the evidence can be reduced.[41]

8.1. DNA EVIDENCE

The advent of DNA testing has been a critical development in the field of forensic science generally, both to convict the guilty and exonerate the innocent. The legislation in the *Criminal Code* has been expanded and now makes it possible to obtain DNA orders following conviction in relation to more offences.[42]

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[39] Section 7 of this directive is largely an excerpt from the recommendations and guidelines in c 9 of the 2005 *FPT Report, supra* note 3.

[40] In a 2013 report on Forensic Science in Canada under the auspices of the Centre for Forensic Science & Medicine at the University of Toronto, forensic experts from across Canada discuss the state of forensic science in Canada. Among their recommendations is that multidisciplinary cross-training should be encouraged among scientists, police, lawyers and judges, and that judges should receive ongoing training in this field.

[41] Detailed guidelines and best practices for prosecutors can be found in c 9 of the *2005 FPT Report, supra* note 3, and in its 2011 update. The Goudge Inquiry, *supra* note 5, vol 3, c 17 also provides advice to Crown Attorneys.

[42] As of 2008, the list of designated offences that qualify for inclusion in the National DNA Data Bank Convicted Offenders Index (COI) has been significantly expanded. More than 150 offences were added to the list. The list captures terrorism offences, criminal organization offences, and drug offences under ss.5,6,7 (or an attempt or conspiracy to commit any of the above) under the *Controlled Drugs and Substances Act*, SC 1996, c 19 that are tried by indictment and carry a maximum sentence of five years or more.

Crown Attorneys should be familiar with the legislation in the *Criminal Code*,[43] and relevant case law, and ensure that the DNA data bank provisions are being used to their full potential and that DNA orders are being sought in all appropriate cases.[44]

Crown Attorneys should also make every effort to work co-operatively with the police and other criminal justice partners to ensure that DNA evidence is available for post-conviction testing in appropriate cases.

9. CONDUCT OF POLICE AND CROWN ATTORNEYS

Official misconduct, which encompasses a broad range of conduct by various criminal justice participants, ranging from abusive investigative procedures that can produce false evidence, to committing or procuring perjury, to concealing exculpatory evidence, has also been cited among factors that can contribute to a wrongful conviction.[45] Regarding Crown conduct, the research suggests the most common transgression is the failure to disclose exculpatory evidence, either because the police did not provide prosecutors with the information, or because prosecutors were unaware that they had such information in the file or intentionally withheld it.[46]

The conduct of defence counsel, which can include conduct that may be perceived in retrospect, to be ineffective, erroneous or missteps, has also been identified as relevant in some wrongful conviction cases in the US and Canada.[47] In *R v GDB,*[48] the Supreme Court of Canada held that the right to effective assistance of counsel is a principle of fundamental justice; however this right will be seen to be violated in law only if the conduct is unreasonable and incompetent and results in a miscarriage

[43] Section 487.051

[44] See c 8 in the 2005 *FPT Report* and in its 2011 update, *supra* note 3.

[45] See Gross and Shaffer study, *supra* note 3 at 65-67 and Brandon Garrett, *Convicting the Innocent* (Cambridge, Mass: Harvard University Press, 2011) at 167-171 and at 205-209.

[46] See Gould and Leo, *supra* note 3 at 854-855. See also MacFarlane, *supra* note 3 at 450-452, and Kathleen M.Ridolfi & Maurice Possley, "Preventable Error: A Report on Prosecutorial Misconduct in California, 1997-2009," (October 2010), Northern California Innocence Project, Santa Clara University School of Law. This study is characterized as the most in-depth statewide review of prosecutorial misconduct in the United States. See also the discussion in the Lamer Commission Inquiry, *supra* note 5, concerning the role of the Crown in the case of Gregory Parsons at 134-156, and Robert J. Frater, *Prosecutorial Misconduct*, *supra* note 7.

[47] This issue is discussed in the Lamer Inquiry, supra note 5. See also MacFarlane, "Convicting the Innocent," supra note 3 at 468-470. The US Innocence Project identifies "bad lawyering" as one of the seven most common causes of wrongful convictions. See also discussion of this issue in Garrett, *supra* note 45 at 205-207 and Gross and Shaffer, *supra* note 3 at 41-43.

[48] 2000 SCC 22. In the US, see *Strickland v Washington*, 466 US 668 (1984), which is the seminal USSC case on the subject but see more recently *Missouri v Frye*, 132 S Ct 1399 (2012).

of justice. If a Crown Attorney develops concerns in a particular case that an accused is not being effectively represented, the Crown Attorney should consult his or her Senior Crown to discuss the appropriate course of action.

10. CONCLUSION

Crown Attorneys, and other key criminal justice system participants should become familiar with the factors that have been widely recognized as contributing to wrongful conviction cases. They must keep abreast of relevant jurisprudence and best practices that have been associated with prevention of these types of convictions. In addition, training in relation to the prevention of wrongful convictions should be provided to provincial prosecutors.[49] Indeed, the education of criminal justice system participants has been identified as a key aspect of the prevention of wrongful convictions.[50]

When a file raises concerns regarding the possibility of wrongful conviction, Crown Attorneys should consult experts, colleagues and superiors.[51]

[49] For example, training on this topic is routinely provided at the Department of Justice and at annual Crown School sessions.

[50] See c 10 in the *2005 FPT Report* as well as the 2011 updated c 10, *supra* note 3. A number of the Canadian inquiries, including the recent 2006 Lamer Inquiry and the 2008 Goudge Inquiry, stressed the importance of educating key justice system participants such as police, Crowns and forensic scientists, regarding the many subjects implicated by the wrongful conviction cases in Canada.

[51] A summary of all of the recommendations from the seven Canadian inquiries that relate to wrongful convictions can be found in: Gary Botting, Wrongful Conviction in Canadian Law, (Markham, Ont: Lexis Nexis Canada Inc., 2010).

Legal Opinions and Advice

Introduction

Crown Attorneys are often are asked to provide legal advice to departments and agencies within the Government of Newfoundland and Labrador and to law enforcement agencies involved in enforcing the criminal law; most often the Royal Newfoundland Constabulary and the Royal Canadian Mounted Police.

Crown Attorneys are not employed by the departments and agencies to which they provide legal advice. Crown Attorneys are never lawyers for the police. At all times, Crown Attorneys remain representatives and agents of the Attorney General.[1] Crown Attorneys should be aware that policies of the Attorney General may conflict with those of the departments and agencies. Conflicts could, for example, arise between a department's enforcement policy and the Attorney General's prosecution policy. Crown Attorneys shall at all times comply with the policies of the Attorney General as set out in this Guide Book. If policies conflict, Crown Attorneys shall advise the department or agency of the conflict and resolve the matter with the Senior Crown Attorney or if need be, the Director of Public Prosecutions.[2]

Crown Attorneys should also be careful to avoid a conflict of interest or the appearance of a conflict of interest.[3] A conflict may arise where there is a recommendation for prosecution by one government department against another government department. If this occurs, Crown Attorneys should advise the Senior Crown Attorney who will consider whether it would be more appropriate to retain counsel from the private sector, as an agent of the Attorney General, to review the evidence, provide advice on the charges, and conduct any resulting prosecution.

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[1] See also Chapter 2 of this Guide Book regarding "The Independence of the Attorney General in Criminal Matters". Agencies include law enforcement agencies such as the RCMP and RNC.

[2] See also Chapter 5 of this Guide Book regarding the "Relationship between Crown Attorneys and the Police".

[3] Also of relevance in considering the issue of accepting a benefit are subsection 121(1)(c) of the *Criminal Code* (dealing with accepting benefits from persons having dealings with the government), section 122 of the Code (dealing with breach of trust by a public officer). See also the *CBA Code of Professional Conduct* as adopted by the Law Society of Newfoundland and Labrador.

Management or Policy Decisions

Crown Attorneys are not responsible for making management or policy decisions for government departments and agencies. A Crown Attorney's duty is to give legal advice on criminal law matters. This may include advising investigative agencies about the legal issues arising from an investigation, practice, or policy. Crown Attorneys have a further responsibility to discuss the public interest implications with a department or agency contemplating a prosecution and to apply the Attorney General's policy, as set out in this Guide Book, regarding those interests.[4]

When advising investigative agencies, Crown Attorneys must always recognize the distinction between the role of the police and the role of the prosecutor in the administration of justice.[5] Given the increasing complexity of law enforcement, Crown Attorneys may be asked to become involved at the investigative stage. For example, in wiretap and search warrant cases, Crown Attorneys may be asked to advise and assist the agency that is preparing preliminary documents. Effective management of complex litigation requires pre-charge co-operation between the police and Crown Attorneys. However, the existence of such a relationship does not diminish the desirability of an independent, impartial assessment of both the evidence and public interest considerations when the decision whether or not to prosecute, is made.[6]

Solicitor-Client Privilege

Legal advice given by Crown Attorneys to government departments and investigative agencies is protected by solicitor-client privilege.[7] Crown Attorneys

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[4] See also Chapter 6 of this Guide Book regarding "The Decision to Prosecute for a list of public interest considerations and how they relate to the decision to prosecute.

[5] See Chapter 5 of this Guide Book regarding the "Relationship between Crown Attorneys and the Police".

[6] Indeed, the Supreme Court has stressed the importance of Crown Counsel's duty to maintain objectivity: see *R*. v *Regan*, 2002 SCC 12, [2002] 1 S.C.R. 227.

[7] See: *R.* v. *Shirose*, [1999] 1 S.C.R. 565 at 601; *R*. v. *Ovidio Jesus Herrera*, (21 November 1990) (Ont. Ct. G.D.) [unreported]; *Alfred Crompton Amusement Machines Ltd*. v *Commissioners of Customs and Excise, (No. 2)*, [1972] 2 All E.R. 353 at 373-85 (C.A.); *Waterford* v. *Commonwealth of Australia* (1987), 71 A.L.R. 673 (H.C.); *Idziak* v. *Minister of Justice*, [1992] 3 S.C.R. 631; *Canada (Attorney General*) v. *Sander* (1994), 90 C.C.C. (3d) 41 (B.C.C.A.). There may be situations where the privilege must yield: see *R.* v. *Gray* (1993), 79 C.C.C. (3d) 332 (B.C.C.A.); or is effectively waived, as in *R.* v. *Shirose* at 611-615. In the *R*. v. *Trang* series of decisions, 2002 ABQB 390, and again in 2002 ABQB 744, Binder J. held that the standard of proof required

may not release the legal opinion, refer to it, or describe it in any fashion to defence counsel[8] or the public unless the privilege has been waived. However, Crown Attorneys must be conscious of the fact that not everything they do will be covered by privilege – whether or not privilege exists depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought.[9]

When advice is requested by law enforcement agencies outside of the Government of Newfoundland and Labrador, privilege rests with the agency. When opinions are given to departments and agencies within the Government, the privilege rests with the Crown in right of the Province of Newfoundland and Labrador. In practical terms, however, decisions concerning privilege, such as waiver, are usually made by the government department or agency that received the advice. In some instances, particularly those in which there is a strong public interest,[10] decisions of this nature should be made in consultation with the Director of Public Prosecutions and the Department of Justice, which may have counsel from the Civil Division assigned to advise that department or agency.

Legal Opinions – Guidelines

Not every information request from a policing agency or government department requires a formal, written legal opinion. In some instances, the answer to a query may be easily ascertainable. For instance, if a police officer wanted to know the statutory limitation period for summary conviction offences, or whether they could charge someone for an offence allegedly committed wholly outside the province, a Crown Attorney may provide an answer swiftly and informally. Generally, legal opinions are required whenever a Crown Attorney is tasked to interpret the law or apply the law to specific evidence.

Crown Attorneys assigned to provide a legal opinion must adopt these practices:

- Crown Attorneys must insist that the request for an opinion is in writing, regardless whether the requesting party is the police or a government department/agency.

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to establish Crown solicitor-client privilege is the balance of probabilities, i.e. it is no different than for a private lawyer and client.

[8] See *R. v. Stinchcombe* (1991), 68 C.C.C.(3d) 1 at 9-10 (S.C.C.). For guidance on this issue when involved in a criminal prosecution, also Chapter 10 of this Guide Book regarding "Disclosure".

[9] *R. v. Shirose*, [1999] 1 S.C.R. 565.

[10] These are sometimes referred to as “high profile” cases.

- A Crown Attorney must respond with a written legal opinion.

- Written legal opinions should include a statement advising that the opinion is subject to solicitor-client privilege. It is recommended that the legal opinion commence with the following, or similar, statement:

  > *"This legal opinion is solicitor-client privileged. The material shall not be distributed, duplicated, or otherwise shared, in hard copy or electronically, in any manner with anyone, except other counsel within the Office of the Director of Public Prosecutions, Department of Justice & Public Safety, and the intended recipient. Should you wish to do so, we request that you consult us in advance."*

- Sometimes an investigator will ask a Crown Attorney whether there are sufficient reasonable and probable grounds to file a charge. A Crown Attorney may provide guidance in terms of the requisite objective grounds required. Otherwise, the investigator must be advised that in order to swear an information, they need to subjectively believe that the suspect has committed an offence.

- Occasionally, the police or a government department, upon completion of an investigation, will refrain from filing charges and instead pre-emptively ask a Crown Attorney if the matter merits a prosecution (in terms of a reasonable likelihood of conviction and the public interest).

  In these circumstances, the Crown Attorney must ensure that the investigating officer/s has concluded that they have the requisite reasonable and probable grounds to swear any proposed charges. There is no point in providing an opinion concerning the merits of pursuing a prosecution if no one is in a position to swear an information.

  To be clear - this is not to say that Crown Attorneys will never provide an opinion unless the investigator has grounds to file a charge. Sometimes the investigator may need guidance on a specific legal issue in order to determine if they have grounds.

- A Crown Attorney may be asked to advise on appropriate charges or, upon reviewing a file, a Crown Attorney may determine that the prosecution is best

served if different charges are filed. A Crown Attorney may recommend specific charges, but cannot direct an investigator to file a charge. In these circumstances, the Crown Attorney must clarify that the investigator(s) themselves need to be satisfied that they have the requisite subjective grounds before filing a charge.

- To ensure due respect for the separation of duties between policing agencies and Public Prosecutions, Crown Attorneys should include the following statement in all legal opinions:

  "*This is but a legal opinion and not meant to direct the investigation of this matter*"

Judicial Interim Release (Bail)

The Presumption of Innocence

- The right not to be denied reasonable bail without just cause is enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms*.

- A fundamental presumption in Canadian criminal law is that a person arrested and charged with an offence will not be held in custody pending trial, based on the presumption of innocence.

- The *Criminal Code* and jurisprudence from the Supreme Court of Canada emphasize that liberty while awaiting trial is a basic principle underlying the judicial interim release process.

- Every accused individual is presumed innocent and the Crown Attorney must be aware of the impact even a short period of detention in custody can have on an accused person. Even a brief period of detention in custody affects the mental, social and physical life of the accused and their family. An accused must not feel pressured to plead guilty in order to secure their release.

- In *R v Zora*,[1] the Supreme Court of Canada unanimously held that:

    - the default form of bail for most crimes is release on an undertaking to attend trial, without any other conditions;

    - bail conditions can be imposed, but only if they are clearly articulated, minimal in number, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the accused's circumstance and risks regarding the statutory grounds for detention in s. 515(10);

    - only conditions specifically tailored to the individual circumstances of the accused can meet the required criteria;

[1] 2020 SCC 14.

- in practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, indicates insufficient individualization of bail conditions; and,

- onerous conditions disproportionately affect vulnerable and marginalized populations, including those living in poverty or with addictions or mental illnesses, and Indigenous people.

Prosecutorial Discretion

- The appropriate exercise of prosecutorial discretion is fundamental to the proper functioning of the bail process.

- Crown Attorneys must act with objectivity, independence and fairness in each case to ensure early, timely and principled decision making based on the circumstances of the accused and the offence and an appropriate use of legal principles without outside pressures or considerations.

- The Attorney General will support decisions made by Crown Attorneys respecting the release or detention of accused persons assuming such decisions are reached in the proper exercise of their discretion.

Expedited Process

- The accused should be released or a bail hearing should be held at the earliest opportunity having regard to the requirements of the *Criminal Code*.

- Crown Attorneys should ensure that the bail hearing proceeds expeditiously and as effectively as possible.

- Wherever possible, the hearing should be conducted and completed on the first appearance of the accused in bail court.

Principle of Restraint

- The Crown Attorney should consider the least restrictive form of release and should not request a release with a surety (the most onerous form) unless each lesser form of release has been considered and rejected as inappropriate.

- As noted by the Supreme Court of Canada, the default position is the unconditional release of the accused.

- Any conditions that are requested should be necessary and required in the interests of the accused and the safety and security of the victim or public and related to the commission of the offence.

- Where the Crown Attorney believes that the release of the accused would jeopardize the safety or security of the victim or the public and such risk cannot be appropriately mitigated by some form of community based release with conditions, the Crown Attorney must seek the accused's detention.

Bail Hearings – an Overview

- A bail hearing involves balancing the liberty interests of the accused and the *Charter* right to reasonable bail against societal interests in public safety and confidence in the administration of justice.

- Where a bail hearing is held, the court determines whether the accused should be released with or without conditions and with or without sureties, or held in custody prior to trial.

- The Crown Attorney should consider whether the hearing can be conducted by a factual summary and submissions without the necessity of calling evidence or by conducting a focused hearing dealing with only issues that are in dispute.

- If the Crown Attorney seeks an adjournment, it should be for as short a time as necessary. The reasons for the request should be stated in open court.

A Judge may decide to detain an accused pending resolution of outstanding charges based on any of these three grounds as outlined in s. 515(10) of the *Code*:

1. To ensure attendance in court;
2. For the protection or safety of the public; or,
3. To maintain the confidence in the administration of justice.

Each of the three grounds is separate and independent from the others. At a bail hearing, the court decides which form of release to order and it is the court that determines and imposes conditions that are specific to the circumstances of the accused and the alleged offence and necessary to address the three grounds.

Factors to Consider

When assessing judicial interim release, a Crown Attorney must consider the following factors:

- Whether there is a reasonable likelihood of conviction (RLC). If the prosecutor does not have RLC then the charges should be withdrawn and the accused released.

- Whether it is in the public interest to proceed with the prosecution of the charges. If it is not in the public interest to proceed then the charges should be withdrawn and the accused released.

- Whether a custodial sentence would be appropriate if the accused is subsequently found guilty. Detention is rare if a custodial sentence is unlikely.

- The circumstances of the offence, including:

    - whether the offence involved violence or threats of violence;
    - whether serious bodily harm was reasonably foreseeable;
    - whether the offence harmed the victim (physical, psychological or financial) and/or community;
    - whether the incident violated the sexual integrity of a person;
    - whether the victim has provided input through police or a victim services agency;

- whether a weapon was used or threatened to be used;
- whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable; and,
- the interests of the community, including the needs of the victim.

- The circumstances of the accused, including:

  - the age of the accused;
  - the presence or absence of a criminal record, including any convictions for violence, related offences, and breach of court orders;
  - a concern that the accused will interfere with the administration of justice (e.g. coercion of witnesses, destruction of evidence);
  - the presence or absence of outstanding charges in any jurisdiction, together with their nature and circumstances;
  - the need for and the availability of supervision of the accused while on bail;
  - any ties to the community; and,
  - the availability of community supports.

- Any charges related to offences against the administration of justice (such as breaches of court orders), including such factors as:

  - the extent of the non-compliance;
  - the seriousness of the alleged breach;
  - any apparent reasons for the breach;
  - gravity of the administration of justice offence; and,
  - the underlying facts in proportion to the consequences of proceeding with the charge.

Judicial Interim Release and Intimate Partner Violence

- Crown Attorneys should be sensitive to the needs of the victim and to the dynamics that exist in families where a partner is allegedly abused.

- Crown Attorneys must be conscious of the potential increased risk of harm in these cases and must seek a detention order where they consider it necessary for the safety and security of the victim and/or the public.

- In determining whether to consent to or oppose release, the Crown Attorney must consider the possibility of ongoing violence and its potential impact on the physical, emotional and psychological well-being of any children, including any child witnesses.

- The Crown Attorney must also consider any risk assessment information before taking a position on judicial interim release.

- Risk factors can include but are not limited to history of violence, a pending or actual separation or substance abuse issues.

- The Crown Attorney should have regard to the existence of any family court orders.

Indigenous Offenders

- Crown Attorneys should consider the background and unique circumstances of an Indigenous accused and their connections to the Indigenous community.

- Crown Attorneys should be mindful of the ongoing overrepresentation of Indigenous people in the criminal justice system across Canada.

- Crown Attorneys should also consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings and forms of release. Indigenous accused may suffer a significant disadvantage if they do not have established connections or supports in the community in which the bail hearing is taking place. In these circumstances,

seeking the detention of an Indigenous accused should remain an exceptional measure unless the release of the accused would jeopardize the safety and security of the victim or the public.

- Although Crown Attorneys should keep in mind those principles emphasized by the Supreme Court in *Gladue*,[2] a *Gladue* report should not be requested for a bail hearing.

- Crown Attorneys must ensure that any conditions recommended on a bail release are necessary and appropriate to the circumstances of the Indigenous accused and relate to the alleged offence.

- Crown Attorneys should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply.

Prior Process

- Where an accused is arrested for breaching a condition of a release order and/or committing a new offence, the decision to cancel any previous release order should not be automatic, but subject to consideration of the same factors set out above.

Forms of Release & Ladder Principle

Overview

- The *Criminal Code* permits a police officer to release an accused upon arrest.
- Where the police officer does not release the accused, the *Criminal Code* directs a court to release an accused on a release order without conditions unless the Crown Attorney shows why a more onerous form of release or detention is warranted.
- There are certain offences for which the *Criminal Code* directs that the accused show why their detention in custody is not required pending trial. These are called "reverse onus" offences.

[2] *R. v. Gladue,* [1999] 1 S.C.R. 688.

Forms of Release

1. A release order that does not include any financial obligation.
2. A release order that includes a promise by the accused to pay an amount of money if they fail to comply with a condition.
3. A release order that includes an obligation to have sureties that may or may not also include a promise by the accused to pay an amount of money if they fail to comply with a condition.
4. A release order that includes a deposit of money with the court by the accused as a condition of release.
5. Where the accused does not live within 200 kilometers of the place of arrest, a release order that includes an obligation to have sureties and that also includes a deposit of money with the court.

Ladder Principle

- This principle requires that a justice not order a more onerous form of release unless the Crown Attorney shows why a less onerous form of release is not appropriate.
- The "*ladder approach*" moves from the least restrictive to the most onerous form of release and permits the court to release via the methods discussed above, with or without conditions.

Sureties

- A surety is a person who assumes responsibility for the accused's compliance with their conditions of release by promising to pay a sum of money if the accused breaches any of those conditions.
- A release order with a surety is one of the most onerous forms of release and should not be automatic.
- Crown Attorneys should not request a surety unless all of the least onerous forms of release have been considered and rejected as inappropriate.
- If a Crown Attorney has determined that a surety release should be requested, the surety approval process should be efficient, minimally intrusive and consistent with the principles of the *Criminal Code*.

- Although the surety approval process is ultimately up to the court, as a best practice Crown Attorneys should generally use an affidavit of the surety (Surety Declaration) and use an out-of-court approval process where available.

Monetary Component

- A surety or an accused may promise an amount of money, with or without deposit, which may be forfeited if the accused does not comply with the conditions of release, including not attending court.
- A Crown Attorney should not request a deposit of cash for the release of an accused if their surety has assets that can be promised.
- A release order with a promise of money is functionally equivalent to depositing money and has the same persuasive effect.
- Requiring a deposit of money should be relied on only in exceptional circumstances where a release order with a surety is unavailable.
- The amount of money promised must be within the means of the accused and their surety.
- Crown Attorneys should not request an amount to be promised or deposited that is unattainable, as this has the same effect as a detention order.

Community Supervision

- In some circumstances, concerns about public safety or attendance in court could be addressed by supervision in the community rather than detention of an accused.
- Supervision should only be considered where it is necessary and appropriate and where lesser forms of release would be inadequate to meet those concerns.
- Supervision may be available through a Bail Verification and Supervision Program or by a surety. Crown Attorneys will need to seek information about the availability of the program in their region.
- The Bail Verification and Supervision Program may require the accused to report to the police or the Program; it assists the accused in abiding by any conditions set by the court. The Program may also help in accessing other community services and/or support for the accused person. The program should not be expected to ensure absolute compliance with the release.

Conditions of Release Orders

Overview

- Crown Attorneys must ensure that any conditions recommended for judicial interim release are necessary and appropriate to the circumstances of the accused and the alleged offence.
- Crown Attorneys should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply.

Recommending Conditions

- The Court ultimately decides the conditions upon which an accused should be released. Any conditions recommended by the Crown Attorney should:

    - be rationally connected to one of the three grounds for detention in custody;
    - relate to the specific circumstances of the accused and the offence;
    - be realistic (the accused will be able to comply with the conditions); and,
    - be minimally intrusive and proportionate to any risk.

- There must always be a connection between bail conditions proposed and the circumstances of the alleged offence and the accused. For example, a "*no alcohol*" or "*no drugs*" condition is not appropriate where it is not connected to the offence.

- Where a connection exists, consideration must be given to crafting the least restrictive bail conditions that still meet public safety concerns. For example, consider imposing "*no drinking outside your residence*" as opposed to a complete ban on alcohol consumption or possession.

- Conditions of release shall not be used for therapeutic or rehabilitative purposes or to punish an accused person. These goals are more appropriately dealt with through the sentencing process following conviction.

- Conditions imposing a curfew or a condition "not to associate with unnamed persons having a criminal record" or a condition prohibiting attendance at a

place may have the unintended consequence of preventing an accused from seeing family, accessing support services or access to the area where they ordinarily reside. The Crown Attorney should not request these conditions as a matter of routine.

Communicating with Victims

- The *Criminal Code* directs that the court shall include in the record of the proceedings a statement that the safety and security of every victim of the offence was considered.

- The Crown Attorney must communicate any concerns about the safety or security of any victims to the court.

- The Crown Attorney must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused.

- In all cases where there is reason to have concerns for a victim's safety, the Crown Attorney must ensure efforts are made for bail notification to occur as soon as possible.

- On request, the victim must be provided with a copy of the court order.

- Similar notification should be made to victims when there is a bail variation or bail review.

Bail Variation

- The terms of a bail order may be varied on the consent of the accused and Crown Attorney.

- In determining the Crown's position on a request to vary any condition in a bail order, a Crown Attorney should consider whether there has been a change in circumstances that warrants a variation to the condition subject to consideration of the same factors set out above.

Bail Reviews

- The decision of a justice to release or detain an accused may be reviewed in the Supreme Court Trial Division if there is new evidence showing a significant change in circumstances, there has been an error in law or the decision is clearly inappropriate.

- If the initial decision on judicial interim release was by a Supreme Court Judge (because, for instance, the charge is murder), an appeal of that decision may be filed with the Court of Appeal. The accused or the Crown may also seek to review the initial judicial interim release before another Supreme Court Justice in some circumstances.

Detention Reviews under s. 525 of the Criminal Code

- The purpose of the s. 525 hearing is to prevent accused persons from languishing in pre-trial custody and to ensure a prompt trial. Parliament sought to achieve this purpose by subjecting lengthy pre-trial detentions to judicial oversight at set points in time, by affording an opportunity to have a judge consider whether the continued detention of an accused person is justified, and by conferring on the judge a discretion to expedite the trial of an individual in pre-trial detention.[3]

- Pursuant to s. 525, the director or head of a correctional facility must apply for a detention review at the Supreme Court Trial Division when an individual has not been charged with an offence under s.469 offence and has been in pre-trial custody for 90 days awaiting trial or since their judicial release hearing.
- Upon receiving the application from the jailer, the judge must schedule the hearing for the first available date. On that scheduled date, the hearing may be adjourned, but this should happen only occasionally, and in limited circumstances.

[3] *R. v. Myers*, 2019 SCC 18

- When the Crown Attorney receives notice of the application, the first step is to contact the detainee's counsel (if they are represented) to determine if he will seek release at the s. 525 review. The accused may consent to continued detention, though a Judge may be cautious about accepting such consent if the accused is unrepresented.

- If the detainee does not consent to continued detention, a bail hearing will proceed before the Supreme Court Judge. The Crown Attorney is required to present evidence and argument in a similar to a bail hearing.

- In terms of whether to give directions under s. 525(9) or 526 to expedite the trial, the reviewing judge must consider all the circumstances of the case and any relevant submissions by the parties. Relevant factors could include the relative complexity of the case, the involvement of co-accused individuals, the completeness of disclosure, problems related to evidence, the presence of any exceptional circumstances and the typical delay in getting comparable matters to trial in the jurisdiction in question.

Disclosure

Introduction

There is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.

R. v. Stinchcombe[1]

There is a duty on the Crown to make full and timely disclosure to the defence of all relevant information known to the investigator and the Crown Attorney. This obligation applies to both inculpatory and exculpatory information.

This obligation is not absolute and is subject to the Crown Attorney's discretion with respect to both the timing of disclosure and withholding information for valid purposes, such as the protection of police informants.

The obligation is also subject to the limitation that the accused has no right to information that would distort the truth-seeking process.[2] The following policy describes the Crown Attorney's responsibilities with respect to disclosure.

Statement of Policy

Crown Attorneys and counsel appearing for the Attorney General of Newfoundland and Labrador in a criminal matter shall, on request, disclose to the accused, or counsel for the accused, the evidence on which the Crown intends to rely at trial as well as any information which may assist the accused, whether intended to be adduced or not.[3]

The purpose of disclosure is two-fold:

a. to ensure that the accused knows the case to be met, and is able to make full answer and defence; and,

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[1] (1991), 68 C.C.C. (3d) 1 (S.C.C.).
[2] R. v. Mills (1999), 139 C.C.C.(3d) 321 (S.C.C.)
[3] Refer to **Directive #25** in the Chapter 12 of this Guide Book: "Conduct of Criminal Litigation".

b. to encourage the resolution of facts in issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings.

The information to be disclosed need not qualify as evidence – it does not need to pass all of tests concerning admissibility.[4] Rather, it is sufficient if the information is relevant, reliable and not subject to some form of privilege. Second-hand information that is unconfirmed may or may not be disclosed, depending on the Crown Attorney's assessment of the issues in the case.

In all cases, whether a request has been received or not, Crown Attorneys shall disclose any information tending to show that the accused may not have committed the offence charged. With respect to this narrow category of disclosure, the obligation is mandatory.

Information "*which may assist the accused*" is not always easily recognizable. It is difficult to provide clear guidelines respecting disclosure of the "*unused*" side of the Crown's file. Crown Attorneys are expected to exercise good judgment and consult with Senior Crown Attorneys in assessing what should and what need not be disclosed. The purpose of this requirement is to avoid a miscarriage of justice on the basis of non-disclosure of helpful information. The key question is relevance, however though"*the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant*"[5].

This policy assumes that the accused is before a court in Canada charged with an offence in a domestic criminal proceeding.[6] If charges were laid but the accused fled Canada or for some other reason they are not before a Canadian court, there is no obligation to provide full disclosure. It may, however, be appropriate to provide counsel with a brief summary of the case. Where an accused absconds during a preliminary hearing or trial, and the hearing is continued in their absence pursuant to ss. 475 and 544 of the *Criminal Code*, the obligation to make disclosure to their counsel continues if counsel continues to act.

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[4] *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) at 20.
[5] *R. v. Stinchcombe*, note 1, at 11. See also *R. v. Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.) at 204; *R. v. Chaplin* (1995), 96 CC.C. (3d) 225 (S.C.C.) at 236; *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.) at 11-12.
[6] In extradition proceedings, the requesting partner need only disclose the materials on which it is relying to establish its *prima facie* case. See *United States of America* v. *Dynar* (1997), 115 C.C.C. (3d) 481 (S.C.C.) at 525.

Subject to the exceptions outlined in this Guide Book, **Crown Attorneys have a *continuing* obligation to disclose, in accordance with this policy, the evidence on which the Crown intends to rely at trial, and any information which may assist the accused, whether intended to be adduced or not.** This obligation relates to information that comes to the attention of or into the possession of Crown Attorneys and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.[7]

Mandatory Inclusions

Upon receiving a request for disclosure, Crown Attorneys shall, as soon as reasonably practicable,[8] provide disclosure in accordance with the principles outlined in this Guide Book. In most cases, this will mean that the defence will be given, at minimum, the following:[9]

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[7] *R. v. Stinchcombe*, note 1, at 14. See also the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, Queen's Printer for Ontario, 1993 (hereinafter referred to as the Martin Committee Report), at 206-208. The purpose of this section is to underscore the proposition that disclosure is not a "one-shot" deal.

[8] The phrase "as soon as reasonably practicable" is intended to provide a degree of flexibility based on the facts in individual cases. The right to disclosure is triggered by a disclosure request made by or on behalf of the accused. Where there has been a timely request, disclosure should be made before plea or election or any resolution discussions: *Stinchcombe,* note 1. Where the request is not timely, disclosure must be made as soon as reasonably practicable and in any event before trial. See the provisions regarding unrepresented accused. Usually, disclosure will occur after the investigators have given Crown counsel the details of the case. In view of the respective roles played by investigators and Crown Attorneys in the criminal justice system, the investigative agency is in a unique, if not an exclusive, position to give Crown counsel the information required to be disclosed under this policy. If the agency fails to do so, Crown Attorneys may need to assess the extent to which the accused is able to have a fair trial and decide whether, in the circumstances, an adjournment, termination of proceedings or other remedy is required or appropriate. The investigative agency, although operating independently of Crown counsel, has a duty to disclose to Crown Attorneys, all relevant information uncovered during the investigation of a crime, including information which assists the accused: *Martin Committee Report*, note 8, at 167. See also *R. v. T. (L.A.)* (1993), 84 C.C.C. (3d) 90 (Ont. C.A.) at 94; *R. v. V.(W.J.)* (1992), 72 C.C.C. (3d) 97 (Nfld. C.A.) at 109.

[9] The "shopping list" of information set out in this section is information that would normally be disclosed in a given case. Subject to the limitations in above, it is more in the nature of a minimal statement of disclosure on behalf of the Attorney General of

1. Charging Document

A copy of the information or indictment;[10]

2. Particulars of the Offence

Particulars[11] of the circumstances surrounding the offence;

3. Witness Statements

Copies of the text[12]of all written statements concerning the offence which have been made by a person with relevant information to give[13]. If the person has not provided a written statement, a copy or transcription[14] of any notes that were taken by investigators when interviewing the witness should be disclosed. If there are no notes, a "*will-say*" or summary of the anticipated evidence of the witness should be disclosed.[15] This requirement includes

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Newfoundland and Labrador. It is not intended to be exhaustive – see above regarding other material. Counsel should take into account the disclosure requirements described by The Court of Appeal and the Supreme Court of Canada when assessing the scope of disclosure required in any given case.

[10] Section 603 of the *Criminal Code* provides that an accused has the right to inspect and obtain a copy of the charge.

[11] "Particulars" is not intended in the sense that it is used in s. 587 of the *Criminal Code*. Rather, it contemplates the provision of details or information concerning the circumstances surrounding the offence.

[12] Use of the word "text" is not intended to preclude counsel from producing a full copy of a statement taken by investigators, where that seems appropriate. In some situations, however, it may be appropriate only to produce the *text* of the statement, editing out personal information concerning the whereabouts of a witness – see specific provisions regarding protecting witnesses against interference.

[13] This section contemplates disclosure of statements made by or provided to an investigator or person in authority. The Crown, of course, cannot be held accountable for a failure to disclose the private notes of a civilian witness if that witness chooses not to make the Crown aware of the existence of such notes. See the provisions in this Guide Book regarding third party information.

[14] *R. v. Stinchcombe,* note 1, contemplates disclosure of the investigator's notes or copies of notes concerning the interview of a witness. In some instances, it may be helpful to provide a transcription, although that is not required as a matter of law. Additionally, a notebook may contain many references to different investigations. Only those notes relating to the interview should be produced.

[15] Three forms of statements are contemplated: where a written statement was taken, the text should be provided; where the investigators only took notes, those should be provided; where neither a statement nor notes were made, a summary of the witness's anticipated evidence should be provided.

statements provided by persons whether or not the Crown Attorney proposes to call them as witnesses;

4. Audio or Video Evidence Statements by Witnesses

A Crown Attorney in his or her discretion, may provide copies of any video or audio recording or a transcript (where available and appropriate). This must only be done after obtaining appropriate undertakings that take into account any privacy interests. Where defence counsel is unwilling to accept the terms and conditions of an appropriate undertaking, Crown Attorneys should apply to the trial judge for directions. Otherwise, the Crown Attorney may arrange an appropriate opportunity[16] to view and listen to, in private, the original or a copy of any audio or video recording of any statements made by a witness other than the accused to a person in authority;[17]

5. Statements by the Accused

A copy of all written, audio or video recorded statements concerning the offence which have been made by the accused to a person in authority should be provided whether or not they are intended to be relied upon by the Crown Attorney. If a statement was given orally, a verbatim account, including any notes of the statement taken by investigators during the interview should be provided where available. If a verbatim account is not available, an account or description of the statement (whether it is intended to be adduced or not) should be provided to defence counsel or the accused, if they are unrepresented, as well as a reasonable opportunity to view and listen to any

[16] This section is intended to provide counsel for the accused with an opportunity to listen to an audio recorded statement of a witness, or watch a videotaped statement of a witness. The phrase "appropriate opportunity" was selected to ensure that access to the recording, or a copy of it, is provided in controlled circumstances. In most instances, it will be appropriate to provide this access under the supervision of an investigator or the Crown Attorney. Where access is being provided to the original recording, particular care must be taken to ensure that the integrity of the tape is maintained, and continuity of possession is not lost. Where it is the accused and not counsel who seeks access, extra particular care should be exercised in this regard.

[17] This section was not intended to require full access to, for instance, intercepted private communications made between co-conspirators, one of whom has now agreed to testify on behalf of the Crown. With respect to intercepted private communications generally, see the provisions in the Guide Book.

original audio or video recorded statement of the accused to a person in authority;[18]

6. Accused's Criminal Record

Particulars of the accused's and any co-accused's criminal record;[19]

7. Expert Witness Reports

As soon as they are available, copies of all expert witness reports[20] in the possession of Crown Attorneys relating to the offence, except to the extent that they may contain clearly irrelevant or privileged information. Expert reports relating to the offence should be disclosed, whether helpful to the Crown or not.[21] Crown Attorneys must pay close attention to the provisions in s.657.3 of the *Criminal Code*, which require notice to be given where an expert is to be called as a witness at trial;

8. Documentary and Other Evidence

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[18] Absent unusual circumstances, recordings made by a potential Crown witness through an electronic body pack should be disclosed. Special considerations may apply where counsel for the accused seeks access to intercepted private communications involving the accused. *R. v. Stinchcombe* requires disclosure of notes prepared during a custodial interview. Absent unusual circumstances, copies of undercover notes outlining conversations involving the accused should similarly be provided.

[19] The purpose of this section is to require disclosure of the full criminal record of the accused's and any co-accused's convictions registered in Canada. Foreign convictions, if known, should also be disclosed. In some instances, they may be available through the Interpol office at RCMP Headquarters. In the case of foreign convictions, however, special care must be taken to confirm the proper identity of the person convicted. Concerning the criminal records of Crown witnesses, see the policy outlined in the Guide Book above.

[20] For example, forensic, medical, laboratory, and other scientific reports.

[21] This section is not intended to require mandatory disclosure of reports or analyses prepared by in-house employees, such as historians. Nor should it be construed so as to require the police to create an expert witness report in cases where a police investigator may be called as an expert witness at the trial. Whether and to what extent such reports or analyses should be disclosed ought to be assessed by Crown Attorneys in consultation with Senior Crown Attorneys. This section contemplates disclosure of expert witness reports commissioned by or on behalf of Crown Attorneys or the investigative agency. Requests for disclosure of reports not possessed by Crown Attorneys or the investigative agency, or which were prepared privately, are governed by the policies in this Guide Book regarding third party information.

Where reasonably capable of reproduction, copies of all documents, photographs, audio or video recordings of anything other than a statement of a person, that the Crown Attorney intends to introduce into evidence during the case-in-chief for the prosecution[22]. Where there exists a reasonable privacy or security interest of any victim(s) or witness(es) that cannot be satisfied by an appropriate undertaking from defence counsel, Crown Attorneys should seek directions from the trial judge[23];

9. Exhibits

An appropriate opportunity[24] to inspect any case exhibits,[25] i.e., items seized or acquired during the investigation of the offence which are relevant to the charges against the accused, whether or not the Crown Attorney intends to introduce them as exhibits;[26]

10. Search Warrants

A copy of any search warrant relied on by the Crown and, subject to the limitations in this Guide Book,[27] the information in support unless it has been

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[22] See *Martin Committee Report*, note 8, at 234.
[23] See *R. v. Blencowe* (1997), 118 C.C.C. (3d) 529 (Ont. Ct. (Gen.Div.).
[24] As in the case of recorded statements of a witness, steps should be taken to ensure that access is provided under controlled circumstances which preserve the integrity of the exhibit. How this can be achieved will depend on the circumstances in each case, although it may be appropriate to provide access only under the supervision of an investigator.
[25] Where a case exhibit is detained by police pursuant to a court order, counsel for the accused may, depending on the circumstances, be required to obtain an order under subsection 490(15) of the *Criminal Code* before it can be examined.
[26] In some types of cases, the sheer volume of case exhibits available, but not intended to be relied on by the Crown, may require Crown Attorneys to exercise some discretion when providing disclosure. Examples include cases involving a substantial number of documents, files or intercepted private communications. Crown Attorneys should respond to requests for disclosure in these types of situations case-by-case, in consultation with Senior Crown Attorneys and the investigators. If appropriate, Crown Attorneys should ask counsel for the accused to define as precisely as possible the type or class of documents, tapes or other exhibits sought for examination. Access to existing indices or intercept logs may, in some cases, help the defence narrow its request to items relevant to the defence of the accused.
[27] Note that the law of privilege is not a closed set of categories. Examples of the type of information that should not be disclosed in the public interest are set out in this Guide Book.

sealed pursuant to a court order,[28] and a list of the items seized there under, if any;

11. Authorizations to Intercept Private Communications

If intercepted private communications will be tendered, a copy of the judicial authorization or written consent under which the private communications were intercepted;[29]

12. Similar Fact Evidence

Particulars of similar fact evidence that a Crown Attorney intends to rely on at trial;[30]

13. Identification Evidence

Particulars of any procedures used outside court to identify the accused;[31]

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[28] Requests for production of the information in support of a search warrant that has been sealed pursuant to a court order under s. 487.3 of the *Criminal Code* will be governed by the substantive law and procedure set out in that section, and the case law as it is developing in this area.

[29] The purpose of this requirement is to provide a copy of all judicial authorizations that led to the acquisition of evidence in the case. To be producible, there must be some nexus to the facts of the case or the investigation. Investigators should be asked to provide Crown Attorneys with advice on any judicial authorizations or consents that were obtained during the course of the investigation, as they relate to the accused. There is, however, no obligation to check with every police agency in the province or Canada on the off chance that they may have had some contact with the accused: *Chaplin,* note 6. Concerning the extent to which access may be provided to the tapes themselves, see the specific provisions in this Guide Book above and accompanying footnotes. Requests for production of the affidavit in support of a wiretap application will be governed by the substantive law and procedure set out in Part VI of the *Criminal Code*, and the case law as it is developing.

[30] The purpose of this requirement is to ensure that similar fact evidence intended to be relied upon by the Crown is disclosed to the accused – even though, strictly speaking, such evidence is not connected with the offence itself. Similar fact evidence intended to be relied upon at trial should be disclosed even though it was not led at the preliminary inquiry. When considering the admissibility of similar fact evidence, refer to: *R. v. Arp* (1998), 129 C.C.C.(3d) 321 (S.C.C.); *R. v. Green* (1988), 40 C.C.C. (3d) 333 (S.C.C.); *R. v. D.* (1989), 50 C.C.C. (3d) 142 (S.C.C.); *R. v. B. (F.F.)* (1993), 79 C.C.C. (3d) 112 (S.C.C.) and *R. v. Moore* (1994), 92 C.C.C. (3d) 281 (Ont. C.A.).

[31] This is especially important in undercover cases: disclosure should be made of any identification evidence such as license plate numbers, business cards, the post-operation "roundup", etc. Evidence or information of this nature often is not included in the court

14. Witnesses' Criminal Records

Upon request, information regarding criminal records[32] of material Crown or defence witnesses that is relevant to credibility.[33] There is no obligation to do a criminal record check on all Crown witnesses.[34] Special care must be taken with police agents and other potentially disreputable witnesses. A reliable copy[35] of the person's criminal record, and relevant information[36] relating to any outstanding criminal charges against the witness, must be disclosed. Crown Attorneys must request such information in writing from the relevant police authority[37] and place the letter and response on the file. Such

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brief. Crown Attorneys should, therefore, ask the investigators to provide a briefing on the means by which the person arrested was identified as the person involved in the impugned transaction. See note 9 concerning the reliance placed by Crown Attorneys upon investigators in the disclosure process.

[32] Information taken from a CPIC (Canadian Police Information Centre) printout or maintained by the records office of the Royal Newfoundland Constabulary will generally meet the requirements of this section. However, it cannot be assumed that a CPIC printout is a fail safe "criminal record" of the person to whom it apparently pertains, absent fingerprint comparisons. A truly accurate "criminal record" can only be obtained by obtaining the fingerprints of the proposed witness. See sections 570(4) and 667 of the *Criminal Code* and s. 12 of the *Canada Evidence Act* which contain specific and detailed statutory requirements to be satisfied before a criminal record can be regarded as proven.

[33] Crown Attorneys have a discretion (reviewable by the trial judge) to determine whether information regarding a criminal record of a proposed witness is relevant to that witness's credibility. For example, Crown counsel may wish to exercise some discretion when assessing whether to disclose old criminal convictions or convictions for offences which could not really assist in the impeachment process. For instance, a criminal conviction for impaired driving 10 years ago could hardly assist in impeaching the credibility of a witness in a theft trial. On the other hand, convictions for offences of dishonesty will almost always be relevant, regardless of when they were entered. The balance to be struck on this issue centers around the privacy interests of the witness, as measured against the right to test the Crown's case. See the *Martin Committee Report,* note 8, at 238 – 244; *R. v. Bahinipaty* (1987), 56 Sask. R. 7 (C.A.) at 22.

[34] This obligation is limited to material witnesses whose credibility is in issue. See the Martin Committee Report, note 8, at 243.

[35] In Canada, this means a printout of the record held by the Canadian Police Information Centre (CPIC); for foreign witnesses, this means the CPIC equivalent. While this issue will seldom arise in Newfoundland and Labrador Crown Attorneys should be aware of it.

[36] "Relevant information" means the nature of the charges, the court, and the status of the proceedings.

[37] "Relevant police authority" means the investigative agency which has been the primary contact with the witness in relation to the information at issue. For example, where the witness is being "handled" by a foreign investigative agency, the request should be made

information should be adduced by the Crown in the examination-in-chief of the witness.

If, at any point in the proceedings, it becomes apparent that the complete criminal record or the relevant information on outstanding charges was not disclosed, or the witness did not testify truthfully about those matters, defence counsel must be advised and Crown Attorneys must make immediate efforts to determine the reasons for the non-disclosure or misleading disclosure. Such efforts will include a written request for an explanation to the police officer "handling" the witness and his or her superior officer, and a request that the witness and "handler" be made available to testify on the issue, should the need arise;

15. Material Relevant to the Case-in-Chief

Particulars of any other evidence on which the Crown Attorney intends to rely at trial;

16. Impeachment Material

Any information in the possession of the Crown Attorney which the defence may use to impeach the credibility of a Crown witness in respect of the facts in issue in the case;[38]

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directly to that agency, and copied to the Canadian investigative agency in charge of the Canadian investigation.

[38] This is a "catch-all" provision, intended to require disclosure of (a) any other evidence forming part of the Crown's case and (b) information that could be helpful for impeachment purposes. Crown Attorneys are expected to exercise careful judgment in assessing the extent to which background information concerning a witness need necessarily be disclosed. For production to be required, impeachment information must be capable of affecting the credibility of the witness with respect to some fact in issue in the case. Some information may be very invasive of privacy rights, e.g., information concerning a mental disorder which may bear upon the capacity of a witness to be sworn. Disclosure of records containing personal information in the possession of Crown Attorneys for which there is a reasonable expectation of privacy is governed by ss. 278.1 to 278.9 of the Criminal Code unless the witness to whom the record relates has expressly waived the application of those sections. In most instances, this section will require disclosure of the basic terms of the arrangement between the Crown and any co-operating accomplice expected to testify on behalf of the Crown, subject to the limitations in this Guide Book for information regarding criminal records of material Crown or defence witnesses.

17. Information Obtained During Witness Interviews[39]

Crown Attorneys have an obligation to disclose any additional relevant information received from a Crown witness during an interview conducted in preparation for trial[40]. Additional relevant information includes information inconsistent with any prior statement(s) provided to the investigative agency, i.e., recantations. Such information should be promptly disclosed to the defence or an unrepresented accused, subject to any limitations contemplated by this policy. To avoid the possibility of a Crown Attorney being called as a witness, interviews should be conducted in the presence of a police officer or other appropriate third person, where practical to do so;[41]

18. Other Material

Additional disclosure beyond that outlined may be made at the discretion of the Crown Attorney.[42] In exercising this discretion, Crown Attorneys shall balance the principle of fair and full disclosure with the need, in appropriate circumstances, to limit the extent of disclosure as discussed below.

Role of the Investigator

Effective disclosure by the Crown to the defence is dependent upon and requires full and timely disclosure by the investigator to the Crown Attorney. It is incumbent upon the investigator to be aware of the duty of the Crown to

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[39] This paragraph does not require the disclosure of information protected by work product privilege. Notes made by Crown Attorneys during the course of witness interviews relating to trial strategy or the examination (or cross-examination) of witnesses are exempt from disclosure under the work product doctrine: *Martin Committee Report,* note 8, at 252. But see *R. v. Regan* (1997), 174 N.S.R. (2d) 72 (N.S.S.C.) where the court held that interview notes made by a Crown Attorney during a pre-charge, fact finding interview were not protected by work product privilege.

[40] See the *Martin Committee Report*, note 8*,* at 253.

[41] Thus, if any new information comes to light, the officer or other third person can make notes to facilitate disclosure, and give whatever testimony may be necessary at trial in relation to that information. See *R. v. Johnson* (unreported, June 12, 1998, Québec Superior Court) for an interesting example of how prosecutors may expose themselves to the possibility of being removed from a case and called as a witness regarding witness interviews.

[42] The list in this Guide Book is not intended to be an exhaustive enumeration of those items that should be disclosed. This section contemplates additional disclosure where on the facts of individual cases it is warranted or necessary. It is important that Crown Attorneys be familiar with developments in this area of law.

disclose all relevant factual information to the defence and to cooperate with the Crown Attorney to ensure full and timely disclosure is provided to the defence. Crown Attorneys should make investigators aware of their obligations in this regard particularly where investigators may be inexperienced or employed by an agency or government department that do not typically deal with prosecutions.[43] The investigator also has an obligation to alert the Crown Attorney to any confidentiality concerns.

Exceptional Situations

Third Party Information

Information in the possession of third parties such as boards, social agencies, other government departments[44], rape crisis centres, women's shelters, doctors' offices and mental health and counselling services, is not in the possession[45] of Crown Attorneys or the investigative agency for disclosure purposes.[46]

In *R. v. McNeil*, the Supreme Court of Canada recognized that the Crown cannot merely be a passive recipient of disclosure material. Instead, the

[43] Police forces such as the RNC or RCMP should be familiar with their obligations in this regard.

[44] *R. v. Gingras* (1992), 71 C.C.C. (3d) 53 (Alta. C.A.); *R. v. W. (D.D.)* (1997), 114 C.C.C. (3d) 506 (B.C.C.A.), affd by SCC on issues other than the "indivisibility of the Crown". But see: *R. v. Arsenault* (1994), 93 C.C.C. (3d) 111 (N.B.C.A.); *R. v. Blyth* (1996), 105 C.C.C. (3d) 378 (N.B.C.A.). See also *R. v. O'Connor*, (1995), 103 C.C.C. (3d) 1 (S.C.C.), note 5, at 50 (per L'Heureux-Dubé J.).

[45] The concept of possession, in law, requires control. Without control there is no duty to disclose on the part of Crown counsel or the police. Records held by U.S. law enforcement agencies are not in the possession or control of the Crown for disclosure purposes. A Canadian court has no jurisdiction to order anyone in the United States to disclose anything to the RCMP, the Crown or an accused directly: *R. v. Lore* (1997), 7 C.R. (5th) 190 (Qué.C.A.) at 200.

[46] Disclosure of information that contains personal information for which there is a reasonable expectation of privacy, including medical, psychiatric, therapeutic, counseling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information protected by other statutes, in sexual assault proceedings is governed by ss. 278.2 to 278.9 of the *Criminal Code*, as interpreted by the Supreme Court of Canada in *R. v. Mills*, note 3. Disclosure of third party information that does not fall within s. 278.1 of the *Criminal Code* is governed by the common law and procedural rules in *O'Connor,* (note 5)*,* as interpreted by the Supreme Court of Canada in *R. v. Mills*, (note 3).

Crown Attorney has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant to the prosecution or the defence.[47]

Where a Crown Attorney receives a request for information which is not in their possession nor the possession of the investigative agency, the defence should be so advised in a timely manner in order that they may take such steps to obtain the information as they see fit.

Even where such records are physically in the possession of the Crown Attorney, disclosure is not automatic. Unless the person to whom the information pertains has waived his or her rights, that person still has a privacy interest in the records.[48]

Protecting Witnesses Against Interference

If the defence seeks information concerning contact information or the location of a witness, four considerations are pre-eminent:

- the right of an accused to a fair trial and to make full answer and defence;

- the principle that there is no property in a witness;[49]

- the right of a witness to privacy and to be left alone until required by subpoena to testify in court; and,

- the need for the criminal justice system to prevent intimidation or harassment of witnesses or their families, danger to their lives or safety, or other interference with the administration of justice.[50]

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[47] R. v. McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66 at para [59].
[48] *R. v. Mills*, (note 3).
[49] See *R. v. Gibbons* (1947), 86 C.C.C. 20 (Ont. C.A.) at 28.
[50] The Supreme Court of Canada has recognized the right of an individual to be left alone and the appropriateness of preventing the unnecessary invasion of witnesses' privacy: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1 at 11 and 15; *R. v. Wong* (1990), 60 C.C.C. (3d) 460, esp. at 483; *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at 387; *Stinchcombe,* note 1*,* at 8-9. The Supreme Court of Canada has also recognized that Crown witnesses are not the property of the Crown whom the Crown Attorney can control and produce for examination by the defence: *R. v. Khela* (1995), 102 C.C.C. (3d) 1, at 10.

Before providing any contact information or location of a witness, a Crown Attorney should discuss with a supervisor or the Senior Crown Attorney.

- Consent by person at risk

Where the witness does not object to the release of this information, and there exists no reasonable basis to believe that the disclosure will lead to interference with the witness or with the administration of justice as described above, the information may be provided to the accused without court order.

- Witnesses refusing to be interviewed

Where a witness does not wish to be interviewed by or on behalf of an accused[51], or where there is a reasonable basis to believe that the fourth consideration referred to above (interference with witnesses or their families, etc.) may arise on the facts of the case,[52] Crown Attorneys may reserve information concerning the identity or location of the witness unless a court of competent jurisdiction orders its disclosure.[53]

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[51] While Crown Attorneys and the investigators may wish to ask if a witness wants to be interviewed by the defence, care should be taken to ensure that the witness understands that he or she is fully entitled to be interviewed or not to be interviewed. It should not be suggested (directly or indirectly) that it would be better not to be interviewed.

[52] There is a two-pronged test for determining whether information concerning whereabouts or identity should be withheld: first, has the witness expressed a desire not to be interviewed by the defence? Second, is there a reasonable basis to believe that the witness may be interfered with? The basis for the belief in a potential witness must be real, not imagined. The information available in each case should be examined carefully. Wherever reasonably practicable, Crown Attorneys should request a written threat assessment from the investigators where limits on disclosure are being considered on this basis. An adjournment may be necessary in these circumstances to ensure a fair trial. The threat assessment may, itself, be the subject of a disclosure request. Absent extraordinary circumstances, disclosure of this assessment should be resisted on the basis that confidential information is necessary in order to ensure that the discretion to produce or withhold is exercised properly. If the defence press with this request, Crown Attorneys should consult with the Senior Crown Attorney or ultimately the DPP. In some instances, resort may have to be made to s. 37 of the *Canada Evidence Ac*t to protect the confidential nature of this information.

[53] An adjournment may be necessary in these circumstances to ensure a fair trial.

- Controlled interviews

Where a witness is willing to be interviewed, but there nonetheless exists a reasonable basis to believe that the disclosure of information concerning the identity or location of the witness may lead to interference with the witness or with the administration of justice as described above, including situations where the witness is under a Witness Protection Program, Crown Attorneys may decide to arrange for an interview by defence counsel at a location and under circumstances that will ensure the continued protection of the witness[54]. If the witness is protected under a Witness Protection Program, the agreement of the police agency administering the program will be required.

Unrepresented Accused[55]

If the accused is not represented by counsel, Crown Attorneys shall arrange to have the accused informed that disclosure is available under this policy[56] and shall determine how disclosure can best be provided. The accused should be advised of the right to disclosure and how to obtain it as soon as he or she indicates an intention to proceed unrepresented. Because of the need to

[54] In Newfoundland and Labrador this is the program administered by the RCMP. It is sometimes referred to as the Source / Witness Protection Program or "SWP". The purpose of this section is to provide for a "controlled interview" by the defence in circumstances where the witness is willing to be interviewed, but there exists some concern for the safety of the witness. In some instances, a controlled interview will provide the necessary balance between the right of the accused to full answer and defence and the need to protect the witness against interference or threats. This approach will be especially helpful in situations where the witness is in a Witness Protection Program. The circumstances surrounding the interview should be agreed upon by Crown Attorneys and the investigators in advance of the interview. This could, in some situations, permit the presence of counsel for the witness or a Crown Attorney, and include a method of recording the interview. Where the witness is under a Witness Protection Program, the consent and co-operation of the police administering the program will, for purely practical reasons, be required. Note, however, that Crown Attorneys are not *required* to produce their own witnesses for pre-trial, oral discovery by the defence.: *R. v. Khela*, (1995), 102 C.C.C. (3d) 1 (S.C.C.), note 52, at 10 (per Sopinka and Iacobucci J.J., for the majority) and 17 (per L'Heureux-Dubé J., dissenting on other grounds but concurring with the majority on this point). See also *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 (Ont.C.A.) at 48.

[55] See the *Martin Committee Report,* note 8*,* at 218-220.

[56] The precise method by which the accused is informed of the availability of disclosure may vary. Crown Attorneys may wish to provide the accused with a written or oral notification in court. In some regions, such as St. John's, the judge presiding at all first appearances may tell an unrepresented accused that disclosure is available from the Crown.

maintain an arms-length relationship with the accused, it will in most instances be preferable to give the accused disclosure in writing.

This requirement does not preclude a guilty plea without disclosure, including situations where the accused simply wishes to dispose of the charge as quickly as possible. In other words, disclosure does not form a condition precedent to the entry of a guilty plea. However, an unrepresented accused must clearly indicate that he or she does not wish to obtain disclosure before a guilty plea is entered.

If an unrepresented accused indicates an intention to plead guilty to an offence for which there will likely be a significant jail term, Crown Attorneys should suggest to the presiding judge that an adjournment may be in order to permit disclosure to the accused. However, that is not required as a matter of law and much will depend on the circumstances of each case, including whether the accused is in custody.

An unrepresented accused is entitled to the same disclosure as a represented accused. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of Crown Attorneys based on the facts of the case. If there are reasonable grounds for concern that leaving disclosure materials with an unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, the Crown Attorney may provide disclosure by means of controlled, supervised, yet adequate and private *access* to the disclosure materials. Special care may be required where an unrepresented accused personally seeks access to evidence where the integrity of that evidence may be placed in issue at trial.

Special care may also be required where an unrepresented accused is incarcerated. Incarcerated unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial officials[57].

When disclosure is made to an unrepresented accused, Crown Attorneys should consider including a written explanation of the appropriate uses and limits upon the use of disclosure material.

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[57] See the *Martin Committee Report,* note 8, at 219. Consultation with custodial officials regarding the manner of disclosure may be necessary in these circumstances.

It is generally a good practice to place an endorsement on the file concerning the nature, extent and timing of disclosure to an unrepresented accused. This is especially important given the prospects of a *Stinchcombe* review of the decisions made by Crown Attroneys on the issue of disclosure.

Disclosure Costs

An accused person or his or her counsel shall not be charged a fee for "basic disclosure" materials[58].

Basic disclosure materials include the court brief, if one has been prepared, and copies of documents, photographs, etc. that the Crown Attorney intends to introduce as exhibits in the Crown's case. In a simple case, e.g., impaired driving, where no court brief has been prepared, basic disclosure will consist of copies of witness statements, a synopsis, the information, an occurrence report, or an alcohol influence report and blood alcohol certificate[59].

Each accused is entitled to one copy of basic disclosure materials. Where an accused person requests an additional copy or copies (e.g., because the original materials have been lost), the accused may be charged a reasonable fee for this service[60].

Costs associated with the preparation of copies of materials that are not part of basic disclosure, e.g., photographs that will not be introduced as exhibits by Crown Attorneys, should be considered on a case-by-case basis. In instances of unfocused or unreasonable requests involving substantial numbers of documents, it may be appropriate to shift the resource burden to

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[58] *Report of the Criminal Justice Review Committee*, Queen's Printer for Ontario, February 1999, at 48. See also the *Martin Committee Report,* note 8*,* at 272; *R. v. Blencowe, supra note 26,* at 537. The rule here is two-pronged: documents and photographs that will form part of the Crown's case should be copied and provided to the accused at the expense of the government or the investigative agency. Documents the Crown does not intend to rely upon need not be copied, although upon request defence counsel should be provided with access to case exhibits not intended to be adduced at trial.

[59] Martin Committee Report, note 8, at 272.

[60] Where defence counsel withdraws from the case, there is a professional obligation to pass disclosure on to new counsel representing the accused. Accordingly, disclosure need not be repeated the second time. Unusual situations should be discussed with the Senior Crown Attorney or DPP.

the defence, by requiring that the costs be borne by the accused.[61] Failing agreement, simple access without copies may be provided.

Form of Disclosure[62]

Crown Attorneys may provide the defence with copies of documents that fall within the scope of basic disclosure materials as defined above in either a paper format (e.g., photocopies) or an electronic format (e.g., by CD-ROM)[63]. Where the accused is unrepresented, Crown Attorneys should generally provide copies of such documents in a paper format[64].

Delaying or Limiting of Disclosure[65]

Disclosure may only be delayed or limited to the extent necessary:

(a) to comply with the rules of privilege, including informer privilege;

(b) to prevent the endangerment of the life or safety of witnesses, or their intimidation or harassment; or

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[61] Martin Committee Report, note 8, at 273. No guidelines have been established in Newfoundland and Labrador for the payment of these costs since the issue has seldom arisen. Extraordinary costs can be assessed on a case by case basis.

[62] An accused is not entitled to insist upon a particular *form* of disclosure as a constitutional prerequisite: *R. v. Blencowe,* note 26*,* at 539. Nor does an accused have an absolute right to disclosure or production of original material: *R. v. Stinchcombe* (1995), 96 C.C.C. (3d) 318 (S.C.C.). However, where the original is within the possession of either Crown Attorneys or the investigative agency, there is an obligation to allow the defence inspection of, or access to, the original.

[63] But see *R. v. Hallstone Products Ltd.* (1999), 46 O.R. (3d) 382 (Ont. S.C.) where the court held that while the CD-ROMs and computer program were a helpful aid to disclosure, they were not a suitable substitute for hard copies. The judge found that the defence had established that accessing the documents through reliance on the CD-ROMs and computer program was problematic, e.g., not all documents in the computer program could be readily found and some, not at all. Nor had all of the seized documents been scanned into the program. *Hallstone* was applied and followed in *R. v. Felderhof*, [1999] O.J. No. 5107 (Ont.S.C.). See also *R. v. Amzallag* (February 19, 1999, Qué.Sup.Ct.); *R. v. Cazzetta* (October 26, 1998, Qué.Sup.Ct.); and *R. v. Obront* (March 25, 1998, Ont.Ct.(Prov.Div.)).

[64] In *R. v. Keeshig*, [1999] O.J. No. 1271 (Ont.Ct.(Gen.Div.)), March 31, 1999, the Court held that if the Crown provided CD-Rom disclosure to an unrepresented accused who is not computer literate or who does not have a computer or appropriate software, then the Crown must provide a hardcopy or the equipment and knowledge to allow access to the information on the CD-Rom.

[65] The discretion to delay disclosure is, of course, reviewable by the Court.

(c) to prevent other interference with the administration of justice.

Where a Crown Attorney limits disclosure to comply with the rules of privilege, the Crown Attorney shall so advise the defence.

Ensuring Timely Prosecutions

1. Introduction

In *R v Jordan*, 2016 SCC 27, the Supreme Court re-examined the *Morin* framework governing the determination of unreasonable delay. A majority of the Court decided to depart from *Morin* and substituted a new framework for analyzing delay under s 11(*b*) of the *Charter*. The new framework sets ceilings beyond which delay will be presumptively unreasonable: if the total length of delay from charge to the actual or anticipated **end of trial** (minus defense delay) exceeds 18 months, in cases going to trial in provincial court, or 30 months for cases going to trial in superior court, the ceilings will have been breached.

The new approach outlined in *Jordan* places an even greater emphasis upon the Crown to avoid, through appropriate case management, reaching the 18/30 month ceilings and in those cases where the ceiling is surpassed, to demonstrate that it did all it could to manage the prosecution. For managers, supervisors and Crown Attorneys, this translates into vigorously following and building upon existing practices and policies relating to file management. Since Crown Attorneys do not control all of the levers to ensure the timely conclusion of a prosecution, the *Jordan* approach will necessarily implicate our relationships with the police, defense counsel and the Courts.

2. File Management

In *Jordan*, the Supreme Court emphasized the significance of the prosecution's case management in determining whether a prosecution should be stayed for unreasonable delay:

> *[70] It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defense to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay.*

Senior Crown Attorneys must apply case management policies and practices in a robust, consistent and effective manner. The following elements bear particular attention.

2.1 Review of Files

There must be timely, competent and effective review of each file to ensure that core disclosure is complete and the charges against each accused meet the test for prosecution. Ordinarily, initial review should occur as soon as possible and certainly no later than the second appearance. Each regional office must have a process in place for assigning files for timely review. Undertaking this review, making decisions based upon the review and clearly noting the results of the review will enhance effectiveness and efficiency.

Responsibility for file review at each stage of the prosecution must be clear. Any Crown Attorney should be able to quickly and confidently see the results of the review, the actions taken and any changes in circumstances. This is especially important when other Crowns are required to deal with the file due to changed scheduling requirements or opportunities. This information must be clearly recorded and readily accessible in the file.

2.2 Disclosure Readiness

Senior Crown Attorneys must ensure that the investigators completing disclosure understand Crown expectations and practices as reflected in the *Jordan* framework. Focused communications with the regional management of investigative agencies should occur to reinforce the expectations and emphasize the impact that delays can have on a successful prosecution.

2.3 Prosecution Plans

When assigned a case that is especially complex, Crown Attorneys shall prepare a plan to prosecute. Whenever possible, such plans should be prepared in advance of charges being filed.

2.4 Advancing Files

Mechanisms must be in place to ensure that files do not languish or move forward without ongoing appropriate follow-up with the police, the defense counsel (if any) and the court.

Follow-up must be ongoing with police related to disclosure, witness availability and trial preparation. Communications with the defense should be undertaken in a

timely way to determine the suitability and completeness of disclosure, readiness for trial, estimates of time for the trial (or preliminary inquiry) and defense election. These communications should occur in the ordinary course.

In any case where it becomes apparent that the 18/30 month ceilings will be breached, the Crown Attorney must assume that an 11(*b*) application will be brought in the absence of a specific undertaking to the contrary by defense counsel. Any necessary transcripts should be ordered in a timely way so as to ensure no additional delay is occasioned.

3. Court appearances

3.1 Remand Dates

A Crown Attorney must be prepared to set preliminary inquiry or trial dates at the earliest opportunity after core disclosure has been completed. At each stage, the prosecutor must ensure that the record will provide an adequate demonstration of the proactive management of the file. In the early stages, the Crown Attorney would be confirming on the record that disclosure has been made and that the prosecution is prepared to set pre-trial dates or even a hearing date. When setting a preliminary inquiry or a trial date, the Crown Attorney should be prepared to provide some information on the record about the file's complexity, in order to explain the time being sought for the completion of the hearing or trial. Particularly, the prosecutor should indicate on the record the number of witnesses to be called, the expectation that defense will bring a *Charter* application (if you are aware of it), the volume of material disclosed, and other pertinent matters.

Crown Attorneys should invite defense counsel to detail any pre-trial applications they intend to bring, including the potential time requirements. Any concessions or narrowing of the issues should be noted on the record as part of explaining the factors considered in estimating hearing time. The Crown Attorney should note on the record any attempts made with defense counsel to obtain concessions or narrow the issues. This demonstrates due diligence by the Crown Attorney where delay is occasioned by the necessity to secure a large block of time, especially if that block subsequently proves unnecessary because issues can be narrowed.

Where available dates for hearings, particularly for lengthy matters, will exceed the 18/30 month ceilings set by *Jordan*, the Crown Attorney should consider asking the court to set aside additional time for the hearing of a s 11(*b*) application, unless defense counsel is prepared to state on the record that no such application will be made. The prosecutor may also consider asking the court to set deadlines for defense

to file *Charter* notices in sufficient time to permit the obtaining of any necessary transcripts for the proper hearing of a s 11(*b*) application.

3.2 Judicial pre-trials

Crown Attorneys should identify in advance any issues which might be usefully canvassed at pre-trials, and provide any relevant material, including case law, to defense counsel. Crown Attorneys should be cognizant that matters discussed at pre-trial hearings may form part of the record at a s 11(*b*) hearing. For this reason, Crown Attorneys should ensure that a record exists of pertinent matters discussed and positions taken at the pre-trial. This includes resolution positions put forward by either side, time estimates, elections, concessions or admissions made, concessions or admissions suggested by Crown Attorneys but rejected by defense counsel, witnesses required or waived, and other pertinent matters. Matters that, in any given jurisdiction, are recorded by the pre-trial judge and form part of the court record need not necessarily be recorded separately in the Crown file. Where appropriate, matters discussed at pre-trial should be reduced to writing and communicated to defense counsel. In some instances, in jurisdictions that permit it, the Crown Attorney may request that pre-trials be conducted on the record because it is anticipated that the transcript of the pre-trial may be required on a s 11(*b*) hearing.

3.3 Adjournments

Crown Attorneys must ensure that it is clearly indicated on the record who asked for an adjournment, the reasons and the effect upon time to trial. Requests for adjournments to accommodate the convenience of police witnesses, should not ordinarily be made in the absence of extenuating circumstances, such as miscommunication or innocent mistake. Where extenuating circumstances do exist, Crown Attorneys must give careful consideration to whether accommodating the request would jeopardize the s 11(*b*) integrity of the proceeding.

Where the defense requests an adjournment that appears unnecessary or unduly delays the proceedings, the Crown should ask whether the resulting delay is waived. In these circumstances, defense requests for adjournments should not be consented to in the absence of such a waiver. There may also be extenuating circumstances in which it would be unreasonable for the Crown Attorney to insist on such a waiver – for example, where the reason for the defense request arises from some failure or inaction on the part of the Crown or the police, such as late disclosure.

3.4 Re-elections

Crown Attorneys should require that accused waive the delay stemming from re-election from a superior court trial to a provincial court trial as a condition of their consent. The majority in *Jordan* recognized that it would be reasonable to do so (para 62). This is significant because the change in level of court moves the yardstick from 30 months to 18 months. Before Crown Attorneys consent, the defense must agree to waive all delay since the date of the original election to Superior Court, in effect, this resets the clock to within the 18 months contemplated at the level of a provincial court trial without a preliminary hearing.

4. Additional Issues

4.1 Ongoing Prioritization of Cases

Systems should be developed to permit the re-scheduling of preliminary inquiries and trials to accommodate moving up higher priority cases or those that are in danger of exceeding the 18/30 month ceilings. Generally, files alleging incidences of sexual violence should be classified as high priority. In jurisdictions where such systems would be a departure from the norm, consultation with the judiciary and defense bar will be required.

4.2 Direct Indictments

The potential that an unreasonable delay will occur and result in a stay is a well-established reason for seeking a Direct Indictment.

4.3 Multiple Accused Prosecutions

Ongoing consideration must be given to the question of whether the accused should be tried together or if severance is appropriate. In addition to the ongoing rigorous application of the decision to prosecute standard against all of the accused in a multiple accused prosecution, it will also require a realistic and pragmatic consideration of the delay implications of proceeding against multiple accused, in particular the difficulty of finding dates available to numerous defense counsel. The minimization of the risk of perverse or contrary verdicts that could result from severance must also be borne in mind.

Conduct of Criminal Litigation

Basic Principles of the Policy

This chapter of the Guide Book provides Crown Attorneys and Senior Crown Attorneys with policy and practice directives aimed at achieving just resolutions in the course of criminal litigation. These directives are further designed to ensure the earliest possible disposition of cases and efficient prosecutions through trial.

This chapter outlines the basic framework of the Attorney General's criminal litigation practice, and should be read in conjunction with the policies and guidelines set out in other sections of this Guide Book which deal more specifically with various elements of the criminal process.

These policies and practices provide the operational framework within which prosecutorial discretion is to be exercised. However, the need to provide prosecutors with flexibility is recognized, as is the fact that differences exist regarding both the nature of the practice of criminal law and the expectations of other participants in the process such as the judiciary, the defence bar and law enforcement agencies.[1] These policies apply to the full range of criminal litigation. Though there is a special focus on the early resolution of routine cases, these policies are to encourage the early identification of difficult issues that arise in more complex matters.

Key aspects of the policy have been highlighted and framed as **Directives**[2] to emphasize their imperative nature.

Criminal litigation policy is based on the following guiding principles:

- The criminal justice system in Newfoundland and Labrador needs to be efficient in its use of available resources and must practice diligence to avoid the possibilities of injustices and mistakes. New practices must be adopted to achieve this end.

[1] For example, whereas this policy focuses to a large extent on the early disposition of routine cases as a means of freeing the resources required to deal with the more complex cases, the Special Prosecutions.

[2] Directives may also be used to signal a departure from past practices of the Director of Public Prosecutions in Newfoundland and Labrador.

- Resources are invested at the beginning of the process in the expectation that this will minimize the subsequent consumption of resources.

- Better and earlier co-operation with police and other investigative agencies, including joint planning, is an essential component of this policy.

PART I - Critical Assessment of Charges

General Principles

Charge screening normally refers to the process by which a prosecutor, applying the "*Decision to Prosecute*" policy,[3] critically assesses the advisability and appropriateness of proceeding with charges which have either been recommended or already laid by investigators. The purpose of this process is in part to ensure that only where proceedings are warranted do cases go forward, and that all cases proceed on the basis of appropriate charges. It also provides an opportunity to assess whether the investigation is complete or needs to be pursued.[4] This type of initial intervention by prosecutors also permits an early assessment of the manner in which the case should proceed or be dealt with, including the consideration of alternatives to prosecution.[5]

Early charge screening and critical assessment of cases are decisive points in the prosecution process and constitute cornerstones of the criminal litigation policy. Crown Attorneys involved in this initial process will have a crucial impact on the way cases are dealt with.

DIRECTIVE #1

Critical assessment of the Crown's case should be assigned to a Crown Attorney capable of effectively and independently assessing:

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[3] See materials in Chapter 6 of this Guide Book: "The Decision to Prosecute".

[4] This assessment by counsel does not per se impose on law enforcement agencies any obligation to pursue their investigation. Counsel may however decide that, absent additional investigation, the case will not proceed.

[5] Although case assessment is dealt with below under a separate heading, this policy identifies charge screening and critical assessment as complementary aspects of the same initial process.

- the sufficiency of the evidence and the public interest in prosecuting;
- the suitability of the offence/s charged, as well as the details included in the count/s on the information;
- the availability of youth or adult diversion programs as an alternative to the laying of, or proceeding with, charges; and,
- any potential need for further investigation by law enforcement.

To avoid having court time and other resources unnecessarily dedicated to charges that will not proceed, or a person charged unnecessarily, charge screening must be completed as soon as reasonably possible.

DIRECTIVE #2

Every charge will be assessed as soon as reasonably possible and prior to setting the date for trial or preliminary inquiry.[6]

Circumstances do not always permit a thorough review at the earliest stages of the proceedings. Nonetheless, whenever reasonably possible, Crown Attorneys should aim to complete the assessment prior to the first court appearance.

Assessing major or complex cases as early as reasonably possible may present a challenge. But given the elevated significance to any victims, the public, and the accused, Crown Attorneys should especially focus on completing assessments in such cases in accordance with this directive.

Due to the importance and scope of charge screening under this policy, a record of decisions made at this stage should be maintained. Such a record will serve several purposes, including certainty and consistency of approach.

[6] This policy does not preclude charge assessment from occurring at more than one step in the process. For example, there may be good cause for reviewing the charge and the justification for going forward to trial after a preliminary inquiry has been held.

DIRECTIVE #3

Prosecutors will keep a record of the assessment in each case indicating what has been done and, where appropriate, the reasons for so doing.[7]

PART II - Termination of Proceedings[8]

It is the prerogative of the Crown Attorney to withdraw charges, to enter a stay of proceedings or to call no (further) evidence and request an acquittal. This broad prosecutorial discretion is not ordinarily subject to judicial review, which imposes an even greater obligation on the Crown Attorney to ensure that it is exercised in a fair and principled manner. The following are guidelines to assist in achieving that goal:

DIRECTIVE #4

1. (a) A withdrawal of the charge is appropriate where the Crown Attorney decides that;

    (i) Reasonable and probable grounds did not exist to lay the charge;

    (ii) There is no reasonable likelihood of a conviction; or,

    (iii) It is not in the public interest to proceed with the charge.

    (b) A Stay of Proceedings is appropriate where there is a reasonable likelihood of recommencement of the proceedings. For instance, a complainant may not be capable of testifying on the trial date but the Crown Attorney has a reasonable basis for believing that s/he may be in a position to testify in the future. Proceedings should not be stayed merely because a judge has made a ruling unfavourable to the Crown.

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[7] Recording the grounds for a decision is particularly appropriate where the application by counsel of "The Decision to Prosecute" policy may be questioned or challenged, or where there is reason to believe that the grounds for the decision may need to be publicly stated. The record of decision should reflect in such cases the factors on which the decision is made.

[8] This Directive is taken from Recommendation # 23 of *The Lamer Report (2006)*, Office of the Queen's Printer NL p. 322.

(c) It is appropriate for the Crown to commence the trial but to elect to call no evidence, and request an acquittal, where there is no reasonable likelihood of a conviction nor a reasonable likelihood of recommencement of the proceedings.

(d) Where the Crown has called evidence it is appropriate to call no further evidence, and request an acquittal, where the Crown Attorney determines that the evidence is so unreliable that it would be dangerous to convict. This follows even though there may be some evidence on which the trial judge likely would deny a motion for a directed verdict.

2(a) The Crown Attorney is encouraged to consult with a direct supervisor or the Senior Crown Attorney, when circumstances permit, in any case which raises a doubt about the proper course to follow.

(b) Such consultation is particularly desirable in relation to a major charge or where special circumstances exist. Such circumstances might include the prosecution of a public official such as a police officer.

(c) The Director of Public Prosecutions may issue further directions, from time to time, as to when such consultation is required.

3.(a) Whenever a Crown Attorney terminates a prosecution involving a matter designated as a major case, or relatively serious charges as directed by policy outlined by the Director of Public Prosecutions, a written report shall be provided to the Senior Crown Attorney that summarizes the circumstances and reasons for the decision that was taken.

(b) Such reports shall be filed in the DPP's Office and made available to all Crown Attorneys to provide assistance in dealing with similar cases. These are not binding but are merely to provide guidance. They may also form the basis for developing more specific policies in future**.**

4.(a) As a general practice, the basic reasons for exercising the discretion addressed in this policy should be expressed in open court. Where a stay of proceedings is entered, the basic reasons

should be provided to the accused, the police and the victim, unless exceptional circumstances require the Crown Attorney to be discreet.

(b) The public reasons provided for a stay of proceedings may be limited by the confidentiality of an ongoing investigation. Still, they should be articulated in the reasons provided to the Senior Crown Attorney.

It follows from this that in those cases where a stay of proceedings has been entered on the record it cannot be allowed to expire.

Instead, the proceedings must be terminated in accordance with the Directive above.

Reports are to be prepared pursuant to section 3 of Directive 4 whenever a charge is withdrawn, no evidence called or a stay of proceedings is filed. These shall be forwarded to the DPP within 30 days.

PART III – Crown Attorney Independence and Critical Assessment

DIRECTIVE #5

Prosecutors must exercise independent judgment in deciding whether charges should be prosecuted.[9]

Moreover, it is important that the Crown Attorney who carries out charge screening in any particular case not only exercise independent judgment, but also be perceived as exercising such judgment.

A perceived lack of independence may result from the nature or extent of the involvement of a Crown Attorney at the investigative stage. Such involvement does not, however, automatically disqualify that Crown Attorney from conducting the assessment.

In cases where a Crown Attorney has had extensive and/or active involvement in the investigative process, it may be prudent for the Senior Crown Attorney or Director of Public prosecutions to apply special measures to avoid a

[9]Note, however, that the exercise of independent judgment by counsel does not preclude consultations with the relevant law enforcement agency where circumstances warrant. See "The Decision to Prosecute" policy set out in Chapter 6 of this Guide Book.

perception of lack of independence. Such measures could range from having a review of the decision of a Crown Attorney made by another Crown Attorney (for example on the basis of the record of decision referred to above) to having the charge screening decision referred to a Crown Attorney who has had no involvement with the investigation.

DIRECTIVE #6

Senior Crown Attorneys or the Director of Public Prosecutions shall ensure in any given case and where special circumstances warrant that means are taken to ensure that critical assessment is carried out in such a way that the necessary independence and appearance of Crown independence are preserved.

DIRECTIVE #7

Police and other investigative agencies should be encouraged to use, at the charging stage, the prosecution standards of the Attorney General of Newfoundland and Labrador and to seek in that regard the assistance of Crown Attorneys where required.

As stated in the "*Decision to Prosecute*" policy, the Attorney General of Newfoundland and Labrador will only prosecute cases where there exists a reasonable likelihood of conviction and where the public interest requires that the matter be prosecuted.

The "*Decision to Prosecute*" policy must be applied in all cases. Law enforcement officers should be encouraged to refer to the policy or to consult a Crown Attorney in case of doubt.

PART IV - Decisions at the Early Stages of a Prosecution

DIRECTIVE #8

Circumstances permitting, the Crown Attorney who completes the charge screening will also, at the same time, make the initial decision on issues such as:

- whether an offence should be prosecuted by summary conviction or by indictment;

- whether diversion of a young offender or an adult, where programming is available, is appropriate;

- the appropriate sentence for each alleged offender upon entry of an early guilty plea; and

- whether additional information is required from the investigator in order to address the issues listed above and as well to ensure the Crown meets disclosure obligations;

It is at the time of initial charge screening (or critical assessment of cases as referred to above) that the Crown Attorney decides whether a prosecution should proceed and, if so, on which charge or charges. It is also at that stage that the decision can be taken in respect of alternate charges, diversion, plea offers and the appropriate sentence on plea, if all the relevant information is available at that time. Moreover, it is clearly more cost-effective to have all preliminary decisions made at an early stage, before cases get into the court system. Duplication of effort can thereby be avoided.

Where trials are long and complex adequate preparation time, and the assistance of junior Crown Attorneys, is even more important to ensure that a full critical assessment of the case is made and that all directives are met.

Individuals can be diverted from the criminal process either before or immediately after a charge has been laid, but only where they would otherwise properly be charged or prosecuted pursuant to the "*Decision to Prosecute*" policy. The issue of diversion first arises at the beginning of the process and is one which will be addressed by the prosecutor responsible for charge screening in accordance with policy.

DIRECTIVE #9

Crown Attorneys will develop a plan to assess cases that involve complex and voluminous investigations so that the resulting prosecution can be managed in the most effective way. Where trials are expected to be long and/or complex, adequate preparation time and the assistance of junior Crown Attorneys are imperative.

Investigations may, on occasion, involve complicated fact situations charging multiple accused. This will in turn present inherent challenges for the

management of the case, not only for the Crown, but for the courts and the criminal justice system in general.

When dealing with cases of this magnitude and complexity, prosecutors will need to be particularly alive to issues such as the appropriate number of indictments and which accused should be regrouped within any given indictment. It is the responsibility of the Crown Attorney to decide how and on what basis the prosecution should proceed.[10] This task requires consideration of a myriad of factors, including the resource implications of any given decision.

DIRECTIVE # 10

Whenever practical and appropriate, Crown Attorneys must seek to tender witness statements as evidence during preliminary inquiries, by way of application pursuant to s. 540(7) of the *Criminal Code*.

Tendering witness statements as evidence by way of a s. 540(7) application may have the beneficial effects of narrowing and resolving issues, limiting the number of witnesses, and reducing the length of the preliminary inquiry.

PART V - Plea Discussions and Agreements

DIRECTIVE #11

Crown Attorneys will seek, to the extent reasonably possible, to dispose of charges through plea discussions and agreements**.**

A large percentage of criminal cases are resolved by a guilty plea, which may result in substantial savings for the system in general. On the other hand, few accused would plead guilty if there were not some advantage in doing so. The courts now recognize that it is appropriate for the Crown to enter into plea discussions with the accused and to agree to a lesser sentence or a lesser charge in return for an acknowledgement of guilt by the accused. As noted by Cathy J.A. of the Ontario Court of Appeal, "... *the justice system acknowledges and encourages plea-bargaining and must show some*

[10] As with other steps in the criminal prosecution process, consultations with the relevant law enforcement authorities may be warranted in deciding such issues.

resistance to undoing a bargain". Plea discussions provide an opportunity to explore the benefits of such a plea.

It is important to note that the rationale for engaging in plea discussions applies whether the case is a routine one or one likely to prove long and complex. In either case, plea discussions should be actively pursued. The distinction between these two situations lies in the particular focus of the litigation policy and the fact that the public interest is not necessarily reflected in the same way in both situations. Thus, it is easier to justify a more lenient approach to the resolution of routine (and usually less serious) cases than it is in respect of offences that are more serious and require stern denunciation. Moreover, the overall object of the policy is to encourage the early disposition of routine cases so that the necessary resources will be available for the prosecution of the more serious and complex cases.

DIRECTIVE #12

Cases involving the commission of serious offences may require that particular consideration be given to the need for public denunciation in determining whether a particular agreement on plea is in the public interest. This does not preclude seeking a mutually agreeable resolution in these as in all other cases.

DIRECTIVE #13

Crown Attorneys will never enter into a plea agreement where an accused continues to claim his or her innocence.

A guilty plea which is not voluntary and informed does not serve the interests of justice, or the prosecution's interest in the early and conclusive resolution of cases.

Moreover, it is important to remember that the object of plea negotiations is to avoid the costs of unnecessary litigation, but only in cases where the accused is guilty, and willing to admit guilt.

DIRECTIVE #14

Where circumstances warrant, Crown Attorneys should initiate the appropriate plea comprehension inquiry, with special attention being given in situations where an accused is unrepresented.

DIRECTIVE #15

Crown Attorneys should seek to inform the defence of their best offer in return for a guilty plea as early as reasonably possible in the criminal process.

Guilty pleas are sometimes offered on the eve of, on the day of or during the course of trial, after the prosecution, police and the courts have already expended considerable time and resources dealing with the case. The administration of justice benefits from properly considered guilty pleas being entered at the earliest possible stage in the process. The approach to negotiations should accordingly tend to favour early pleas and discourage late pleas to the extent possible.

DIRECTIVE #16

Senior Crown Attorneys will establish within their respective offices a practice that aims to encourage Crown Attorneys to communicate an initial plea offer at the first reasonable opportunity.[11]

DIRECTIVE #17

Absent a change in circumstances, no subsequent offer of settlement made by the Crown should be more advantageous to the accused than the initial plea arrangement proposed.

DIRECTIVE #18

If a Crown Attorney does decide to make a subsequent offer of settlement which is more advantageous to the accused than a previous offer, the Crown Attorney must record on the file the reasons for departing from the previous sentencing position.

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[11] The means of communicating the Crown's offer to the accused may vary with circumstances and local practice. For example the offer could be communicated to unrepresented accused through a police office at the time of first appearance. In Ontario, the *Report of the Criminal Justice Review Committee* (note 16, above, at p. 24) recommends that the Crown's position on sentence not be given directly to accused persons. In any event, as is the case for other communications with an accused, it is good practice to keep a record of such communications. Judges in the Supreme Court of Newfoundland and Labrador Trial Division usually conduct this inquiry directly with the accused. See s.606(1.1) of the *Code*.

Generally, as criminal proceedings advance, plea offers should be less advantageous for an accused. A sentencing judge should not grant an accused who enters a late plea the same benefit that may accompany an early plea of guilty.[12] A late plea entered by an accused who has received timely disclosure does not reflect the element of reformation which is the usual basis for granting a benefit in return for the plea. Moreover, resource limitations within the criminal justice system are now such that the system cannot afford to encourage late pleas by treating them in the same manner as early pleas.

DIRECTIVE #19

The facts upon which a plea agreement is concluded should be clear. To the extent that it is reasonably possible to do so in the circumstances, prosecutors should have those facts reduced to writing and agreed to by the accused.

It would in all cases be prudent for counsel involved in plea discussions to have a clear understanding, which is shared by the accused, as to what facts the parties have agreed upon for the purposes of making representations on sentence following the agreement as to plea.

Special care must be taken when discussions are with an unrepresented accused. The Crown Attorney must ensure that the accused comprehends the consequences of a guilty plea. A written record of plea discussions with an unrepresented accused should be maintained in order to avoid uncertainty as to the terms of any offer.

PART VI – Resolution Discussions and Agreements

DIRECTIVE #20

Crown Attorneys will, to the extent reasonably possible, pursue issue resolution at pre-hearing conferences and at other appropriate opportunities during the course of criminal proceedings.

Not all cases will end in a guilty plea, and a trial may be necessary to establish the guilt or innocence of the accused. Even where early resolution of a case

[12] The reasonableness of this position has been accepted by the Provincial and Supreme Courts throughout Newfoundland and Labrador.

is not possible, it may be possible to expedite the litigation by identifying and resolving specific issues.

DIRECTIVE #21

Before engaging the court process (preliminary inquiry or trial), Crown Attorneys will first explore with the defence the possibility of narrowing or resolving issues and limiting the number of witnesses to be called by either party. Further, whenever appropriate, Crown Attorneys will seek to obtain a joint statement of facts on all or some of the issues at trial, with a written record of agreed facts being prepared for filing with the court.

Prosecutors should seek to identify and circumscribe outstanding issues and should not agree to have court time scheduled for arguing legal issues unless satisfied that the issues require argument.

A joint or agreed statement of facts on some or all of the issues may be the most effective vehicle to identify the issues in a timely fashion. It frees up witnesses and court time, and may leave only issues of law to be argued both at trial and on appeal. It may also lead to a re-election before judge alone, thus avoiding the additional costs of a jury trial.

Discussions may assist in narrowing both factual and legal issues. Admissions on the part of both parties and the use of statutory evidentiary aids may also result in a more efficient process, saving the time of both the court and the affected witnesses.

DIRECTIVE #22

Crown Attorneys will seek from the defence a clear indication of *Charter* and other legal issues likely to be raised, and endeavour to have these matters addressed at pre-hearing conferences.[13]

DIRECTIVE #23

Plea discussions and agreements with unrepresented accused will be carried out in accordance with the rules of caution set out in the Guide Book.

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[13] Pre-hearing conferences are provided for at s. 625.1 of the *Criminal Code* and at Rule 15 of the *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, Canada Gazette Part II Volume 138, No.21.

Discussions with an unrepresented accused raise special issues of ethics, fairness and certainty as to the result. They should be approached with particular care.

PART VII - Disclosure

DIRECTIVE #24

In accordance with the Disclosure policy, disclosure will be provided as soon as it is reasonably possible.[14]

Early disclosure has a beneficial effect on the whole process and is, in many instances, essential to an early resolution of the case. Moreover, timely disclosure may result in admissions which will reduce the length of (and in some cases even the need for) a judicial hearing.

DIRECTIVE #25

Senior Crown Attorneys, will seek arrangements with law enforcement agencies by which the agencies will undertake to identify cases involving information which, in the public interest, should not be disclosed, or for which disclosure will require editing or other means to protect the public interest.

DIRECTIVE #26

When providing disclosure Crown Attorneys will be conscious of the need to protect and/or withhold privileged information and will discuss the necessary methods of doing so with law enforcement agencies while also maintaining compliance with disclosure obligations.

The Crown's duty to disclose is not absolute. Discretion exists to withhold certain privileged information, such as information which might reveal the identity of a confidential informer or the existence of a continuing investigation. Crown Attorneys must be aware of the potential for harm resulting from the disclosure of confidential or privileged information, and where appropriate, must discuss with law enforcement agencies whether any information subject to privilege is contained in the material given to the

[14] Note that, for the purposes of the present policy, disclosure need not be preceded by a request from the defence. The focus is on providing the relevant information as early as possible with a view to avoiding unnecessary delay. Disclosure should be provided to the accused at the time of the first court appearance.

Crown for disclosure purposes. It is important to keep in mind that seemingly innocuous facts could potentially identify a confidential source just as easily as if the person's identity was directly stated in the material.

DIRECTIVE #27

Senior Crown Attorneys will develop and enforce practices designed to ascertain and record what has been disclosed and what disclosure obligations or requests, if any, remain to be completed in any given file.

Due to the importance of disclosure and the consequences of non-disclosure (for example, *Charter* relief), it has become essential for the Crown to develop the necessary tools to ascertain, at any given time, what has or has not been received from law enforcement agencies, and what has or has not been disclosed to the accused.

DIRECTIVE #28

Crown Attorneys involved in complex investigations will advise investigators on the issue of disclosure and on the preparation of the necessary disclosure material as the investigation progresses.

Whereas in routine cases the issue of disclosure is usually addressed by Crown Attorneys after a charge has been laid or the investigation completed, the process can be quite different in complex cases where a prosecutor has been involved in assisting investigators in the course of their investigation. In such circumstances, not only are disclosure issues addressed on an ongoing basis during the course of the investigation, but it is also the Crown Attorney's responsibility to advise investigators in this regard so that delays in effecting disclosure do not become an impediment to the early disposition of the case once a charge has been laid.

DIRECTIVE #29

The DPP will work collaboratively with law enforcement agencies to develop best practices to meet disclosure requirements in cost-effective ways, including through the use of available technology.

Disclosure can be a very costly and cumbersome process. Crown Attorneys are encouraged to seek and develop better ways of effecting disclosure. For example, it may be the preference for all involved in a particular case to have

the information communicated in an electronic format rather than in physical boxes of documents.

PART VIII - Complex Cases[15]

DIRECTIVE #30

Senior Crown Attorneys will meet with law enforcement agencies in their regions to discuss their priorities. This will enable them to identify:

- cases where dedicated prosecution resources may be required at the investigative stage;

- cases which will require substantial prosecution resources after charges are laid;

Law enforcement agencies and Crown Attorneys play complementary roles in the criminal process: one being responsible mainly for the investigation of offences, and the other being responsible for the prosecution of offences. They both enjoy institutional independence at their respective stage of the process. The need for institutional independence does not, however, preclude co-operation and mutual assistance in carrying out each other's mandate. Indeed, ongoing co-operation between the Crown and law enforcement agencies, although always desirable, has now become essential so as to ensure that resources will not be wasted in the pursuit of incompatible goals.

Co-operation is vitally important when the investigation is likely to result in the expenditure of substantial Crown resources at the prosecution stage. In this context, joint planning becomes a management tool aimed at anticipating and responding to resource requirements. The magnitude and complexity of certain investigations is such that the Crown may not be able to deal in a timely and effective way with the resulting prosecutions unless it has been informed beforehand of what and when resources are likely to be required.
The need for co-operation also arises in the course of specific investigations as both parties should be working together in contemplation of, and in preparation for, subsequent prosecution. The major aspect of this ongoing effort, beyond the seeking and giving of legal advice, is the preparation of materials which will be required by the process after the charges have been

[15] Complex or major cases include those which are lengthy or comprise many interrelated issues, or involve an important question of law.

laid. This includes, for example, the material required for the purposes of disclosure, bail, and the trial proper.

DIRECTIVE #31

The role of the Crown Attorney at the investigative stage is one of support and assistance. The components of that role may include:

- providing legal advice to investigators including guidance about potential *Charter* issues and the admissibility of evidence;

- assisting investigators in determining appropriate charges;

- assisting investigators in assessing the strength of the case, including the credibility of witnesses;
- advising investigators in the preparation of the court brief and the marshalling of the materials which will be required for various post-charge purposes such as disclosure, bail, etc.; and

- preparing for the prosecution during the course of the investigation so that timely and informed decisions can be made.

The Crown can assist the police and other investigative agencies in all cases by providing them with advice which may help focus investigations and facilitate the Crown's task at trial. This is particularly important where long and costly investigations are involved, which in turn are likely to result in equally long and expensive prosecutions.

Some of the areas where the advice of prosecutors may be particularly helpful include the sufficiency of grounds for obtaining a search warrant, the legality of warrantless searches, the constitutionality of certain investigative practices and the application of the Attorney General's charging standards as set out in this Guide Book.

It is important to note that early and active Crown involvement as proposed above is not intended to deprive the police of their independence at the investigative stage, but merely to make available to them the resources that may assist them in proceeding according to the rule of law and in a way that will facilitate subsequent prosecutions. As a general rule, investigative

agencies remain ultimately responsible for the way in which the investigation is carried out.

DIRECTIVE #32

Senior Crown Attorneys and the DPP will seek to identify those cases where early involvement of an assigned prosecutor during the course of the investigation might best serve the interests of effective post-charge proceedings.

Especially in more significant cases, the involvement of experienced Crown Attorneys at the investigative stage may benefit both law enforcement officials and the Crown by ensuring that, throughout the investigation, relevant decisions are made with effective prosecution in mind. It is important that consideration be given to having a prosecutor assigned to assist at the investigative stage where a case has been identified as one likely to benefit from such involvement at a particular point in the investigation.

DIRECTIVE #33

Senior Crown Attorneys will seek to ensure continuity when assigning a Crown Attorney to a particular prosecution. To this end, prosecutors assigned to assist investigators during their investigation of complex cases may also be assigned to the prosecution of the case once charges have been laid.[16]

DIRECTIVE #34

Specially assigned Crown Attorneys shall proceed during the course of the investigation in a way that will reduce as much as possible the risk of being called as a witness in the case.

Involvement of a Crown Attorney in the police investigation does raise the slight possibility that the prosecutor will be called as a witness in the case. This is obviously a matter of great concern since the prosecutor heard as a witness is rarely able to continue in his or her capacity as Crown Attorney in the case. This in turn defeats one of the main objectives of assigning Crown Attorneys to a case at the early stage, namely having a knowledgeable and

[16] The DPP's approach in this regard varies according to the particular fact situation and the policy considerations involved. The resources required for a prosecution will be a significant factor.

experienced prosecutor ready to proceed in the case from the moment the charge is laid. Fortunately, courts have been reluctant to allow counsel on either side to be called as witnesses in a case unless there are no reasonable alternatives available in the circumstances.

Resolution Discussions

Introduction

In an environment of early and comprehensive disclosure, Crown Attorneys may be in a position to informally resolve issues of procedure, plea, facts and sentence without running a case through the full criminal process.

Discussions between Crown Attorneys and defence counsel which expedite proceedings or avoid unnecessary litigation form an important and necessary part of the criminal justice system in Newfoundland and Labrador.

Discussions of this nature will be referred to throughout this section as "*resolution discussions*".[1] Though not defined in the *Criminal Code*, resolution discussions embrace several practices:

- identifying which charges an accused may plead guilty to;
- deciding how the case may proceed;
- defining what an appropriate sentence might be;
- determining what the facts are for the purposes of a guilty plea; and,
- pinpointing issues that may be narrowed in order to expedite a trial.

Resolution discussions may also facilitate the prompt and just disposition of cases in a manner more sensitive to the circumstances of the participants than would be possible in a formal trial.

These guidelines are intended to clarify the issues Crown Attorneys may attempt to resolve, and to ensure consistency in approach.

General Principles

1. A resolution agreement must reflect the public interest in effective law enforcement. In this respect, appropriate factors to consider may include:

    - the criminal history of the accused
    - the nature and gravity of the offence
    - the value of a prompt and certain disposition
    - the perspective of the victim and witnesses

[1] This subject matter is also dealt with in this Guide Book in Chapter 12, "Conduct of Criminal Litigation".

- the sentence that may be expected after a trial

2. Where reasonable options for agreements exist, Crown Attorneys should seek to engage defence counsel in resolution discussions at the earliest opportunity. Resolution discussions with unrepresented accused are discussed in further detail later in this chapter.

3. Crown Attorneys are strongly encouraged to discuss difficult resolution proposals with supervisors and colleagues prior to entering into an agreement.

4. Crown Attorneys must be mindful of policies that specifically address particular types of offences (for example, impaired driving or intimate partner violence offences).

5. Resolution discussions are primarily conducted between counsel; however during these discussions prosecutorial discretion will sometimes require consultations with victims and/or the investigating agency.

   While a Crown Attorney should consider any concerns expressed by the victim, the victim's family, the police or any other investigative agency, the final decision with respect to a potential resolution agreement rests with the Crown Attorney in accordance with this policy.

6. If a resolution agreement is reached, Crown Attorneys should ensure that victims and the investigator(s) understand its substance and rationale. The scope of this discussion may, rarely, have to be limited by privacy or secrecy considerations in the accused's interest or in the general public interest.

   The Crown Attorney may only forego this general policy when the charge is relatively minor (ex. a summary conviction theft) or the resolution is a routine occurrence (ex. an impaired driving charge for a first time offender).

7. Where a plea or sentence agreement has been reached, Crown Attorneys should present the proposal to the trial judge in open court and on the record.

   In certain circumstances, particularly when a sentence agreement may be characterized as a "*joint submission*" it may be necessary to discuss some aspects of the agreement with the trial judge privately. This should be done only in rare and compelling situations involving facts which in the interest of the public or the accused ought not to be disclosed publicly. Common examples include cases where the accused is terminally ill, or has acted as a

confidential informer for the police. The best mechanism for this may be an *in camera* hearing.[2]

However, it is not acceptable to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it. This does not, however, prevent counsel's participation in a pre-trial conference conducted under section 625.1 of the *Criminal Code* or under the *Provincial Court Criminal Rules*.

8. Crown Attorneys may acknowledge that a plea of guilty is a mitigating factor in sentencing considerations. When there is sincere remorse and the guilty plea is offered at the first reasonable opportunity, it is particularly mitigating. At the early stages of the criminal process, Crown Attorneys should give full and appropriate credit for a guilty plea. When resolution discussions occur at a later stage in the criminal process, particularly when a guilty plea is offered only after ascertaining that all essential evidence has been assembled at court, significantly less credit should be given.

9. Crown Attorneys should maintain a complete record of all resolution discussions and agreements on the file. This will promote a consistent and informed practice and enhance the ability of Crown Attorneys to provide appropriate information to the public and persons directly involved in a case, thus increasing confidence in the justice system.

In routine cases where the accused pleads guilty early in the criminal process and the Crown Attorney agrees to a sentence within the usual range for the offence charged, the position of the Crown and its rationale will usually be apparent from the court record.

In all other instances, careful notes should be made in the prosecution file outlining any discussions that have occurred with defence counsel, any consultations with supervisors or colleagues, and the rationale for the position taken. This is particularly important when the Crown Attorney has taken an

[2] *In Camera* hearings are those done in a closed courtroom, with all spectators excluded. Section 486 of the *Criminal Code* provides for in camera proceedings where it is ruled to be in the interest of public morals, the maintenance of order, the proper administration of justice, or if an open court could hurt international relations or affect national security or defence (Steve Coughlan et al, *Canadian Law Dictionary,* (Hauppauge, NY: Barron's, 2013) sub verbo "in camera".

unusual position, the case is complex, the prosecution is (or may be) passed on to another prosecutor, or the case is likely to attract public attention.

10. Generally, negotiated resolution agreements must be honoured by the Crown. Repudiation of a resolution agreement can occur only if the agreement would bring the administration of justice into disrepute and the accused can be restored to his or her original position, or, if the Crown Attorney has been misled about material facts. Repudiation by a Crown Attorney must be approved by a Senior Crown Attorney.

    If an accused enters a plea based on a negotiated plea or sentence agreement and the court disposes of the case on those terms, no appeal may be undertaken unless exceptional circumstances exist and the Senior Crown Attorney authorizes the appeal after consultation with the DPP.

11. Crown Attorneys must not purport to bind the discretion of the Attorney General or the Director of Public Prosecutions to appeal. Dispositions flowing from a resolution agreement will only be the subject of an appeal or of a recommendation to appeal where, in the opinion of the DPP, the agreed outcome, if unaltered, would bring the administration of justice into disrepute.

Application of the Policy

The following guidelines are not designed to require a set form. Instead, these guidelines are intended to assist Crown Attorneys in the conduct of meaningful resolution discussions.

Charge Discussions

Charge discussions may properly include the following:

- reducing a charge to a lesser or included offence;
- withdrawing or terminating proceedings related to other charges;
- agreeing not to proceed on a charge or agreeing to terminate proceedings with respect to charges against others (for example, friends or family of the accused, or individual corporate officers);
- agreeing to reduce multiple charges to one all-inclusive charge (where permitted by law); and,

- agreeing to terminate proceedings with respect to certain counts and proceed on others, and to rely on the material facts that supported the terminated counts as aggravating factors for sentencing purposes. This may not be done, however, where the counts to be withdrawn are serious charges unrelated to the charges for which guilty pleas are entered.

The following practices are not acceptable:

- instructing or proceeding with unnecessary additional charges to secure a negotiated plea;

- agreeing to a plea of guilty to an offence not disclosed by the evidence; or,

- agreeing to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct unless, in exceptional circumstances, the plea is justifiable in terms of the benefit that will accrue to the administration of justice, the protection of society, or the protection of the accused.

Plea and Sentence Discussions

Crown Attorneys may participate in resolution discussions concerning pleas and sentence where:

- the case meets the charge approval standard set out in this Guide Book;
- the accused is willing to acknowledge guilt unequivocally; and,
- the consent of the accused to plead guilty is both voluntary and informed. A guilty plea which is not voluntary and informed does not serve the interests of justice, or the prosecution's interest in the early and conclusive resolution of cases.

<u>Advising Victims</u>

Crown Attorneys should take reasonable steps, when possible, to ensure that a victim is consulted about a potential plea and/or sentence agreement.

By consulting victims before any agreements are finalized, the Crown Attorney will have the opportunity to gather information that may inform the terms and conditions

of ancillary orders such as probation orders, restitution orders and firearm prohibitions.

In accordance with the *Canadian Victims Bill of Rights*, every victim has the right to convey their views about decisions that may be made by appropriate authorities in the criminal justice system that affect the victim's rights under the Act, and to have their views considered through the mechanisms provided by law.[3]

Under the *Victims Bill of Rights* amendments to the *Criminal Code*, where a resolution to plead guilty has been reached in a case where an accused is charged with a serious personal injury offence within the meaning of s.752 of the *Code*, or with murder, or with an indictable offence punishable by five years' imprisonment or more, the court is mandated to inquire of the Crown Attorney whether reasonable steps were taken to inform the victim of the resolution. While the amendments do not mandate the court to adjourn proceedings in cases where this has not been done, this is a likely potential consequence of a failure to keep victims informed. The amendments mandate Crown Attorneys to take reasonable steps to inform victim(s) after the guilty plea has been accepted. The amendments underscore the need for timely victim communication.

If a victim expresses significant concerns about the proposed resolution or wish to have the agreement reviewed, the Crown Attorney should consult with a Senior Crown Attorney and should not conclude resolution discussions, withdraw charges, or enter a stay of proceedings until that consultation has occurred.

However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with the Crown Attorney.

<u>Indigenous Accused</u>

When engaging in resolution discussions and developing a sentencing position with respect to an Indigenous accused person, Crown Attorneys must consider:

[3] *Canadian Victims Bill of Rights* , C. 2015, c. 13, s. 2

• the principles[4] established in *R. v. Gladue;*[5]

• the contents of any available *Gladue Report*[6] or related information or evidence about the unique or systemic background factors that may have played a part in bringing the Indigenous accused person before the court;

• the impact these factors, as well as the continuing consequences of colonial history, will have on the Indigenous accused person's ongoing interaction with the criminal justice system;

Further, when a case involves Indigenous persons as victims, Crown Attorneys should ensure that their sentencing positions reflect the gravity of the problem of violence against Indigenous persons in our society, particularly Indigenous women and girls, and the serious injustices they have faced. Crown Attorneys must also be aware, in cases that involve the abuse of a person who is vulnerable because of personal circumstances (including because a person is Indigenous and female) that section 718.04 of the *Criminal Code* requires the court to give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

Consultation Required

1. Crown Attorneys must consult with their supervisors before engaging in charge, plea and/or sentence discussions in any case which involves:

   (a) a death; and,

   (b) a charge against public figures or persons involved in the administration of justice.

[4] s.718.2(e) of the *Criminal Code* states "a court that imposes a sentence shall also take into consideration: all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders".

[5] *R v Gladue*, [1999] 1 SCR 688.

[6] A Gladue report is a report similar to a pre-sentencing or pre-bail hearing report which can be requested by the judge, defence or Crown Attorneys and which includes background information on Aboriginal offenders including the individual's history regarding residential schools, child welfare removal, physical or sexual abuse and/or any underlying developmental or health issues (mental or physical). These reports also include recommendations on sentencing considerations.

2. Crown Attorneys should consult with their supervisors before engaging in charge, plea and/or sentence discussions in the following types of cases:

   (a) criminal conduct involving group or organized activity;

   (b) cases expanding the use of particular Criminal Code provisions, or which raise novel issues relating to aboriginal rights or any other legislation, including the Charter; and

   (c) cases which have attracted media attention, or which will likely be of public concern when presented in court.

3. Crown Attorneys are strongly encouraged to consult with Senior Crown Attorneys and experienced colleagues before engaging in charge, plea and/or sentence discussions in all other significant or unusual cases. The determination of whether a case is significant requires judgment by the prosecutor involved. If a lengthy prison sentence appears to be appropriate for the criminal conduct, this may be a strong indicator that the matter is significant enough to involve consultation.

   Cases with multiple victims, large losses of property or which involve criminal activity at several locations are other examples of cases often considered to be significant.

The Conduct of Plea and Sentence Discussions

The following should inform Crown Attorney's approach to plea and sentence negotiation:

- Resolution agreements which result in inadequate sentences tend to undermine public confidence in the justice system. It is never appropriate to accept an inadequate sentence proposal simply to avoid a trial, or to obtain a guilty plea when the evidential threshold is not met. If the requisite evidential threshold is not met, and the Crown Attorney determines that there is no reasonable likelihood of a conviction, the case should be terminated.

- While joint submissions are subject to the overriding discretion of the court to accept or reject, the Supreme Court of Canada has determined that a judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into

disrepute or is otherwise contrary to the public interest.[7] To a lesser extent, joint recommendations are also subject to a degree of judicial deference.[8]

- The administration of justice benefits from properly considered guilty pleas being entered at the earliest possible stage in the process. The approach to negotiations should accordingly tend to favour early pleas and discourage late pleas.

- Absent a change in circumstances, a Crown Attorney should not offer the same sentencing position at later stages in the proceedings. Absent a significant change in circumstances, a Crown Attorney should not lower the initial sentencing offer later in the proceedings.

- Crown Attorneys should initiate plea discussions, and there must be a response to a request for plea discussion from counsel or an unrepresented accused.

- Crown Attorneys who conduct sentence negotiations shall have full authority to enter into binding agreements.

- Senior Crown Attorneys shall ensure that Crown Attorneys are made available to conduct plea and sentence discussions; this may include, for example, the court where accused persons make their first appearance.

- Where an accused changes counsel, Crown Attorneys should advise the new counsel of previous offers and the Crown's current position.

- Any recommendation not to request a DNA Order should only occur in exceptional circumstances and then only after consultation with the Senior Crown Attorney in advance of the confirmation of sentence discussions.

[7] *R v Anthony-Cook*, 2016 SCC 43, at para. 32
[8] *R v Frampton*, 2018 NLCA 23, at para. 27 & 28.

The Appropriate Subject-Matter for Sentence Discussions

Sentence discussions may properly include the following:

- a recommendation by Crown Attorneys for a certain range of sentence or for a specific sentence;
- a joint recommendation or joint submission for a range of sentence or for a specific sentences;
- an agreement by Crown Attorneys not to oppose a sentence recommendation by defence counsel which has been disclosed in advance;[9]
- an agreement by Crown Attorneys not to seek additional optional sentencing measures (for example, prohibition orders, preventive detention, forfeiture). However, Crown Attorneys cannot negotiate sentencing measures which apply by operation of law;[10]
- an agreement by Crown Attorneys not to seek more severe punishment by not proceeding with a Notice of Intention to Seek Greater Punishment;[11]
- agreement by Crown Attorneys not to oppose the imposition of an intermittent sentence rather than a continuous sentence; and
- the type of conditions to be imposed on a conditional sentence or probation order.

The following practice is not acceptable:

- a promise in advance not to appeal the sentence imposed at trial.

Joint Recommendations and Joint Sentence Submissions

A joint submission is to be distinguished from a joint recommendation on sentence. A joint submission results from a resolution or agreement between the Crown and defence following discussions that led to a guilty plea. Joint submissions generally involve a *quid pro quo*[12] in which, through discussions, both counsel agree to some

[9] But see the mandatory aspects of some sentences such as impaired driving as set out in this Guide Book.
[10] See for example; subsection 109(1) of the Criminal Code which requires a prohibition order for firearms in certain cases.
[11] But see also Chapter 21 of this Guide Book, "Impaired Driving Cases".
[12] *Quid pro quo* is latin for "what for what", essentially meaning something given for something. In some legal contexts it is synonymous with consideration – indicating that which a party receives

accommodation. By contrast, a joint recommendation arises when defence counsel agrees that the sentence proposed by the Crown would be appropriate or, otherwise, the Crown and defence have come to a similar conclusion regarding an appropriate sentence.[13]

Agreements on the Facts of the Offence

Where an accused decides to plead guilty, Crown Attorneys should agree to put before the court those facts that could have been proved by admissible evidence if the matter went to trial. Discussions regarding the facts may properly include the following:

- an agreement not to include in representations to the court embarrassing facts which are of little or no significance to the charge; and

- an agreement to rely on an agreed statement of facts.

The following practices are not acceptable:

- an agreement respecting facts which results in or gives the appearance of misleading the court, such as:

    a. an agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;

    b. an agreement not to advise the court of the extent of the injury or damages suffered by a victim;

    c. an agreement to withhold from the court facts that are provable; and,

    d. an agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.

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or is promised in return for something he or she promises, gives or does. (Steve Coughlan et al, Canadian Law Dictionary, (Hauppauge, NY: Barron's, 2013) sub verbo "quid pro quo").

[13] *Frampton*, *supra* note 5, at para 20

Procedural Discussions

Procedural discussions may properly include the following:

- agreeing to proceed summarily instead of by indictment;
- agreeing to dispose of the case at a specified future date if, on the record and in open court, the accused is prepared to waive the right to a trial within a reasonable time; and,
- agreeing to the transfer of charges to or from Newfoundland and Labrador, or to or from a particular region within Newfoundland and Labrador.

However, procedural discussions **cannot** include an agreement to contravene or ignore provisions of the *Criminal Code*. As an example, in a particular case the Crown Attorney and defence counsel may see the benefit of gathering information about an accused by means of a psychological assessment; but there can be no agreement to obtain an assessment order unless the circumstances satisfy the specific criteria listed in section 672.11 of the *Criminal Code*.

Pre-Trial Conferences[14]

Pursuant to s. 625.1(2) of the *Criminal Code*, pre-trial conferences are mandatory for cases in which a jury trial is to take place. Pre-trial conferences may also take place in trials to be conducted by a judge or justice alone, pursuant to s. 625.1(1). A pre-trial conference may also take place under Rule 15 of the *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings.*[15]

Judicially supervised pre-trial conferences are an important facet of our criminal justice system. They are effective not only for encouraging fair dispositions of cases without trial, but also for narrowing the issues in cases that do proceed to trial. Crown Attorneys are encouraged to take whatever steps are reasonably possible to ensure that such conferences run smoothly, which may include:

[14] This section follows suggestions made by the *Report of the Criminal Justice Review Committee* (Ontario: Queen's Printer, 1999) pp. 66-68, and are in accord with the practices which have been implemented in Newfoundland and Labrador.

[15] *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, Canada Gazette Part II Volume 138, No.21.

- ensuring that sufficient disclosure has been made to defence counsel prior to the pre-trial conference;

- meeting with defence counsel prior to the pre-trial conference;

- attempting to secure the attendance of an investigator on the case, where such attendance would be useful or necessary;

- initiating steps with court administrators for the holding of a pre-trial conference, where the court has not done so; and

- identifying areas and issues in which agreements can be reached before the pre-trial conference, which would potentially shorten the proceedings.

Narrowing the Issues for Trial

When cases proceed to trial, Crown Attorneys must attempt to narrow the issues to be litigated as much as possible. Crown Attorneys should:

- identify any legal issues that may arise and seek the defence's position on those issues;

- more particularly, identify those issues from which defence counsel might make admissions, such as voir dires on the admissibility of statements[16]; and

- identify witnesses whose evidence may not be necessary, so that unnecessary subpoenas are not issued.

Unrepresented Accused

Plea or sentence negotiations with an unrepresented accused call for extreme care. In general, Crown Attorneys should not initiate negotiations with an unrepresented accused; if approached by an accused, however, Crown Attorneys may negotiate in accordance with this policy. It is essential that any such discussions proceed only where it is clear that the accused is acting voluntarily.[17] Pursuant to s. 606 (1.1) of

[16] It may be useful in this regard to prepare a list of potential admissions and provide it to defence counsel for his or her signature.
[17] See, in this regard, *R v Rajaeefard* (1996), 104 C.C.C.(3d) 225 (Ont.C.A.), where undue pressure was brought to bear on the accused by a judge.

the *Criminal Code*, a court must be satisfied that guilty pleas are made voluntarily and are understood by accused persons.

Crown Attorneys should first encourage the accused to retain counsel and, where appropriate, advise the accused of the availability of legal aid. If the accused declines to retain counsel, Crown Attorneys should generally arrange for a third person to be present during discussions because of the need to maintain an arms-length relationship with the accused. A detailed record should be kept of all discussions. In most instances, a written agreement or written evidence of an agreement[18] will be appropriate. When the case is disposed of in accordance with a negotiated plea or sentence agreement, Crown Attorneys should tell the judge about the existence of the agreement and that the accused was encouraged to retain counsel but declined to do so.

Crown Attorneys should not conduct plea or sentence discussions with an unrepresented accused unless satisfied that the accused has been given full disclosure or is aware of the right to full disclosure.[19]

Directives from Chapter 8 "The Conduct of Criminal Litigation"

Chapter 8 of this Guidebook also includes a number of directives pertaining to plea and sentence negotiations and agreements. Though many of the points are addressed above, for the sake of convenience those directives are repeated here:

DIRECTIVE #11

Crown Attorneys will seek, to the extent reasonably possible, to dispose of charges through plea discussions and agreements.

DIRECTIVE #12

Cases involving the commission of serious offences may require that particular consideration be given to the need for public denunciation in determining whether a particular agreement on plea is in the public interest. This does not preclude seeking a mutually agreeable resolution in these as in all other cases.

[18] Such as a memorandum to file or, minimally, a detailed endorsement on the file.
[19] See materials in this Guide Book in Chapter 10 regarding "Disclosure", and in particular on providing disclosure to an unrepresented accused.

DIRECTIVE #13

Crown Attorneys will never enter into a plea agreement where an accused continues to claim his or her innocence.

DIRECTIVE #14

Where circumstances warrant, Crown Attorneys should initiate the appropriate plea comprehension inquiry, with special attention being given to the situation of unrepresented accused.

DIRECTIVE #15

Crown Attorneys should seek to inform the defence of their best offer in return for a guilty plea as early as reasonably possible in the criminal process.

DIRECTIVE #16

Senior Crown Attorneys will establish within their respective offices a practice that aims to encourage Crown Attorneys to communicate an initial plea offer at the first reasonable opportunity.

DIRECTIVE #17

Absent a change in circumstances, no subsequent offer of settlement made by the Crown should be more advantageous to the accused than the initial plea arrangement proposed.

DIRECTIVE #18

If a Crown Attorney does decide to make a subsequent offer of settlement which is more advantageous to the accused than a previous offer, the Crown Attorney must record on the file the reasons for departing from the previous sentencing position.

DIRECTIVE #19

The facts upon which a plea agreement is concluded should be clear. To the extent that it is reasonably possible to do so in the circumstances, prosecutors should have those facts reduced to writing and agreed to by the accused.

DIRECTIVE #20

Crown Attorneys will, to the extent reasonably possible, pursue issue resolution at pre-hearing conferences and at other appropriate opportunities during the course of criminal proceedings.

DIRECTIVE #21

Before engaging the court process (preliminary inquiry or trial), Crown Attorneys will first explore with the defence the possibility of narrowing or resolving issues and limiting the number of witnesses to be called by either party. Further, whenever appropriate, Crown Attorneys will seek to obtain a joint statement of facts on all or some of the issues at trial, with a written record of agreed facts being prepared for filing with the court.

DIRECTIVE #22

Crown Attorneys will seek from the defence a clear indication of Charter and other legal issues likely to be raised, and endeavour to have these matters addressed at pre-hearing conferences.

DIRECTIVE #23

Discussions with unrepresented accused will be carried out in accordance with the rules of caution set out in the Guide Book on plea discussions and agreements with unrepresented accused.

Transferring Charges & Inter-Jurisdictional Issues

Introduction

Offences are generally tried in the judicial district where they are alleged to have been committed. The transfer of charges between jurisdictions gives rise to important policy considerations. This section outlines policy that guides Public Prosecutions in the exercise of discretion to consent to transfer *Criminal Code* charges to another jurisdiction.

Provincial offences cannot be transferred out of the province.

Section 479 of the *Criminal Code* governs intra-provincial transfers of charges - transfers from one judicial district to another in the same province.

Subsection 478(3) governs inter-provincial transfers - transfers from one province to another.

Both types of transfers must meet the following requirements:

- the offence is not listed under section 469;
- the prosecution is being conducted on behalf of the Attorney General of Newfoundland and Labrador;
- the Attorney General of Newfoundland and Labrador or their designate must consent to the transfer; and
- the accused must have agreed to plead guilty to the charge/s being transferred.

Statement of Policy

In general, the Attorney General or their designate will consent to a transfer of charges from this province to another upon the request of the accused and an undertaking to plead guilty.

However, consent should be withheld if, due to the facts and circumstances of the case, the public interest would not be served by a transfer.

In deciding whether a transfer is in the public interest, the following considerations, among others, are relevant:

a. Does the accused have substantial ties with the receiving jurisdiction to which it is proposed that the charge be transferred?

b. Are the sentencing practices and precedents in the receiving jurisdiction reasonably consistent with practices and precedents in Newfoundland and Labrador?

c. Is there a significant public interest in the case such that it ought to be disposed of in the community where the offence occurred?

d. Is a transfer likely to result in undue delay, or has undue delay already occurred?

e. Is there a reasonable basis to believe that once the charge is transferred the accused may withdraw the undertaking to plead guilty to the offence, thereby requiring the charge to be returned to the originating jurisdiction?

f. Despite the undertaking to plead guilty, are any material facts likely to be in issue, thus requiring the Crown to call *viva voce* evidence under the rule in *R*. v. *Gardiner?*[1]

The Senior Crown Attorney of the Special Prosecutions Office is the Attorney General's designate for the purpose of determining if there will be consent to an application to transfer of charges to another province.

If the Senior Crown Attorney (SPO) decides not to consent to a transfer, s/he shall advise counsel for the accused or the accused personally if they have not retained counsel.

Additional Guidelines

Any accused or defence counsel who seeks a transfer of charges to another province should be referred to the Special Prosecutions Office.

When a Crown Attorney is assigned a case that has been transferred from another jurisdiction, they may not reduce any charge to a lesser, included offence without first consulting the originating office.

[1] [1982] 2 SCR 368 at 413 ff.; 68 C.C.C. (2d) 477 at 513-16.

The originating office should advise the receiving office of any discussions with respect to sentencing that took place prior to the waiver; however, the originating office should not dictate a sentence recommendation to the receiving office.

Where the waiver of charges involves a provincial prosecution service, the process must respect the protocol adopted by the Federal / Provincial / Territorial Heads of Prosecution on transfer of charges. The protocol appears as Appendix "C" to this chapter.

For an inter-provincial waiver of charges, the receiving office shall return the file, with a certified copy of the Information (showing disposition) and certified copies of any court orders, to the Special Prosecutions Office. The Special Prosecutions Office will ensure that the court, police and victims are advised of the outcome of the case.

Where the accused, on an intra-provincial transfer, fails to appear in the receiving court or refuses to plead guilty, the office which authorized the waiver must arrange for the clerk of the receiving court to return the information to the originating court. The accused must then re-appear before the originating court. If the accused fails to appear before the originating court, a warrant should be requested.

For out of province transfers, where an accused fails to appear or refuses to plead guilty, the file, including the original Information, should be returned to the Special Prosecutions Office, to be forwarded to the originating province.

Procedure[2]

The *Application for Transfer*[3], signed by the accused, must state the following:

a. the full name of accused;

b. the current location of the accused;

c. particulars of the offence, to make clear which charge(s) is the subject of the request;

[2] This procedure should be followed for both intra-provincial and inter-provincial transfer of charges.
[3] A sample application for waiver is attached as Appendix "A".

d. an undertaking by the accused to plead guilty in the receiving jurisdiction to the charge(s) for which transfer is sought; and

e. the originating and receiving judicial districts.

The *Consent to the Transfer of Charges* [4]should include the following:

a. a copy of the Information(s);

b. a reference to the accused's undertaking to plead guilty;

c. the name and current location of the accused; and

d. the signature of the DPP or designate of the originating office.

Other than the *Consent to the Transfer*, the receiving court generally requires the following documents:

a. the original information/indictment sworn in respect of the offence(s);

b. a summary of the facts alleged in support of the charge(s);

c. a copy of the accused's criminal record (if any);

d. a copy of the accused's application for transfer and

e. a copy of the Notice to Seek Greater Punishment (if applicable) and other documents associated with impaired driving offences.

To ensure that the receiving court acquires these documents, the office in the originating jurisdiction must make certain that:

a. any inquiries concerning inter-provincial transfers be referred to the Special Prosecutions Office. Special Prosecutions will then request the file from the regional office and the original information from the court. Special Prosecutions will send the entire package to the transfer coordinator in the receiving jurisdiction;

[4] A sample consent form is attached as Appendix "B".

b. Crown Attorneys appearing in the receiving court receives a prosecution brief including sufficient particulars about the offence to support the Crown's case and to enable the court to accept a plea of guilty;

c. Crown Attorneys appearing in the receiving court receive a copy of any correspondence or notes made by the Crown previously handling the file about any agreement with defence counsel on sentencing submissions;

d. the investigating agency in the originating jurisdiction is advised of the transfer; and

e. victim services or the victim is advised of the transfer.

It is important to note that a court hearing or an endorsement by a judge is not required.

Extradition

Extradition refers to the process of surrender by one state, at the request of another, of a person who is accused or has been convicted of a crime committed within the jurisdiction of the requesting state.

The *Extradition Act* (Canada) is the applicable legislation when the return is sought of an accused or convicted offender to Canada from another country. Most requests are made to countries with which Canada has entered into an Extradition Treaty but this is not always the case.

The criminal conduct underlying the offence for which extradition is sought must be an offence against the laws of both countries. Generally speaking, the fugitive must not be subjected to trial or punishment for offences except for those offences for which his surrender was requested and ordered.

Requests for the extradition of an accused person to Canada involving Newfoundland and Labrador must first be approved by the Director of Public Prosecutions. The Special Prosecutions Office is responsible for providing the information supporting the request to the International Assistance Group (IAG) at the Department of Justice, Canada. The IAG will then review the request and, where appropriate, send it through the proper channels and liaise with the foreign state.

Extradition is a labour and resource intensive process for both the requesting state and the jurisdiction receiving the request. As such, it can only be pursued in exceptional circumstances.

Mutual Legal Assistance

Mutual Legal Assistance (MLA) is a formal process by which countries share evidence and provide other types of assistance to advance criminal investigations and prosecutions. The requests are generally made pursuant to Mutual Legal Assistance Treaties that are in force between Canada and other countries. The main types of assistance covered by the treaties include:

- gathering evidence, including documents, affidavits and witness testimony:
- lending of exhibits;
- transfers of sentenced prisoners to testify or assist in an investigation or prosecution;
- search and seizure; and
- the enforcement of criminal fines and confiscation orders.

Where no treaty exists, assistance may still be provided pursuant to agreement between Canada and the foreign country.

All requests are processed through the International Assistance Group (IAG) at the Department of Justice, Ottawa. Both Crown Attorneys and police are competent authorities for the purpose of making MLAT requests. Investigative requests will normally be made by police.

Any MLAT requests should go through the Special Prosecutions Office who will assist with the drafting and submitting of requests to the IAG. The IAG will ultimately decide whether the MLAT request will proceed. As MLAT requests are a time consuming and lengthy process, they will only be considered when necessary and for serious offences.

The Federal Department of Justice handles all requests from other countries for Mutual Legal Assistance.

Return of Accused Persons in another Province

Warrants of arrests or committals issued by the Supreme Court of Newfoundland and Labrador a well as the Court of Appeal may be executed anywhere in Canada (s. 703, *Criminal Code*).

Warrants issued by a justice or Provincial Court Judge may only be executed in the province.

However, there is a process pursuant to sections 528 and 503(3)-(3.1) of the *Criminal Code* that effectively permits the execution of a warrant in another province. A justice in the jurisdiction where the accused has been located may endorse an outstanding warrant, and the accused may be remanded in that province for up to 6 days to permit filing of the necessary documentation and the arrangements for their transport back to the originating jurisdiction.

The Crown has a role in the process whether police from this province are seeking the return of an accused in another province, or police from another province are seeking the return of an accused in Newfoundland and Labrador.

<u>Accused in another province with an outstanding warrant in NL</u>

Occasionally, a policing agency in this province will advise that they have located an accused who is subject to a warrant, and that the accused is in another province. The police should ask the Crown if charges will proceed if the accused is returned. The Crown will then ask the police to determine if the evidence and witnesses in relation to the outstanding charge are still available. Further, the Crown will need to assess the public interest in proceeding, with due consideration for the potential transportation costs relating to the accused's return to Newfoundland and Labrador.

If the Crown determines that the evidence is no longer available and/or the public interest does not weigh in favour of returning the accused, the Crown should further consider withdrawing the charges in question.

<u>Accused in NL with an outstanding warrant in another province</u>

On other occasions, the Crown will be advised that an accused in custody here is being sought by a policing agency in another province due to an outstanding warrant. The Crown must confirm that the authorities in the other jurisdiction will seek the return of that accused. In this circumstance, the Crown should obtain a copy of the warrant to present to the Court. Further, the Crown must ensure that the policing agency seeking the accused has made the

arrangements necessary to retrieve the accused from custody within the 6 days remand period.

Appendix A

Canada **Province of Newfoundland and Labrador**

Request for Transfer of Criminal Charges
Pursuant to Section 478(3) of the Criminal Code

Name: _____

Date of Birth: _____

Address: _____

_____

Telephone: _____

Take Notice that I, _____, hereby seek the consent of the Attorney General of _____, to have criminal charges transferred to my present jurisdiction pursuant to the provisions of Section 478(3) of the Criminal Code of Canada. I undertake to enter a guilty plea in Provincial Court in the Province of _____ _____ and to have sentence imposed at that time.

PARTICULARS OF OUTSTANDING CHARGES

	OFFENCE	**LOCATION COMMITTED**	**DATE COMMITTED**
1.	_____	_____	_____
2.	_____	_____	_____
3.	_____	_____	_____

DATED at _____, in the Province of _____ _____, this _____

day of _____, 202 .

_____ _____

Witness Applicant

Appendix B

TRANSFER OF CHARGES - SECTION

RE:

WHEREAS the undersigned has been informed that the accused is at present in the Province of ;

AND WHEREAS there are in the Province of Newfoundland and Labrador outstanding charges against the accused set out in the attached Information(s);

AND WHEREAS the undersigned has further been informed that the accused is prepared, in accordance with subsection (1) of Section 478 of the *Criminal Code of Canada*, to signify his consent to plead guilty to the offence(s) with which he is charged in the Province of Newfoundland and Labrador;

NOW THEREFORE the undersigned consents to have the accused brought before a court in the Province of British Columbia that would have had jurisdiction to try the offence(s) as if it/they had been committed in that Province to be dealt with in accordance with subsection (3) of Section 478 of the *Criminal Code of Canada*.

DATED this day of , 202 .

JOHN R. SMITH
CROWN COUNSEL AND AGENT
FOR
THE ATTORNEY GENERAL FOR
THE PROVINCE OF
NEWFOUNDLAND
AND LABRADOR

Appendix C

- F/P/T Protocol on the Inter-Provincial Transfer of Criminal Charges

This protocol addresses the definition of responsibilities and accountability between transferring and recipient provinces, territories, and the Federal Prosecution Service under s.478 of the *Criminal Code*.

Statement of Principle

It is understood that an originating jurisdiction, in agreeing to transfer of a charge to another, is effectively waiving control over that charge, subject to the provisions of this protocol.

Reduction/Withdrawal of Charges

Reduction of charges or withdrawal of multiple counts should be delineated by the originating jurisdiction prior to transfer. The receiving jurisdiction should consult with the originating jurisdiction regarding any proposed reduction or withdrawal of a transferred charge.

Sentencing Representations to the Court

While the receiving jurisdiction will take into consideration any recommendations as to sentence offered by the originating jurisdiction, the position to be taken on sentencing will be determined by the receiving jurisdiction [in accordance with the sentencing regime of the receiving

jurisdiction]. The Crown in the originating jurisdiction should communicate to defence counsel and unrepresented applicants for transfers in the originating jurisdiction that any recommendation on sentence agreed to before transfer will not be binding in the receiving jurisdiction.

The Decision to Appeal

The decision to appeal a sentence rests with the receiving jurisdiction. That jurisdiction may seek input from the originating jurisdiction in this regard, but shall be guided by the principles and ranges, as established by that jurisdiction's appellate courts.

Limitation on Transfer Requests

Generally, only one request for the transfer of charges between jurisdictions will be considered, subject to any exceptional circumstances which may exist. This should be communicated to applicants for transfer by the originating jurisdiction.

Victims and Victim Impact Statements

In considering whether or not to transfer a charge, the originating jurisdiction must consider the interests of the victim, as well as the offender. Should the Crown in the originating jurisdiction receive an indication from the victim that he/she wishes to participate in person in the sentencing proceeding, this position should be considered prior to transferring the criminal charge. Where a charge is transferred, Victim Impact Statements which have been prepared will be provided in separate sealed envelopes to the receiving jurisdiction along with the charges and other related documentation.

Where the matter is sensitive and has significant public interest and concern, the originating jurisdiction should advise victims that the matter is being waived and that the ultimate control over the filing of Victim Impact Statements will be subject to the policies and practices of Crown counsel in the receiving jurisdiction. Victims in these circumstances will be provided a telephone number or other contact means to reach the Crown in the receiving jurisdiction in order to express their concerns about the filing of victim impact information. Otherwise, the filing of victim impact information should be at the discretion of the receiving Crown, with the benefit of recommendations from the originating jurisdiction but based on the receiving jurisdiction's policies and practices.

Documentation

All receiving jurisdictions will attempt to provide certified copies of sentencing documentation to the originating jurisdiction.

Determination of the Facts

Crown counsel in the originating jurisdiction should ensure that a summary of the facts is included in the documentation transferred to the receiving jurisdiction. Save in exceptional circumstances, Crown counsel in the receiving jurisdiction, in making representations to a Court, should not vary from the facts as determined by the Crown in the originating jurisdiction. This protocol does not provide for witnesses to travel from the originating jurisdiction to the receiving jurisdiction to establish the facts. Where it is proposed to vary from the facts as submitted by the originating jurisdiction, Crown Counsel in the receiving jurisdiction is encouraged to contact the Crown in the originating jurisdiction. A dispute as to the facts which cannot be resolved by Crown counsel in the receiving jurisdiction will result in the return of the file to the original jurisdiction for its attention.

Charges Under the *Controlled Drugs and Substances Act*

Currently, the Federal Prosecution Service, New Brunswick, Quebec, and Alberta [with respect to proceedings respecting youth, only] undertake the prosecution of *CDSA* charges. These jurisdictions may refer such charges to either a provincial prosecuting agency which undertakes such prosecutions, or to the FPS for disposition.

Where these matters fall within the prosecutorial responsibility of the Attorney General of Canada, prosecutors or standing agents engaged by the Federal Prosecution Service will generally conduct such transferred proceedings in the receiving jurisdiction, unless the FPS opts to request the involvement of a provincial prosecution service.

Administration

All jurisdictions are encouraged to have one office to coordinate transfers to and from that jurisdiction. In any jurisdiction where this is not feasible, that jurisdiction will provide all jurisdictions with a list of those individuals within that prosecution service who are responsible for transfer of criminal charges.

Elections and Re-Elections

Introduction

This section of the Guide Book sets out policies on the following:

- determining whether to proceed summarily or by indictment in "*dual procedure*" ("*hybrid*") offences;
- consenting to re-election by an accused; and
- the decision of the Attorney General to require a trial by a judge and jury under section 568 of the *Criminal Code*.

Crown Elections in Dual Procedure Offences

In dual procedure offences, Crown Attorneys have the discretion to proceed by summary conviction or indictment.[1] Crown Attorneys have the discretion to take the specific circumstances of a case into account to ensure that in each case the interests of justice, including the public's interest in the effective enforcement of the criminal law, are best served.

Statement of Policy

When deciding whether to proceed summarily or by indictment[2], Crown Attorneys shall examine the circumstances surrounding the offence and the background of the accused. The following factors are of particular importance:

- whether the facts alleged make the offence a serious one;

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[1] See generally: *R. v. Smyth*e (1971), 3 C.C.C. (2d) 366 (S.C.C.), which held that the discretion given by law to the Attorney General to prosecute by way of summary conviction or on indictment is not discriminatory or contrary to the principles of equality; *R* v. *Century 21 Ramos Realty* (1987), 32 C.C.C. (3d) 353 (Ont.C.A.), holding that the authority of Crown Attorneys to elect the mode of procedure in hybrid offences is not contrary to the *Charter*; and *R. v. V.T.* (1992), 71 C.C.C. (3d) 32 (S.C.C.) which confirmed *R. v. Smythe*.

[2] Before the Crown elects, a hybrid offence is treated as an indictable offence, pursuant to par. 34(1)(a) of the *Interpretation Act*. Where the Crown fails to elect the mode of procedure for a hybrid offence and the case proceeds in summary conviction court, the Crown is deemed to have elected to proceed on a summary conviction basis: see E. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed. Aurora, Ont.: Canada Law Book, 1998, s. 7:2070.

- whether the accused has a lengthy criminal record or a record of criminal convictions for similar types of offences;
- the sentence that will be recommended by the Crown Attorney in the event of a conviction;
- if an election to proceed by indictment would permit an accused to insist on a preliminary inquiry, the effect that having to testify at both the preliminary inquiry and a trial may have on victims or witnesses (being mindful that the Crown may prefer a direct indictment)[3];
- whether it is in the public interest to have a trial by jury; and,
- if the accused is charged with a number of offences arising out of the same transaction, Crown Attorneys should consider entering elections that avoid a multiplicity of litigation. Such a course may benefit the accused, by reducing his or her court appearances, as well as serving the interests of the administration of justice. This approach will be beneficial not only at the trial level, but also in the event of an appeal.

Where, based on the above criteria, Crown Attorneys would normally elect to proceed summarily but the limitation period for a summary proceeding has expired, Crown Attorneys should not elect to proceed by indictment unless:

- the accused contributed significantly to the delay;
- the investigative agency acted with due diligence but the investigation continued beyond the limitation period because of the complexity of the case;
- the particular circumstances of the offence did not come to light until shortly before or at some time after the limitation period expired, and the offence is serious;
- the accused has refused to give consent, pursuant to s. 786(2) of the Criminal Code, to have the matter proceed by summary conviction; or
- the public interest otherwise warrants prosecuting[4].

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[3] See also materials in this Guide Book related to "Direct Indictments" (Chapter 16), and also materials related to "Victims of Crime" (Chapter 22).

[4] In some circumstances, the Crown's election may be impugned as an abuse of process if it appears that it was made solely to circumvent a limitation period. There are a number of decisions in the area, with each turning on its particular facts: see e.g.: *R. v. Quinn*

Consenting to Re-elections by an Accused

Where proceedings are by indictment, an accused in most circumstances may elect to have a trial before a Provincial Court judge, or preliminary inquiry before a Provincial Court Judge and then trial before a judge alone, or they may elect to have a preliminary inquiry and a trial before a Supreme Court judge and jury.[5]

Section 561(1) of the *Criminal Code* outlines the procedure for re-election by an accused. In certain circumstances, the written consent of the prosecutor is required.

Statement of Policy

Crown Attorneys should generally consent to a timely request for re-election made by an accused or counsel for the accused. The following factors are, however, important in deciding whether to consent:

- the amount of notice given;
- whether the proposed re-election will result in delay that could lead to a violation of section 11(b) of the Charter of Rights and Freedoms;
- whether the accused has previously re-elected in the case;
- whether the court, including prospective jurors, will be inconvenienced by a re-election;
- whether it would not be in the public interest to have a trial by jury (for instance, where the issues in dispute are primarily legal rather than factual); and

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(1989), 54 C.C.C.(3d) 157 (Que.C.A.); *R. v. Boutilier* (1995), 104 C.C.C.(3d) 327 (N.S.C.A.); *R. v. Belair* (1988), 41 C.C.C.(3d) 329 (Ont.C.A.); *R. v. Jans* (1990), 59 C.C.C.(3d) 398 (Alta.C.A.). For a consideration of the factors bearing on the public interest see materials in Chapter 6 of this Guide Book on "The Decision to Prosecute".

[5] Pursuant to s. 535 of the *Criminal Code*, a preliminary inquiry is only available where the indictable offence is punishable by 14 years or more of imprisonment.

- whether it would be in the public interest to have a trial by jury (see below).

Requiring Trial by Judge and Jury

Under section 568 of the *Criminal Code*[6], the Attorney General may require an accused to be tried by a court composed of a judge and jury, even if the accused has elected or re-elected otherwise. The alleged offence must be punishable by more than five years imprisonment.

Statement of Policy

A requirement to be tried by judge and jury under section 568 will only be directed when the Attorney General thinks it clearly in the public interest to do so. This direction may be justified, for instance, if an official involved in the administration of justice has been charged with a serious offence. In these circumstances, a trial by judge and jury may promote confidence in the integrity of the criminal justice system. A direction under s. 568 of the *Code* may also be appropriate where community standards are in issue, or where the guilt or innocence of the accused is of particular public importance. In addition, this provision is a potential option for the Crown if jointly charged individuals select different modes of trial, and the provincial court judge chooses not to exercise the power in section 567 to decline to record the non-jury elections.

In all instances, the decision to proceed under section 568 shall be made personally by the Attorney General of Newfoundland and Labrador, on the advice of the Director of Public Prosecutions.

[6] In *Re Hanneson* v. *The Queen* (1987), 31 C.C.C. (3d) 560 (Ont.H.C.), it was held that this section is not contrary to the *Charter*.

Direct Indictments

Introduction

Section 577 of the *Criminal Code* permits the Attorney General or the Deputy Attorney General to prefer an indictment and send a case directly to trial without a preliminary inquiry or after an accused has been discharged at a preliminary inquiry. The object of the section has been described by Southin J.A. of the British Columbia Court of Appeal in the following terms:

> *In my opinion, Parliament intended, by this section, to confer upon the Attorney General or his Deputy the power to override the preliminary inquiry process. It is a special power not to be exercised by Crown counsel generally but only on the personal consideration of the chief law officer of the Crown and his or her deputy*.

This power recognizes the constitutional responsibility of Attorneys General to ensure that those who ought to be brought to trial are brought to trial.

There are many reasons why an Attorney General or a Deputy Attorney General might consider a direct indictment in the interests of the proper administration of criminal justice. For example, witnesses may have been threatened or may be in precarious health, there may have been some delay in carrying a prosecution forward and, thus, a risk of running afoul of s. 11(*b*) of the *Canadian Charter of Rights and Freedoms, or* a preliminary inquiry in cases which depend on wire-tap evidence may be considered unduly expensive and time consuming. These are simply illustrations. It is neither wise nor possible to circumscribe the power of the Attorney General under this section.[1]

This chapter outlines the criteria that will be applied by the Attorney General of Newfoundland and Labrador when determining whether to consent to a direct indictment. It also describes the procedure for Crown Attorneys to follow when making a recommendation for a direct indictment.

Statement of Policy

The discretion vested in the Attorney General of Newfoundland and Labrador under section 577 of the *Criminal Code* will be exercised only in circumstances involving serious violations of the law. **The controlling factor in all instances is whether the public interest requires a departure from**

the usual procedure of indictment following an order to stand trial made at a preliminary inquiry. The public interest may require a direct indictment in circumstances which include (but are not restricted to) the following:

a. where the accused is discharged at a preliminary inquiry because of an error of law, jurisdictional error, or palpable error on the facts of the case[2];

b. where the accused is discharged at a preliminary inquiry and new evidence is later discovered which, if it had been tendered at the preliminary inquiry, would likely have resulted in an order to stand trial;

c. where the accused is ordered to stand trial on the offence charged and new evidence is later obtained that justifies trying the accused on a different or more serious offence for which no preliminary inquiry has been held;

d. where significant delay in bringing the matter to trial (caused, for example, by persistent collateral attacks on pre-trial proceedings) has led to the conclusion that the right to trial within a reasonable time guaranteed by section 11(b) of the Charter of Rights and Freedoms may be violated unless the case is brought to trial immediately;

e. where there is a reasonable basis to believe that the lives, safety or security of witnesses or their families may be in peril, and the potential for interference with them can be reduced significantly by bringing the case directly to trial without preliminary inquiry[3];

f. where proceedings against the accused ought to be expedited to ensure public confidence in the administration of justice – for example, where the determination of the accused's innocence or guilt is of particular public importance;

g. where a direct indictment is necessary to avoid multiple proceedings -- for example, where one accused has been ordered to stand trial following a preliminary inquiry, and a second accused charged with the same offence has just been arrested or extradited to Canada on the offence;[4]

h. where the age, health or other circumstances relating to witnesses[5] requires their evidence to be presented before the trial court as soon as possible; and

i. where the holding of a preliminary inquiry would unreasonably tax the resources of the prosecution, the investigative agency or the court.

The circumstances in a case for which a direct indictment is recommended must meet the charge approval standard outlined in Chapter 6 of these materials on "The Decision to Prosecute" - namely, that there is a reasonable prospect of conviction at trial, and the public interest requires a prosecution to be pursued.

Procedure

The Senior Crown Attorney must ensure the following is prepared:

a. a concise statement of facts sufficient to conclude that there is a reasonable prospect of conviction at trial and that the public interest requires a prosecution to be pursued. The statement must include the names of the accused, the charges and the evidence, the reasons for requesting a direct indictment and the date for which the indictment is required. Where the indictment charges several accused, the statement must adequately demonstrate that there is sufficient evidence to implicate each accused individually;

b. a statement of the extent of disclosure already given to the defence or that will be given before trial;

The Director of Public Prosecutions will consider the request. In unusual circumstances involving a significant public interest, the DPP may recommend that the Attorney General consent to the preferment of the indictment personally.

If the Deputy Attorney General accepts the recommendation the indictment may then be prepared for his or her signature.

Procedural Considerations after Direct Indictment

Where an indictment has been preferred pursuant to a consent under section 577, the Crown Attorney assuming responsibility for the trial should ensure that two important procedural issues are considered. First, there is a heightened need for early and full disclosure in accordance with Chapter 10 of this Guide Book. Second, where, after a full review of the evidence, the Crown Attorney concludes that the charges (or any of them) ought to be terminated or reduced, the Senior Crown Attorney must be consulted.

Re-Elections

Where an indictment has been preferred pursuant to a consent under section 577, the accused is deemed under subsection 565(2) to have elected to be tried by a court composed of a judge and jury.

Under that same subsection, the accused may re-elect for trial by a judge alone, with the written consent of the Crown Attorney. The procedures necessary to give effect to this right of re-election are described in subsections 565(3) and (4), and subsections 561(6) and (7).

Crown Attorneys should consider the criteria described in Chapter 15 of this Guide Book: "*Elections and Re-Elections*", when assessing whether consent should be provided to a proposed re-election.

As noted earlier, a direct indictment should be endorsed to read that consent has been given "*pursuant to section 577 of the Criminal Code*". This avoids an erroneous presumption that the preferment by the Attorney General was intended to *require* a jury trial under section 568. A requirement of that nature, given its extraordinary character, will be expressly endorsed on the indictment, as outlined in this Guide Book on "*Elections and Re-elections*",

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[1] R. v. Charlie (1998), 126 C.C.C.(3d) 513 at 521-522 (B.C.C.A.)

[2] For a discussion of "palpable error" as a basis for controverting findings of fact made in earlier proceedings, see: *MacNeill and Shanahan v. Briau* [1977], 2 S.C.R. 205; *Hoyt v. Grand Lake Devl. Corp*,. [1977] 2 S.C.R. 907 at 911-12, adopted in *R. v. Purves*, (1979) 50 C.C.C. (2d) 211 at 222-24 (Man. C.A.); *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 at 565-566.

[3] Wherever reasonably practicable, Crown Attorneys should first ask the investigators to prepare a confidential threat assessment where a direct indictment is being considered on this basis.

[4] See e.g. *R. v. Cross* (1996), 112 C.C.C. (3d) 410 (Que.C.A.)

[5] It would be appropriate to consider, for example, the particular circumstances relating to complainants in sexual offences, especially youthful ones. This may include consideration of whether requiring the witness(es) to testify about the same matters a number of times will cause harm to them, or whether the circumstances will inhibit the presentation of candid and truthful evidence.

Intimate Partner Violence

Introduction

Although physical abuse of another person is obviously a criminal offence, violence in the context of a domestic or intimate relationship has not always been treated as a crime. Today, the approach is different: intimate partner violence is recognized as intolerable criminal activity.[1] It is important to recognize some special features of intimate partner violence:

- It is prevalent in all sectors of society;[2]
- The degree of violence can be fatal: in Canada more women die at the hands of a domestic partner than by any other violent cause;[3]
- It is costly[4] and the physical, emotional, mental and financial effects are long-lasting;
- It tends to be repetitive until the cycle of abuse is arrested by an external factor; and
- A person sustaining physical abuse is often financially and emotionally connected with the offender in such a manner that any sanctions imposed upon the offender may adversely affect the complainant as well.

In the early 1980's policies on the investigation and prosecution of domestic violence were formulated by the Department of Justice, the Royal Newfoundland Constabulary and the RCMP. The policies sought to: relieve the responsibility for initiating and pursuing criminal charges from the complainant(s); improve

[1] See, generally, *Final Report of the AD Hoc Working Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation*. Canada: Department of Justice, 2003. (hereinafter "FPT Working Group Report").

[2] Statistics Canada's 2016 report *Police-reported intimate partner violence* found that just under three in ten victims of police-reported violent crime in adults (aged 15 or older) had been victimized by an intimate partner. The vast majority of victims of intimate partner violence are women (80%).

[3] Statistics Canada's JustFacts fact sheet from March 2019 reported that from 2006 to 2016, the risk of intimate partner homicide was highest for young female adults between the ages of 25 to 29 years (rate of 7.9 per 1 million population).

[4] A 2013 Justice Canada study estimated that only one facet of intimate partner violence (spousal violence) cost Canadians $7.4 billion in 2009. The majority of these costs were related to victims, such as pain and suffering, counselling, and legal fees. The next highest costs were to third parties such as families, employers and social services as well as criminal and civil justice. See: T. Zhang, S.McDonald & K.Scrim, "An Estimation of the Economic Impact of Spousal Violence in Canada, 2009" (2013) Department of Justice, Canada.

protection and assistance for complainants; and, ensure that police investigators and Crown Attorneys would give priority to cases involving intimate partner violence.

However, despite this commitment to vigorous action, the incidence of intimate partner violence remains unacceptably high. Further, it must also be recognized that policies can have unintended negative consequences for victims of intimate partner violence when they are applied inflexibly. Accordingly, this policy draws on recent experiences in seeking to attain the objective of reducing intimate partner violence.

Application of the Policy

This policy relates to "*intimate partner violence*", which may be defined as any criminal offence where violence is used, threatened or attempted by one person against another person in the context of a relationship between intimate partners. Violence in this context includes sexual and physical assault, threats of violence and criminal harassment. "*Intimate partner*" is defined in the *Criminal Code* as including a "*current or former spouse, common law partner and dating partner*".[5] An intimate partner relationship does not require the parties to have cohabited. While many or most of the principles in this policy may be equally applicable to other sorts of domestic violence such as child or elder abuse, it is not specifically designed for those situations.

This policy is intended to reflect the special circumstances of the areas in which it is applied. In many small communities in Newfoundland and Labrador, the options available to victims of intimate partner violence may be limited for a variety of reasons, including:

a. The victim may have no access to the same types of support often found in larger centers, such as emergency shelters or counselling services;
b. The victim may face pressure in the community not to report the crime; and
c. Absolute prohibitions on contact with the alleged abuser may be unrealistic in a small, isolated community.

This policy places primary responsibility for decision-making with the police and Crown Attorneys rather than with complainants. At all stages of the criminal process,

[5] *Criminal Code*, RSC 1985, c C-46, s 2

Crown Attorneys shall engage in appropriate consultation with the police and the complainant to ensure that the complainant is protected, informed and supported.

This policy seeks to guide Crown Attorney's discretion, not remove it. Crown Attorneys must consider and apply other Guide Book policies, including those outlined in the "*Decision to Prosecute*"[6] and "*Victims of Crime*"[7] chapters, while bearing in mind the strong public interest in the denunciation and deterrence of intimate partner violence.[8]

Judicial Interim Release[9]

If an accused is charged and detained with offences that allege intimate partner violence, the Crown Attorney must request that the police provide sufficient information in order to determine whether releasing the alleged offender from custody would be an unreasonable risk to the safety of the complainant. In appropriate cases, the Crown Attorney should make representations in support of a request that the accused not be released on bail. In this situation the Crown Attorney should consider the advice and information provided by the police officer in respect to the following:

- The history of violence or threats of violence by the accused against the complainant/victim;
- The history of violence or threats of violence by the accused against others;
- The nature of the threat or assault;
- The presence, use or threat of use of weapons;
- The involvement of alcohol or drugs;
- The apparent mental health status of the accused;
- The presence of children during the alleged offence;
- The concerns of the complainant/victim; and
- The criminal record of the accused.

Crown Attorneys should be conscious of the fact that in some instances, if the alleged offender is not kept in custody, the complainant and/or children will be forced to

[6] See materials in Chapter 6 of this Guide Book related to "The Decision to Prosecute."
[7] See materials in Chapter 22 of this Guide Book related to "Victims of Crime."
[8] *Supra* note 5 at s 718.2(a)
[9] See materials in this Guide Book related to "Victims of Crime."

leave the family home. Where the court is satisfied that the alleged offender can be released, some restrictions will ordinarily be necessary both to ensure the security of the complainant and preserve the integrity of the prosecution. These may include:

- Non-communication with the complainant directly or indirectly;[10]
- Custody and access arrangements through a neutral third party;
- Obligation to provide support for dependents as required by law;
- Non-attendance at or near the residence and/or place of work of the complainant; and,
- Surrender of all firearms, ammunition, explosives and Firearms Possession and Acquisition Certificates.[11]

The complainant in intimate partner violence cases may express or demonstrate a reluctance to proceed with the arrest and prosecution of the suspect. While the position of the complainant is always relevant, responsibility for the investigation rests with police and the Crown Attorney is responsible for the prosecution. Therefore, Crown Attorneys should consider the question of pretrial release without regard to the likelihood that the complainant will continue a relationship with the accused or co-operate in the prosecution of the charges laid, and should consider any and all terms of release which are necessary to preserve the evidence, protect the complainant, and avoid the commission of any further offence.

Generally, Crown Attorneys should not call the complainant as a witness at a judicial interim release hearing. Given that the prosecution process is intrusive and traumatic for the complainant(s), every reasonable effort should be made by Crown Attorneys to mitigate such distress. However, Crown Attorneys must make every reasonable effort to secure a full and frank hearing of the evidence. Therefore, the Crown Attorney may elect to call *viva voce* evidence from the complainant at a judicial interim release hearing where the proper conduct of the case requires it, after due consideration to the interests of the complainant. For example, where Crown Attorneys oppose release of an accused person charged with an intimate partner offence and the complainant is willing at that time to cooperate with the prosecution of the case, Crown Attorneys may deem it appropriate to elicit the complainant's evidence on the record, in order to secure a statement from the complainant which

[10] Even where an accused person is detained, non-communication orders may be imposed pursuant to s 515(12) and s 516(2) of the *Criminal Code*.
[11] These conditions should be considered even where no firearms were involved in the incident, due to the tendency of intimate partner violence to escalate in seriousness.

might be used at trial as substantive evidence should the legal requirements for its admission be met.

If the accused is released from custody, reasonable efforts should be made to provide a copy of the release terms to the complainant as soon as practicable. In the event that the complainant has relocated to another community and the prosecutor is aware of it, the police detachment nearest to the complainant shall be informed of the release terms. It is important that the police detachment in both the accused's and the complainant's communities have copies of the terms of release.

Court Brief

Senior Crown Attorneys should discuss with the RNC and RCMP all matters relevant to disclosure and reach agreement on the content and timeliness of disclosure. At a minimum the court brief should contain:

- A summary of the investigation;
- Any utterances by the complainant to police or others, and the circumstances in which the utterances were made;
- Details or photographs of injuries or property damage related to the investigation
- Details of the manner in which any statement of the complainant was taken: i.e., reduced to writing, signed by the complainant, whether audio or video recorded, whether under oath or after any advice or caution;
- Details of any indications that the complainant may be reluctant to co-operate in the investigation and prosecution of the offences charged;
- Details of any witnesses to the offences, or to injuries sustained;
- Details of any utterances made by the accused person and any notes or transcript of such utterances;
- The criminal record of the accused, including details of any intimate partner violence offences or other offences of violence;
- Summary of past police involvement pertaining to this accused and the investigation of prior intimate partner violence offences; and
- The details of any attempt by the accused to contact the victim in violation of a court order.

Review of the Court Brief

Where a court brief alleging an intimate partner violence offence is received, the brief will be reviewed at the earliest opportunity by a Crown Attorney. The reviewing Crown Attorney should:

- Assess the brief for completeness;
- Meet with the complainant, where possible, or ask a Victim Services Worker to meet with the complainant;
- Ensure that the appropriate charges have been laid by the investigating officer; and
- Assess whether further investigative measures, such as videotaped statements are necessary.

Review of Detention or Conditions of Release

Frequently, the complainant in an intimate partner violence case will indicate after a bail hearing a desire to resume communication, or even cohabitation, with the accused. Often, the position of the complainant in respect of these matters will change from time to time. The wishes of the complainant in such situations are to be given significant weight but should not be treated as conclusive. The Crown Attorney must, before agreeing to any variation, consider the circumstances of the request. Specifically, Crown Attorneys should consider:

a. The source of the information about the complainant's wishes – it may be necessary to speak to the complainant personally;
b. Any history of violence in the relationship; and
c. Whether any specific condition might adequately address the risks of harm to the complainant or to the integrity of the prosecution.

The Crown Attorney should show flexibility, provided that the safety of the victim and any secondary victim, such as a child exposed to violence, is paramount. It is imperative that any change made to a "*no contact*" order be done on an informed basis. Care should be taken to minimize conflicts between release orders and other types of court orders, including matrimonial, child custody and access, or child welfare-related orders. Where in the judgement of the Crown Attorney it is necessary in the interests of justice to do so, the Crown Attorney should facilitate the placing

of the undertaking or recognizance on the court docket. The complainant/victim should then describe under oath all of the circumstances of the request.

Violation of Release Conditions

Generally, a breach of bail terms imposed with respect to an intimate partner violence offence will be prosecuted, particularly where the breach involves another intimate partner violence offence or interference with the security of the initial complainant. This does not restrict the discretion of Crown Attorneys in matters of plea and sentence negotiation. Crown Attorneys shall also consider contesting the release of the accused in respect of the breach offence and, where the accused is detained, should seek an order cancelling the accused's release in respect of the original offence.[12] Crown Attorneys shall also consider seeking a non-communication order[13] when the accused is detained.

Preparation of Witnesses

Witness preparation is a pivotal function in prosecuting intimate partner violence offences; Crown Attorneys are often assisted in this task by Victim Services Workers. Crown Attorneys should attempt to provide support, encouragement and understanding, as well as a non-judgmental attitude where the complainant/witness is reluctant, and assurance that it is wise and prudent for a fearful complaint to seek the support and protection of the criminal justice system. After reviewing the court brief with the investigating officer the Crown Attorney should, where possible, meet with the complainant in private and comfortable surroundings and:

- Explain the prosecution policy in relation to intimate partner violence offences;
- Explain the role of Crown and defence counsel in such proceedings;
- Explain the role of a witness in court;
- Assess the complainant's reliability as a witness;
- Encourage the complainant to testify truthfully;
- Inform the complainant of any release conditions imposed on the accused, and determine if the complainant has any concerns with the accused's compliance with those conditions;

[12] *Supra* note 5 at s 524(8).
[13] *Ibid* at s 515(2).

- Confirm that the complainant has been made aware of available community services, including the services of a Victim Services Worker, where one is available;
- Attempt to answer any questions the complainant might have, including discussing any continuing safety concerns; and
- Ensure that the complainant has been informed of the opportunity to give a victim impact statement.

Reluctant Witnesses

Crown Attorneys may find that many intimate partner violence complainants will be reluctant to testify for a number of complex reasons. Reluctant witnesses in such cases require special consideration.

Research has shown that the greater and the earlier support a complainant receives, the less likely a complainant will recant or be reluctant. Accordingly, and especially where there is fear that the complainant may recant, Crown Attorneys should make every reasonable effort to provide support for the complainant including:

- Seeking the early intervention of a victim witness assistant or other support person; and
- Applications to the court pursuant to the use of testimonial aids including:
    a. Subsection 486(1) (exclusion of the public)
    b. Subsection 486.1 (presence of a support person)
    c. Subsection 486.2(2) (use of screen or closed circuit television)
    d. Subsection 486.3 (accused not permitted to personally cross-examine)
    e. Subsection 486.4 (publication bans in sexual offences)
    f. Subsection 486.5 (publication bans in other instances)

Where the Witness Fails to Attend Court

Where a complainant fails to attend court in answer to a subpoena, Crown Attorneys should make every reasonable effort to determine why the person has failed to appear. Based on that information, knowledge of the personal circumstances of the complainant and the seriousness of the offence, Crown Attorneys should consider four options:

- Requesting an adjournment if the complainant's evidence is crucial to the case and the absence is unavoidable, e.g. because of the complainant's illness;
- Proceeding with the case, where the charge can be proven through the evidence of others;
- Requesting a warrant[14] where the complainant's evidence is crucial, no information is available concerning the reasons for non-appearance and the offence is a serious one; [15] and
- Terminating proceedings, where the offence is less serious, the alleged offender is not considered dangerous, and the complainant's arrest would serve only to further victimize that person.

The considerations listed above should not be considered exhaustive. They are intended to underscore the fact that great care must be taken in reaching a decision.

Where a Crown Attorney decides to seek arrest, in the vast majority of cases the complainant should be released as soon as possible on terms that he or she attend court as required. In the highly unusual case where detention is deemed necessary, Crown Attorneys should consult with the Senior Crown Attorney.

Where the Witness Attends, but Refuses to Give Evidence

Witnesses who refuse to answer questions may be cited for contempt. Crown Attorneys should make every reasonable effort to persuade witnesses to testify and to avoid such a result. If the Crown Attorney is aware before trial that a witness is likely to refuse to answer questions before they testify, the Crown Attorney should consider whether it is appropriate to call the person as a witness.

Where the Witness Fails to Describe the Events in Question as Anticipated

[14] Prior to seeking a witness warrant, the Crown Attorney should consider all the evidence including the complainant's likelihood of testifying, circumstances of the case, severity of the intimate partner violence, the need to protect children and other vulnerable witness, etc.
[15] When requesting a warrant (where appropriate) Crown Attorneys should ask that it be issued as a warrant-to-hold, in order to give the Crown time to ascertain why the witness failed to appear. In appropriate circumstances the warrant may be released in consultation with Senior Crown Attorneys.

If the charge is provable through other evidence, Crown Attorneys may decide to excuse the complainant without the need to testify and without further sanction. Crown Attorneys with carriage of the case should anticipate the reluctance of the complainant, and should consider other means of presenting the case before the trier of fact, such as:

- Seeking leave to show the complainant a prior police statement, for the purpose of refreshing memory;
- Seeking to admit evidence of a prior inconsistent statement as substantive evidence, pursuant to the Supreme Court's judgement in *R v B (KG)*[16];
- Seeking to admit evidence of prior out-of-court utterances of the complainant as *res gestae* evidence (i.e., 911 or police dispatch tapes);
- Seeking leave to cross-examine the complainant on a prior inconsistent statement, pursuant to s.9(2) of the *Canada Evidence Act*[17]; and
- Seeking leave to cross-examine the complainant as an adverse witness, pursuant to s.9(1) of the *Canada Evidence Act*[18].

The Recanting Witness

On occasion, the complainant in an intimate partner violence case will indicate to police or the Crown Attorney prior to the completion of trial that the offences alleged did not occur, in whole or in part. Crown Attorneys must inform defence counsel accordingly, in accordance with disclosure policies.[19]

The concerns of the complainant are a proper public interest consideration. However, because of the societal interest in addressing the problem of intimate partner violence, this factor alone is not a sufficient basis upon which to discontinue a prosecution. When faced with a complainant recantation, in addition to disclosing the recantation to defence counsel, Crown Attorneys should consider the following:

a. Conducting inquiries or requesting the police conduct inquiries into the background of the recantation to determine its cause;
b. Meeting with the complainant/victim and advising of support services which might assist during the court process;

[16] *R v B (KG)*, [1993] 1 SCR 740 (SCC).
[17] *Canada Evidence Act*, RSC 1985, c C-5.
[18] *Ibid*.
[19] See materials in Chapter 10 of this Guide Book related to "Disclosure."

c. Instructing the police to take a statement from the complainant/victim concerning the recantation;
d. Assessing the strength of the Crown's case and likelihood of conviction in light of the recantation with particular attention to the SCC decision in *R v B (KG)*[20]; the use of this decision in appropriate cases will allow the Crown Attorney to use the complainant's original statement to police in court;
e. When a complainant recants on the stand, the Crown Attorney should consider invoking the provisions of section 9(2) of the *Canada Evidence Act*[21].

Where the Crown Attorney is satisfied that the recantation is true (that is, that no intimate partner violence offence in fact occurred), then proceedings against the accused should be terminated at once. The Crown Attorney should consult with the Senior Crown Attorney before deciding if the matter should be referred to the police for consideration of criminal action against the complainant with respect to the initial complaint.[22]

The fact that the complainant has recanted will be a factor used by defence counsel to attack the credibility of the complainant at trial. Generally, this weakens the prospects of conviction and increases the burden of the trial process for the complainant. Further, a recantation clearly demonstrates that the complainant will not co-operate with Crown Attorneys, and may undermine the Crown's case. Therefore, the propriety of the prosecution must be reconsidered. The principles enunciated in the "*Decision to Prosecute"* policy apply.[23]

The fact that the complainant has recanted will likely diminish the strength of the Crown's case, and is therefore relevant to the question of the accused's detention or the propriety of release conditions previously imposed. Once details of the recantation are disclosed to defence, Crown Attorneys should co-operate in any effort by defence to have the question of release or conditions promptly reviewed by a court of competent jurisdiction. However, Crown Attorneys must bear in mind that

[20] *Supra* note 14.
[21] *Supra* note 27 at s 9(2).
[22] Crown Attorneys should carefully examine the entire context within which the alleged criminal behaviour occurred before recommending proceedings against a recanting complainant for public mischief or contempt of court. The fullest inquiries are those made through police to ensure that the decision is made against a background of all possible information.
[23] See materials in Chapter 6 of this Guide Book related to "The Decision to Prosecute.".

the fact of the recantation may indicate pressure has been exerted on the complainant by the accused or persons associated with the accused.

Child Witnesses

Children of a home where intimate partner violence occurs, including adult children, may be reluctant to testify because of their relationship with the accused or the complainant or both. Some of the considerations (including the use of testimonial aids) that Crown Attorneys may take into account when dealing with reluctant complainant witnesses may also be applicable to children called as witnesses in these cases.

Cross-examination by a Self-Represented Accused

In cases where an accused person is self-represented, the Crown Attorney must consider seeking an order appointing counsel to conduct the cross-examination of the victim.

Termination of Proceedings

After reviewing the prosecution brief and, where necessary, consulting with the police and interviewing the complainant, Crown Attorneys may decide that the case is not appropriate for prosecution. In these circumstances, proceedings may be terminated only after careful consideration of all aspects of the case including any alternatives with respect to presentation of evidence, as noted below. Less experienced Crown Attorneys should terminate proceedings only after consultation with the Senior Crown Attorney.

The question of discontinuing proceedings may require reconsideration by Crown Attorneys at any point in the criminal proceedings. Once Crown Attorneys determine that there is no *reasonable likelihood of conviction*[24] the prosecution should be terminated. Where the evidence is sufficient to warrant continuation, Crown Attorneys should consider the following factors in determining whether the prosecution is in the public interest:

- The seriousness of the offence;
- Whether it appears that the complainant has been directly or indirectly threatened or intimidated by the accused or the accused's family or friends in connection with the present prosecution;

[24] See Chapter 6 of this Guidebook, "*The Decision to Prosecute*".

- Whether it appears that the complainant will be unduly traumatized if required to testify;
- Whether the complainant may commit perjury if called to testify;
- Whether there is sufficient evidence to prosecute without the co-operation and direct involvement of the complainant;
- Whether there is a likelihood of similar offences in the future particularly against the complainant or children in the home;
- Whether the accused is addressing the abusive behavior through counselling or some other treatment or program;
- Whether the accused has prior convictions for intimate partner violence offences or other violent offences; and
- The impact that terminating the prosecution may have on future cases and on the administration of justice generally.

A decision to terminate proceedings is made in the interest of the proper administration of justice, including the public's interest in the effective enforcement of the criminal law, the safety of the complainant, and respect for the dignity and security of the complainant. When a decision to terminate the prosecution is reached it should be communicated quickly to the police, the complainant, and the defence.[25] If proceedings are terminated for public interest considerations, the presiding judge may require that those be stated in court unless inappropriate to do so.

Sentence

If an accused is found guilty Crown Attorneys shall recommend a sentence which, among other goals, reflects public denunciation of intimate partner violence offences. Crown Attorneys must be familiar with the *Criminal Code* provisions on the role of victims in sentencing proceedings.[26] The following general considerations apply:

- Crown Attorneys should oppose recommendations for conditional or absolute discharges unless extraordinary and compelling circumstances are present.[27]

[25] Crown Attorneys should have regard to **Directive #4**; "Termination of Proceedings", in Chapter 12 of this Guide Book: "Conduct of Criminal Litigation."
[26] This subject is dealt with more extensively in the "Victims of Crime" section of this Guide Book.
[27] These may include such considerations as the accused's participation in Family Violence Intervention Court and/or other relevant programming.

- Crown Attorneys should bear in mind that s.718.2(a)(ii) of the *Criminal Code* makes abuse of one's intimate partner or a member of the victim or the offender's family an aggravating feature on sentencing.
- Crown Attorneys should oppose recommendations for conditional or non-custodial sentences unless conditions can be imposed that will provide adequate protection for the complainant's safety. Crown Attorneys should not however, consider incarceration the only appropriate solution; for example, Crown Attorneys should bear in mind the principles in *R v Gladue*[28], in relation to the incarceration of Aboriginal offenders.
- Consideration should be given to a guilty plea as a mitigating factor. By their nature, intimate partner violence offences are largely unpredictable in terms of outcome. Reformation of the offender is more likely when the offence is admitted, and the burden placed upon the complainant through the course of the trial process is significant. Therefore, demonstration of remorse by the tendering of a plea of guilty may be significant.
- Whether or not incarceration is to be imposed, consideration should be given to probation as part of the sentence, with conditions obliging the offender to attend and participate meaningfully in an intimate partner violence program.[29]
- Crown Attorneys should ensure that the complainant has had an opportunity to prepare a Victim Impact Statement and present any such statement to the court in the course of sentencing submissions. Section 722.2 of the *Criminal Code* requires that the complainant be given such an opportunity, and Crown Attorneys must be able to advise the court in that regard.
- Crown Attorneys should consider in all cases representations in support of an order that the offender not possess firearms, ammunition, explosives or a Firearms Possession and Acquisition License.
- Crown Attorneys should consider representations in support of an order for forfeiture of any weapon or ammunition used in the commission of an intimate partner violence offence: see s.491 of the *Criminal Code*.
- Where the sentence imposed is erroneous in principle, an appeal should be considered.[30]

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[28] *R v Gladue*, [1999] 1 SCR 688.

[29] Crown Attorneys should also keep in mind the use of s.743.21 (discussed earlier in this chapter) to prohibit contact during any period of incarceration.

[30] In accordance with Chapter 23 of this Guidebook "The Decision to Appeal."

Crown Attorneys shall take reasonable steps to ensure the complainant is aware of the sentence imposed and any appeal proceedings undertaken.

The use of the peace bond procedure set out in s.810 of the *Criminal Code* should not ordinarily be pursued as an alternative or recommended in cases of intimate partner violence offences. However, in some situations, survival and safety strategies employed by victims (such as unwillingness to give information, resistance to testifying, recanting all or part of previous statement) come into conflict with the goals or needs of the justice system; then, the safety and protection of victims and children becomes of paramount concern. In these situations, a peace bond may be appropriate. Crown Attorneys should consult with a Senior Crown Attorney before agreeing to a peace bond in cases of intimate partner violence offences. Due to the prevalence of domestic violence, and the tragic consequences often associated with this crime, only rarely is it not in the public interest to proceed with such charges when the available evidence will support a prosecution.

The willingness of the accused to enter into a peace bond is one of a number of relevant circumstances which may be considered by the Crown Attorney in deciding whether or not the public interest requires that a particular charge be prosecuted. In consultation with a Senior Crown Attorney, the Crown Attorney should first review the evidence and background to the case and be satisfied that the following conditions precedent to a possible withdrawal of the charge are present:

- The evidence is "*borderline*" (i.e. the evidential threshold for prosecution is met but it is not clear to the prosecutor that a conviction is more likely than an acquittal);[31]
- The incident was relatively minor (i.e. there were no injuries, the matter did not continue over an extended period of time, and the aggressive behavior of the accused stopped without intervention by outside parties);
- The actions of the accused appear to have been out of character (i.e. the accused has no known history of assaults or threats);
- The accused is prepared to enter into a recognizance to keep the peace in regard to the complainant; and

[31] It is recognized that the strength of a case may diminish over time, particularly when further information is received.

- The prosecutor is satisfied that the complainant is likely to report any breach of a recognizance, or other aggressive behaviour by the accused, to the police or other authorities.

If these conditions are satisfied, the Crown Attorney (in consultation with a Senior Crown Attorney) should then consider other circumstances of the case before making a final decision. Some circumstances which may affect the decision are:

- The wishes of the complainant;
- Whether the pre-trial process (which may have included police involvement, arrest, detention, retaining counsel, or court appearances) appears to have had a deterrent effect upon the accused;
- Whether the accused has a substantial history of abusive behaviour against the victim or other intimate partners (even if charges have not previously been laid);
- Whether the accused has voluntarily embarked upon a rehabilitation program (e.g for anger management, for alcohol abuse, marriage counselling, etc);
- The prevalence of intimate partner violence in the locality where the incident occurred, and the success or failure of this approach (peace bonds) in similar local cases;
- Whether the accused has a criminal record;
- The maturity, personality, and attitude of the parties involved, and the nature of their particular relationship;
- The history of the accused in regard to compliance with previous court orders, and his/her general respect for authority;
- Whether the accused will admit the particulars of the offence in open court. If an accused denies wrongdoing in the course of treatment, a transcript f the court proceedings should be produced to the treatment agency.
- The staleness of the matter (i.e. the time which has passed since the charge arose).

Where there is no reasonable prospect of conviction, it may be nonetheless appropriate to urge the accused (through counsel) to enter into a recognizance in regard to the complainant, provided that the Crown Attorney does not mislead the accused or defence counsel in regard to the assessment which has been made of the charge and the intention of the Crown Attorney to withdraw it. No one should be left with the impression that the withdrawal was in exchange for the signing of the

recognizance. Crown Attorneys must ensure that defense understands that the withdrawal of a domestic violence charge is not done as a result of the accused's willingness to abide by a s.810 recognizance[32], but rather that the complainant still has reasonable fears for his or her safety.

In rare circumstances there may be a reasonable prospect of conviction, but in all of the circumstances proceeding with a prosecution would not serve the public interest. This will only be a consideration where the following factors are present:

- The complainant is agreeable;
- Any violence was minimal;
- The accused has no history of violence with either the complainant or others;
- A realistic safety plan is executed to safeguard against any future violence;
- Available information about the accused's treatment and rehabilitative steps is consistent with the prospect that future violence will be avoided;
- There are resources in the community for the effective monitoring of compliance with the peace bond.

Where an s.810 recognizance[33] is deemed an appropriate resolution in a matter, it is imperative that the terms of the recognizance be tightly structured to contain conditions and restrictions similar to those of a probation order so that it can be properly enforced if necessary. Attendance in a domestic violence treatment program will often be an appropriate condition, as well as alcohol/drug abstinence and treatment as well as weapons prohibitions where suitable. A reporting condition is necessary so that compliance with the peace bond can be monitored. Entering into an s.810[34] peace bond does not require the accused to accept responsibility for committing a criminal act (it is not an admission of guilt), however such orders provide the accused with an opportunity to change his or her behaviour. If the accused fails to comply with the conditions of the order, he or she may be charged with a breach.

[32] *Supra* note 5 at s 810.
[33] *Ibid*.
[34] *Ibid*.

Family Violence Intervention Court

Family Violence Intervention Court (FVIC) is a voluntary specialized criminal justice court which was created in recognition that violence involving an intimate partner is different than violence between strangers or acquaintances. FVIC courts may not be an available option throughout the province.

Legally, FVIC operates in the same manner as a traditional criminal justice court, but is administered in a manner that attempts to better serve victims of intimate partner violence, aims to hold offenders more accountable, and to reduce rates of recidivism. The goal of Family Violence Intervention Court is to change the cycle of relationship violence and the intergenerational nature of violence in the family, thereby contributing to the health and well-being of individuals and families.

Family Violence Intervention Court is a therapeutic court which encourages participants to take responsibility for their behaviour early in the justice system process and to actively work to understand and to change problem behaviours. Therapeutic courts provide an increased level of support to participants; rather than respond to the offence alone, therapeutic justice takes a problem-solving approach with the goal of healing participants and preventing recurring offences. The court addresses criminality like a traditional court, but also uses a team of professionals to apply behavioural science tools in an effort to maximize therapeutic outcomes. This problem solving approach uses the authority of judges to monitor the behaviour of participants in order to also maximize the safety of victims.

Therapeutic justice is not intended to override the traditional goals of the criminal justice system or to decriminalize domestic violence. Domestic violence courts are not "*soft on crime*" and elicit a similar response as in any other criminal matter; an accused is arrested and/or ordered to appear in court to answer to a criminal charge, a plea is entered, and sentencing occurs if there is a conviction or a finding of guilt.

The guiding principles of FVIC are:

- The value of early intervention to give the offender the best opportunity for rehabilitation;
- Supporting victims and their children, and keeping victim and child safety at the center of the process; and,

- Keeping offenders accountable while supporting them to make the necessary positive changes in their lives.

There are specific eligibility criteria that must be met in order for a matter to move to FVIC:

- The accused must be an adult (18+ years);
- The accused must be charged with an intimate violence offence(s)[35] which includes any offence involving an intimate partner or ex-partner;[36]
- The accused must be charged with an offence(s) that is eligible for a conditional sentence as described in s.742.1 of the *Criminal Code*;
- The accused must participate in a Risk Assessment and the results of the Risk Assessment must show that the risk level is appropriate for the family violence programming being offered;
- The accused must agree to participate in family violence programming;
- The accused must agree to bail supervision by Corrections and Community Services; and
- The accused must agree to information sharing amongst the FVIC team and sign any required consent forms.

If an accused does not meet the eligibility criteria, their matter will return to the traditional criminal justice court system. Even if eligibility criteria are met, the Crown Attorney retains the right to deny any accused access to the FVIC. [37] A decision by the Crown Attorney to deny access to an accused prior to completing a risk assessment may only be made after consultation with a Senior Crown Attorney.[38] When Crown Attorneys are presented with a file that they believe may be a candidate for Family Violence Intervention Court they should direct the file to the FVIC Crown or their manager.

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[35] This includes a range of offences including physical violence, sexual violence, harassment, stalking, threatening, disturbing the peace, and damage to property (including a family pet).
[36] On a case by case basis, matters involving third parties (such as a family member or new partner) can be considered as well.
[37] This decision can be made by the Crown Attorney either before or after an accused has completed a risk assessment.
[38] A decision by the Crown Attorney to deny access to an accused after completing a risk assessment and otherwise meets the eligibility criteria can only be made after consultation with a Senior Crown Attorney who should consult with the Director of Public Prosecutions.

A variety of issue-specific programming is available for individuals who plead guilty in FVIC. The Risk Assessment determines the level of programming; the range of sessions may vary depending on client risk assessment and other factors.[39] The sentencing judge considers the relative success or failure of offender in the FVIC Treatment Program. [40] Sentencing may include a discharge, suspended sentence, fines/restitution, conditional sentence, incarceration (along with varying periods of probation), and ancillary orders (such as DNA, and/or Firearms Prohibition).

Victims are also supported in FVIC through referrals to Victim Services which includes access to safety planning, case and court updates, copies of court orders, support and counselling, facilitation of access to community supports and resources and assistance preparing Victim Impact Statements used in FVIC before sentencing[41]. Victims are also given the option to participate in the FVIC process.

[39] In addition to the family violence programming, clients may avail of other John Howard Society services such as Anger Management, Caring Dads, Criminal Behaviour Awareness, MIMOSA, and Employment Services.
[40] FVIC has dedicated judges who are familiar with intimate partner violence cases and can make informed decisions on sentencing.
[41] Victim Impact Statements are optional.

Sexual Offences

Introduction

Sexual offences involve violations of sexual integrity, privacy and autonomy that can have enduring and substantial effects upon victims. These crimes pose a serious threat to individual and public safety and must be prosecuted vigorously.

Rape myths, misogyny and stereotypes about the nature of sexual offences and of victims of sexual offences must not influence any aspect of the criminal case. Such distortions have harmful effects on victims and the integrity of the administration of justice. Crown Attorneys play an important role in preventing these dated and misguided perspectives from playing any role in the adjudication of sexual offences

Crown Attorneys must ensure that efforts are made, at all stages of the prosecution to provide the victim with whatever information or assistance is required to ensure full and fair participation in the criminal justice system. This includes the availability of the following:

- victim services;
- interpreters to assist the victim in communicating;
- testimonial aids to assist the victim in providing evidence[1];
- appointment of counsel to cross-examine the victim where the accused is self-represented;[2] and,
- access to independent legal representation for victims or witnesses on applications to access their private records under the *Criminal Code*.[3]

Judicial Interim Release

When the accused has been arrested and held in custody pending an appearance before a Provincial Court Judge, the Crown Attorney must be conscious of the potential risk of harm and must seek a detention order where they consider it necessary for the safety and security of the victim or the public.

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[1] *Criminal Code*, RSC 1985, C-46, ss 486, 486.1, 486.2, 486.7.
[2] Pursuant to s. 486.3, a judge may order that an accused cannot personally cross-examine a complainant, and appoint counsel to do so.
[3] Be advised that Victim Services may be in a position to provide funding for independent counsel.

Where the accused is remanded in custody pending a bail hearing, detained or released on conditions, the Crown Attorney should seek an order from the court prohibiting the accused from having any contact with the victim, or where appropriate, any witnesses.

The Crown Attorney must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Crown Attorney must ensure that bail notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

Publication Ban

The *Criminal Code* directs that the court shall prohibit the publication of any information that could identify the victim or witnesses, upon application.[4]

At the first appearance, the Crown Attorney must seek a publication ban directing that the identity of a victim or a witness and any information that could disclose the identity of the victim or witness not be published or transmitted in any way. If the victim wishes to have her identity known, the issue of lifting the publication ban can be revisited at any later stage in the proceedings.

Charge Assessment

The Crown Attorney should determine whether the full gravity of the criminal act is reflected in the offence charged and recommend a more appropriate charge be laid if necessary.

The following factors should be considered when determining whether the offence charged is appropriate to the circumstances and whether to proceed by summary conviction or by indictment:

- the circumstances of the offence (e.g. protracted sexual abuse, significant physical, emotional or psychological harm to the victim);
- whether the offence is alleged to have occurred within 12 months of reporting;

[4] *Supra* note 1 at ss 486.31, 486.4, 486.5, 486.6.

• the circumstances of the offender e.g. history of similar offences, position of trust/authority in relation to victim;

• the circumstances of the victim including the impact on the victim of testifying twice (at a preliminary inquiry and trial) and special vulnerabilities (disabilities, health, age of victim); and

• the potential range of sentence.

The Crown Attorney should further consider whether the accused should be flagged as a High Risk Offender or the subject of a Long Term Offender or Dangerous Offender Application. In those cases, the Crown Attorney should consult with the National Flagging Co-ordinator (Senior Crown, Special Prosecutions Office)[5].

Protecting Privacy

Crown Attorneys must be sensitive to the privacy interests of victims at every stage of the prosecution. Disclosure must be carefully vetted. Victims of sexual offences are protected by publication bans and laws restricting access to their private records and sexual history.

(i) Production of Private Records (Third Party Records)

In order to gain access to a victim's private information, such as their medical, psychiatric or personal records, the *Criminal Code* provides that the accused must establish that the private records are likely relevant to an issue at trial or to the competence of a victim to testify.[6] The Crown Attorney should engage with Victim Services to assist the victim in obtaining independent legal counsel to provide advice and represent their interests pertaining to a third party records application.

The Crown Attorney must not disclose a victim's records absent a court order unless the victim has expressly waived their right to privacy over those records. The victim is entitled to independent legal advice about their right to privacy. The validity of any waiver will depend on the circumstances.

[5] *See* Chapter 26 of this Guidebook*:* "The National Flagging System".
[6] *Supra* note 1 at ss 278.1 and 278.97.

If the victim chooses not to be represented by counsel, the Crown Attorney should make the victim aware that the *Criminal Code* prohibits publication of information provided on the application.

(ii) Sexual History

The *Criminal Code* provides that evidence that a victim has engaged in prior sexual activity with the accused or with any other person is not admissible.[7] This evidence cannot support an inference that the victim consented to the sexual activity nor can it be used to assess the victim's credibility.

Should the accused bring an application to have evidence of the victim's sexual history admitted, the Crown Attorney must advise the victim that they are not required to testify at the hearing to determine the admissibility of their sexual history. The Crown Attorney must also advise the victim that the *Criminal Code* prohibits publication of information provided on the application.

Crown Attorneys must avoid leading evidence that may relate to a victim's sexual history. Sometimes evidence that seems peripheral or unavoidable may subtly lead to inferences about the victim's sexual history. If a Crown Attorney is unsure about the possibility that particular evidence relates to a victim's sexual history, they should discuss the issue with other Crown Attorneys, if they are left in doubt they should consult with the Senior Crown Attorney.

If the Crown Attorney determines that leading such evidence is unavoidable in the circumstances of the case, the trial judge shall be advised and an application must be made pursuant to s. 276 of the *Criminal Code*.[8]

Cross-examination by a Self-Represented Accused

In cases where an accused person is self-represented, the Crown Attorney must seek an order appointing counsel to conduct the cross-examination of the victim.[9]

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[7] *Ibid* at s 276.

[8] See *R v Barton*, 2019 SCC 33, where the Supreme Court of Canada clarified that while s. 276 specifically applies to the defence use of evidence of prior sexual activity, *Seaboyer* required any party seeking to adduce the evidence to demonstrate that its probative value exceeded its prejudicial effect.

[9] *Supra* note 1 at s 486.3.

Testimonial Aids

Crown Attorneys should consider whether a victim's ability to communicate their evidence would be facilitated by the use of testimonial aids or other means that enable the evidence to be better understood. Where appropriate, Crown Attorneys should apply for an order permitting the use of a testimonial aid.[10]

Resolution Discussions and Sentence

The Crown Attorney must ensure reasonable steps are taken to inform the victim of a proposed resolution (e.g. guilty plea or proposed sentence) or that the charges will be withdrawn.[11]

Crown Attorneys must consult with a Senior Crown Attorney before agreeing to take a plea of common assault in exchange for withdrawing a charge of sexual assault.

Victim Impact Statement

As soon as feasible after a finding of guilt, the Crown Attorney must ensure reasonable steps are taken to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court as well as their other options.[12]

Restitution

The *Criminal Code* directs the court to consider making a restitution order and to ask the Crown Attorney if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution (for example, compensation for counselling). As soon as is feasible after a finding of guilt, the Crown Attorney must ensure reasonable steps are taken to provide the victim with an opportunity to indicate whether they are seeking restitution for their losses and damages.[13]

Ancillary Orders

The Crown Attorney must seek the following orders if applicable and remind the court of all mandatory orders:

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[10] *Ibid* at *ss* 486, 486.1, 486.2, 486.7.
[11] See Chapter 13 of this Guidebook: *"Resolution Agreements"*.
[12] *Supra* note 1 at s 722.
[13] *Ibid* at ss 737.1-741.2.

• DNA order[14]

• Sex Offender Information Registration Act (SOIRA)[15]

• Weapons Prohibition.[16]

[14] *Ibid* at ss 487.04 - 487.0911.
[15] *Ibid* at ss 490.011 – 490.032.
[16] *Ibid* at ss 109 – 110.

Offences Against Children

Introduction

Offences against children include crimes of abandonment, abduction, neglect, physical abuse, sexual abuse and Internet child exploitation. These offences have devastating effects on the physical and psychological well-being of victims, their families and the community.

Crown Attorneys must ensure that efforts are made, at all stages of the criminal proceedings, to provide the victim and/or, where appropriate, their parents or legal guardians, with whatever information or assistance is required to ensure full and fair participation in the criminal justice system. This includes the availability of the following:

- specialized victim's services facilitated by the Government division responsible for the welfare of children or other similar victims' support services;
- testimonial aids to assist the victim in providing evidence;[1]
- appointment of counsel to cross-examine the victim where the accused is self-represented;[2] and
- access to independent legal representation for victims or witnesses on applications to access their private records under the *Criminal Code*.[3]

Judicial Interim Release

When the accused has been arrested and held in custody, and the victim of an alleged offence is a child, the Crown Attorney must be conscious of the potential risk of harm in these cases and must seek a detention order where they consider it necessary for the safety and security of the victim or the public.

Where the accused is remanded in custody pending a bail hearing, detained or released on conditions, the Crown Attorney should seek an order from the court prohibiting the accused from having any contact with the victim, or where

[1] *Criminal Code*, RSC 1985, C-46, ss 486, 486.1, 486.2, 486.7.
[2] Pursuant to s 486.3, a judge may order that an accused cannot personally cross-examine a complainant, and appoint counsel to do so.
[3] Be advised that Victim Services or the government division responsible for the welfare of children may be in a position to provide funding for independent counsel.

appropriate, any witnesses. The Crown Attorney must ensure that any conditions they recommend on a bail release are necessary and appropriate to the circumstances of the alleged offence and the accused.

In all cases involving a victim under the age of eighteen, the Crown Attorney must seek a publication ban directing that the identity of the victim and any information that could disclose the identity of the victim not be published or transmitted in any way.[4]

The Crown Attorney must ensure that efforts are made to notify the victim and/or, where appropriate, their parents or legal guardians of any release order, the conditions of release (including non-communication) and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Crown Attorney must ensure that bail notification occurs as soon as possible. On request, the victim and/or, where appropriate, their parents or legal guardians must be provided with a copy of the court order.

Reporting Concerns to the Child Protection Authorities

Crown Attorneys have a statutory obligation to report to child protection agencies any case where they have reasonable suspicion that children are, or may be, in need of protection.[5]

Charge Assessment

The Crown Attorney should determine whether the full gravity of the criminal act is reflected in the offence charged and recommend a more appropriate charge be laid if necessary.

The following factors should be considered when determining the offence charged is appropriate to the circumstances and whether to proceed by summary conviction or by indictment:

- the circumstances of the offence, e.g. protracted sexual abuse, significant physical, emotional or psychological harm to the victim;

[4] *Supra* note 1 at s 486.4(2)
[5] *Children, Youth and Families Act*, SNL 2018, c C-12.3, s 11.

• whether the offence is alleged to have occurred within 12 months of reporting;

• the circumstances of the offender e.g., history of similar offences, position of trust/authority in relation to victim;

• the circumstances of the victim including the impact on the victim of testifying twice (at a preliminary inquiry and trial) and special vulnerabilities (disabilities, health, age of victim); and

• the potential range of sentence.

The Crown Attorney should consider whether the accused should be flagged as a High Risk Offender or the subject of a Long Term Offender or Dangerous Offender Application. In those cases, the Crown Attorney should consult with the National Flagging Co-ordinator (Senior Crown, Special Prosecutions Office).[6]

Protecting the Privacy of Child Victims

Crown Attorneys must be sensitive to the privacy interests and needs of child victims at every stage of the prosecution. Disclosure must be carefully vetted. Privacy of victims of sexual offences is protected by publication bans and laws restricting access to their private records.

(i) Publication Bans and other Restrictions on Public Access

At the earliest opportunity, the Crown Attorney must seek a publication ban directing that the identity of the victim and any information that could disclose the identity of the victim shall not be published or transmitted in any way.[7]

Where a concern exists that testifying publicly about a traumatic event may risk causing further trauma to a child victim, inhibit testifying or raise an issue respecting a victim's safety, the Crown Attorney may apply for an order excluding the public.

[6] See Chapter 26 of this Guidebook: "*The National Flagging System*".
[7] *Supra* note 1 at ss 486.31, 486.4 - 486.6.

(ii) Production of Private Records (third party records)

In order to gain access to a victim's private information, such as their medical, psychiatric or personal records, the *Criminal Code* provides that the accused must establish that the private records are likely relevant to an issue at trial or to the competence of a victim to testify.[8] The Crown Attorney should engage Victim Services to assist the victim and/or, where appropriate, their parents or legal guardians in obtaining independent legal counsel to provide advice and represent their interests on a third party records application.

The Crown Attorney must not disclose a victim's records absent a court order unless the victim has expressly waived their right to privacy over those records. The victim is entitled to independent legal advice about their right to privacy. The validity of any waiver will depend on the circumstances.

If the victim chooses not to be represented by counsel, the Crown Attorney should make the victim aware that the *Criminal Code* prohibits publication of information provided on the application.

(iii) History of Sexual Abuse and/or Activity

The *Criminal Code* provides that evidence that a victim has been sexually abused or engaged in prior sexual activity is not admissible.[9] This evidence cannot be used to assess the victim's credibility nor support an inference that the victim consented to the sexual activity.

Should the accused bring an application to have evidence of a victim's previous sexual abuse or prior sexual activity admitted, the Crown Attorney must advise the victim and/or, where appropriate, their parents or legal guardians that the victim is not required to testify at the hearing to determine the admissibility of the evidence. The Crown Attorney must also advise the victim and/or, where appropriate, their parents or legal guardians that the *Criminal Code* prohibits publication of information provided on the application.

Crown Attorneys must avoid leading evidence that may relate to a victim's sexual history. Sometimes evidence that seems peripheral or unavoidable may subtly lead to inferences about the victim's sexual history. If a Crown Attorney is unsure about

[8] *Supra* note 1 at ss 278.1 - 278.97.
[9] *Ibid* at s 276.

the possibility that particular evidence relates to a victim's sexual history, they should discuss the issue with other Crown Attorneys and, if they are left in doubt, they must consult with the Senior Crown Attorney.

If the Crown Attorney determines that leading such evidence is unavoidable in the circumstances of the case, the trial judge shall be advised and an application must be made pursuant to s. 276 of the *Criminal Code*.[10]

Cross-Examination by a Self-Represented Accused

In cases where an accused person is self-represented, the Crown Attorney must seek an order appointing counsel to conduct the cross-examination of the victim.

Testimonial Aids

Crown Attorneys should ensure that victims and witnesses under the age of 18 years, or their parents/legal guardian are informed of the availability of testimonial aids to assist them to communicate their evidence. Where appropriate, Crown Attorneys should apply for an order permitting the use of a testimonial aid.[11]

Resolution Discussions and Sentence

The Crown Attorney must ensure reasonable steps are taken to inform the victim and/or, where appropriate, their parents or legal guardians of a proposed resolution (e.g. guilty plea or proposed sentence) or that the charges will be withdrawn.

Crown Attorneys must consult with a Senior Crown Attorney before agreeing to take a plea to a common assault in exchange for withdrawing a charge of sexual assault.[12]

Victim Impact Statement

As soon as feasible after a finding of guilt, the Crown Attorney must ensure reasonable steps are taken to provide the victim and/or, where appropriate, their parents or legal guardians with the opportunity to prepare a Victim Impact

[10] See *R v Barton*, 2019 SCC 33, where the Supreme Court of Canada clarified that while s. 276 specifically applies to the defence use of evidence of prior sexual activity, *Seaboyer* required any party seeking to adduce the evidence demonstrate that its probative value exceeded its prejudicial effect.
[11] See *Criminal Code* ss. 486.3.
[12] See Chapter 13 of this Guide Book: "Resolution Agreements".

Statement, and inform the victim of their right to present it to the court as well as their other options.[13]

Restitution

The *Criminal Code* directs the court to consider making a restitution order and to ask the Crown Attorney if reasonable steps have been taken to provide the victim and/or, where appropriate, their parents or legal guardians with an opportunity to indicate whether they are seeking restitution (compensation for counselling costs). As soon as is feasible after a finding of guilt, the Crown Attorney must ensure reasonable steps are taken to provide the victim and/or, where appropriate, their parents or legal guardians with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.[14]

Ancillary Orders

The Crown Attorney must seek the following orders if applicable and remind the court of all mandatory orders:

- DNA order;[15]
- Section 161 *Criminal Code* order;
- Sex Offender Information Registration Act (SOIRA);[16] and
- Weapons Prohibition.[17]

[13] *Supra* note 1 at s 722.
[14] *Ibid* at *ss* 737.1 - 741.2.
[15] *Ibid* at ss 487.04 - 487.0911
[16] *Ibid* at ss 490.011 - 490.032.
[17] *Ibid* at ss 109 - 110

Internet Child Exploitation (ICE) Offences

Introduction

Internet child exploitation (ICE) covers a number of offences including child pornography, voyeurism, luring a child, agreeing or arranging to commit a sexual offence against a child and making sexually explicit material available to a child. This may include the non-consensual distribution of intimate images. Child pornography exists in a variety of forms including written material, audio recordings, photographic, film, video or other visual representations. Like all crimes against children, offences relating to internet child exploitation pose a serious threat of harm to children, the family, and the community and must be prosecuted vigorously.

The prosecution of internet child exploitation offences raises a number of unique concerns including to: the victims themselves, disclosure of sensitive or illegal materials, management of the courtroom and exhibits at trial, ancillary orders at sentencing and the wellness of those exposed to this evidence, including the Crown Attorneys involved.

Sensitivity to the perspective of the child victims, their privacy interests, and their need to be protected from re-victimization must be considered at every stage of the prosecution. This is true even in cases where the specific identity or whereabouts of the child victims are unknown.

If the identity of victims is known, Crown Attorneys should ensure that efforts are made to advise victims and/or, where appropriate, their parents or legal guardians of significant steps in the proceedings in advance of the case being heard in court, as appropriate. This includes meeting with victims in advance of the preliminary hearing and trial. Crown Attorneys should also ensure that efforts are made to inform the victims and/or, where appropriate, their parents or legal guardians of available specialized victims' services as facilitated by the Victim Services Program.

Crown Attorneys dealing with cases involving internet child exploitation should also consider the directions set out in the Offences Against Children and Victims sections of this Guidebook[1].

[1] See Chapter 19 "Offences Against Children" and Chapter 22 "Victims of Crime" of this Guide Book.

File Review

Crown Attorneys shall review any assigned ICE file upon receipt and determine whether hybrid offences should be prosecuted by indictment or summary conviction. Crown Attorneys shall consult with their direct supervisor or Senior Crown Attorney if there is any question regarding appropriate election.

Crown Attorneys should consider whether the offender should be flagged as a potential Long Term or Dangerous Offender. If the offender has been flagged as such, the Assistant Flagging Coordinator shall be notified.[2]

Disclosure

Prosecutions of child pornography offences raise unique disclosure concerns because access to child pornography is a criminal offence. Viewing such materials may cause trauma. Further, there is a strong public interest in protecting the privacy and dignity of the children depicted in these materials.

In these unique circumstances, disclosure may be provided in two ways:

- by providing defence counsel with an opportunity to view the child pornography in a secure, private location; or,
- by providing copies of the material pursuant to a court order with conditions sufficient to satisfy concerns that the material will be used for a legitimate purpose connected to the administration of justice, disclosure will not pose an undue risk of harm to children and the privacy interests of the children depicted in the child pornography will be adequately protected.

If the Crown Attorney has any questions regarding disclosure on an ICE file, the Crown shall consult with their Senior Crown Attorney.

Protecting the Privacy of Child Victims

Publication Bans

The Crown Attorney must employ the relevant statutory provisions to ensure that the privacy interests of the child victim and other witnesses are protected. In cases involving a child pornography offence, the *Criminal Code* directs that the judge must

[2] See Chapter 26 of this Guidebook "The National Flagging System"

impose a publication ban, even in the absence of a request by the prosecution.[3] Crown Attorneys must remind the court of its obligation to make the order.

Trial

Crown Attorneys should consider the following in preparation for trial:

- consider direct indictment where appropriate;
- seek to prioritize cases involving internet child exploitation in the court stream;
- s. 715.1 of the *Criminal Code*, if the victim is known and will be required to testify;
- if a decision is made not to proceed with an internet child exploitation case, Crown Attorneys shall consider whether a preventative recognizance may be appropriate per s. 810, s. 810.1 and s. 810.2.[4]

Tendering Child Pornography Evidence

In prosecutions related to internet child exploitation, exhibits are often filed that contain material alleged to be child pornography. Crown Attorneys must seek to protect the privacy and dignity of those children who may be depicted in child sexual abuse materials, as well as others who may be impacted by inadvertent exposure to such materials.

Given these concerns, all precautions must be taken to ensure that child pornography evidence is presented to the Court in such a manner that only those who are required to view the material are able to do so. Ultimately, the manner in which this material may be accessed will be determined by the court.

Sealing Orders

Crown Attorneys must apply for a sealing order in respect of any exhibit containing material alleged to be child pornography. On appeal, Crown Attorneys must seek an order sealing any appeal books or exhibits containing child pornography and seek restrictive terms respecting the use and eventual destruction of the appeal books.

[3] *Criminal Code*, RSC 1985, C-46, s 486.4.
[4] *Ibid* at ss 810 - 810.2

Resolution Discussions and Sentence

Crown Attorneys should consider the specific directions set out in the Offences Against Children[5] section of this Guidebook when entering into resolution discussions. As soon as feasible, the Crown Attorney must take reasonable steps to ensure that the victims and/or, where appropriate, their parents or legal guardians are informed of a proposed resolution (e.g. a guilty plea or proposed sentence) or that the charges will be withdrawn.

Absent exceptional circumstances and the express approval of the Senior Crown Attorney or designate, the Crown Attorney must not:

- reduce or withdraw a charge relating to internet child exploitation;
- accept a plea to a different offence, solely to avoid a mandatory minimum sentence; or
- accept a plea to a different offence, solely for the purpose of avoiding a DNA order or an order under the *Sex Offender Information Registration Act* (SOIRA).[6]

Victim Impact Statements

The *Criminal Code* directs the court to ask the Crown Attorney if reasonable steps were taken to provide the victim, if known, with an opportunity to prepare a victim impact statement. As soon as feasible after a finding of guilt, Crown Attorneys must take reasonable steps to provide the victim and/or, where appropriate, their parents or legal guardians with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court as well as their other options.

Ancillary Orders

DNA

All internet child exploitation offences are primary designated offences, with the exception of voyeurism. Crown Attorneys must remind the court that the DNA order is mandatory regardless of whether the offender's profile is already included in the DNA Data Bank.

[5] See Chapter 19 of this Guidebook *"*Offences Against Children".
[6] *Sex Offender Information Registration Act*, SC 2004, c-10.

SOIRA

All child exploitation offences are designated offences for which a SOIRA order is mandatory, with the exception of voyeurism. Crown Attorneys must remind the court of this mandatory order and of the appropriate duration of the order.

In cases of voyeurism, the Crown Attorney should make an application for both DNA and SOIRA orders where the Crown Attorney is of the view that the voyeurism offence was committed with the intent of committing a designated sexual offence (such as making child pornography) or there is evidence supporting a legitimate concern that the offender's behavior may be escalating or that the offender has a history of antisocial behavior.

Section 161 *Criminal Code* Orders

Where appropriate, Crown Attorneys should apply for a prohibition order restricting the offender's ability to interact with children under the age of 16, either in person or over the internet.[7]

In all cases where an offender has been convicted of an offence involving internet child exploitation, Crown Attorneys must seek forfeiture of any child pornography, the possession of which is illegal and all offence related property, including computers.

[7] *Supra* note 2 at s 161.

Impaired Driving Cases: Notice to Seek Greater Punishment

Introduction

The *Criminal Code* prescribes minimum sentences for second and subsequent impaired driving offences.[1] To permit the use of these greater punishment provisions, Crown Attorneys must prove that the accused was notified, before plea, that greater punishment would be sought because of previous convictions. The accused's criminal record must also be proven.

This section of the Guide Book sets out the policy for seeking greater punishment for second and subsequent impaired driving offences. It also seeks to ensure compliance with the intent of the *Criminal Code* provisions.

The relevant sections are:

> *320.19(1) Everyone who commits an offence under subsection 320.14(1) or 320.15(1) is liable on conviction on indictment or on summary conviction (a) to the following minimum punishment, namely,*
>
> *(i) for a first offence, a fine of $1,000,*
>
> *(ii) for a second offence, imprisonment for a term of*
>
> *30 days, and*
>
> *(iii) for each subsequent offence, imprisonment for*
>
> *a term of 120 days[2];*
>
> *727. (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.*

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[1] *Criminal Code*, RSC 1985, C-46, ss 320.14 and 320.15.

[2] The *Criminal Code* provides the same mandatory penalties when the impaired driving caused bodily harm to another person (s.320.2) as well when the impaired driving caused the death of another person (s. 320.21).

Statement of Policy

Crown Attorneys should ensure that individuals charged with an impaired driving offence(s) have been served with a Notice of Intention to Seek Greater Punishment in all cases where the accused has previous conviction(s) within the meaning of subsection 320.26 of the *Code.*[3]

Crown Attorneys shall seek greater punishment by proving service of the notice and the relevant criminal record in cases where the accused has one or more previous convictions recorded within **five years** of the current offence.

Crown Attorneys may exercise discretion *not* to prove service of the notice where

- the accused has one previous conviction recorded within five years before the date of the current offence and one previous conviction which has been recorded more than five years before the current offence, and

- punishment would likely result in an unduly harsh consequence under the circumstances.[4]

Crown Attorneys shall prove the relevant criminal record whether or not the notice to seek greater punishment is tendered. The intention of permitting this narrow discretion is to recognize that there may be rare instances in which it might be unduly harsh to require a third time offender to serve the mandatory minimum sentence of ninety days' imprisonment.

Crown Attorneys may also exercise discretion not to prove service of the notice where the accused has previous conviction(s), all of which have been

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[3] 320.26 In determining, for the purpose of imposing a sentence for an offence under subsection 320.14(1) or 320.15(1), whether the offence is a second, third or subsequent offence, any of the following offences for which the offender was previously convicted is considered to be an earlier offence:

(a) an offence under any of subsections 320.14(1) to (3) or section 320.15; or
(b) an offence under any of sections 253, 254 and 255, as those sections read from time to time before the day on which this section comes into force.

[4] This policy is in accordance with those of most other prosecution services across Canada and preserves a suitable element of Crown discretion.

recorded more than five years before the current offence. Crown Attorneys must still prove the relevant criminal record.

Guidelines for Application of the Policy

Service of the notice should be considered in all cases, in light of all circumstances of the offence and the background and circumstances of the offender. Service of the notice will likely be appropriate if any of the following circumstances exist:

- the current offence involves a fatality, significant accident or personal injury caused by the accused;

- the degree of intoxication and the nature of operation of the conveyance demonstrated a significantly enhanced risk of injury or property damage;

- the accused has already been incarcerated for a previous related offence;

- there is evidence that the concentration of alcohol in the blood of the offender at the time of the offence was equal to or exceeded 160 (one hundred and sixty) mg alcohol in one hundred mL of blood;

- during or after the commission of the current offence, the accused attempted to flee from the police; or

- the totality of the circumstances of the current offence suggests a need to protect the public by incarcerating the accused for at least the minimum period which would ordinarily follow proof of serving the notice.

In the exercise of discretion not to prove service of the notice to seek greater punishment, Crown Attorneys may weigh such factors as:

- the relative strength or weakness of the Crown's case if the matter proceeded to trial;

- any plea of guilt proffered; and

- any agreement with defence counsel in terms of submissions pertaining to the appropriate range of sentence.

When exercising their discretion, Crown Attorneys must be careful to ensure that the reasons for the decision are stated in court. Where the criminal record discloses only one prior conviction more than five years before, this task is not difficult. Other cases may require a more thorough explanation to the court.

Even if a Crown Attorney decides not to prove service of the notice, is unable to prove service, or notice has not been served, the court must still consider whether the mandatory minimum sentence for a first offender is an appropriate sentence. Crown Attorneys should consider advancing the following submissions in situations where the mandatory minimum sentence may be inadequate:

- the court is entitled to take into account the previous record of the accused in imposing a fit sentence, whether service of notice is proved or not;[5]

- the relevant sentencing cases indicate that the minimum sentence is inadequate;

- any aggravating factors as outlined in s. 320.22 of the *Code*[6];

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[5] *R v Norris* (1988), 41 CCC (3d) 441 (NWTCA).

[6] 320.22 A court imposing a sentence for an offence under any of sections 320.13 to 320.18 shall consider, in addition to any other aggravating circumstances, the following:

(a) the commission of the offence resulted in bodily harm to, or the death of, more than one person;

(b) the offender was operating a motor vehicle in a race with at least one other motor vehicle or in a contest of speed, on a street, road or highway or in another public place;

(c) a person under the age of 16 years was a passenger in the conveyance operated by the offender;

(d) the offender was being remunerated for operating the conveyance;

(e) the offender's blood alcohol concentration at the time of committing the offence was equal to or exceeded 120 mg of alcohol in 100 mL of blood;

(f) the offender was operating a large motor vehicle; and,

(g) the offender was not permitted, under a federal or provincial Act, to operate the conveyance.

- the offender should not be treated less severely than others in similar circumstances; and

- it would be inappropriate to treat the offender as a first time offender.

Where an inadequate sentence is imposed, an appeal should be brought promptly.[7]

The following practices are not acceptable:

- proving service of the notice and the relevant criminal record, then advising the court that the Crown is only relying on part of the relevant record;[8]

- proving service of the notice and only part of the relevant criminal record[9].

[7] See Chapter 25 of this Guide Book: "The Decision to Appeal".
[8] *Kotchea v R*, [1987] NWTR 289 (NWTSC).
[9] Despite obiter in *Kotchea v R*, ibid, suggesting that Crown counsel should have alleged only part of the relevant criminal record, the Attorney General of Newfoundland and Labrador takes the position that Crown Attorneys should in all cases place the entire relevant criminal record before the sentencing judge.

Victims of Crime

Introduction

There is a need for heightened awareness on the part of all members of the justice community of the needs and perspectives of victims of crime. Victims of crime should be treated with courtesy, compassion, and respect. The goals of Public Prosecution include the encouragement and facilitation of the participation of victims in the criminal justice system, the protection of victims' rights as set out in the *Canadian Victims Bill of Rights*[1], the minimization of inconvenience to victims, the consideration of victims' concerns when decisions may affect them, and ensuring that victims are adequately informed.

The *Canadian Victims Bill of Rights* was enacted in 2015. It highlighted that "*consideration of the rights of victims of crime is in the interest of the proper administration of justice*".[2]

This policy is intended to emphasize the importance of achieving these goals as well as outline the ways in which Crown Attorneys can achieve them.

Application of the Policy

This Policy provides guidance to Crown Prosecutors engaging with and assisting victim(s) of crime.

By virtue of the 1999 amendments to the *Criminal Code* as well as the *Canadian Victims Bill of Rights*, a "*victim*", is a person:

- against whom an offence (under a provincial or federal statute) has been committed, or is alleged to have been committed;
- who has suffered, or is alleged to have suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence (under a provincial or federal statute); and,
- includes, for the purposes of sections 672.5, 722, and 745.63 of the *Criminal Code*, a person who has suffered physical or emotional harm, property damage,

[1] *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.
[2] *Ibid* at preamble.

or economic loss as the result of the commission of an offence against any other person.

It is acknowledged that it is not only those victims directly involved in a crime who experience the effects of victimization, but also their friends, family and society at large. However, this policy is intended to deal primarily with individuals who have been directly affected by criminal conduct.

Statement of Policy

Crown Attorneys shall carry out their duties in a manner that gives victims opportunity for meaningful participation in the criminal justice process. Crown Attorneys must, however, ensure early in the process that any victim(s) have a clear understanding of the proper role of Crown Attorneys, as outlined below in "*The Role of the Crown Attorney*";

- that the Crown Attorney does not represent the victim as their legal advisor in the proceedings; and

- that Crown Attorneys must be scrupulously fair in presenting the case, which may include, for example, presenting evidence that is favorable to the accused.

Crown Attorneys must take every reasonable opportunity to invoke the mechanisms and procedures provided by law to ensure that justice is seen to be done in the eyes of victims. No formula can prescribe the manner in which this goal can be achieved; the principles enunciated in this policy will provide guidance for application in a wide variety of specific circumstances.

Child witnesses constitute a specific class of victims. They must be treated with dignity and compassion. Crown Attorneys should ensure that children are kept informed and remember that they are entitled to express their views and concerns. It is important that children be protected, as much as possible, from any potential hardship related to the justice process. Crown Attorneys should be well versed on the services and court related aids that are available to ensure child witnesses can be assisted effectively.

Right to Participate

Victims may express their opinions regarding decisions made by Crown Attorneys, particularly when these decisions affect the victim's rights as enumerated by the *Canadian Victims Bill of Rights*. Crown Attorneys must consider those views to the extent that they do not:

(a) cause interference with prosecutorial discretion or cause excessive delay in, or compromise or hinder, the prosecution of any offence;
(b) endanger the life or safety of any individual;
(c) cause injury to international relations or national defence or national security; or,
(d) cause any adverse inference against a person charged with an offence from the fact that a victim has been identified in relation to the alleged offence.

Right to Privacy

The Crown Attorney shall consider a victim's right to privacy, including any "*record*" as defined by section 278.1 of the *Criminal Code* that contains any personal information for which there is a reasonable expectation of privacy by the victim and/or witness, and the Crown Attorney shall:

(a) ensure that no such record, possessed and/or controlled by the Crown Attorney is provided to the accused in relation to offences under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273 of the *Criminal Code*, or for any offence, as it read at any time before July 23, 2015, wherein the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an above-listed offence if it occurred on or after July 23, 2015;
(b) upon an application served on the Crown Attorney's Office by the accused for production of a section 278.1 record, the Crown Attorney shall ask the court to consider the victim and/or witness' right to privacy, personal security, and equality;
(c) consider an application pursuant to section 486.4 of the *Criminal Code* prohibiting the publication and/or transmission of any information that could identify a victim and/or witness in proceedings in respect of offences under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346, or 347 of the *Criminal Code*, or

for any offence, as it read at any time before July 23, 2015, wherein the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an above-listed offence if it occurred on or after July 23,2015; and,

(d) consider an application pursuant to section 486.4(2.1) or (2.2) of the *Criminal Code*, in proceedings in respect of offences other than those above listed, prohibiting the publication and/or transmission of any information that may identify a victim and/or witness under the age of 18 years.

Upon an application served on the Crown Attorney by the accused for production of a section 278.1[3] record, the Crown Attorney shall inform the victim who has a privacy interest in the record of the victim's right to be present at the hearing and to be represented at the hearing by counsel retained by the victim.

Right to Security

The Crown Attorney shall consider the victim's right to security, and will take any reasonable and necessary measures required to protect the victim from intimidation and retaliation, including requesting orders pursuant to sections 486 to 486.5 of the *Criminal Code* when circumstances so dictate, giving consideration to the following:

(a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
(b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;
(c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;
(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(e) the protection of the participants in the justice system who are involved in the proceedings; and,
(f) any other relevant factors.

When the victim requests that their identity be protected as a complainant to the offence or as a witness in the proceedings, the Crown Attorney shall consider an application to the court pursuant to sections 486.31, 486.4, and/or 486.5 of the

[3] *Criminal Code*, RSC 1985, c C-46, at s 278.1.

Criminal Code, when it is in the interests of the proper administration of justice, for an order:

(a) prohibiting the disclosure of the victim/witness' identity in the course of the proceedings;
(b) prohibiting the publication and/or transmission of any information that could identify the victim/witness; or,
(c) prohibiting the publication and/or transmission of any information that could identify a justice system participant, as defined in the Criminal Code, when involved in proceedings in respect of an offence under section 423.1, 467.11, 467.111, 467.12, or 467.13; or terrorism offence.

The proper administration of justice includes consideration of the following:

(a) the right to a fair and public hearing;
(b) whether there is a real and substantial right that the victim, witness, or justice system participant would suffer harm if their identity were disclosed;
(c) whether the victim, witness, or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
(f) the salutary and deleterious effects of the proposed order;
(g) the impact of the proposed order on the freedom of expression of those affected by it; and,
(h) any other relevant factors.

The Role of the Crown Attorney

Where possible, the Crown Attorney should take reasonable steps to ensure that the victim has the opportunity to participate in the justice process in a meaningful way.

When appropriate, the Crown Attorney may meet with victim(s) to explain the role of the Crown Attorney and the prosecution process, to prepare the victim for court, and to provide such other information as may be required in the circumstances.

Specific Aspects of the Role of the Crown Attorney

Where appropriate, the Crown Attorney should draw the attention of the victim to the following:

(a) that the Crown Attorney owes an overriding duty to the proper administration of justice;
(b) that the Crown Attorney does not represent the victim as their legal advisor or representation in the criminal proceedings;
(c) that the Crown Attorney's goal is not to obtain a conviction, but to assist the court in discovering the truth while ensuring that the accused receives a fair trial;
(d) that, at each state of the criminal justice process, the Crown Attorney exercises their discretion with independence, objectivity, and impartiality; and,
(e) that the Crown Attorney makes sentencing recommendations that are consistent with the principles of sentencing.

Referral to Victim Services

The *Victims of Crime Services Act*[4] establishes that information about services, remedies, and the mechanisms to obtain remedies should be made available to victims.

Where appropriate, the Crown Attorney should inform the victims about the Victim Services Program and should provide contact information for the local office. In particular, the Crown Attorney should refer the victims to the Victim Services Program, and provide Victim Services with the victim's name, date of birth, address, phone number, name of the accused, and charges, where the victim requests the following:

(a) Information about the criminal justice system and the victim's role therein;
(b) Information about services and programs available to them as a victim, including restorative justice;
(c) Information about their right to file a victim impact statement; and,
(d) Information about their right to file a complaint for an infringement or denial of any of their rights under the *Canadian Victims Bill of Rights*.

[4] *Victim of Crime Services Act*, RSNL 1990, c V-5.

Other Information

When the victim requests information relating to the status and outcome of an investigation into an offence, without confirming the existence of any investigation known to the Crown Attorney, the Crown Attorney shall redirect the victim to the relevant policing agency, regardless of whether or not charges have been approved at the time of contact.

When a victim requests information relating to the location, date, progress, and outcome of the proceedings (including disposition hearings pursuant to section 672 of the *Criminal Code*), the Crown Attorney shall advise the victim(s) of this information or ensure that victim(s) are informed by the relevant policing agency.

When a victim requests information relating to unpaid restitution orders, the Crown Attorney shall redirect the victim to the relevant court services office for information on how to file the order as a civil court judgment enforceable against the offender.

When a victim requests information relating to reviews under the *Corrections and Conditional Release Act*[5], including information about the offender's conditional release, and the timing and conditions of that release, the Crown Attorney shall redirect the victim to the appropriate Corrections Canada office for such information.

When a victim requests information regarding filing a complaint related to an infringement or denial of their rights under the *Canadian Victims Bill of Rights* relative to their contact with the Public Prosecutions Division, the Crown Attorney shall advise the victim to contact the regional Senior Crown Attorney, and provide the necessary contact information. If necessary, the Senior Crown Attorney may refer the matter to the Office of the Director of Public Prosecutions.

In the event that a victim advises the Crown Attorney that they have a complaint relating to another service provider within the justice system, the Crown Attorney shall redirect the victim to that service provider for information on how to make a complaint.

[5] *Corrections and Conditional Release Act*, SC 1992, c 20.

Operation of the Policy

Special Needs of Victims

While the needs and circumstances of each victim will be unique, there are some general considerations Crown Attorneys should bear in mind.

Children tend to be more vulnerable and dependent than adults. When a child ist he victim of a crime[6], communication and protection take on heightened importance. Crown Attorneys must consider what measures ought to be invoked to ensure the victim understands information that is conveyed. These measures include, but are not limited to, the following:

- using language appropriate to the maturity of the child;
- conducting interviews of the child in a place and manner more likely to ensure their comfort and security. When interviewing child witnesses, a qualified expert should be present; and,
- adopting practices that maximize not only the safety of a child victim but also the child's perception of safety.

It is of the utmost importance that Crown Attorneys be versed in the current best practices related to interviewing child witnesses and presenting such evidence in court. Many aspects of the ability of children to recollect and recount events have been misunderstood. This area has been heavily researched and there are vast resources available to assist Crown Attorneys in supplementing their skills.[7]

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[6] "Child" in this context, means persons under 18 years of age. Section 486.1(1) of the *Criminal Code* now seeks to ensure the safeguarding of witnesses under 18. Special measures should be taken when interviewing child witnesses, see; *The Lamer Report (2006)* Office of the Queen's Printer NL at page 274.

[7] The Ontario Law Reform Commission concluded in 1991 that many traditional views about the unreliability of children's evidence had no support. (See Report on Child Witnesses, LRC of Ontario at p. 17). One effective intervention model for sexual offences against children which has been widely adopted is outlined in the text; *Sexual Offences Against Children*, 2nd edition Butterworths, 2001. See also materials titled, *Children as Witnesses* by Hurley et al published by the Centre for Children and Families in the Justice System in Ontario, ISBN 1-895953-20-0. More recently many law enforcement agencies are adopting these practices at the investigative stages. See, for example, an article in the RCMP Gazette Vol.69, No.2, 2007 at page 26, *The Importance of Using Open-Ended Questions When Interviewing Children.*

If the crime is an intimate partner violence offence[8] Crown Attorneys should be aware of the dynamics commonly at play with respect to such victims. The needs of intimate partner violence victims are discussed in Chapter 17 of this Guide Book on "*Intimate Partner Violence*."

Where the crime violates the victim's sexual integrity (for example, an offence contrary to ss. 271 to 273.3 or Part V of the *Criminal Code*) Crown Attorneys should expect that the victims will find their involvement in the proceedings to be particularly difficult, and that the impact of the crime on the victim may be severe and pervasive. Crown Attorneys should attempt to ascertain victims' needs and respond accordingly.

In all crimes of violence, victims generally harbor a legitimate sense of violation which is more pronounced than is commonly found in cases of property crime. Crown Attorneys should be sensitive to a victim's sense of vulnerability in these cases, and should consider appropriate measures to enhance the victim's security and comfort. These measures should include taking steps to ensure that victims are kept well-informed about the progress of the case, and about the types of issues that may arise that will be of particular interest to them: for example, applications to introduce evidence of prior sexual activity, or for access to their personal medical or other records.[9]

Crown Attorneys will often deal with victims who have special physical needs.[10] In some cases, a victim may not be fluent in the language in which proceedings are being conducted. These situations require special consideration and planning by Crown Attorneys to eliminate barriers that might impede involvement of victims in the proceedings.

Many victims may view court proceedings with suspicion because they feel people of their race, ethnicity, gender, or sexual orientation are less likely to be treated fairly. Crown Attorneys should be aware of such concerns and seek to address them in an appropriate manner.

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[8] This term is defined in Chapter 17 of this Guide Book: "Intimate Partner Violence" as "any criminal offence where violence is used, threatened or attempted by one person against another person in the context of a relationship between intimate partners".

[9] The victim may have to be advised about the availability of independent legal representation.

[10] For example, when prosecuting the offence of sexual exploitation of a person with a disability under s. 153.1 of the *Criminal Code*.

Alternative Measures

Not all criminal offences require criminal proceedings. In some cases, the interests of both victim and offender might be properly addressed through the use of alternative measures programs.[11]

However, in cases involving physical violence, the severity of the offence or its impact upon the victim may be such that prosecution is required. Crown Attorneys must:

- consider the position of the victim; and,
- where appropriate, consult with the victim in deciding whether an alternative to prosecution is appropriate.[12]

When a Crown Attorney determines that an alternative to prosecution is available and appropriate, this decision must be carefully explained to the victim(s), with particular emphasis on how the chosen disposition will protect the victim's interests.

Judicial Interim Release

The *Criminal Code* includes a number of provisions relevant to bail hearings with which Crown Attorneys must be familiar. These include provisions concerning:

- obligations imposed on peace officers and others to protect victim safety;[13]
- the conditions of a bail order relating to non-communication with the victim,[14] general powers to ensure the victim's security,[15] and possession of weapons,[16] and
- the test to be employed by the presiding judge in deciding whether to grant bail, which explicitly requires consideration of the victim's safety.[17]

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[11] In accordance with the policy set out in this Guidebook at Chapter 25.
[12] Please note that alternative measures are **not** to be considered in a case of intimate partner violence.
[13] *Supra* note 3 at ss 497(1.1)(a)(iv), 499(2)(c), 499 (2)(h).
[14] *Ibid* at ss 515(4)(d), 515(4.2), 515(12), 516(2), 522(2.1), 522(3).
[15] *Ibid* at ss 515(4)(e.1) and 515(4.2).
[16] *Ibid* at s 515(4.1)(d).
[17] *Ibid* at s 515(10)(b).

Safety Measures

The role of Crown Attorneys in respect of protecting and considering victims goes beyond the conduct of criminal prosecutions. Crown Attorneys must consider *Criminal Code* measures designed to prevent offences and to maximize the security of persons.

Sections 810, 810.01, 810.1 and 810.2 of the *Criminal Code* are designed to assist victims by prohibiting contact between potential victims and persons who may commit violent acts. Crown Attorneys should also consider measures provided by law to protect potential victims; see, for example, s. 161 of the *Criminal Code*, which provides for the imposition of prohibition orders against offenders. By these and similar measures, Crown Attorneys should seek to secure greater safety for victims.

Interviewing Victims

In many criminal cases, victims are obliged to testify at court as part of the Crown's case. Often it is in this context that a victim first comes into contact with a Crown Attorney.

Prior to speaking to the Crown Attorney, victims often speak to a Victim Services Worker. Victim Services Workers are individuals employed by the Government of Newfoundland and Labrador who can provide information to victims about the court proceedings and their role. The police generally advise victims about the availability of a Victim Services Worker. In any case, the victim should be directed toward victims' services as early in the process as possible. Where possible, Crown Attorneys should speak with any victim prior to their courtroom testimony, in order to:

- explain relevant prosecution policies (for example, in cases of intimate partner violence);
- explain the role of Crown, defence counsel, the judge, and the jury in such proceedings;
- explain the role of a witness in court;
- assess the victim's reliability as a witness;
- encourage the victim to testify truthfully to what occurred;

- ensure that the victim has been given the opportunity to review his or her statement, (if any), prior to testifying;

- inform the victim of any release conditions imposed on the accused, and determine if the victim has any concerns with the accused's compliance with those conditions – if the victim has concerns, Crown Attorneys should make sure the victim knows what to do and who to call if there is a breach;

- ensure that the victim has been made aware of available community services, including the services of a victim witness assistant, where one is available;

- attempt to answer any questions the victim might have; and

- advise the victim that if the offender is convicted, the victim may prepare and submit a victim impact statement.

Aids to Trial Testimony

The *Criminal Code* provides a number of measures that can be invoked in particular cases to increase the comfort and security of victims obliged to testify in a criminal proceeding. It is the responsibility of Crown Attorneys to consider if any of these measures are available and appropriate in a given case, and to seek to rely on them accordingly. Testimonial aids include:

- the use of a screen or closed circuit television;[18]

- the services of a support person;[19]

- the use of pre-recorded video evidence;[20]

- the use of affidavit evidence;[21]

- *in camera* proceedings;[22]

[18] *Ibid* at s 486.2(2).
[19] *Ibid* at s 486.1(1) – a support person is available for persons under 18 years, and those with mental or physical disabilities.
[20] *Ibid* at s 715.1.
[21] *Ibid* at s 657.1.
[22] *Ibid* at s 486(1).

- an order banning publication that might identify the victim;[23]
- opposing production to the accused of the victim's personal records[24];
- opposing the admissibility of evidence of the victim's prior sexual conduct[25]; and,
- preventing abusive cross-examination by self-represented accused[26].

If the victim is under the age of 18 or has a mental or physical disability and the victim requests testimonial aids, the Crown Attorney shall make an application to the court to request such testimonial aids pursuant to sections 486.1, 486.2, or 486.3 of the *Criminal Code.* In all other circumstances where the victim requests any of the above testimonial aids, the Crown Attorney shall consider making such an application using the following factors:

(a) the age of the witness;

(b) the witness' mental or physical disabilities, if any;

(c) the nature of the offence;

(d) the nature of any relationship between the witness and the accused;

(e) whether the application is needed to protect the identity of a peace officer who has acted, is acting, or will be acting in an undercover capacity, or of a person who has acted, is acting, or will be acting covertly under the direction of a peace officer;

(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and,

(g) any other relevant factors.

[23] *Ibid* at s 486.4.
[24] *Ibid* at s 278.2.
[25] *Ibid* at s 276.
[26] *Ibid* at ss 486.3 and 537(1.1).

Participation in Court Processes

Directly testifying in court is not the only method for victims to participate in criminal justice proceedings. Crown Attorneys must also consider the victim:

- at any time that an accused is released from custody pending the completion of proceedings, Crown Attorneys shall take reasonable steps to ensure the victim is aware of the release, the terms of release, and any amendment to terms of release;

- where a Crown Attorney proposes to make a significant amendment to the charges, or discontinue a prosecution, he or she should ensure that victims of the alleged offences are consulted, where appropriate;

- where a Crown Attorney discloses to defence counsel materials of a sensitive nature pertaining to the victim, he or she shall consider such steps as might be prudent to protect against inappropriate use or dissemination of the materials;[27]

- the right of the victim to independent representation at proceedings (for example, where an application is brought pursuant to s. 278.2 of the *Criminal Code* to access personal records pertaining to the victim);

- timely information pertaining to plea and sentence negotiations;

- the possibility of restitution orders[28] or access to forfeited proceeds of crime;[29]

- participation of the victim in sentencing hearings, by means of *viva voce* testimony, a Victim Impact Statement[30] (which the victim should be advised

[27] See the section in these materials on the subject of "Disclosure".
[28] *Supra* note 3 at ss 738-741.2.
[29] *Ibid* at s 462.43.
[30] See s. 722 of the *Criminal Code*, particularly s. 722.2, which obliges Crown Attorneys to provide information to the Court as to whether the victim has been given the opportunity to prepare a victim impact statement. Section 672.5(14) of the *Criminal Code* also permits use of Victim Impact Statements in hearings affecting persons held not criminally responsible by reason of mental disorder. A Victim Impact Statement must be written in the form and in accordance with the procedures established by the Lieutenant Governor-in-Council. The Department of Justice of Newfoundland and Labrador has a form prescribed by this process.

can be read aloud or presented by other means)[31] or otherwise; and

- the right of the victim to notice of and participation in various post- conviction processes such as *Criminal Code* Review Board hearings and parole eligibility hearings.

Victim Impact Statements

Section 722 of the *Criminal Code* permits the victim to make a statement to the court, which the court shall consider for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged.

The Crown Attorney should ensure that sentencing does not proceed for an offence where there is a victim until the victim has been informed of the possibility of making a Victim Impact Statement, and the Crown Attorney is aware of the victim's wishes with respect to making a statement. Where appropriate, the Crown Attorney should refer the victim to the Victim Services Program for the purpose of the preparation of a Victim Impact Statement.

Where the victim wishes to submit a Victim Impact Statement or other victim impact information and that statement or information is not available at the time of sentencing, and the Crown Attorney is aware of the victim's wishes, the Crown Attorney shall advise the court of the situation, and, where appropriate, request an adjournment.

When a Victim Impact Statement has been filed with the court, the Crown Attorney shall consider its contents in making submissions on sentence.

Restitution

Section 737.1 of the *Criminal Code* provides a mechanism for the victim to seek restitution in respect of a loss caused by an offence committed under the *Criminal Code*. In such circumstances, the Crown Attorney should ensure that the victim is advised of the right to seek restitution and shall determine whether a completed restitution form is included, or should be included, in the investigation file forwarded by the policing agency. In the event that a completed form is not present in the file, and the circumstances of the file are such that it should be included, the Crown

[31] *Supra* note 3 at s 722(2.1).

Attorney shall request that the policing agency contact the victim to have the victim complete the form and return it to the policing agency to forward it to the Crown Attorney.

The Crown Attorney shall review any completed form to ensure that any losses and damages claimed by the victim are readily ascertainable as required by sections 737.1(2) and 737.1(4) of the *Criminal Code*. The Crown Attorney shall present a properly completed claim for restitution to the court regardless of the Crown Attorney's assessment of the ability to pay of the accused, in accordance with section 739.1 of the *Criminal Code*.

In the event a completed form is not available at the time of sentencing, the Crown Attorney may request an adjournment of the proceeding to permit the victim to indicate whether they are seeking restitution, provided the Crown Attorney determines that a request for an adjournment will not interfere with the proper administration of justice.

Victim Fine Surcharges

Victim surcharges are imposed on the offender when appropriate[32]. In addition, Crown Attorneys may request a greater amount than those fixed by s. 737(2) of the *Criminal Code*. The surcharge may be waived on application of the offender pursuant to s. 737(5) (for example, where it would cause undue hardship), but the waiver must be sought before the sentence is imposed.

Appeals

It is important that Crown Attorneys bear in mind that their duties with respect to victims do not end at trial. Convictions/acquittals and/or sentences may be appealed; therefore, the duty to inform victims encompasses explaining appeal processes, including the possibility of judicial interim release (bail) pending the determination of an appeal and/or of a new trial being ordered.

[32] *Ibid* at s 737(1).

Appendix A

Victim Interview Checklist - First Interview

This checklist should be used in accordance with the Crown Attorney's Guidelines and should take place in the presence of a third party.

- Introduce yourself and explain the role of the Crown Attorney, intention for this meeting, and the intention for subsequent meeting(s).

- Explain lack of confidentiality/privilege between Victim and Crown Attorney.

- Explain the court process, including anticipated time lines, court procedure, and the burden of proof.

- Explain the disclosure process.

- Explain importance of telling the whole truth.

- Discuss day of trial expectations including, but not limited to: manner of dress, time frames, support persons, where to meet/wait, audience.

- Explain publication ban, if applicable (P.I,, name and identifying information)

- Explain procedure for relevant *Criminal Code* sections, if applicable (example: if the Victim is the victim of a sexual assault, explain the procedure for s. 277 and s. 278)

- Provide a copy of the victim's statement to be reviewed for the next meeting. Discuss why a statement is taken and what use can be made of it in court.

- This interview does not involve any discussion of evidence.

Appendix B

Victim Interview Checklist - Second Interview

This checklist should be used in accordance with the Crown Attorney's Guidelines and should take place in the presence of a third party.

- Discuss court procedure: direct, cross, and re-direct examinations, objections, breaks.

- Discuss appropriate demeanor in the court and its importance.

- Determine if the Victim has reviewed their statement (don't presume literacy and/or absence of other factors that would impede their ability to review same) and if there are any inaccuracies they (now) identify.

- Discuss testimonial fears (i.e. tears, nausea, embarrassment, etc.)

- Discuss importance of telling the whole truth and the necessity of being explicit/graphic.

- Direct examination

  - Discuss the non-leading question;

  - Discuss the Crown's job being to get the story out to the Court;

  - Review questions you intend to ask, including those designed to acclimatize or relax the Victim.

- Cross-examination

  - Discuss the role for defence counsel and the leading question;

  - Discuss Crown's role regarding objections;

  - Review the inevitable lines of questioning and provide the Victim with a heads-up regarding inconsistencies or other lines of questioning that may be particularly triggering;

  - Discuss the Victim's demeanor under cross-examination

- Elaborate on the opportunity for re-direct examination.

- Discuss “good witness” advice:
  - Listen to the question
  - Answer what is asked of you
  - Be honest
  - Don’t guess or estimate
  - Speak clearly and at a good volume
  - Think before responding
  - Don’t argue, but don’t be afraid to disagree if it’s called for;
  - Remind them that they alone control their responses.

The Decision to Appeal

Introduction

This section of the Guide Book explains the criteria applied by the Attorney General of Newfoundland and Labrador when deciding whether to appeal an acquittal, judicial stay or sentence. This section also discusses who should make the decision to appeal on behalf of the Attorney General and how the decision is reached.

History of the Crown's Right to Appeal

The authority to appeal in criminal proceedings comes entirely from statute.[1] Common law appeals against conviction or acquittal did not exist.[2] In Canada, accused persons had no effective right of appeal until 1923.[3] In 1930, an amendment to the *Criminal Code* permitted Crown appeals against an acquittal, though only in cases raising a "question of law alone".[4] While the basis for Crown appeals has since been codified in more detail, they are still limited to raising legal (not factual) issues.[5]

Canadian appellate courts viewed Crown appeals as an extraordinary remedy, in some cases suggesting that the 1930 amendment was regrettable.[6] For example, in 1939, a member of the Supreme Court of Canada described the 1930 amendment as "*drastic*".[7] A year later the Supreme Court dismissed a

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[1] *Welch* v *The King*, [1950] SCR 412 (SCC); *Dennis* v *The Queen*, [1958] SCR 473 (SCC); *R* v *Meltzer* (1989), 49 CCC (3d) 453 at 460-61 (SCC).
[2] *R* v *Meltzer*, *ibid*; *R* v *Robinson* (1990), 51 CCC (3d) 452 at 463 (Alta CA).
[3] SC 1923, c C-41; *Cullen* v *The King* (1949), 94 CCC 337 at 340 (SCC).
[4] SC 1930, c C-11, s 28; and see *R* v *Morgentaler* (1985), 22 CCC (3d) 353 (ONCA), adopted by the Supreme Court of Canada at 37 CCC (3d) 449 at 542 (per McIntyre J. speaking for the unanimous Court on this issue).
[5] *Criminal Code*, RSC 1985, c C-46, s 676(1)(a) regarding indictable appeals, and ss 813, 830, 676(1.1) and 839 regarding summary conviction appeals.
[6] Even before 1930, when a much more limited form of review was available to the Crown, courts were reluctant to permit trying an accused a second time: *The King* v *Burns (No. 1)* (1901), 4 CCC 323 at 327 (ONCA); *The King* v *Karn* (1903), 6 CCC 479 at 484 (ONCA).
[7] *Wexler* v *The King* (1939), 72 CCC 1 at para 5. A commentator reviewing the Court's decision in the same report series remarked, "It is clear from this judgment that the roots of the principle that no man shall be twice placed in jeopardy for the same crime were not eradicated with the creation of a right to appeal for an acquittal."

Crown appeal on jurisdictional grounds, noting that the Code section permitting Crown appeals should be interpreted narrowly.[8] In 1949, Rand, J. observed in *Cullen v The King*[9] that the amendment provided "*a striking departure from fundamental principles of security for the individual*":

> *At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy*.[10] [emphasis added].

Two conclusions emerge from this historical overview. First, the 1930 amendment provided an extraordinary remedy. It created an exception to the general rule that no person should be tried twice on the same charge. Second, over the past 90 years, the courts have signaled the need to show restraint in exercising the right to appeal. Only cases that the public interest requires pursuing should be appealed.

Statement of Policy

Not every unfavorable ruling or error in law should be appealed. Neither the courts nor the Crown has the resources to review every judgment that appears to be wrong. Nevertheless, the public is entitled to a criminal justice system that is consistent and effective in the suppression of crime.

Two issues must be considered when deciding whether to appeal.

1. **Is there a proper basis, both in law and on the facts, to believe that the judgment is wrong?**
2. **If there is, does the public interest require an appeal?**

These criteria are similar to those applied when making the decision to prosecute - with two very important differences. First, since the facts have

[8] *Rex* v *Wilmot* (1940), 75 CCC 161 esp at para 165 (SCC).
[9] (1949), 94 CCC 337 at para 345 (SCC).
[10] *Ibid* at para 347.

already been established at trial, it is important to ensure that significant questions of law are litigated on the basis of a proper and compelling record of evidence.

Second, the public interest plays a much more important role in the decision to appeal than it does in deciding whether to lay charges. In most potential appeals, the controlling principle is whether the public interest *requires* an appeal.

Factors which may be considered when deciding whether the public interest requires an appeal include:

a. Is the issue raised by the case of widespread importance for the effective enforcement or administration of the criminal law, or is its impact confined largely to the instant case?

b. Does the seriousness of the offence or the circumstances of the offender demand a reconsideration of the case?

c. Have courts differed in interpreting the issue raised?

d. Could the decision impair the effective enforcement of the criminal law if left unchallenged?

e. Could the trial decision impair the enforcement or administration of a significant government policy initiative (for instance, confiscating the proceeds of crime, reducing domestic violence) if left unchallenged?

f. Will the resources required to prepare and present the appeal significantly outweigh the value of pursuing the case further?[11]

g. Is there a reasonable prospect that the appeal court may award costs against the Crown even if the appeal has merit?

[11] On the use of judicial resources, see *Borowski* v *Attorney General of Canada* (1989), 47 CCC (3d) 1 at para 14-15 (SCC); *R* v *Robinson* (1989), 51 CCC (3d) 452 at para 487 (Alta CA); but see also materials in Chapter 6 of this Guide Book on "The Decision to Prosecute".

h. In sentence appeals, was the sentence clearly below the acceptable range of sentence (and not merely at the low end of the acceptable range), so that a successful appeal should lead to a significant increase in sentence?[12]

The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case.

Public expressions of concern do not in themselves provide a proper basis for bringing a review at the instance of the Attorney General. However, where the arguments for and against appealing are evenly matched, the expression of a strong public concern for a further review of the case may tip the scales in favour of an appeal. In evaluating this concern, Crown Attorneys should be extremely cautious.

Guidelines for Application of this Policy

In general, the decision to appeal to the Court of Appeal is made by the Senior Crown Attorney Special Prosecutions. The decision to appeal to the Trial Division is made by the Regional Senior Crown Attorney who may, depending on the circumstances, wish to consult with the Senior Crown Attorney Special Prosecutions.

Appeals raising significant public interest considerations should first be discussed with the Director of Public Prosecutions (DPP) - Assistant Deputy Minister (Criminal Division). The decision to appeal to the Supreme Court of Canada is made by the DPP on the advice of the Senior Crown Attorney, Special Prosecutions Office (SPO).[13]

Crown Attorneys should ensure that questions regarding whether a case should be appealed are brought to the attention of the SPO as soon as possible so that adequate time will be available to file the notice of appeal. Crown

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[12] On sentence appeals, appellate courts may only intervene where there was an error in principle or the sentence is demonstrably unfit: *R* v *Shropshire* (1995), 102 CCC (3d) 193 (SCC); *R* v *M (CA)* (1996), 105 CCC (3d) 327 (SCC); *R* v *McDonnell* (1997), 114 CCC (3d) 436 (SCC). Special considerations also apply when the sentence is one which a Crown Attorney proposed at trial: see Chapter 13 of this Guide Book regarding, "Plea Discussions and Agreements".

[13] See materials in Chapter 2 of this Guide Book on the "Independence of the Attorney General in Criminal Matters".

Attorneys are obliged to bring significant adverse decisions to the attention of the Senior Crown Attorney in their region so that appropriate and timely action can be taken.

Irrelevant Criteria

A decision whether to appeal must *not* be influenced by any of the following:

a. the race, national or ethnic origin, colour, religion, gender, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the case;

b. Crown Attorney's personal feelings about the accused, the victim, or the trier of fact;

c. possible political advantage or disadvantage to the government, special interest group or political party; or

d. the possible effect of the decision on the personal or professional circumstances of those responsible for making the decision to appeal.

Conceding Appeals

The Crown is much more frequently the respondent than the appellant on criminal appeals. On rare occasions, appellate counsel may be placed in a situation in which an error of law committed by the trial court is so clear, or the findings of fact so patently unreasonable, that it may raise the possibility that the appeal ought to be conceded. This may arise, for example, in a case where a decision by the Supreme Court of Canada subsequent to the trial but prior to the appeal completely undermines the basis for conviction.

The decision to concede an appeal or to concede on a particular issue[14] within the appeal is never one that can be taken lightly. Conceding an appeal will impose additional burdens on the investigative agency, witnesses, and the courts if a new trial will be required. As a general rule, the Crown Attorney's duty is to advance all reasonable arguments that may be made to support the

[14] The Supreme Court has been highly critical of concessions by Crown counsel that it felt should not have been made: see *Schachter v The Queen*, [1992] 2 SCR 679 (SCC), and *Miron* v *Trudel et al*, [1995] 2 SCR 418 at para 485-486 (SCC).

decision of the court below, and to leave it to the appellate court to decide whether to allow the appeal.[15]

Generally speaking, it is within the discretion of appellate counsel to concede on a particular issue in an appeal without conceding the appeal itself, where there is no reasonable argument to be made on that issue. Where that issue concerns the constitutional validity of legislation, however, instructions must be sought from the DPP.[16]

Appellate Crown Attorneys may also be called upon to exercise a discretion with respect to the admission of fresh evidence on appeal. The admission of such evidence is governed by a four part test consistently used by the Supreme Court.[17] Crown Attorneys may well choose to consent to the admission of such evidence where it raises a substantial concern about an offender's innocence.[18]

Where a Crown Attorney is of the view that an appeal ought to be conceded, further consultation with the DPP is necessary. Before making such a recommendation, appellate Crown Attorneys should seek the views of the trial Crown Attorney and, where appropriate, the investigative agency. The decision should be discussed with the DPP. Consultation with the Attorney General may be necessary if a concession is considered in a serious and/or high profile case.[19]

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[15] Bearing in mind that many legal errors may be regarded as causing an accused no prejudice: *Supra* note 5 at s 686(1)(b)(iv).

[16] Broader considerations may apply to such decisions requiring a consultation by the DPP with the Attorney General.

[17] See e.g., *R* v *Palmer and Palmer* (1979), 50 CCC (2d) 193 (SCC), *R* v *Stolar* (1988), 40 CCC (3d) 1 (SCC).

[18] In this regard, see *Report of the Commission on Proceedings Involving Guy Paul Morin*, Toronto: Queen's Printer, 1998, Vol 2, at 1170-1171. See also the Lamer Report 2006.

[19] Broader considerations such as social or economic policy factors may apply to such decisions requiring a consultation with the Attorney General.

Extrajudicial Measures for Youths

Introduction

The Youth Criminal Justice Act (*YCJA*[1]) aims to reduce the use of youth courts by increasing the prevalence of extrajudicial measures.

"*Extrajudicial measures*" are defined in s. 2 of the *YCJA* as measures other than judicial proceedings used to deal with a young person alleged to have committed an offence. Extrajudicial measures include "*extrajudicial sanctions*," which are defined in s. 2 of the *Act* to be a sanction that is part of a program set out in s. 10 of the *Act*.

The *YCJA* outlines the objectives and proper use of extrajudicial measures, and also lists specific types of available measures.

Crown Attorneys have a key role in ensuring that Parliament achieves its objective of reducing the use of youth court, where appropriate. Crown Attorneys should be mindful of their prosecutorial duties in light of the requirements and considerations in Part 1 of the *YCJA* (sections 4-12).

General Principles for the Use of Extrajudicial Measures

In addition to the principles set out in Section 3 of the *YCJA*, which apply to the entire Act, Crown Attorneys must be mindful of the following principles in Section 4 when considering whether to use an extrajudicial measure and in determining which extrajudicial measure option to use:

- Extrajudicial measures are often the most appropriate and effective way to address youth crime;
- Extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour; and,
- Extrajudicial measures should be used if they can adequately hold the young person accountable for their offending behaviour.

Determining whether an extrajudicial measure can adequately hold the young person accountable requires Crown Attorneys to determine whether an

[1] *Youth Criminal Justice Act*, SC 2002, c 1.

extrajudicial measure can provide meaningful consequences that are proportionate to the seriousness of the offence and to the degree of responsibility of the young person while also promoting the young person's rehabilitation. Additional factors to consider in making this determination are discussed below.

As outlined in s. 4(c), extrajudicial measures are presumed to be adequate to hold a young person accountable if the young person has committed a non-violent offence and has not previously been found guilty of an offence. This presumption is a strong direction from Parliament that Crown Attorneys are expected to use extrajudicial measures rather than the court to deal with non-violent offenders who have not previously been found guilty of an offence. However, Crown Attorneys may find that there are circumstances related to the seriousness of the offence that rebut the presumption in some cases.

Further, under s. 4(d), extrajudicial measures may be used even if the young person has had previous matters resolved by extrajudicial measures or has previously been found guilty of an offence. The use of another extrajudicial measure in these circumstances does not mean that the previous extrajudicial measure was a failure, or that another extrajudicial measure would not be adequate to hold the young person accountable for the current offence.

Section 5 of the *YCJA* further provides that extrajudicial measures should be designed to:

- Provide an effective and timely response to offending behaviour;
- Encourage young persons to acknowledge and repair the harm caused to the victim and the community;
- Encourage the involvement of families and the community;
- Provide an opportunity for victims to participate and to receive reparation;
- Respect the rights and freedoms of young persons; and,
- Be proportionate to the seriousness of the offence.

Referral to Extrajudicial Measures - Factors to consider

In determining if an extrajudicial measure is appropriate for a young person the following factors should be considered:

1) The background of the young person:

- their age;

- any prior findings of guilty or past involvement with extrajudicial measures;

- The nature and number of any such previous offences;

- any outstanding charges;

- the role of the young person and their corresponding degree of responsibility in relation to the offence;

- whether the young person has been previously victimized;

- any remorse and willingness to engage in extrajudicial measures or an appropriate treatment program;

- any mental health concerns, and the degree that the concerns can be said to have impacted the young person's behavior;

- whether the young person comes from a disadvantaged group;

- whether the young person has been or is presently engaged with the child welfare system; and,

- whether the young person self-identifies as Métis, Inuit or First Nation.

2) The circumstances and nature of the offence

- whether the offence is summary or indictable;

- whether the offence involves violence;

- whether the offence actually harmed the victim (physical, psychological or financial) and/or society;

- whether the incident impacted the sexual integrity of a person;

- whether a weapon was used or threatened to be used;

- whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable;

- whether the offence was against the administration of justice, such as breach of a court order, and if so, the extent of non-compliance;

- whether the offence involved malice, extortion, exploitation or revenge;

- whether the offence involved a breach of trust;

- whether the offence was motivated by bias, prejudice or hate;

- whether the offence involved any type of bullying including cyber-bulling;

- the age of the victim; and,

- the views of the victim and/or their parents or legal guardians (if the victim is a child), if available.

3) Administration of justice considerations

- public confidence in the administration of justice;

- the length and expense of trial when considered in relation to the seriousness of the offence;

- the likely sentence upon a finding of guilt;

- the availability of an appropriate sanction, including programming options, to hold the young person accountable for their offending behavior and focus on correcting the offending behavior;

- frailties in the prosecution e.g. staleness of the case, or the technical nature of the offence;

- whether the consequences of the prosecution would be unduly harsh to the young person, the victim or any witnesses in the case, considering factors such as age, health or the relationship between the parties; and,

- whether a just result can be accelerated through extrajudicial measures.

Options for Crown Attorneys

Withdrawal of the Charge

Crown Attorneys may determine that, although there is sufficient evidence to proceed with a prosecution of the charge, withdrawal of the charge is appropriate. It may be clear, for example, that after considering the principles and objectives in sections 3, 4 and 5 of the *Act,* and the factors related to the seriousness of the offence, the process of apprehension, detention and charging has been a sufficient response from the youth criminal justice system, and no further action is required. Crown Attorneys should also consider the factors listed in the Decision to Prosecute policy outlined in this Guidebook.[2]

Referral to a Community Program or Agency

A referral to a community program or agency, with the consent of the young person, may be appropriate in cases where it is clear that the young person needs assistance with a problem that may have contributed to the commission of the offence. Rather than prosecuting the young person for a minor offence, a Crown Attorney may determine that the matter can be addressed more appropriately outside of the criminal justice system and a referral can be made to an appropriate program or agency. For example, a young person who has

[2] See Chapter 6 of this Guidebook: *"The Decision to Prosecute*"

committed a minor offence may require help from a substance abuse program. While the *Act* does not expressly codify this referral power for prosecutors, as it does for the police, it is within the Crown's discretion to make such referrals. However, Crown Attorneys may wish to consult individuals and experts who have relevant information about existing community programs prior to making a referral.[3]

Crown Caution

Section 8 of the *Act* states that the Attorney General may establish a program authorizing prosecutors to administer cautions to young persons instead of starting or continuing judicial proceedings under the *YCJA*. No formal program exists in Newfoundland and Labrador.

Extrajudicial Sanctions

Extrajudicial sanctions are the most serious response within the range of extrajudicial measures. Unlike the other types of extrajudicial measures, an extrajudicial sanction requires the young person to accept responsibility for the act that forms the basis of the offence, and to comply with the terms and conditions of the sanction. Failure to comply can result in the prosecution of the offence. The history of a young person's involvement in extrajudicial sanctions can be raised during the young person's sentencing for a subsequent offence in certain circumstances.

An extrajudicial sanction can be used only if the young person cannot be adequately dealt with by a warning, caution or referral under sections 6, 7, or 8[4], because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances. The additional conditions that must be satisfied under s. 10(2) of the *YCJA* before an extrajudicial sanction can be used are virtually identical to the conditions that must be satisfied under s. 4(1) of the *Act* before an alternative measure could be used.

[3] Please see *"Rules of Conferencing"* approved by the Attorney General on May 2, 2003 at Appendix I.
[4] *Supra* note 1.

Extrajudicial sanctions programs under the *YCJA* include letters of apology, essays, anti-shoplifting educational programs, victim-offender reconciliation programs, personal service to the victim, and community service.

There is no limit to the number of times that a young person may be dealt with through extrajudicial sanctions.

If the Crown determines that a less serious extrajudicial measure is inappropriate, Crown Attorneys should still consider whether an extrajudicial sanction would be adequate to hold the young person accountable for his or her offending behaviour. Crown Attorneys must also remain cognizant of the principle that an extrajudicial measure is presumed adequate to hold a young person accountable if the young person has committed a non-violent offence and has not previously been found guilty of an offence. It is important to bear in mind, however, that presumptions are rebuttable. In applying the factors above and the relevant principles under the *YCJA*, the Crown will sometimes conclude that a sanction is not appropriate to hold the young person accountable in the circumstances.

When a Crown Attorney imposes a sanction on a young person, the young person's file should be documented accordingly.

A young person's refusal to consent to, or failure to follow through on, an extrajudicial sanction or measure regarding substance abuse treatment should not be interpreted as an unwillingness to participate in extrajudicial measures in general, or as an indication that an extrajudicial measure would not be adequate to hold the young person accountable for the offence. The refusal or failure may be a factor in determining the appropriateness of a particular measure but it should not be considered a bar to all extrajudicial measures.

Where there is partial compliance with the extra judicial sanction the Crown Attorney should consider whether it is in the interests of justice to proceed with the prosecution.[5]

[5] See Chapter 6 of this Guidebook: *"The Decision to Prosecute*".

The Prosecution of Youths

Introduction

The *Youth Criminal Justice Act*[1] *(YCJA)* governs the prosecution of those individuals alleged to have committed a criminal offence while between the ages of 12 and 17 years old.

Section 3(1)(a) of the *YCJA* states that the youth criminal justice system is intended to protect the public by:

1) Holding young persons accountable through measures that are proportionate to the seriousness of the offence and degree of responsibility of the young person;

2) Promoting the rehabilitation and reintegration of young persons who have committed offences; and,

3) Supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behavior.

A separate criminal process specifically for young people exists due to the relative immaturity of these offenders that diminishes their moral blameworthiness and/or culpability.

Crown Attorneys must adhere to the principles and specific provisions of the *YCJA* at every stage of a young person's involvement with the youth criminal justice system.

Judicial Interim Release (Bail)

The *YCJA* outlines the procedure to determine judicial interim release, or detention, for young persons charged with criminal offences. The procedure and options are distinct from the process for adults described in the *Criminal Code.*[2]

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[1] *Youth Criminal Justice Act*, SC 2002, c 1.
[2] *Criminal Code*, RSC 1985, c C-46.

An important distinction between adult and young offenders is the use of custody. For example, section 29(1) provides that detention of a young person as a social measure is prohibited:

> 29(1) *A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures*.

A young person may only be denied pre-trial release in accordance with s. 29(2) of the *Act*:

> *29(2) A youth justice court judge or a justice may order that a young person be detained in custody only if*
>
> *A) The young person has been charged with*
> *I) A serious offence, or*
> *II) An offence other than a serious offence, if they have a history that indicates a pattern of either outstanding charges or findings of guilt;*
> *B) the judge or justice is satisfied, on a balance of probabilities,*
> *I) that there is a substantial likelihood that, before being dealt with according to law, the young person will not appear in court when required by law to do so,*
> *II) that detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence, or*
> *III) in the case where the young person has been charged with a serious offence and detention is not justified under subparagraph (i) or (ii), that there are exceptional circumstances that warrant detention and that detention is necessary to maintain confidence in the administration of justice, having regard to the principles set out in section 3 and to all the circumstances including*
> *a. the apparent strength of the prosecution's case,*
> *b. the gravity of the offence,*
> *c. the circumstances surrounding the commission of the offence, including whether a firearm was used, and*
> *d. the fact that the young person is liable, on being found guilty, for a potential lengthy custodial sentence; and*

C) the judge or justice is satisfied, on a balance of probabilities. That no condition or combination of conditions of release would, depending on the justification on which the judge or justice relies under paragraph (B),

I) reduce, to a level below substantial, the likelihood that the young person would not appear in court when required by law to do so,

II) offer adequate protection to the public from the risk that the young person might otherwise present, or

III) maintain confidence in the administration of justice.

In situations where the young person is released from custody there should be efforts made to so advise any alleged victims. Release orders should include provisions that prohibit contact with alleged victims.

Section 31(1) of the *YCJA* permits a young person to be placed into the care of a "*responsible person*" if, but for this section, the young person would be detained. If a Crown Attorney or court is contemplating the release of a young person into the care of a responsible person, the prosecutor should ensure that it is clear on the record that otherwise the young person would be detained pending resolution of their charges.

Before agreeing to place a young person with a responsible person pursuant to s. 31[3], the Crown Attorney should make inquiries to satisfy themselves that any proposed responsible person is (a) fully aware of the obligations that pertain to a responsible person and is willing to assume those responsibilities, and (b) that the proposed responsible person is able to take care of the young person and exercise control over the young person. Ideally, this information should be obtained through a direct interview with the proposed responsible person. If that is not feasible, sufficient reliable and detailed information must be obtained through the police, defence counsel, or other sources.

Once satisfied that a suitable responsible person is available, the Crown Attorney must ensure that sufficient evidence is before the court to enable the judge to make a finding that the proposed responsible person is willing and able to meet the obligations outlined in the section. Again, this evidence would ideally emerge

[3] *Supra* note 1.

through examination and/or cross-examination of the proposed responsible person, on the witness stand.

Election as to Mode of Trial

Where the young person has been charged with a homicide or where there has been an adult sentence sought under the *YCJA* directive, the young person shall elect the mode of trial and have the option to have a trial in the Provincial Court of Newfoundland before a judge without a jury or in the Supreme Court of Newfoundland and Labrador with a judge alone or with a judge and jury.

In any other circumstance, a young person has no election in terms of the mode of trial. The proceedings will be held before a Youth Court Judge in the Provincial Court.

Resolution Discussions and Sentencing

The sentencing regime for young persons in the *YCJA*, includes specific sentencing principles and, is distinct from that of adults. The *YCJA* places a general emphasis on community-based dispositions for young persons. Adult sentencing provisions such as mandatory minimum sentences do not apply.

The *YCJA* further directs that a youth justice court shall not commit a young person to custody unless:

1. the young person has committed a violent offence;

2. the young person has failed to comply with non-custodial sentences and is being sentenced for such an offence in circumstances that caused harm or the risk of harm to the safety of the public;

3. the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or both under this *Act*; or,

4. in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the

imposition of a non-custodial sentence would inconsistent with the purpose and principles of sentencing under the *YCJA*.[4]

Where lawfully available, Crown Attorneys may seek a custodial sentence for a young person where a non-custodial sentence would be inadequate to hold the young person accountable for their actions. Crown Attorneys must consider the background of the young person and the circumstances and nature of the offence.

Adult Sentences

Under Section 64 of the *YCJA*, the Attorney General may apply for an order that a young person is liable to an adult sentence where the following conditions are met:

1. the young person had attained the age of 14 years when the offence was committed

2. the young person committed an offence for which an adult is liable to imprisonment for a term of more than two years

A Crown Attorney must give notice to the youth justice court of its intention to seek an adult sentence. This notice must be given where either of the following conditions is met:

- before a young person enters a plea

- with leave of the youth justice court, before the commencement of the trial (sections 64(1.1) and 64(2) *YCJA*)

Though the Crown must make the application prior to the commencement of the trial, the youth justice court judge, as defined in sections 2 and 13 of the *YCJA*, decides the issue after the young person has been convicted.

The onus is on the Crown Attorney to satisfy the youth justice court that an adult sentence should be imposed (section 72(3) *YCJA*).

Where a Crown Attorney has filed notice of intention to seek an adult sentence, a young person, prior to entering their plea, will be put to their election (section 67 *YCJA*).

[4] *Ibid* at s 39(1).

DNA Orders

DNA orders are applicable to young persons' found guilty of criminal offences. For the purpose of DNA collections, the *Criminal Code* designates eligible offences as either compulsory primary offences, other primary offences or secondary offences[5].

Crown Attorneys must remind the youth justice court of its obligation to make a DNA order for each primary designated offence.

Crown Attorneys should request a DNA order for each secondary designated offence. In determining whether to seek a DNA order for these offences, the Crown Attorney must consider the principles of the *YCJA*.

Weapons Prohibition Orders

A weapons prohibition order for a period not exceeding two years is mandatory for young persons' found guilty of certain offences in the *Criminal Code.*[6] The Crown Attorney must request this order when the young person is found guilty of any of these offences.

[5] *Criminal Code,* RSC 1985, c C-46, s 487.051.
[6] *Ibid* at s 109.

The National Flagging System for High Risk / Violent Offenders

Introduction

A National Flagging System for High-Risk Offenders was created in 1995. The concern at the time was that offenders who had committed serious crimes, but were not subject to a Dangerous Offender application, could avoid being designated as Dangerous Offenders by moving to another province or territory. At that time, there was no system for Crown Attorneys to gather information on an offender from another jurisdiction.

Presently, the offices of the High-Risk Flagging Coordinators facilitate this transfer of information. The Special Interest Police (SIP) category of the Investigative Data Bank within CPIC is used to identify offenders who have been judged by Crown Attorneys to be high risk for future violent conduct. These offenders will generally demonstrate a high potential for prosecution as Dangerous Offenders or Long-Term Offenders under Part XXIV of the *Criminal Code*. Such cases are flagged for CPIC entry only on the authority of a Crown agent designated for this purpose and are then entered as SIP records only in accordance with policy.

When an individual who is being investigated is found to be "*flagged*" as a SIP high-risk violent offender, the CPIC agency must notify the Crown agent of the finding and the circumstances surrounding the investigation. The flagging system alerts Crown Attorneys to previous concerns about an offender, such as an escalating pattern of violence. This assists in determining whether the offence being investigated will attract a Dangerous Offender application. CPIC operates across Canada with links to other computerized information systems in other jurisdictions. The flag normally contains only a brief reference to the offender as a possible Dangerous Offender candidate and gives information as to who to contact for further information. Offenders often move throughout the country - the National Flagging System makes sure that Crowns Attorneys in one province or territory can obtain full information from a Crown in another province or territory who has previously been involved in prosecuting the offender. The hardcopy file resides with the coordinator who entered the offender on CPIC.

Purpose of Flagging

The purpose of flagging is to ensure that Crown Attorneys have access to full background materials about those offenders who pose an ongoing, serious threat to society. The offender will be flagged on CPIC in the Special Interest Police (SIP) category of the Investigative Data Bank as a high risk offender. Through this flagging system, Crown Attorneys can quickly access that information for use in subsequent proceedings including bail hearings, similar fact applications, sentencing considerations, and decisions about long-term and dangerous offender applications. The purpose in flagging an offender is not to presuppose that the offender should be the subject of a dangerous or long-term offender application, but to ensure that all full information is available to Crown Attorneys who may be faced with the offender on a subsequent occasion.

The Flagging program is a cross-Canada initiative. All jurisdictions utilize the same basic flagging criteria, but may expand the criteria as they consider appropriate. Through this program, Crown Attorneys in Newfoundland and Labrador obtain detailed information about flagged offenders who have committed offences in other provinces. Similarly, Newfoundland and Labrador provides information about its flagged offenders to other jurisdictions.

Criteria for Flagging

As they prosecute cases, Crown Attorneys are expected to identify those offenders (whether convicted or not) who pose an ongoing risk to society. This will include those offenders who, even if they currently do not meet the conditions established for dangerous or long term offenders in Part XXIV of the *Criminal Code*, will likely be the subject of a Part XXIV application if they commit a further serious personal injury or sexual offence.

Some of the relevant indicators are:

- Sexual offences against a child
- Violent sexual offence or sexual offence involving a significant breach of trust
- Acts of gratuitous brutal violence

- Arson, and it appears that the offender has a psychiatric/personality disorder which leads to fire setting behavior

- Criminal record that demonstrates an escalating pattern of violence

- Offender has a history of committing violent offences while on release, probation or parole

- Offender commits crime using a firearm while prohibited from possessing firearms

- A psychiatric report that indicates future dangerousness

- In a prior proceeding against the accused, the criteria for DO or LTO application appear to be met, but the application did not proceed, was unsuccessful, or a definite sentence was imposed

The Flagging Process

- Once a candidate for flagging has been identified by a Crown Attorney, the Crown Attorney is to send a memo to the Flagging Coordinator for Newfoundland and Labrador requesting that flagging occur.

- The memo should include a brief outline of the basis for the request, and should include the prosecution files in relation to that offender including, if available:
    - a synopsis of most recent offences;
    - a transcript of sentencing reasons, and relevant excerpts from the transcripts of the trial or other proceedings related to recent offences which demonstrate the nature and gravity of those offences;
    - the criminal record of the Flagging candidate;
    - victim impact statements;
    - psychiatric reports and institutional reports;
    - pre-sentence reports; and,
    - details of previous offences, if available.

- If the Flagging Coordinator agrees that the criteria for flagging are met, a "*Flagging File*" will be opened at the Special Prosecutions Office and the steps necessary to have the offender flagged on CPIC will be taken.

- Flagging files in Newfoundland and Labrador will be made available upon request to any prosecutor in Canada who has future dealings with a flagged offender. Similarly, Coordinators in other jurisdictions have arranged to have flagging files available relating to flagged offenders in their jurisdictions.

- If a Crown Attorney in Newfoundland and Labrador becomes aware that an accused is flagged in another jurisdiction, they should contact Special Prosecutions, who will provide any information which has been accumulated in Newfoundland and Labrador as well as liaise with Flagging Coordinators in other jurisdictions to obtain their information.

Dangerous & Long-Term Offender Applications

Dangerous and Long-Term Offender Applications are applications brought by Crown Attorneys during sentencing. These applications are reserved for those offenders who have committed serious personal injury and/or sexual offences and where there is a strong likelihood that the offender will continue to commit such offences in the future. The designation of Dangerous or Long-Term Offender is a very serious implication and these applications should be used only when absolutely necessary.

- Protection of the public is the paramount consideration of the sentencing regime for dangerous and long-term offenders.

- Part XXIV of the *Criminal Code* permits the Crown to apply to have a high risk offender, including a high risk personal injury offender or a high risk impaired driver, declared a dangerous or long-term offender.

- All Crown Attorneys are responsible for identifying potential dangerous and long-term offenders.

- A dangerous offender application should be commenced where there is a reasonable likelihood the court will be satisfied that:

    - an offender meets one of the definitions of a dangerous offender under s. 753(1) of the *Criminal Code*;[1]
    - there is no reasonable possibility of eventual control of the risk in the community; and,
    - the public would not be adequately protected by a conventional sentence under Part XXIII of the *Criminal Code*.

- A long-term offender application should be commenced when:

    - the criteria in s. 753.1(1) of the *Code* have been met;

[1] *Criminal Code*, RSC 1985, c C-46

- the criteria for a dangerous offender application are not met and it is unlikely that further information will become available that might support a dangerous offender application; and,
- a determinate sentence alone would be insufficient to protect the public.

The s. 752.1 Assessment Report

- A Crown Attorney must get the approval of the Director of Public Prosecutions before applying for a remand for an assessment pursuant to s. 752.1 of the *Code*.

- Section 752.01 of the *Criminal Code* requires the Crown Attorney to notify the court as soon as feasible and before a sentence is imposed, whether he or she intends to make an application under s. 752.1(1). Therefore, the regional Senior Crown and the Senior Crown of Special Prosecutions, who is our National Flagging Coordinator, must be contacted as soon as possible to discuss making an assessment application. Crown Attorneys should not wait until a conviction is obtained.

- Crown Attorneys must request a full assessment and not limit the assessment to just a dangerous offender or a long-term offender assessment.

- Crown Attorneys must be mindful that the psychiatric assessment is not determinative of the issues the court must decide. The Crown Attorney must still determine whether the evidence satisfies the legal tests to be met and whether the offender's risk can be reasonably controlled in the community.

- Once the assessment report is received it must be forwarded, along with the Crown Attorney's recommendations, to the regional Senior Crown and the Senior Crown of Special Prosecutions for review. A Crown Attorney must get the approval of his or her Senior Crown, the Senior Crown of Special Prosecutions, the DPP, and the Attorney General before proceeding with an application.

Attorney General Consent

- The consent of the Attorney General is required to initiate a dangerous or long-term offender application. It is for the Attorney General to determine whether an application will be made and whether it will be for a dangerous offender or a long-term offender designation.

Resolution Discussions

- The possibility of commencing a dangerous or long-term offender application should not be used to negotiate a guilty plea in exchange for agreeing to forego the application, without first consulting with the regional Senior Crown and the Senior Crown of Special Prosecutions.

- When the possibility of a dangerous or long-term offender application is involved in resolution discussions, Crown Attorneys should not make or accept any offer without consulting with his or her Senior Crown, who should in turn consult the Senior Crown of the Special Prosecutions Office. Any plea agreement should be approved by the Director of Public Prosecutions.

- If, in the course of a dangerous or long-term offender application, it becomes apparent that the evidence does not support the Crown's original position, the Crown Attorney must notify his or her Senior Crown, the Senior Crown of Special Prosecutions and Director of Public Prosecutions before deciding to alter their position on the matter.

Contact with the Courts

Introduction

The Minister of Justice and the Attorney General of Newfoundland and Labrador play dual roles in the justice system.[1] Accordingly, situations may arise which raise questions about government influence on the courts and the possible impairment of judicial independence. To cite only the most obvious example, Department of Justice officials are in the unique and delicate position of being responsible both for conducting government litigation and for advising on issues relating to the courts and the judiciary. Contacts with the courts to deal with matters of policy and administration are both appropriate and necessary, but have the potential to be controversial if they are not handled properly. The purpose of this policy is to ensure that Crown Attorneys have sufficient guidance to assist them in their contacts with courts.

The principle of judicial independence is fundamental to our justice system, and every lawyer should be conscientious regarding their interactions with courts and judges. Crown Attorneys must be particularly vigilant due to the potentially serious implications of their unique role in the justice system and must avoid acting in any way that could give rise to a suggestion that they have attempted to improperly influence or pressure the judiciary. Most of the time, common sense and professional integrity are a sufficient guide.[2] The materials set out in this section of the Guide Book are a statement of commitment to the important principles referred to above, and a useful reminder of what is expected of all Crown Attorneys and employees of the Department of Justice.

The objective of these guidelines is to help Justice Officials avoid situations that could give the impression that Crown Attorneys, the Department of Justice, or the government are attempting to improperly influence or exert pressure on the courts or judges in the exercise of judicial functions. All counsel must act ethically and be sensitive to the propriety of their contacts

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[1] See also Chapter 2 of this Guide Book *"The Independence of the Attorney General in Criminal Matters".*

[2] See the CBA *Code of Professional Conduct* as adopted by the Law Society of Newfoundland and Labrador, especially Chapters IX and X.

with the courts and their relationship with the judicial branch of government. However, Crown Attorneys and other officials are representatives of the Minister of Justice and the Attorney General and are therefore in a unique position that requires particular caution in dealings with the courts.

Business or Personal Relationship With a Judicial Officer

Crown Attorneys shall not appear before a judicial officer when the lawyer has a business or personal relationship with that officer which might reasonably be perceived to affect the officer's impartiality.

Improper Attempts to Influence a Judicial Officer

In a contested cause or matter, Crown Attorneys shall not attempt, or knowingly allow anyone else to attempt, to influence the decisions or actions of a judicial officer, directly or indirectly, except by means of open persuasion as an advocate.

Communicating with a Judicial Officer in Contested Matters

In a contested cause or matter, Crown Attorneys shall not communicate, directly or indirectly, with a judicial officer, except:

- in open court;
- with the consent of, or in the presence of, all other parties or their counsel;
- in *ex parte* matters, as permitted by law.

Meetings in Relation to Administrative Matters

Crown Attorneys may have occasion to discuss matters of government policy with members of the judiciary and/or court officials that could affect that administration of the courts. In such a situation, Crown Attorneys shall conduct themselves in such a way as to avoid any possible suggestion that they are improperly attempting to influence or exert pressure on the courts or individual judges in the course of exercising their judicial functions.

If doubt arises regarding whether a particular contact or action involving a Crown Attorney is appropriate, the Senior Crown Attorney shall be consulted. If there is still doubt, the question shall be referred to the Director of Public Prosecutions who may consult with the Attorney General.

Communications With The Media

Introduction

An essential component of a fair and equitable justice system is the obligation of its employees to inform the public. Public confidence in the administration of justice depends on access to full and accurate information regarding court proceedings and, where appropriate, the reasons for certain decisions. Misinformed media can convey inaccurate and misleading messages, thereby undermining public confidence.

Crown Attorneys can help to ensure that citizens have a fair opportunity to determine whether the justice system is functioning effectively by providing appropriate information.

In some cases, such as when policy or fiscal announcements are made on behalf of the Department of Justice, communications with the media will be handled by official spokespersons retained by the Department. In other situations, such as court proceedings, Crown Attorneys should be able to respond to the media directly to ensure that accurate information is presented to the public.

Statement of the Policy

Crown Attorneys are encouraged to provide the media with timely, complete and accurate information on appropriate matters relating to the administration of criminal justice in which the Attorney General of Newfoundland and Labrador is involved, subject to the overriding duty to the administration of justice to ensure trials are fair.

The goal of the policy is to enhance public understanding of, and confidence in, the administration of justice by providing available information. Crown Attorneys should respond to all reasonable requests for such information.

Scope of the Policy

This policy is complementary to, and should be read along with, the general policy of the Department of Justice and Public Safety.[1] This policy provides

[1] See generally the Government's policy.

specific guidance to Crown Attorneys. Like all other policies in this Guide Book, it is also applicable to Crown agents.

Types of Communication

Contacts Initiated by the Media

This policy applies both to contacts initiated by the media, and to contacts initiated by Crown Attorneys. In the former case, media representatives may seek information in person (e.g. by questioning Crown Attorneys outside the courtroom), by telephone, or by electronic mail. In such situations, Crown Attorneys may not have the opportunity for consultation before responding.

Contacts Initiated by Crown Attorneys

Crown Attorneys may also identify a need to provide information to the media in circumstances where a news report has been identified as inaccurate. This may be done, for example, by contacting the journalist to seek a correction, through a letter to the editor of a newspaper, by a handout or fact sheet, by the issuance of a press release or the holding of a press conference. In those situations, Crown Attorneys must consult with a Senior Crown Attorney who in turn may contact the DPP.

Crown Attorneys may consider such measures when staying proceedings or withdrawing charges. In these circumstances, a statement in court may serve as the best means of communication.

Communications before Charges are Sworn and Filed

Before charges are laid, the media may seek to confirm that the police are investigating a specific individual or that charges are expected. It is a longstanding practice of the Office of the Director of Public Prosecutions to decline to confirm or deny such allegations. To deny the existence of an investigation at one time, and to decline to comment later, is as revealing as an affirmation. Moreover, it is important to refrain from commenting to avoid prejudicing an ongoing investigation. **The proper response is to advise that, as a matter of policy, the Attorney General of Newfoundland and Labrador does not discuss such matters publicly.**

Communicating with the Media in a Personal Capacity

Crown Attorneys, like all departmental employees, are subject to certain limitations when communicating with the media in their personal capacity. Crown Attorneys must not make statements that would:

- compromise his or her ability to do his or her job in the future; for example, a prosecutor who states that a certain law is "*immoral*";

- discourage public respect for the administration of justice or weaken the public's confidence in our legal institutions, for example by publicly commenting on or criticizing a judge's decision in another case in a manner that could bring about either of these results;

- contravene the *CBA Code of Professional Conduct;*[2] or

- constitute opinions on matters of public interest where the primary reason the opinion is sought or is relevant is because of the nature of a person's position as a Crown Attorney.

Application of the Policy

Guiding Principles

The following general principles should govern the Crown Attorney's approach to communications with the media:

- **Give facts, not opinions** - Crown Attorneys should explain and provide information. They should not offer personal opinions about court decisions, laws, or governmental policies. The goal is to foster understanding, not to create sensation.

- **Speak for attribution** - All communications with the media should be considered "*on the record*". Crown Attorneys must assume that any comments they make to journalists can be attributed to them.

- **Respect journalists' needs** - It is important to recognize that journalists have a job to do, whether or not you assist them. Because

[2] See; *CBA Code of Professional Conduct* as adopted by the Law Society of Newfoundland and Labrador.

they will pursue the story, it is usually better to respond to their questions. It is also necessary to bear in mind journalists' deadlines in attempting to respond.

- **Be responsive** - "*No comment*" is not an acceptable response to a request for information. If the particular question posed cannot be answered because it calls for an opinion, invites comment on matters under judicial consideration, or attempts to confirm the existence of a police investigation, explain to the questioner why the response sought would be inappropriate.

- **Educate the public** - The media, and the public generally, may not understand the complexities of the justice system. Crown Attorneys have a duty to explain aspects of the system such as the role of the prosecutor or the appeal process, in a comprehensible way.

- **Be timely** - Misinformation, left uncorrected, damages the system's reputation. Seek to prevent an inaccurate public record by providing information in a timely way. Where comment is to be made after a misleading or inaccurate story appears, a representative of the Crown should set the record straight as soon as possible.

- **Protect the integrity of the trial** - All comments which prejudice the right of an accused to a fair trial must be avoided. Crown Attorneys do not argue their cases in the media.

Specific Direction

The following sections are intended to guide Crown Attorneys in applying the foregoing general principles.

Provision of Factual Information

Crown Attorneys may provide factual information, not opinions, concerning:

- cases before the courts;[3]

[3] Great caution must be exercised in this regard. It would be permissible, for example, to provide a copy of a document entered as an exhibit, e.g., after its admissibility had been determined.

- the prosecution policies in this manual (e.g. explaining the "*reasonable likelihood of conviction*" standard in the "Decision to Prosecute" policy);

- the process, substantive criminal law or procedure;

- the operation of the criminal justice system;

- the role of prosecutors in the system;

- the meaning of a court decision, without commenting on whether it is "*right*", "*wrong*", "*good*" or "*bad*"; and,

- the role and responsibilities of the Attorney General and Minister of Justice.

Information which Cannot be Provided

Crown Attorneys should not comment on:

- privileged information;

- advice given to, or discussions held with, the Attorney General, colleagues, or members of an investigative agency, whether or not such advice or discussions are privileged;

- any information the disclosure of which is prohibited by law (e.g., by virtue of the *Privacy Act* (*Criminal Code* Part VI) , *Youth Criminal Justice Act*) or by a court-imposed publication ban;

- policies, procedures or decisions of investigative agencies (such inquiries should be directed to the investigative agency); and,

- the existence of any plea negotiations or possibility of a guilty plea or other disposition.[4]

[4] Note, however, that after a guilty plea has been entered, Crown Attorneys may explain, for example, why a plea to a lesser included offence was accepted.

Expression of Personal Opinion

Prosecutors should not speculate on, or offer personal opinion on:

- the wisdom or efficacy of federal or provincial policies, programs or legislation;
- the possibility of charges being laid;
- the strength or weakness of the Crown or defense case during a trial;
- the appropriateness of a judge's charge to the jury, particular rulings, the verdict of a jury, the sentence or any comments made by the judge;
- whether a decision will be appealed or not (however, the procedure for considering whether or not to appeal may be explained); and,
- the guilt or innocence of an accused.

Deferring Requests

When in doubt about some aspect of a media inquiry, Crown Attorneys should decline to answer at that time, explain why, and seek the advice of the Senior Crown Attorney or Director of Public Prosecutions. Additionally, prosecutors may wish to refer calls to designated spokespersons for the Department who should be notified of the inquiry in any event. Referring the inquiry to another person will often be advisable where: a) the case is a particularly controversial one; b) a designated spokesperson has already handled media inquiries regarding the same subject; or c) there are security concerns in the case, for example, for the personal safety of the Crown Attorney.

Internal Responses to Media Inquiries

Crown Attorneys should brief the Senior Crown Attorney on all media inquiries. Where a proceeding may receive media attention or create public controversy, the Attorney General may be called upon personally for comment. In such cases, Crown Attorneys may be called upon to provide a briefing note to the DPP - Assistant Deputy Minister (Criminal Division),

routed through the appropriate Senior Crown Attorney. The briefing note should outline the facts, action taken to date, and the focus of media interest[5].

Such cases include those in which:

- the subject matter of the prosecution involves significant constitutional questions, federal-provincial or international relations or government operations;

- the accused is a public figure; and,

- the issue or issues raised have previously generated public debate.

[5] See the format for briefing notes, if this is required.

Informer Privilege

Introduction

An informer is anyone who provides information to the police about a criminal investigation or a matter of national security in return for an express or implied guarantee of confidentiality.[1]

The principle of informer privilege is grounded upon a recognition of the important role that informers play in the investigation of crime and prosecution of suspected offenders. By law, informer privilege is sacrosanct[2] - it is almost absolute.[3] Once found, it is not for the court to engage in a balance of interests to decide whether to maintain privilege.[4]

Informer privilege may arise in the course of a criminal prosecution in several ways. For example, an informer may have provided vital information in a search warrant that led to the discovery of key evidence. In some cases, Crown Attorneys are advised by police that a key witness is a confidential police informant.

If a Crown Attorney has any reason to be concerned that the continuation of criminal proceedings may lead to the disclosure of an informant's identity, they must advise the Senior Crown Attorney immediately. A plan to address the issue must be formed as soon as reasonably possible. Delay may lead to inadvertent disclosure. For instance, a Crown Attorney may learn that a prosecution witness is an informant, and accordingly becomes concerned that their testimony may possibly lead them to disclose their identity as an informant. Inexplicably canceling that witness at the last minute may effectively reveal that they are a confidential informant. It is imperative that decisive action is taken early, when more discrete options are available.

A Crown Attorney can never disclose the identity of an informant to an accused or their counsel unless a court orders the Crown Attorney to do so in accordance with the "*innocence at stake*" exception. Even then, the Crown Attorney may decide to enter a stay of proceedings instead of revealing the identity of an informant.

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[1] *Named Person v Vancouver Sun*, 2007 SCC 43 at para 16.
[2] *R v Leipert,* [1997] 1 SCR 281 (SCC).
[3] *Supra* note 1 at para 15.
[4] *Supra* note 2 at para 12.

Agent vs Informer (or Informant)

- Informer privilege does not attach where the information is obtained from a "*state police agent*" or an "*agent provocateur*".

- The main question to ask is whether the exchange between the accused and the informer would have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents.[5] If the informer is considered a state police agent, section 7 of the *Charter*[6] may be implicated.[7]

- An informer may be considered a state police agent in cases where the exchange between the accused and the informer is materially different than it would have been without police intervention.[8]

Scope of Privilege

When Informer Privilege Applies

- In all proceedings to protect the identity of an informer and any information that may identify the informer;[9]
- Whether or not the informer is present in court or believed to be a witness in the proceedings;[10]

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[5] *R v Broyles*, [1991] 3 SCR 595 (SCC).
[6] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 7.
[7] *Supra* note 5.
[8] In *Broyles*, the court stated, when looking at the conversation as a whole, the question is did the informer conduct his or her part of the conversation as the accused would ordinarily have expected, or was the conversation the functional equivalent of an interrogation? The second set of factors concerns the nature of the relationship between the state agent and the accused: did the state agent exploit any special characteristics of the relationship to extract a statement? For example, if the informant conducted a conversation which closely resembled an interrogation, after being instructed by police to extract such information, that person will likely be considered a state police agent. Thus, informer privilege would not attach.
[9] *Supra* note 1 at para 26; *Supra* note 2 at paras 17-19.
[10] *Supra* note 1 at para 26.

- Whether or not the informer acted rightly or wrongly through revealing the information tendered;[11]
- Informer privilege must be respected by, parties to the proceeding, the trial judge, crown, and police;[12]
- Informer privilege does not apply to third parties. However, attempts to determine identity of the informer may amount to obstruction of justice;[13] and
- The identity of an informer cannot be revealed via a request for disclosure.[14]

When Informer Privilege is Challenged

- The dispute must be determined by the trial judge with the sole participation of the Crown and the informer. Defence counsel is excluded from this assessment.[15]

- The court must give effect to the privilege if it has been satisfied, on a balance of probabilities, that the person is an informer.[16]

- If disclosure is ordered by the court, it is not improper for the Crown to:

    - Stay the proceedings and reinstitute them before a different trial judge;[17]

    - Exercise section 37 of the *Canada Evidence Act*, thereby objecting to the disclosure. The Crown, or other official may assert this claim;[18] or

    - The Crown may also terminate proceedings in accordance with the appropriate section of this policy manual.[19]

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[11] *Canada (Solicitor General) v Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records)*, [1981] SCJ No 95 (SCC).
[12] *Supra* note 1 at para 26; *Bisaillon v Keable*, [1983] SCJ No 65 at paras 93-96 (SCC).
[13] *R. v Barros*, [2011] SCJ No 51 (SCC).
[14] *R v Brassington*, 2018 SCC 37
[15] *Supra* note 1 at para 47.
[16] *Ibid*.
[17] *R v Scott*, [1990] SCJ No 132 at para 40 (SCC).
[18] *Canada Evidence Act*, RSC 1985, c C-5, s 37.
[19] See Chapter 6 of this Guide Book: "*The Decision to Prosecute*".

Waiver of Informer Privilege

- A Crown Attorney who is faced with informer evidence should know from the beginning what the informant's position is on privilege as there may be situations where privilege was unnecessarily assumed. The informer may not care if their identity is revealed. Knowing this will enable the Crown Attorney to be a step ahead of the court in the event that disclosure is ordered.

- Informer privilege is held by the Crown, but cannot be waived without consent of the informer; thus, any disclosure of the information protected by informer privilege must be consented to by both the Crown and the informer,[20] notwithstanding the following exception.

- Unless the informer consents, informer privilege can only be waived in circumstances where the accused's innocence is at stake. The exception is narrow in that it will only apply where disclosure of the informer's identity is the only means of demonstrating innocence of the accused.[21]

- The court in *Leipert*[22] determined three situations where it can be established that innocence is at stake, they include:

    - Where the informer is a material witness to the crime;

    - Where the informer has acted as an *agent provocateur* through playing an instrumental role in the offence; and,

    - Where an accused is seeking disclosure for materials that supported a wiretap or search warrant – alleging the search was in conflict with section 8 of the *Charter.*[23]

[20] *Supra* note 2 at paras 15-16; *Supra* note 1 at para 25.
[21] *Supra* note 1 at paras 27 and 28; *R v Klymchuk*, 2011 ONCA 258.
[22] *Supra* note 2.
[23] *Supra* note 6 at s 8.

Private Prosecutions

Introduction

The *Criminal Code* grants any person who has reasonable grounds to believe that a person has committed an indictable offence the right to commence a private prosecution of that person.[1] A private prosecution may be commenced by presenting a privately laid information to a justice[2] and does not require the consent or involvement of any police agency or prosecution service.

However, the Attorney General of Newfoundland and Labrador has common law and statutory authority to intervene in a private prosecution at any time after the proceedings are commenced, and direct a stay of such proceedings if appropriate. The statutory authority is established in the *Code*,[3] while the common law authority is grounded in the exercise of prosecutorial discretion.[4]

Statement of Policy

i. General Principles

All private prosecutions are subject to scrutiny by the Attorney General. The Attorney General, and its Deputy and Agents, have the authority to intervene in any private prosecution, including the authority to direct a stay of such proceedings. This authority is discretionary and must be exercised with restraint.

However, the Attorney General, or its Deputy or Agents, must intervene if the prosecution involves allegations of intimate partner violence, allegations against a young person, other offences of a more sensitive or technical nature or indictable offences.

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[1] *Criminal Code*, RSC 1985, c C-46, s 504.
[2] *Ibid*.
[3] *Criminal Code,* RSC 1985, c C-46, s 579(1).
[4] See *Krieger v Law Society (Alberta),* 2002 SCC 65 at para 46 and *R v Anderson*, 2014 SCC 41 at paras 39 and 40; see also *R v K (A),* 2016 NLCA 23 at para 56.

The Authority of the Attorney General to Intervene in Private Prosecutions

The Attorney General has both statutory and common law authority to intervene in private prosecutions, including the discretion to direct a stay of such prosecutions.

The statutory authority to direct a stay in any proceedings in relation to an accused or a defendant is established under s. 579(1) of the *Criminal Code*. That provision applies to public prosecutions as well as private prosecutions.

The common law authority to intervene in private prosecutions is based in the exercise of prosecutorial discretion. In *Krieger v Law Society (Alberta)*, the Supreme Court of Canada (SCC) held that (emphasis added):

> *Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b**) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1**; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: R. v. Osborne (1975), 25 C.C.C. (2d) 405 (N.B. C.A.); and (e) the discretion to take control of a private prosecution: Osiowy v. Linn (1989), 50 C.C.C. (3d) 189 (Sask. C.A.)..*[5]

The Court of Appeal of Newfoundland and Labrador) further adopted this position in *R v K.(A.)*[6]:

> *What constitutes an exercise of prosecutional [sic] discretion is settled law, summarized at paragraphs 40, 44, and 45 of Anderson …*
>
> *Based on the above authorities, it is well established that the Attorney General and counsel instructed by the Attorney General have the discretion to intervene in, and direct the stay of, private prosecutions in Newfoundland and Labrador.*

ii. The Role of the Director of Public Prosecutions

The Director of Public Prosecutions, as lawful Deputy of the Attorney General of Newfoundland and Labrador, has the authority to intervene in private prosecutions,

[5] *Krieger v Law Society (Alberta),* 2002 SCC 65 at para 46.
[6] *R v K.(A.),* 2016 NLCA 23 at para 62.

including the authority to direct a stay of such proceedings. The Director may intervene and direct a stay of a private prosecution where, based upon a review conducted in accordance with the procedures set out herein, it is satisfied that the proceedings are frivolous, vexatious, an abuse of the criminal process, have no reasonable likelihood of conviction and/or are not in the public interest.

Where appropriate, the Director may intervene on an interim basis to direct a stay of a private prosecution to allow time for a review to be conducted in accordance with the procedures set out herein.

iii. The Role of Crown Attorneys

Crown Attorneys, as lawful Agents of the Attorney General, have the authority to intervene in private prosecutions, including the authority to assume carriage of such proceedings. Crown Attorneys may intervene and assume carriage of a private prosecution where, upon a review conducted in accordance with the procedures set out herein, they are satisfied that it is necessary, in the public interest, and that there is a reasonable likelihood of conviction.

Operation of the Policy

i. Initiation of a Review

The policy of the Provincial Court of Newfoundland and Labrador is to advise the Attorney General if someone files an information to initiate a private prosecution. Otherwise, if a Crown Attorney becomes aware of the initiation of a private prosecution, they must advise their Senior Crown Attorney, who must in turn consult with the Director of Public Prosecutions.

All private prosecutions will be subject to a review to determine whether an intervention in or a stay of the private prosecution is appropriate.

ii. Conduct of a Review

The Director of Public Prosecutions or a Senior Crown Attorney will initiate a review to determine whether to take no action, intervene, or direct a stay of the private prosecution.

The DPP or a Senior Crown Attorney may direct a Crown Attorney to conduct a review.

If so directed, the Crown Attorney should attend the s. 507.1(1) *pre-enquete* hearing[7]. At that hearing, the informant must satisfy the provincial court judge that the evidence discloses a *prima facie* case against the potential accused. If the informant succeeds in establishing a prima facie case, the accused will be compelled to attend court in answer to the charges. Crown Attorneys should not be involved in this hearing; instead, they shall collect information on the nature of the allegations and the available evidence.

Further, where practical and appropriate, the Crown Attorney conducting the review will:

(a) obtain copies of all relevant, available documentation;

(b) attempt to obtain the views, in writing, of the complainant and the person who is the subject of the complaint;

(c) where a police investigation of the matter giving rise to the private prosecution has been conducted, obtain a copy of the police report;

(d) where no police investigation has been conducted, request the police to investigate the matter and file a report;

(e) obtain any previous legal actions or private informations laid by the complainant;

(f) attempt to obtain such other statements or information as deemed relevant to the review;

(g) determine if the charge assessment standard is met; and,

(h) consult with the Senior Crown as to whether intervention in the private prosecution is required, including the decision to assume carriage of the matter or whether a stay is necessary.

iii. Decision to Intervene

Upon completion of their review, the Crown Attorney will make a recommendation in writing to the Senior Crown Attorney. The Senior Crown Attorney and the Director will consult on the issue. The Director will decide whether to take no

[7] *Supra* note 1 at s 507.1(1).

action, intervene and assume carriage of the prosecution, or direct the court to enter a stay of proceedings.

iv. Notice of Decision

A decision to intervene in a private prosecution will be set down in writing and sent to the Attorney General, the complainant, the person who is the subject of the complaint, and, where applicable, the investigating police agency.

Prosecutions by the Crown Against the Crown

Introduction

Many provincial statutes and their accompanying regulations create offences aimed at deterring conduct that is capable of "*inflict[ing] serious harm on large segments of society*".[1] Such offences are usually referred to as regulatory or public welfare offences, and deal with subjects such as workplace safety and environmental protection, among others.

On occasion, government departments, Crown corporations or their employees engage in the proscribed conduct. As a result of this, the prosecuting arm of the government (as represented by the Attorney General), may have to consider prosecuting another arm of government.

Notwithstanding the unusual appearance of the government prosecuting itself, Courts have recognized that such action may be entirely appropriate. As the Nova Scotia Court of Appeal has stated:

> *The respondents argued that the prosecution of Her Majesty in Right of Canada by Her Majesty in Right of Canada creates an absurdity. While there may be conceptual difficulties, these must yield to the principle that Her Majesty in Right of Canada or a province is not above the law*.[2]

More recently, the Supreme Court of Canada has held:[3]

> *It is one of the proud accomplishments of the common law that everybody is subject to the ordinary law of the land regardless of public prominence or governmental status*.

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[1] *R* v *Wholesale Travel Group Inc* (1991), 67 CCC (3d) 193 at 238 (SCC).
[2] *R v Canada (Minister of National Defence)*, (1993), 125 NSR (2d) 208 (NSCA).
[3] *R* v *Shirose* (1999), 133 CCC (3d) 257 at 273 (SCC).

Purpose of the Policy

This policy has three objectives:

- to affirm the principle that governmental offenders of regulatory legislation will be treated similarly to private individuals;

- to manage potential conflicts of interest that may arise from the roles departmental counsel (usually a lawyer from the Civil Division of the Department of Justice) in the provision of legal advice; and

- to outline the procedures to be followed in commencing and conducting these types of prosecutions.

Investigative Stage

During the investigative stage, Crown counsel may be called upon to advise not only the investigative agency, but also the department[4] which is under investigation. For example, Crown Attorneys may be called upon by investigators prior to the obtaining of a search warrant, and legal services counsel may be contacted by the department being searched during the execution of that warrant.

The Department of Justice cannot provide legal advice to both the investigating agency and the department under investigation in such circumstances. Accordingly, the role of departmental counsel (usually of the Civil Division) advising the department under investigation will be limited to assisting that department in obtaining counsel from the private sector.

Decision to Prosecute

Crown Attorneys may be called upon to assess whether a prosecution should occur in one of two ways. The investigative agency may simply lay charges, and refer the matter for prosecution; or, the investigative agency may provide a court brief for assessment with a recommendation that proceedings be instituted.

[4] The same situation may also arise with respect to Crown corporations.

In both circumstances, counsel from the private bar ("outside counsel") or counsel for an Attorney General from another province should be retained to apply the "*Decision to Prosecute*"[5] criteria. Once a legal opinion from outside counsel is obtained, the matter will be forwarded to the DPP for a final decision.

Conduct of the Prosecution

The prosecution will normally be conducted by outside counsel. In most cases, this will be the lawyer who provided the independent legal advice as to whether the case should proceed.

The outside counsel will exercise all the usual discretionary powers of the Crown Attorney. He or she will be bound by the prosecution policies in the **Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador**.

Appeals

Should outside counsel believe an appeal from an acquittal or sentence is required, a recommendation will be made according to the procedure set out in Chapter 23 of this Guide Book: "*The Decision to Appeal*".[6] The appeal may be conducted by a Crown Attorney or outside counsel, depending on the circumstances.

[5] See Chapter 6 of this Guide Book: "*The Decision to Prosecute*".
[6] See "*The Decision to Appeal*".

Training and Professional Development

Introduction

The role of the Crown Attorney is crucial to the administration of criminal justice. The position has become much more challenging in recent years due to changes in legislation and social policy considerations. The complexity of cases has increased tremendously, due to the constitutional dimension, the increasing seriousness of crimes and sophistication of criminals. The behavior of Crown Attorneys has come under scrutiny especially in cases of wrongful convictions.[1]

Statement of Policy

Training, mentoring and other forms of professional development are essential to prepare all Crown Attorneys to respond effectively to these demands, and for the Criminal Division of the Department of Justice in Newfoundland and Labrador to foster a culture of individual excellence.

Senior Crown Attorneys, as managers and mentors, must also continuously educate themselves so that a healthy, respectful and professional workplace can be maintained where individual prosecutors may achieve the highest standards.

Discussion

The need for continuous training has been highlighted by several high-profile examples of wrongful conviction across the country. In the *Report of the Commission on Proceedings Involving Guy Paul Morin*, the Honourable Fred Kaufman, C.M., Q.C., made numerous recommendations concerning the necessity of providing training for Crown Attorneys to minimize the risk of wrongful convictions will occur.[2] Similarly, the FPT Heads of Prosecution Committee's *Report of the Working Group on the Prevention of Miscarriages of Justice* stressed the importance of training in instilling a workplace culture that encourages Crown Attorneys to be open to alternative theories of the case

[1] See three notable Inquires in Canada; *Lamer Report (2006)* Office of the Queen's Printer NL; Commission of Proceedings Involving Guy Paul Morin. Toronto: Queen's Printer, 1998, (The "Kaufman Report."); *The Inquiry Regarding Thomas Sophonow (2001)* referred to as the *Sophonow Report*, Commissioner Hon. Peter deC. Cory.
[2] Ontario: Queen's Printer, 1998, vol.2, pp. 1134-1138.

to avoid the development of "*tunnel vision*."[3] The Report urged prosecution services to educate Crown Attorneys on the causes and prevention of wrongful convictions and thus promote a stronger, fairer justice system.

The Attorney General is committed to education, training and professional development for all Crown Attorneys and those who support them. The policies and practices established in this Guide Book reflect this approach.

[3] See Chapter 4 of the Report.