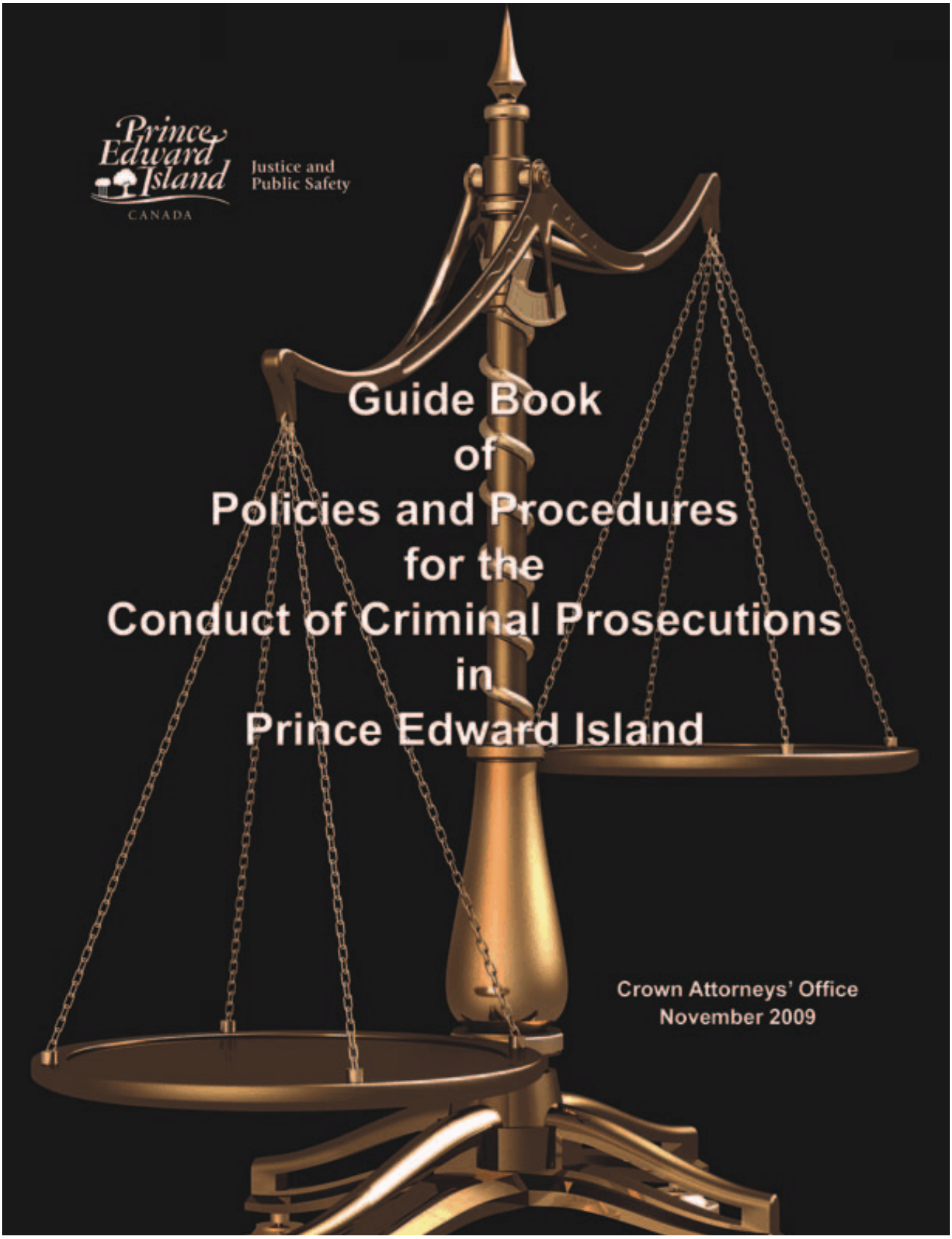
Prince Edward Island
CANADA
Justice and Public Safety
Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island
Crown Attorneys' Office
November 2009

I IN D E X

INTRODUCTION

In Prince Edward Island, the prosecutorial discretion of the Attorney General must be exercised independently and in an objective and consistent fashion. The independence required to exercise the prosecution function has been 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 Crown Attorneys' Office is an entity which constitutes an integral part of the Office of the Attorney General. It is comprised of the Director of Prosecutions to whom the Crown Attorneys in the Province are accountable.

The Attorney General of the Province is responsible for carrying out many varied duties which either involve or are related to the prosecution of the offences. Broadly speaking, the Crown Attorneys' Office performs the criminal litigation responsibilities of the Attorney General, that is, the prosecution function and prosecution-related functions. The Minister is aided in the carrying out of the prosecution function by prosecutors (also known and referred to throughout this Guide Book interchangeably, as Crown Attorneys or Crown Counsel) whose principal task is the prosecution of offences.

The Director of Prosecutions for Prince Edward Island ("Director") and the Crown Attorneys acting under his or her direction act as prosecutors in all matters prosecuted by the Attorney General on behalf of the Crown. The Director of Prosecutions provides legal advice to all law enforcement agencies and government departments with law enforcement responsibilities. The Crown Attorneys' Office in this respect, acts as a centre of expertise for criminal law and related matters.

Tradition and case law require political independence for the Attorney General in the carrying out of the prosecution function. On the other hand, the Minister remains accountable to the Legislative Assembly for the manner in which his or her functions have been carried out.[1] The 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. The Attorney General will rarely intervene in the carrying out of day-to-day operations of the prosecution function so as to avoid any suggestion of political interference.

Functional Responsibility within the Office of the Attorney General

The Director of Prosecutions has been given functional responsibility over the manner in which prosecutions are carried out on behalf of the Attorney General. He or she is in turn answerable directly to the Deputy Attorney General and then to the Attorney General, with respect to the manner in which he or she exercises that functional responsibility.

The Relationship between the Director of Prosecutions and the Crown Attorneys

Functional responsibility is a term which includes functional authority. It means establishing policies and guidelines, giving direction, advice, assistance and guidance. It also means determining 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 Prosecutions provides functional direction, advice and assistance to those in the Office of the Attorney General who discharge direct prosecution functions or prosecution related activities.

In Prince County, the day-to-day exercise of the functional responsibility of the Director of Prosecutions has been 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 Prosecutions for ensuring directly that all counsel, if in the region for whom the Senior Crown Attorney is responsible, exercise the prosecutorial discretion of the Attorney General independently in accordance with the guidelines contained in the Guide Book.

It is recognized in this context that the Director of Prosecutions has the authority:

- to intervene personally in a local matter. In practice, however, this authority should be relatively infrequent;

- to determine the allocation of resources for the performance of the prosecution function;

- to develop prosecution policy guidelines as required to ensure that the highest standards are maintained and that prosecutorial excellence is achieved for the people of Prince Edward Island.

Purpose of the Guide Book

The Guide Book includes policies of the Crown Attorneys' Office which relate to decision-making by Crown Attorneys in the course of prosecuting criminal cases. The policies 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 in the decision making process. 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 purport to cover all aspects of the criminal process. Some issues are not addressed; other issues are more comprehensively covered. Even where a policy has been drafted to give relatively complete guidance in regard to a particular type of decision, it is impossible to anticipate the infinite variety of circumstances in which criminal cases arise. 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 presented. 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 or the Director before decisions are made. The vast majority of decisions which are left to Crown Attorneys envisage a range of options. A common challenge for a Crown Attorney is to select from those options the one which, in the prosecutor's assessment of the public interest at the time that a decision must be made, is the most responsive to the circumstances.

It is clearly understood at all levels of the Office of the Attorney General that the exercise of judgment in the criminal process is not an exact science. Reasonable, competent people often disagree. When the balancing of competing factors is precarious, inexperienced counsel are encouraged to consult with senior colleagues or the Director in order to arrive at an appropriate decision. Similarly, when there is uncertainty in regard to what should be done in the absence of specific guidance in the Guide Book, the fullest possible discussion of the issues with supervisors and colleagues is strongly encouraged.

It is important for all Crown Attorneys to be aware that to neglect or to avoid making a necessary decision can be more harmful to the administration of justice and public interest than actually making a decision that is later challenged.

Just as the failure to exercise available discretion can be destructive, so too would be the blind, unthinking application of stated policies. Prosecuting, even by experienced counsel, requires careful analysis of issues, and consultation. Crown policies as set out in this Guide Book are not designed to be "automatic" decision makers or to be a substitute for judgment. The criminal law requires that people be treated as individuals in unique situations, and policies are not intended to distort this approach. There cannot, for instance, be a single approach prescribed in advance for a class of persons. Prosecuting counsel 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.

Because the very idea of discretion implies that a range of reasonable options exists, 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]

---

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

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

CROWN ATTORNEY'S INDEPENDENCE AND ACCOUNTABILITY IN DECISION MAKING

Introduction

The principle of the independence of the Attorney General as an integral part of a parliamentary democracy is firmly entrenched in our legal system, widely respected, and carefully safeguarded. The theory underlying the principle and the leading statements concerning it are dealt with in detail elsewhere.[1] Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown Attorneys acting in cases throughout the Province of Prince Edward Island.

Crown Attorneys exercise their independence **as the representative of the Attorney General of Prince Edward Island**. As such, 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 the Director of Prosecutions. Crown Attorneys retain a significant degree of discretion in individual cases.[2]

Crown Attorneys, like the Attorney General, are accountable for their decisions. Since the Attorney General is accountable to the Legislative Assembly and the public[3] for decisions made in his or her name, this may mean that the Attorney General (either personally, or through the Director), may provide Crown Attorneys with instructions in a particular case, though such situations would be relatively rare.[4]

The independence principle also does not mean that Crown Attorneys need not consult.[5] Quite to the contrary, responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators. Indeed prosecutorial discretion is not exercised in a vacuum.

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 Director and the Deputy Attorney General.

The interaction of the principles of independence, accountability and consultation mean that **what is protected is a system of prosecutorial decision-making** in which the prosecutor is an integral component. A large measure of independence is conferred on Crown Attorneys, but absolute discretion is not.

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 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 Prince Edward Island is accountable to the Legislative Assembly for decisions taken in his or her name. This form of public accountability is crucial to a system of open justice, and counsel for the Attorney General must be cognizant of this fact. This explains the need for the Director of Prosecutions 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.[6]

An equally important form of accountability is internal accountability. All counsel for the Attorney General, whether employees within the Office of the Attorney General or *ad hoc* agents, are accountable to their superiors for decisions taken.[7] The Office of the Attorney General is organized to foster principled, competent and responsible decision making.[8] One of the goals of the **Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island** is to assist counsel 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 Prince Edward Island.[9] Another form of public accountability occurs through judicial review of a prosecutor's actions, for example through the abuse of process doctrine[10], or judicial control of actions which may prejudice fair trial interests, such as inflammatory jury addresses.[11] Accountability is also enhanced because of the availability to the public of the **Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island**, since the public (which includes the accused and counsel) is able to assess the actions of Crown Attorneys against the standards set out in the policies. Finally, recognition of the importance of public accountability imposes a duty on Crown Attorneys in certain circumstances to communicate the reasons for certain decisions to the public through the media.[12]

Delegation of Decision-Making Power

As a practical matter, Crown Attorneys exercise most of the functions assigned by the *Criminal Code* to the Attorney General. The Attorney General delegates these powers to counsel, but always retains a discretion to direct that a particular decision be made.

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 counsel can and should consult include police officers or other investigators, government department employees, and Legal Services counsel who may be assigned to give legal advice to the relevant department or agency of government.

The purpose of consultation is to ensure that counsel has access to a wide range of viewpoints and information ensuring that the decisions are made with full knowledge of all the 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.

Consultation within the Office of the Attorney General rests on a somewhat different footing.[13] As a practical matter, the Attorney General delegates considerable authority to responsible officials. Because those officials continue to act in the Attorney General's name, it is important that consultation be undertaken to ensure that the Attorney General is made aware of potential problems, and, in some cases, to direct that a particular course of action be undertaken. This is necessary to ensure consistent decision-making, and that the Attorney General approves of decisions for which he or she is publicly accountable.[14] It also helps avoid the unfortunate situation in which appellate counsel must resile from a position taken by trial counsel.[15]

Safeguards

Because the independence principle protects a system of decision-making and not the absolute right of an individual prosecutor to do as he or she sees fit, it is important to briefly outline that system in order to show how it seeks to protect independence.

The prosecution function of the Attorney General of Prince Edward Island is exercised in accordance with the following safeguards:

- **Functional authority**

Through the Deputy Attorney General, the Director of Prosecutions has been assigned functional responsibility for the provision of prosecution services. The authority is then exercised by Crown Attorneys responsible to the Director of Prosecutions for the exercise of prosecutorial discretion.

- **Delivery of prosecution services**

The delivery of prosecution services is performed in accordance with public guidelines contained in the **Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island**, and approved by the Attorney General.

- **Resource allocation**

As part of his or her functional responsibility, the Director of Prosecutions plays a lead role in the allocation of resources for the delivery of criminal litigation services.

---

1 See materials in this Guide Book regarding "Independence of the Attorney General in Criminal Matters".

2 Indeed some courts have indicated that policies that completely remove Crown counsel's discretion are improper: see *R. v. Catagas* (1978), 38 C.C.C.(2d) 296 (Man. C.A.); *R. v. Wood* (1983), 31 C.R.(3d) 374 (N.S. Prov. Mag. Ct.).

3 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".

4 See the discussion in *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Ottawa: Law Reform Commission of Canada, Working Paper 62 (1990) at pp. 16-17, 53-59. See also *Vasta v. Clare* (2002), 133 A Crim R. 114 (Qld. S.C.).

5 See the discussion of this in the materials in this Guide Book on "Decision to Prosecute" and "Conduct of Criminal Litigation".

6 See for example Criminal Code sections 174(3), 283(2), 319(6) and 754(1)(a).

7 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.

8 See materials in this Guide Book titled "Duties and Responsibilities of Crown Attorneys".

9 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 Legal Profession Act, RSPEI, CHAPTER L-6.1 and the *Code of Professional Conduct* of the CBA as adopted by the Law Society of Prince Edward Island.

10 See materials in this Guide Book regarding "Independence of the Attorney General in Criminal Matters".

11 See materials in this Guide Book "Duties and Responsibilities of Crown Attorneys" and "Conduct of Criminal Litigation".

12 See materials in this Guide Book regarding "Communicating with the Media".

13 See materials in this Guide Book "Duties and Responsibilities of Crown Attorneys".

14 See materials in this Guide Book “Duties and Responsibilities of Crown Attorneys” and “Conduct of Criminal Litigation”.

15 See *R. v. Barry*, 2004 NSCA 145. See also in this Guide Book “Decision to Appeal”.

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. First, prosecution decisions may take into account the public interest,[2] but must not include any consideration of the political implications of the decision. Second, 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 principle in England, Canada and throughout the Commonwealth. As the Supreme Court 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 counsel 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.
>
> 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 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.
>
> 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, often referred to as the "Shawcross Principle", has been adopted by federal and provincial Attorneys General in Canada.

In dealing with a case which has been referred to him, the Attorney General of Prince Edward Island is unquestionably entitled to obtain information and advice from whatever source he sees fit, including his colleagues in Cabinet.[6] The course of action which he adopts in particular cases must, however, in the last analysis be his decision. The Attorney General does not act on directions from his colleagues, other members of the Legislative Assembly or anyone else in discharging his duties in the enforcement of the law. On the other hand he must, of course, be prepared to answer in the Legislature for what he does.[7] These principles are well known and established not only in all provinces of Canada, but in the United Kingdom and elsewhere where the system of Parliamentary democracy exists.[8]

As regards the decision whether or not to institute public prosecutions, the Attorney General acts in a quasi-judicial capacity, and does not take orders from the government that he should or should not prosecute in particular cases. In political cases, e.g., sedition, he may seek the views of the appropriate ministers, but he should not receive instructions.[9]

Expressions of these principles have not, however, been confined to Attorneys General. The judiciary has supported them[10], as have leading authorities on the role of the Attorney General.[11]

Although the Attorney General can become involved in decision-making in relation to individual criminal cases, such practice would leave the Minister vulnerable to accusations of political interference. Accordingly, it is traditional to leave the day-to-day 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 cases. He 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 Legislative 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 case of significant importance to the public interest.

---

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 in this Guide Book "The Decision to Prosecute", respecting the test to be applied when deciding to institute or continue criminal proceedings.

3 [2002] SCC 65.

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

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

10 *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 (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, Chariman) (1981) at 509.

11 J. L1.J. Edwards, *Law Officers of the Crown*, supra, note 4; J. L1.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.L1J. 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.

HISTORY OF THE CRIMINAL LAW IN PRINCE EDWARD ISLAND

Canada

To understand the nature and purpose of criminal law as it applies in Prince Edward Island, it is necessary to understand its sources.[1] Our criminal law principles are founded on British Law as it became introduced into Canada, developed from colonial times. Under the British colonial system, the letters patent or instructions issued by the Crown to the Governor governed the constitution of a settlement. When *unsettled* territory was conquered by or ceded to England, it was a matter of royal prerogative whether the Crown would grant the territory its own constitution.

Settlers of unsettled territory were deemed to take with them the common law and applicable statute law of England.[2] Accordingly, the unsettled territories that were to become Canada had a criminal law from the moment of their settlement. That law consisted of the common law and applicable statute law of England as of the date of settlement. In addition, each territory had a legislature with limited power to amend existing laws or enact new ones.

When settled territories were conquered or ceded, England did not always automatically impose English law. If the territory already had a legal system, England often allowed the system to remain in force, at least for a time. For example, when New France was ceded to Great Britain, the civil law (including criminal law) and customs continued until 1764. Then, in accordance with *The Royal Proclamation of 1763*, English common law and statute law replaced the existing legal system, and the French colonial courts were abolished and replaced by common law courts. This change caused chaos for almost a decade. Finally, in 1777, under the *Quebec Act*,[3] a variation of the original civil law was reinstated. However, the criminal law of England remained in force.[4]

The basic criminal law of each territory varied according to the date of initial settlement or conquest. For example, the date of "reception" fixed for Ontario was September 17, 1792.[5] Just before Confederation, the criminal law of Canada consisted of that part of the criminal law of England applicable as of the reception date for each territory concerned, and any alterations made by the legislature of the territory.[6] Because the various colonial and provincial legislatures had passed criminal laws, striking differences existed in the criminal law from one jurisdiction to another. The system of criminal law at Confederation was therefore not consistent across Canada, except for the common law base. Immediately after Confederation, that criminal law remained in force. However, the *British North America Act* [now the *Constitution Act, 1867*], transferred the amending power to the federal government.

Section 91 of the *Constitution Act, 1867* empowered Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to provincial legislatures. Clause 27 of this section covered the criminal law, including procedure in criminal matters.

The task of unifying and consolidating the new Canadian criminal law began almost immediately after Confederation. Parliament enacted several pieces of criminal legislation.[7] Of particular importance was *The Criminal Procedure Act*,[8] which formed the basis for much of today's criminal procedure. By 1892, the criminal law of Canada consisted of several elements: the common law and statute law of England as of the various reception dates, the statute law of the individual provinces, and federal legislation since Confederation.

The Criminal Code

In 1833, Lord Chancellor Henry Brougham appointed a Criminal Law Commission, consisting of a group of eminent practitioners, to draft a comprehensive code of criminal law for England.[9] The initial process took more than ten years, during which time the commissioners made a comparative study of codified legislation in other jurisdictions. The commissioners submitted a draft code in 1843. Brougham introduced the code in the House of Lords as a private bill in 1844. Despite numerous debates and supplementary reports, the bill was never passed. Instead, it was sent for further study to a select committee, where it remained in limbo.

In 1877, Lord Chancellor Cairns asked James Fitzjames Stephen to draft a penal code and a code of criminal procedure. In 1878, Stephen completed a draft code covering both penal and procedural matters. Although the Attorney General of England presented the English Draft Code as a bill before the English Parliament on two occasions, it was never enacted. However, the attempt at codification and the proposed code received widespread publicity throughout the British Empire.

In Canada, the proposal for a comprehensive code of criminal law received significant encouragement. In 1890, Sir John Thompson, the Attorney General of Canada, approached Robert Sedgewick, Deputy Minister of Justice, and Mr. Justice Burbidge of the Exchequer Court of Canada (a former Deputy Minister of Justice) to draft legislation codifying the Canadian criminal law.[10] On March 8, 1892, the Attorney General introduced Bill 7 into Parliament - *The Criminal Code, 1892*.[11] The Bill was based on the English Draft Code, *Stephen's Digest of the Criminal Law* (1887 ed.), *Burbridge's Digest of the Canadian Criminal Law* (1889 ed.), and existing Canadian statute law. The Bill was a code of the criminal law, but not a complete code.

It reduced the existing law to an orderly written system, though it did not purport to reduce all criminal law in Canada into one comprehensive document. It would still be necessary to refer to the common law. As well, many previously enacted federal statutes were preserved and listed in a schedule to the Bill.[12]

The Bill was proclaimed in force on July 1, 1893. The criminal law in Canada then consisted primarily of *The Criminal Code*, 1892 and federal legislation preserved in the schedule to the Code. It also consisted of the common law of each province as of the reception date, except where the common law had been altered by federal legislation. As well, any imperial criminal statutes that had not been superseded by Canadian legislation remained in force.

In 1947, the Government of Canada appointed a Royal Commission to revise the *Criminal Code*. In 1953, Parliament enacted a revised *Criminal Code*[13] that came into force in 1955. Section 8 of the

revised *Code* abolished all common law offences, offences under Imperial acts, and offences under pre-Confederation acts. The *Code* consisted of statements of general principles followed by parts dealing with specific offences. The second part of the *Code* dealt with procedure and punishments. Besides the *Code*, other federal criminal statutes remained in force. The structure of the criminal law remains in this state today.

In addition to federal criminal law, there is also a body of provincial laws which may be described as "quasi-criminal" or "penal". Section 92 of the *Constitution Act, 1867* assigned jurisdiction to the provinces over a variety of subjects including property and civil rights in the province. Clause 15 of that section allowed for the imposition of punishment to enforce any law of the province made in relation to any matter coming within any of the classes of subjects set out in section 92. The provinces have legislated procedures for applying these penal laws. Many provincial procedural acts incorporate the relevant procedures of the *Criminal Code*.[14]

Prince Edward Island

Prince Edward Island joined Confederation on July 1, 1973. The Terms of Union included the following:

> That the Provisions in the "British North American Act, 1867" shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be especially applicable to, and only to affect one and not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island, in the same way and to the same extent as they apply to the other Provinces of the Dominion, and as if the Colony of Prince Edward Island had been one of the Provinces originally united by the said Act.[15]

Hence the Terms of Union incorporating Prince Edward Island into the Dominion of Canada resulted in the aforementioned history of the *Criminal Code* having application within the province.

Purpose of the Criminal Law

The Supreme Court of Canada has held that the objective of the criminal law is to maintain a just, peaceful and safe society.[16] Criminal law is premised on the belief that some acts ought to be prevented, and that the criminal process is the best way to prevent them. The criminal law achieves its objective through punishment. As the Supreme Court has stated:

> ...the ultimate purpose of criminal proceedings is to convict those found guilty beyond a reasonable doubt. Our system of criminal justice is based on the punishment of conduct that is contrary to the fundamental values of society, as statutorily enshrined in the *Criminal Code* and similar statutes.[17]

The essence of criminal law is its public nature. A crime is not a wrong against the actual person harmed, if there is one, but a wrong against the community as a whole. Protection of the public cannot be left to the individual, but is instead the responsibility of the community and, in a larger sense, the

state. The Supreme Court has noted this in a leading judgment dealing with the principles of sentencing:

> Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behavior, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.[18]

---

1 See generally, Mewett and Manning, *Criminal Law*, (3d ed.) (Toronto: Butterworths 1994) at 3-33.

2 *Ibid*, at 3.

3 1774, 14 Geo. III, c. 83 (U.K.).

4 Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989) at 44-45.

5 *Criminal Law*, note 1, at 4.

6 G.W. Burbidge, *Digest of the Criminal Law of Canada*, (Toronto: Carswell, 1980), foreword by The Honourable Mr. Justice Fred Kaufman.

7 The statutes dealt with various aspects of substantive criminal law such as forgery, larceny, perjury, and offences against the person and coinage.

8 R.S.C., 1886, vol. 2, c. 174.

9 See generally, *The Genesis of the Canadian Criminal Code of 1892*, note 5, at 12-37.

10 *Ibid.*

11 S.C., 1892, vol. 1-2, c. 29.

12 *Criminal Law*, note 2, at 6.

13 S.C., 1953-54, vol. 1, c. 51.

14 See the Summary Proceedings Act, RSPEI, Chapter S-9.

15 *Canadian Constitutional Documents Consolidated*, Funston & Meehan, p. 225.

16 *R. v. M. (C.A.)* (1996), 105 C.C.C.(3d) 327 (SCC) at 376.

17 *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257 (SCC) at 275.

18 R. v. M. (C.A.) supra, note 17 at 369.

THE DECISION TO PROSECUTE

Introduction

In Prince Edward Island, police do not require charging approval from Crown Attorneys. So long as police have reasonable and probable grounds to believe that an offence has been committed, they may lay a charge.

Notwithstanding the above, best practice dictates that police consult with a Crown Attorney on sexual assaults, cases involving children, cases involving complex areas of the law, and cases involving serious personal injury.

This section of the Guide Book presumes that a charge has been laid and is intended to provide guidance to Crown Attorneys on the issue of whether a prosecution should be continued. It will also be of assistance in situations where the police wish to consult with the Crown prior to a charge being laid.

Such determinations must reflect a sound knowledge of the law and careful consideration of the interests of victims, the accused and the public at large. Prosecutions which are not well founded in law or fact, or which do not serve the public interest, may unfairly expose citizens to the anxiety, expense and embarrassment of a trial. The consequences of this can be of the gravest sort.

Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.[1]

This section explains the criteria for deciding whether to prosecute. It is based on standards that have been 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.[2] However, fairness 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; indeed, it would be undesirable to attempt to do so. The breadth of factors to be considered in exercising this discretion clearly demonstrates the need to apply general principles to individual cases and to exercise good judgment in so doing.

Statement of the Policy

Crown Attorneys in Prince Edward Island must consider two issues when deciding whether to prosecute. First, whether the evidence is sufficient to justify the institution or continuation of proceedings. Second, whether the public interest requires that a prosecution be pursued.

As noted above, this policy is consistent with policies used by Attorneys General throughout all provinces in Canada and by prosecution agencies throughout 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 this prosecution must also be in the public interest.[3]

There is a value in maintaining this national standard.

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 plainly open to, or have been indicated by the accused, and any other factors which could affect the prospect of a conviction; for example this would necessarily include the existence of a *Charter* violation that would undoubtedly 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"[4] through close contact with the investigative agency, colleagues or victims, such that the assessment is insufficiently rigorous and objective.

This evidentiary standard must be applied throughout the proceedings - from the time the charge 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, counsel 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 the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable likelihood of conviction. If counsel are not so satisfied, proceedings must be terminated.[5]

Critical Assessment of the Strength of a Case

In 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 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 would not be ruled inadmissible.

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. If, for example, there is unimpeachable evidence that the accused was in jail at the time of the offence and thus has available the defence of alibi, there would not be a realistic prospect of conviction. 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, prosecutors 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 decisions in regard to the strength of a case or the prospects of conviction 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.

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. Has a witness a motive for telling less than the whole truth?

e. Are there matters which might properly be put to a witness by the defence to attack his or her credibility?

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

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

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

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

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

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

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

m. 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?

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 provided 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.* This is the type of case in which consultation with the Director and experienced colleagues is recommended.

Occasionally, there are cases in which witness's testimony may 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.

Public Interest Criteria

If satisfied that there is sufficient evidence to justify the continuation of a prosecution, Crown Attorneys must then consider whether, in the 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.[6]

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.[7]

In some cases, it will be appropriate for Crown counsel to obtain the views of the investigative agency or government department when determining whether the public interest requires a prosecution to be 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.[8]

Where the alleged offence is not so serious as plainly to require criminal proceedings, Crown counsel should always consider whether the public interest requires a prosecution. 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;

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 imports 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 connotes 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 a prosecution. Mitigating factors present in a particular case can then be taken into account by the court in the event of a conviction.

Where a decision is made not to proceed with a prosecution, it is recommended that a record be kept of the reasons for that decision. Furthermore, counsel should be conscious of the need in appropriate cases to explain a decision not to prosecute to, for example, 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. 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.[9]

The need to maintain confidence in the administration of justice may also necessitate public communication of the reasons for not prosecuting. To ensure that the proper course is followed, the Crown Attorney should consult the portion of this Guide Book related to the termination of proceedings in the "Conduct of Criminal Litigation".

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 statues where the offence provisions serve important regulatory goals. Consideration of what the public interest requires will, of necessity, 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 the alleged offender such as a compliance program, Crown counsel should consider whether an alternative such as this might better serve the public interest than prosecution. The need to understand the particular regulatory context underscores the obligation of Crown Attorneys to consult in carrying out counsel's duties under this policy.

Irrelevant Considerations

The Crown Attorney should consider as irrelevant;

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 investigation;

b. the Crown Attorney's personal feelings about the accused or the victim;

c. possible political advantage or disadvantage to the government or any political group or party; or

d. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Consultation

Just as reasonable, competent people can disagree on whether evidence can provide a realistic prospect of conviction, so too is there a possibility that differing opinions will arise in regard to the need to prosecute or terminate proceedings in the public interest. This is frequently a difficult decision and, as has been noted earlier, the guidance available to Crown Attorneys is necessarily given in general terms with room for adaptability to the actual circumstances encountered by prosecutors. In this decision making process, the experience of other counsel is a valuable resource that should be readily utilized. The Law Reform Commission of Canada, as did Commissioner Lamer, noted that the criminal justice system should not be deprived of this experience in regard to prosecutorial decisions. Crown Attorneys in Prince Edward Island who are faced with difficult decisions concerning the sufficiency of evidence or the public interest are strongly urged to consult with the Director 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 should occur will also vary with each case. When the decision to be made in regard to the prosecution of a charge is clear, the consultation will mostly involve the prosecutor keeping the Director informed of developments. When the factors to be considered are more finely balanced, there is likely to be a fuller discussion, and 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 cases:[10]

1. Crown Attorneys **must** consult with the Director 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 the Director 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 the Director 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 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 strongly encouraged to consult with experienced colleagues before deciding to prosecute any case in which they are unsure of either the strength of the case or whether the evidential threshold is met.

The Director recognizes the need to leave considerable discretion in the hands of Crown Attorneys. Occasionally, however, the Director, in fulfilling the responsibilities regarding accountability, may become directly involved in the decisions arising in extraordinary cases. 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, discharging such a vital public function.

Transparency

Generally, prosecutors 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 involved 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 with the investigating police officers the reasons for not continuing with a charge. 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.[11] If the investigation has been extensive and complete, and the case is not being prosecuted for public interest reasons, Crown Attorneys should still discuss the decision with investigators prior to announcement of the decision.[12]

---

1 Courts tend to be deferential in reviewing discretionary decision-making by Crown counsel: See *R. v. Power*, [1994] 1 S.C.R. 601; 89 C.C.C. (3d) 1, and other cases referred to in this Guide Book on "Duties and Responsibilities of Crown Attorneys". See also the decision of the House of Lords in *R. v. D.P.P. Ex parte Kebilene and others*, [1999] 4 All E.R. 827 at 835 in which Lord Steyn suggested the decision to prosecute was not amenable to judicial review absent dishonesty, bad faith or exceptional circumstance.

2 In this section, "criminal proceedings" includes regulatory prosecutions.

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

4 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.

5 The proper course for terminating proceedings is set out in this Guide Book on "Conduct of Criminal Litigation". Pursuant to ss. 579 or 579.1 of the *Criminal Code* charges may also be stayed.

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

7 In this regard, see also set out in this 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.

8 See also in 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.

9 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 as well the policy regarding materials in this Guide Book on "Victims of Crime" and that the Crown Attorney is not the lawyer for the victim.

10 These considerations and requirements to consult also pertain to plea agreements. See materials in this Guide Book related to “Plea Discussions and Agreements”.

11 This section should be read in conjunction with materials in this Guide Book related to the “Relationship between Crown Attorneys and the Police”. The Municipal Police and RCMP have traditionally obliged when such requests have been made.

12 The proper course for terminating proceedings is set out in this Guide Book on “Conduct of Criminal Litigation”.

DUTIES AND RESPONSIBILITIES OF CROWN ATTORNEYS

> *"It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and a solid moral compass. It requires humility and willingness, where appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about the issues, but compassionate in their approach, always guided by fairness and common sense."*
>
> - D.A. Bellemare, MSM, Q.C.

Introduction

This section of the Guide Book describes the duties and responsibilities of Crown Attorneys in the provision of legal advice during the conduct of criminal litigation. The terms "Crown Attorney" or "Crown counsel", as used in this part and throughout the Guide Book, are meant to refer to lawyers employed by the Crown Attorneys' Office and private practice lawyers employed as agents acting on behalf of the Attorney General of Prince Edward Island.[1] Crown Attorneys are often asked to provide legal advice to departments and agencies within the Government of Prince Edward Island and to law enforcement agencies involved in enforcing the criminal law.

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 of the Attorney General.[2] Counsel 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, counsel shall advise the department or agency of the conflict and resolve the matter with the Director.[3]

Crown Attorneys should also be careful to avoid a conflict of interest or the appearance of a conflict of interest.[4] An easily identifiable conflict of interest may arise where, for example, counsel prosecutes a former client.[5] However, conflicts of interest may also arise due to the structure or organization of government. For example, a conflict may arise where there is a recommendation for prosecution by one government department against another government department, both of whom, from time to time, are given legal advice by the Office of the Attorney General. If this occurs, Crown Attorneys should advise the Director who will consider whether it would be more appropriate to retain counsel from the private sector, as agent of the Attorney General, to review the evidence, provide advice on the charges, and conduct any resulting prosecution.[6]

Management or Policy Decisions

Crown Attorneys are not responsible for making management or policy decisions for government departments and agencies. Counsel's duty is to give legal advice on criminal law matters. This may include advising investigative agencies about the criminal law issues arising from an investigation, practice, or policy. Counsel 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.[7]

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.[8] Given the increasing complexity of law enforcement, counsel may be asked to become involved at the investigative stage. For example, in wiretap and search warrant cases, counsel 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 is made as to whether to prosecute.[9]

Solicitor-Client Privilege

Legal advice given by Crown counsel to government departments and investigative agencies is protected by solicitor-client privilege.[10] Crown Attorneys may not release the legal opinion, refer to it, or describe it in any fashion to defence counsel[11] or the public unless the privilege has been waived. Crown Attorneys must be conscious of the fact that not everything they do will be covered by privilege – whether or not the privilege attaches depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought.[12]

With law enforcement agencies outside the Government of Prince Edward Island, the privilege rests with the agency. With departments and agencies within the Government, the privilege rests with the Crown in right of the Province of Prince Edward Island. In practical terms, however, decisions concerning privilege, such as waiver, are usually made by the government department or agency which received the advice. In some instances, particularly those in which there is a strong public interest,[13] decisions of this nature should be made in consultation with the Director and the Office of the Attorney General which may have counsel from Legal Services assigned to advise that department or agency. It must be borne in mind that public interest is a concept quite different from that of public opinion.

Written legal opinions given by Crown Attorneys should, in general, be marked "Solicitor-Client Privileged". This may be helpful in resolving issues such as disclosure.

Obligations during the Conduct of Criminal Litigation

The responsibilities placed on Crown Attorneys as law officers of the Crown flow from the special obligations resting on the office of the Attorney General. As a result, Crown Attorneys are subject to certain ethical obligations which may differ from those of defence counsel.[14] 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 the adversarial system. However our constitution has long granted prosecutors a special status distinct from that of a mere opponent at trial.[15]

The Attorney General and his or her agents are vested with very substantial discretionary powers.[16] Public interest considerations require Crown Attorneys to exercise judgment and discretion which go beyond functioning simply as advocates.[17] Counsel appearing for the Attorney General are considered "ministers of justice", more part of the court than proponents of a cause.[18] Fairness, moderation, and dignity should characterize the conduct of Crown Attorneys during criminal litigation.[19] This does not mean that counsel cannot conduct vigorous and thorough prosecutions.[20] 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.[21]

The conduct of criminal litigation is not restricted to the trial in open court. It also encompasses the prosecutorial authority of Crown counsel leading up to trial -- for example, the decision to prosecute, referring an alleged offender to an alternative measures program, disclosure, the right to stay or terminate proceedings, elect the mode of trial, grant immunity to a witness, prefer indictments, join charges and accused, consent to re-elections, and consent to the transfer of charges between jurisdictions. Crown counsel's obligation to ensure the integrity of the prosecution continues throughout the litigation process.[22]

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 counsel in court.[23]

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 Crown Attorneys' Office 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 the 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 not becoming simply an extension of a government department or investigative agency;[24] and
- by conducting plea and sentence negotiations in a manner consistent with the policies and procedures set out in this Guide Book.[25]

Preserving judicial independence

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

The duty to be fair and to appear to be fair

Crown Attorneys can discharge this duty:

- by making disclosure in accordance with the policy set out in this Guide Book;[26]
- by bringing all relevant cases and authorities known to counsel to the attention of the court, even if they may be contrary to the Crown's position;
- by not 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;
- by carefully guarding against the possibility of being afflicted by "tunnel vision" and of practicing "overzealous" or "overreaching" advocacy,[27] through close identification with the investigative agency and/or victim, or through pressure by the media and/or special interest groups or to "shore up" a weak case;

- 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 Crown Attorney's duty to be fair, counsel 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.

As mentioned previously, the Attorney General of Prince Edward Island and his or her agents have very substantial discretionary powers. It must be borne in mind that the opportunity to damage the reputation of the administration of justice is always present.[28]

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.
>
> 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 as trial. [citations omitted throughout]

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
    - these include 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.[29]
- 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.[30]
- Observations or statements of fact not supported by the evidence
    - These situations tend to be ones in which Crown counsel misstates the evidence in a way which impugns the accused's character.[31]
- Appeals to fear, emotion, prejudice or religious belief
    - These comments are often *in terrorem* arguments in which Crown counsel urges the jury to protect society from the accused, who is portrayed in very unflattering terms.[32]
- Negative comments about the counsel for the accused
    - On occasion, Crown counsel have suggested that defence counsel have used improper tactics, presented illegal evidence or made other comments designed to portray defence counsel as being untrustworthy.[33]
- 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.[34] Inappropriate tactics include:

- not placing before 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 his credibility, bringing various matters before the jury which have no direct relation to the question of the accused's guilt;

- 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 through the device of reading from reports of judgments of the Supreme Court of Canada; and

- raising a "concoction theory" with respect to disclosure for the first time in the closing address.[35]

Prevention of Wrongful Convictions

In January 2005, FPT Ministers Responsible for Justice released the Report of the Working Group on the Prevention of Miscarriages of Justice. The Report calls a wrongful conviction "a failure of justice in the most fundamental sense."

> No matter how many cases are successfully prosecuted every day in our courtrooms, wrongful convictions regardless of how infrequent, are a reminder of the fallibility of the justice system and a stain on its well-deserved positive reputation.
>
> Public confidence in the administration of justice is fostered by demonstrating that participants in the criminal justice system are willing to take action to prevent future miscarriages of justice. It is also important to foster public understanding that fair, independent and impartial police investigations and Crown prosecutions are in the public interest.[35]

The Report makes a series of recommendations on what prosecutors can do to prevent wrongful convictions and concludes "everyone involved in the criminal justice system must be constantly on guard against the factors that can contribute to miscarriages of justice." Indeed, the Working Group believes that individual police officers and prosecutors, individual police forces and prosecution

services, and indeed the entire police and prosecution communities, must make the prevention of wrongful convictions a constant priority.

In particular, the Report notes that "tunnel vision" has been identified as a leading cause of wrongful convictions in Canada and is the "antithesis" of the proper role of Crown counsel. "Tunnel visions must be guarded against vigilantly, as it is a trap that can capture even the best police officer or prosecutor."[37]

Many of the Report's recommendations are reflected throughout this Guide Book. Although the Report's recommendations are aimed primarily at the most serious of offences, particularly homicides, many of its suggestions have general application.

Mentoring and Guidance

A dynamic criminal law system which is responsive to the needs of the people of Prince Edward Island requires a professional prosecution service. This can only be achieved if all Crown Attorneys and support staff receive proper resources and training. It is the responsibility of the Director of 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.

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 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 exercises 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. IX, page 37 commentary 9:

> When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.

---

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 in this Guide Book materials related to "The Independence of the Attorney General in Criminal Matters".

3 See also in this Guide Book materials related to "Relationship between Crown Attorneys and the Police".

4 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*.

5 This Guide Book applies equally to lawyers in private practice who are employed as agents to act as Crown Attorneys.

6 See also in this Guide Book materials related to "Prosecutions by the Crown against the Crown".

7 See also in this Guide Book materials related to "The Decision to Prosecute", for a list of public interest considerations and how they relate to the decision to prosecute.

8 See materials in this Guide Book on the "Relationship between Crown Attorneys and the Police".

9 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

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

11 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 see materials in this Guide Book related to, "Disclosure".

12 *R. v. Shirose*, [1990] 1 S.C.R. 565.

13 These are sometimes referred to as "high profile" cases.

14 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".

15 M. Proulx & D. Layton, *The Prosecutor*: in Ethics and Canadian Criminal Law.

16 See *The Ethical Prosecutor*, note 14.

17 *Re Skogman and The Queen*, note 14.

18 *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 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 that 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 discussion of the 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 Newfoundland and Labrador.

19 *Ibid*.

20 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.

21 *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..."

22 See, for example, *R. v. Ahluwahlia* (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.

23 See *The Ethical Prosecutor*, note 14. 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 counsel be aware of and fulfill their duty to be fair. See also *Lamer Report (2006)*, Office of the Queen's Printer NL.

24 See also in this Guide Book materials related to "The Independence of the Attorney General in Criminal Matters" and "The Relationship between Crown Attorneys and the Police".

25 See also in this Guide Book materials related to "Plea Discussions and Agreements" 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 "Conduct of Criminal Litigation". This procedure was recommended by the *Lamer Report (2006)*, Office of the Queen's Printer NL.

26 See also in this Guide Book materials related to "Disclosure".

27 "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.

28 See *The Ethical Prosecutor*, note 14.

29 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.

30 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.).

31 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. 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.).

32 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.

33 See *Moubarak*, note 30. *R. v. Shchavinsky* (2000), 148 C.C.C. (3d) 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.).

34 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 (C.A.), *R. v. Bradbury* (2004), 243 Nfld. & P.E.I.R. 1 (NLCA).

35 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.).

36 FPT Heads of Prosecution Committee, Report of the Working Group on the Prevention of Miscarriages of Justice, 2005, p. 2.

37 FPT Heads of Prosecution Committee, Report of the Working Group on the Prevention of Miscarriages of Justice, 2005, p. 36, also see The *Lamer Report (2006)* Office of the Queen's Printer NL.

RELATIONSHIP BETWEEN CROWN ATTORNEYS AND THE POLICE[1]

Introduction

In many ways law enforcement can be seen as a continuum. At one end, the police investigate criminal offences and arrange for suspected offenders to appear in court. At the other, the Attorney General, through the Crown Attorney, is responsible for neutrally and fairly presenting the Crown's case in court. Their roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work in partnership to enforce criminal laws effectively.

This section of the **Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island** describes the responsibilities of the police and Crown Attorneys, emphasizing the role of each in the administration of justice. Special attention is given to the following: the authority to commence prosecutions and deal with prosecutions once commenced, consultations, critically assessing or screening cases, and resolving disagreements between police and Crown Attorneys. The policy with respect to the termination of proceedings is set out in a separate section of this Guide Book.[2]

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 Legislative 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.

It should be noted here that, for particular reasons, some *Criminal Code* offences - - for instance, public nudity[5] require the consent of the Attorney General before an information can be laid.

Role of Crown Attorneys before and after Charges Are Laid

- **Introduction**

Crown Attorneys and investigative agencies play complementary roles in the criminal process. Both have roles to play before and after charges are laid.

While the involvement of a Crown Attorney is not generally required as a matter of law prior to a charge being laid, it has become increasingly apparent that it is desirable.[6] Co-operation and effective consultation between the police and Crown counsel are essential to the proper administration of justice, as investigators are expected to gather evidence that is admissible and relevant to the charge. Later, when deciding whether to prosecute, consultation will often be helpful in assessing the sufficiency of the evidence and the public interest criteria.[7]

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, counsel's role is to provide the investigators with a fair and objective assessment of the strength of the case and the appropriateness of proceeding. In performing this assessment, counsel 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.[8]

- **Statutorily Prescribed Involvement of Crown Counsel Before Charges Are Laid**

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;[9]

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

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

- **Non-Statutory Involvement of Crown Attorneys**

Crown Attorneys can provide a wide range of assistance to investigators. In most of these non-statutory roles, Crown Attorneys play a supporting role, with the investigator drafting the materials and providing them to Crown Attorneys for review.

- **Advice Concerning Police Operations**

The police have complete autonomy in deciding whom to investigate and for what suspected crimes. 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 counsel must be involved, as a practical matter of law, in the rare case of the granting of immunity from prosecution. Agreements to this effect should be reduced to writing.[10] In this exceedingly rare circumstance, consultation with, and approval of, the Director is required.

While generally investigators are fully versed in the requirements for obtaining a search warrant, 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[11]
- Tracking warrants
- Dialed number recorder warrants
- DNA warrants
- Production orders under sections 487.012 and 487.013 of the *Criminal Code*

The nature of assistance will range from advising as to whether a warrant is needed to assisting in the drafting of the 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 municipal police agencies and RCMP assigned to cases which utilize these investigative tools usually have the expertise necessary to prepare the supporting documents.

- **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 whether some form of partial release of information can be made, 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) 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 received a Form 5.2 Report;[12]
- The next nine month period;[13] or
- A period longer than one year from the date of seizure.[14]

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

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

- Reviewing and providing input into affidavit material prepared by investigators (even where Crown counsel 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;[15]
- Appearing on contested hearings, where it is anticipated that complex issues will arise.[16]

- **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 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[17]) 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 laid.[18] Crown Attorneys assess potential evidence by reviewing the material contained in the Court Brief, and in deciding whether the Decision to Prosecute[19] 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 issues of credibility that arise with witnesses of this type, a pre-charge interview is generally prudent;[20]
- 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 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;[21]
- 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 Attorney General to consent to the laying of charges.[22]

- **During the Course of an Investigation**

It is impossible to anticipate all forms of advice that Crown counsel is able to give during the course of investigation. When in doubt whether Crown Attorneys can assist, a senior investigator should contact either the Director or the Senior Crown responsible for Prince County to determine if assistance can be given. Some examples of general advice include:

- advice on limitation periods for the laying of charges and the renewal or extension of court orders;

- providing advice concerning agents and informers;[23]

- providing advice as to whether a search warrant is needed in particular circumstances;

- 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. Counsel 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.

- **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, because of 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.[24]

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:[25] 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 whether 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 preempting by the Crown Attorney of the role to be played by the courts in the criminal trial process.

The Attorney General of Prince Edward Island 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 municipal police agencies 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 cases involving sexual assaults, other offences involving children and cases resulting in serious personal injury or death) 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, whether a referral to Alternative Measures will be made) without first consulting with the Crown Attorney assigned to the case.

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*, 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."[26]

- **Post Charge Proceedings**

The right and duty of the Attorney General, through the Crown Attorney, to supervise criminal prosecutions once charges are laid is a fundamental aspect of our criminal justice system.[27] 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.[28] Crown counsel's independence extends, for instance, to assessing the strength of the case,[29] electing the mode of trial,[30] providing disclosure to the accused,[31] deciding which witnesses to rely on (including decisions about immunity from prosecution)[32] and deciding if the public interest warrants continuing or terminating a prosecution.[33]

The authority of the Attorney General to screen and critically assess charges at this stage is clear. Indeed, as described in this Guide Book in the section regarding the "Decision to Prosecute", Crown Attorneys are expected to review the initial decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a *reasonable likelihood of conviction*. Crown Attorneys are also obliged to pursue early and fair resolution of all cases.[34]

Once charges are laid, full responsibility for the proceedings shifts to the Attorney General. On request, police have traditionally accepted the responsibility to carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court. As well, the Attorney General has the authority to control the proceedings after charges are laid, including conditions of bail, termination of proceedings and representations on sentence. These decisions, wherever necessary, can be made in consultation with the investigators although consultation (much less agreement) is not required as a matter of law.

- **Disagreements between Crown Attorneys and Investigators**

After consultation, investigators and Crown counsel will usually 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 Director.

---

1 While this chapter focuses primarily on the role of the RCMP and municipal police agencies, 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 See; "*Termination of Proceedings"* in the materials on "Conduct of Criminal Litigation".

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.).

5 *Criminal Code* s. 174.

6 With respect to major or complex cases it is considered essential.

7 See also in this Guide Book materials related to "The Decision to Prosecute".

8 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. See also the *Lamer Report (2006)*, Office of the Queen's Printer NL.

9 Section 462.331 also provides that if a management order is needed with respect to property seized under section 462.32 or restrained under section 462.33, the application is to be made by the Attorney General, or a person acting with the written consent of the Attorney General.

10 This type of agreement would be exceedingly rare and can be expected to give rise to complex considerations. Consultation with the Director is required.

11 Crown counsel will often appear before the Judge in Chambers with the investigator.

12 *Criminal Code*, s. 490(1)(b).

13 *Criminal Code*, s. 490(2).

14 *Criminal Code*, s. 490(3).

15 The extent to which Crown counsel 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.

16 Crown counsel would appear in most cases where the application has to be brought in the Supreme Court of Prince Edward Island. Where the case proceeds in the Provincial Court, Crown counsel's attendance will depend on the nature of the case.

17 See materials in this Guide Book related to "Informer Privilege".

18 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.

19 See also in this Guide Book materials related to "The Decision to Prosecute".

20 See the procedure for dealing with "Jailhouse Informers" also in this Guide Book.

21 See also in this Guide Book materials related to "Victims of Crime" and the caution to be exercised when interviewing child witnesses.

22 See also in this Guide Book, "Crown Attorney's Independence and Accountability in Decision Making".

23 See also in this Guide Book, "Informer Privilege".

24 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.

25 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.

26 [2002] 1 S.C.R. 297 at para. 64.

27 *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.).

28 See also in this Guide Book, "Independence of the Attorney General in Criminal Matters".

29 See also in this Guide Book, "The Decision to Prosecute".

30 See also in this Guide Book, "Elections and Re-elections".

31 See also in this Guide Book, “Disclosure”.

32 See Note 10.

33 See also in this Guide Book materials related to the *“The Decision to Prosecute”* and “Termination of Proceedings” in the materials on “Conduct of Criminal Litigation”.

34 See also in this Guide Book materials related to the “Conduct of Criminal Litigation”, and “Plea Discussions and Agreements”.

35 See also in this Guide Book, “Independence of the Attorney General in Criminal Matters”.

CONDUCT OF CRIMINAL LITIGATION

Basic Principles of the Policy

This section of the **Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island** provides Crown Attorneys with policy aimed at achieving the best possible use of available resources. It seeks to ensure the earliest possible disposition of cases which need not go to trial and the efficient prosecution of cases which are not otherwise concluded. To these ends, the policy sets out practices that should apply in respect of post charge screening, critical assessment of cases, the termination of proceedings, disclosure and plea discussions and agreements, and addresses the issue of the relationship with law enforcement agencies.[1]

This policy is an umbrella or overarching policy which provides the basic framework of the Attorney General's criminal litigation practice. It 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.

The policy provides the operational framework within which prosecutorial discretion is to be exercised. However, the need to provide prosecutors with the necessary 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. This policy applies to the full range of criminal litigation. Whereas the policy focuses on the early resolution of routine cases, it also encourages the early identification of difficult issues in the case of long and complex trials.

The criminal litigation policy is based on the following guiding principles:

- The criminal justice system in Prince Edward Island needs to be efficient in its use of available resources and alert to avoid the possibilities of injustices and mistakes.
- 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.
- Excellence in prosecutorial practices is to be maintained.

Critical Assessment of Charges

Charge screening normally refers to the process by which a prosecutor, applying the "Decision to Prosecute" policy,[2] 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.[3] 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.[4]

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 deal with.

Critical assessment of the Crown's case should be initially conducted by the docket Crown to determine:

- the sufficiency of the evidence and the public interest in prosecuting;

- the availability of alternative measures rather than proceeding with charges; and

- the need for the law enforcement agency involved to complete its investigation.

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

Termination of Proceedings[5]

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:

l. (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 probability 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 but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. It is not a basis to stay proceedings merely because a judge has made a ruling unfavourable to the Crown.

(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 probability 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 manifestly 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 the Director, 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.

3. Whenever a Crown Attorney terminates a prosecution under this Policy, a notation must be made on the file summarizing the circumstances and reasons for the decision that was taken.

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, in most cases.

(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 noted on the file.

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.

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 counsel at the investigative stage. Such involvement does not, however, automatically disqualify that counsel from conducting the assessment.

In cases where counsel has had an extensive or active involvement in the investigative process, it may be prudent for the Director to apply special measures to avoid a perception of lack of independence. Such measures could range from having a review of the decision of counsel made by another Crown Attorney to having the charge screening decision referred to a counsel having had no involvement with the investigation.

Critical Assessment of Cases

- **Introduction**

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 counsel are even more important to ensure that a full critical assessment of the case is made.

Circumstances permitting, the Crown Attorney who does 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;

- what additional information, if any, is required from law enforcement agencies to allow the Crown to meet its disclosure obligations;

- whether diversion is appropriate;

- the appropriate sentence for each alleged offender upon entry of an early guilty plea; and

- additional information, if any, required from law enforcement agencies to allow counsel to deal with any of the issues above.

- **Alternative Measures**

Individuals can be referred to Alternative Measures either before or 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 referral to Alternative Measures first arises at the beginning of the process and is one which, ideally, will be addressed by the prosecutor responsible for charge screening in the particular case in accordance with this policy.[6]

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 acknowledgment of guilt by the accused. As noted by Carthy, J.A. of the Ontario Court of Appeal, "... the justice system acknowledges and encourages plea-bargaining and must show some resistance to undoing a bargain".[7] 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, and the accused may be entitled to some advantage in return for a guilty plea. 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.

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.

Informed and Voluntary Pleas

A guilty plea which is not voluntary and informed does not serve the interest of justice, or the prosecution's interest in the early and conclusive resolution of cases. 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.

Crown Attorneys should never enter into a plea agreement where an accused continues to claim his or her innocence.

Early Pleas

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.

Where circumstances warrant, prosecutors should argue that the court should not grant the accused who enters a late plea the same extent of benefits which can sometimes accompany a plea of guilty. 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.

Agreed Statement of Facts

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 purpose of making representations on sentence following the agreement as to plea**.**

The facts upon which a plea agreement is concluded should be clear. To the extent that it is reasonably possible and useful to do so in the circumstances, prosecutors should have those facts reduced to writing and agreed to by the accused.

Special Practice Directions

The special circumstances of the unrepresented accused have brought particular attention to the need for certainty in resolving cases through plea discussions and have led to practices which deserve to be considered in all cases, and not only in those involving unrepresented accused. These practices include ensuring plea comprehension by the accused and keeping a written record of discussions to avoid uncertainty as to the terms of any offer.

Therefore Crown Attorneys should keep on file a record of resolution discussions and, where appropriate, of the particular factors considered. The refusal of any offer by the defence and the grounds alleged for such refusal should also be recorded where appropriate.

Issue Resolution

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 is not possible, it may be possible to expedite the litigation by identifying and resolving specific issues.

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.

Admissions of facts to be Proven

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.
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.

Admissions and Use of Evidentiary Aids

Discussions may assist in narrowing both factual and legal issues. Admissions on the part of both parties and the use of statutory evidentiary aids[8] may also result in a more efficient process, saving the time of both the court and the affected witnesses.

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.

Moreover, 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.

Unrepresented Accused

Discussions with an unrepresented accused raise special issues of ethics, fairness and certainty as to the result. They should be approached with particular care.

Disclosure

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. In accordance with the Disclosure policy, disclosure will be provided as soon as it is reasonably possible.[9]

The Crown's duty to disclose is not absolute. It has discretion to withhold certain privileged information, such as information which might disclose the identity of a confidential informer or the existence of a continuing investigation. Because of the harm which may result, in particular from the inadvertent disclosure of an informer's identity,[10] prosecutors involved in the process of disclosure should be alive to the possibility of such inadvertent disclosure and seek, when appropriate, from the relevant law enforcement agency, an indication of whether any damaging information subject to privilege is contained in the material produced to the Crown for disclosure. In this regard, it is important to keep in mind that apparently innocuous facts may sometimes identify a confidential source just as easily as if the person's identity were directly revealed in the material.

Because of the importance of disclosure and the consequences of non-disclosure (in terms, for example, of *Charter* relief), it has become essential for the Crown to develop the necessary tools for ascertaining at any given time what it has or has not received from law enforcement agencies, and what it has or has not already disclosed to the accused.

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 should disclosure issues be addressed on an ongoing basis during the course of the investigation, but it should be one of counsel's tasks to advise investigators in that 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.[11]

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.

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 just as convenient for all involved in a particular case to have the information communicated in an electronic format rather than in boxes of documents.

Complex Cases[12]

- **Co-operation between Police and the Crown**[13]

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 function. 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 all the more 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 laid. This includes, for example, the material required for the purposes of disclosure, remand hearings, voir dires and the trial proper.

- **Role of the Crown Attorney**

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.

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, remand, voir dires, etc.; and
- preparing for the prosecution during the course of the investigation so that timely and informed decisions can be made.

Especially in the more significant cases, the involvement of experienced counsel 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.

The Director 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.

It may also be more efficient, in certain cases, for the prosecutor assigned to the investigation to be assigned to the subsequent prosecution as well. It also facilitates co-operation with the investigators, permits a more efficient determination of what witnesses are required, and facilitates disclosure by the Crown.

The Director will seek to ensure continuity when assigning counsel 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.[14]

It is, however, important to recognize that Crown involvement in the police investigation carries with it the possibility that the prosecutor will be called as witness in the case.[15] 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 counsel in the case. This in turn defeats one of the main objectives of assigning counsel to a case at the early stage, namely having a knowledgeable and experienced counsel ready to proceed in the case from the moment the charge is laid. Fortunately, courts have been reluctant to allow counsel for either side to be called as a witness in the case unless there is no other reasonable alternative available in the circumstances.

---

1 See also materials in this Guide Book related to the "Relationship between Crown Attorneys and the Police".

2 See materials in this Guide Book related to "The Decision to Prosecute"

3 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.

4 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.

5 This aspect of the policy is taken from Recommendation #23 of *The Lamer Report (2006),* Office of the Queen's Printer NL p.322.

6 For assistance in determining whether a referral for Alternative Measures is appropriate, Crowns are referred to the Alternative Measures Policy adopted by the Office of the Attorney General on October 1, 2004.

7 *R. v. Closs* (1988), 105 O.A.C. 392. The importance of "plea bargaining" in the administration of criminal justice is also emphasized by the Quebec Court of Appeal in *Canada (Procureure générale) v. Obadia* (l998), 20 C.R. (5th) 162, at p.169. This practice should be governed by the policies set out in this Guide Book in "The Decision to Prosecute". See more recently the discussion of this subject by Rowe, J.A. in *R. v. Druken* 2006 NLCA 67, 261 Nlfd.&P.E.I.R.27l (2006), 215C.C.C. (3d) 394 at paragraphs 27-34.

8 Evidentiary aids include affidavits and certificates that are declared by statute to constitute evidence of a particular fact without the need for admission or the testimony of witnesses. Such aids are found, for example, at ss. 29 and 30 of the *Evidence Act*, and 657.l and 657.3 of the *Criminal Code*.

9 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.

10 See also materials in this Guide Book related to "Informer Privilege".

11 Cooperation between Law Enforcement Agencies and the Crown is essential.

12 Complex or major cases include those which are lengthy or comprise many interrelated issues, or involve an important question of law.

13 This section should be read in conjunction with materials in this Guide Book related to the "Relationship between Crown Attorneys and the Police".

14 The Director'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.

15 It is also important that the Crown Attorney be alert to the possibility of being affected by "Tunnel Vision". For a discussion of this subject see materials in this Guide Book related to the Prevention of Wrongful Convictions in the section on "Duties and Responsibilities of Crown Attorneys". "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, l998, Vol. l, p. 601 (The "Kaufman Report"). See also *The Lamer Report*, Office of The Queen's Printer NL.

DISCLOSURE

Introduction

In the leading case on the Crown's disclosure obligations, *R. v. Stinchcombe*,[1] the following was accepted as a correct statement of the law:

> . . . 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.

The judgment went on to note that the obligation is not absolute, but is subject to Crown counsel's discretion with respect to both the timing of disclosure and withholding information for valid purposes, such as the protection of police informers.

There is a duty on the Crown to make full and timely disclosure to the defence of all relevant[2] information known to the investigator and the Crown Attorney. This obligation applies to both inculpatory and exculpatory information.

The obligation is also subject to the limitation that the accused has no right to information that would distort the truth-seeking process.[3] This policy seeks to describe Crown counsel's responsibilities with respect to disclosure.

Statement of Policy

Counsel appearing for the Attorney General of Prince Edward Island 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.

In all cases, whether a request has been received or not, Crown counsel 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.

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

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, i.e., pass all of the tests concerning admissibility.[4] 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 counsel's assessment of the issues in the case.

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 the Director 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 and "while 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 is 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 his absence pursuant to ss. 475 and 544 of the *Criminal Code*, the obligation to make disclosure to his counsel continues if counsel continues to act.

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 counsel and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.[7]

Mandatory Inclusions

On receiving a request, 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 least the following:[9]

- **Charging Document**

A copy of the information or indictment;[10]

- **Particulars of the Offence**

Particulars[11] of the circumstances surrounding the offence;

- **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] where 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; if there are no notes, a "will-say" or summary of the anticipated evidence of the witness.[15] This requirement includes statements provided by persons whether or not Crown counsel proposes to call them as witnesses;

- **Audio or Video Evidence Statements by Witnesses**

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] This does not preclude a Crown Attorney, in his or her discretion, from providing copies of any video or audio recording or a transcript, where available and appropriate, but only after obtaining appropriate undertakings[18] that take into account any privacy interests.[19] Where defence counsel is unwilling to accept the terms and conditions of an appropriate undertaking, Crown counsel should apply to the trial judge for directions;

- **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; in the case of oral statements, a verbatim account, where available, including any notes of the statement taken by investigators during the interview; if a verbatim account is not available, an account or description of the statement (whether the statement, in whatever form, is intended to be adduced or not); and a reasonable opportunity to view and listen to, any original audio or video recorded statement of the accused to a person in authority. Copies of all such statements or access thereto should be provided whether or not they are intended to be relied upon by the Crown;[20]

- **Accused's Criminal Record**

Particulars of the accused's and any co-accused's criminal record;[21]

- **Expert Witness Reports**

As soon as available, copies of all expert witness reports[22] in the possession of Crown counsel 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.[23] Counsel should 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;

- **Documentary and Other Evidence**

Where reasonably capable of reproduction, copies of all documents, photographs, audio or video recordings of anything other than a statement of a person, that Crown counsel intends to introduce into evidence during the case-in-chief for the prosecution.[24] 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;[25]

- **Exhibits**

An appropriate opportunity[26] to inspect any case exhibits,[27] i.e., items seized or acquired during the investigation of the offence which are relevant to the charges against the accused, whether or not Crown counsel intends to introduce them as exhibits;[28]

- **Search Warrants**

A copy of any search warrant relied on by the Crown and, subject to the limitations in this Guide Book,[29] the information in support unless it has been sealed pursuant to a court order,[30] and a list of the items seized there under, if any:

- **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;[31]

- **Similar Fact Evidence**

Particulars of similar fact evidence that Crown counsel intends to rely on at trial;[32]

- **Identification Evidence**

Particulars of any procedures used outside court to identify the accused;[33]

- **Witnesses' Criminal Records**

Upon request, information regarding criminal records[34] of material Crown or defence witnesses that is relevant to credibility.[35] There is no obligation to do a criminal record check on all Crown witnesses.[36] Special care must be taken with police agents and other potentially disreputable witnesses. A reliable copy[37] of the person's criminal record, and relevant information relating[38] to any outstanding criminal charges against the witness, must be disclosed. Crown Attorneys must request such information in writing from the relevant police authority[39] and place the letter and response on the file. Such 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.

- **Material Relevant to the Case-in-Chief**

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

- **Impeachment Material**

Any information in the possession of Crown counsel which the defence may use to impeach the credibility of a Crown witness in respect of the facts in issue in the case;[40]

- **Information Obtained During Witness Interviews**[41]

Crown Attorneys have an obligation to disclose any additional relevant information received from a Crown witness during an interview conducted by Crown counsel in preparation for trial.[42] 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 Crown counsel 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;[43]

- **Other Material**

Additional disclosure beyond that outlined may be made at the discretion of the Crown Attorney.[44] In exercising this discretion, Crown counsel shall balance the principle of fair and full disclosure, described above 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 disclose all relevant factual information to the defence and to cooperate with the Crown Attorney in order that full and timely disclosure can be 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 unused to prosecutions.[45] As well the investigator must bring to the attention of the Crown Attorney confidentiality concerns.

Exceptional Situations

- **Third Party Information**

Information in the possession of third parties such as boards, social agencies, other government departments,[46] rape crisis centres, women's shelters, doctors' offices and mental health and counselling services, is not in the possession[47] of Crown Attorneys or the investigative agency for disclosure purposes.[48] Where Crown counsel receives a request for information not in their possession or 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, 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.[49]

- **Protecting Witnesses Against Interference**

If the defence seeks information concerning the identity or location of a witness, four considerations are pre-eminent: First, the right of an accused to a fair trial and to make full answer and defence; second, the principle that there is no property in a witness;[50] third, the right of a witness to privacy and to be left alone until required by subpoena to testify in court; fourth, 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.[51]

- **Consent by person at risk**

Where the witness does not object to the release of this information(that being the identity or location of a witness), 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,[52] 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,[53] Crown Attorneys may reserve information concerning the identity or location of the witness unless a court of competent jurisdiction orders its disclosure.[54]

- **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 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.

If an unrepresented accused indicates an intention to plead guilty to an offence for which there will likely be a significant jail term, counsel 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, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, *access* to the disclosure materials. 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]

Counsel should consider, where disclosure is made to an unrepresented accused, the inclusion of a written explanation of the appropriate uses and limits upon the use of disclosure material.

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 counsel on the issue of disclosure.

Exclusions

The Crown's obligation to disclose is not absolute: only relevant information need be disclosed, and withholding of information which is relevant to the defence may be justified on the basis of the existence of a legal privilege.

Where Crown Attorneys decide not to disclose information, defence counsel should be advised of the refusal, the basis of the refusal (i.e. type of privilege alleged) and the general nature of the information

withheld to the extent possible. However, in some circumstances, even the acknowledgment that information exists (i.e. information regarding a police informer or an ongoing police investigation) would be injurious to the information sought to be protected. In such circumstances, counsel are expected to exercise good judgment and consult with the Director to assess what is an appropriate course of action on a case-by-case basis.

Where disclosure of information is delayed to protect the safety or security of witnesses or to complete an investigation, Crown Attorneys must disclose the information as soon as the justification for the delay in disclosure no longer exists. The fact that some disclosure is being delayed should be communicated to the defence without jeopardizing the reason for the delay.

- **Reply Evidence**

Pre-trial disclosure is not required of reply evidence tendered by the Crown in response to issues raised by the accused at trial, where the relevance of that evidence first becomes apparent during the course of the trial itself.[59] However, during trial, Crown Attorneys must disclose any undisclosed information in Crown counsel's possession, as soon as reasonably possible after it becomes apparent that the information is relevant.

For example, Crown counsel is not generally required to disclose evidence in his or her possession regarding the accused's bad character. However, if the accused indicates that reliance will be placed on good character evidence in support of the defence advanced and the Crown becomes aware of information either rebutting or confirming the defence, the information must be promptly disclosed to the defence.[60] There is a general obligation to disclose any relevant information resulting from an investigation prompted by an accused's pre-trial disclosure of a defence.

- **Police Informers**

Disclosure is not required of information that may tend to identify a confidential police informer.[61] The Crown Attorney, (like the Court) is under an obligation to protect the identity of a confidential police informer. This obligation is not limited to protecting the name of the informer: it extends to any information that may tend to reveal the person who provided information to the police.[62] The police informer privilege is subject to only one exception: where the information is needed to establish the innocence of the accused.[63]

- **On-going Investigations**

Information that may prejudice an ongoing police investigation should not be disclosed. It is important to note that the Crown may *delay* disclosure for this purpose but cannot *refuse* it, i.e. withhold disclosure for an indefinite period.[64] Any delays in disclosure to complete an investigation should, however, be rare.

- **Investigative Techniques**

Information that may reveal confidential investigative techniques used by the police is generally protected from disclosure.[65]

- **Cabinet Confidences**

Information that may be considered a confidence of the Executive Council for Prince Edward Island such as Cabinet documents, communications between Ministers of the Crown and other documents described in s. 39(2) of the *Canada Evidence Act* must be protected.[66]

- **International Relations/National Security**

Information cannot lawfully be disclosed that would be "injurious to international relations or national defence or security".[67]

- **Solicitor-Client Privilege**

Information protected by solicitor-client privilege[68] is not subject to disclosure.

- **Work Product Privilege**[69]

This privilege protects information or documents obtained or prepared for the purpose of litigation, either anticipated or actual. Thus, Crown Attorneys generally need not disclose any internal notes, memoranda, correspondence or other materials generated by the Crown in preparation of the case for trial unless the work product contains "material inconsistencies or additional facts not already disclosed to the defence."[70] As a general rule, work product applies to matters of opinion as opposed to matters of fact.[71] This privilege does not exempt disclosure of medical, scientific, and other experts' reports.[72]

Disclosure Costs

An accused person or his or her counsel shall not be charged a fee for "basic disclosure" materials[73].

"Basic disclosure" materials include the court brief, if one has been prepared, and copies of documents, photographs, etc. that Crown counsel 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.[74]

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.[75]

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 the defence, by requiring that the costs be borne by the accused.[76] Failing agreement, simple access without copies may be provided.

Form of Disclosure[77]

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).

Delaying or Limiting of Disclosure[78]

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

(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.

---

1 (1991), 68 C.C.C. (3d) 1 (S.C.C.).

2 One measure of the relevance of information is its usefulness to the defence. If it is of some use, it is relevant and should be disclosed. Accordingly, information is relevant if it can reasonably be used by the defence either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence, see *R. v. Egger* (1993), 82 C.C.C. (3d) 193 at 204 (S.C.C.)*; R. v. Ryan* 2004 NLCA No. 2; 233 Nfld & PEIR 51.

3 *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.)

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 C.C.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.

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 discussion: *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 7, 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 above, it is more in the nature of a minimal statement of disclosure on behalf of the Attorney General of Prince Edward Island. It is not intended to be exhaustive – see above regarding other material. Counsel should take into account the disclosure requirements described by 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.

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.

18 Crown Attorneys will, in most cases, be satisfied by an undertaking by defence counsel that a copy of an audio or video tape will be retained in the possession of defence counsel and returned to Crown Attorneys at the conclusion of the retainer: *Martin Committee Report*, note 8, at 182, and 226.

19 See *Lucas v. The Queen* (1996), 104 C.C.C. (3d) 550 (Sask. C.A.); *Muirhead v. The Queen* (1995), 148 Sask. R. 244 (C.A.); *Smith v. The Queen* (1994), 146 Sask. R. 202 (Q.B.).

20 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.

21 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.

22 For example, forensic, medical, laboratory, and other scientific reports.

23 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. 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 counsel or the investigative agency, or which were prepared privately, are governed by the policies in this Guide Book regarding third party information.

24 See *Martin Committee Report*, note 8, at 234.

25 See *R. v. Blencowe* (1997), 118 C.C.C. (3d) 529 (Ont. Ct.) (Gen. Div.).

26 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.

27 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.

28 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 the Director 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.

29 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 the Guide Book.

30 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.

31 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 5. 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.

32 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, counsel may wish to 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.).

33 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 brief. Counsel 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 8 concerning the reliance placed by Crown Attorneys upon investigators in the disclosure process.

34 Information taken from a CPIC (Canadian Police Information Centre) printout or maintained by the Provincial Court Crystal Reporting System 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.

35 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' 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. Forinstance, 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.C.) At 22.

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

37 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 Prince Edward Island, Crown Attorneys should be aware of it.

38 "Relevant information" means the nature of the charges, the court, and the status of the proceedings.

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

40 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. Counsel is 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.

41 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 Crown counsel during a pre-charge, fact finding interview were not protected by work product privilege.

42 See the *Martin Committee Report*, note 8, at 253.

43 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.

44 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.

45 Municipal police agencies and the RCMP should be familiar with their obligations in this regard.

46 *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.), aff'd 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 4, at 50 (per L'Heureux-Dubé J.).

47 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.

48 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 4), as interpreted by the Supreme Court of Canada in *R. v. Mills*, (note 3).

49 *R. v. Mills*, (note 3).

50 See *R. v. Gibbons* (1947), 86 C.C.C. 20 (Ont. C.A.) at 28.

51 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 Crown counsel can control and produce for examination by the defence: *R. v. Khela* (1995), 102 C.C.C. (3d) 1, at 10.

52 While Crown Counsel 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.

53 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, counsel should consult with the Director. In some instances, resort may have to be made to s. 37 of the *Canada Evidence Act* to protect the confidential nature of this information.

54 An adjournment may be necessary in these circumstances to ensure a fair trial.

55 See the *Martin Committee Report*, note 9, 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.

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.

58 See *Stinchcombe*, note 1, at 11.

59 *Martin Committee Report*, note 8, at 202. In general, the Crown's obligation is to adduce evidence that is relevant to an element of the offence that the Crown must prove, and not adduce evidence in chief to challenge a defence that an accused might possibly raise: *R. v. Chalk* (1990), 62 C.C.C. (3d) 193 (S.C.C.), at 237 *et seq*. Crown Attorneys cannot be expected to disclose information relevant to an issue not reasonably anticipated before trial. See also *R. v. Wilson* (1994), 87 C.C.C. (3d) 115 (Ont. C.A.).

60 See *R. v. Hutter* (1993), 86 C.C.C. (3d) 81 (Ont. C.A.) at 89-90, leave to appeal to the S.C.C. refused and *Martin Committee Report*, note 8, at p. 206.

61 See materials in this Guide Book on "Informer Privilege".

62 *R. v. Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.); *R. v. Stinchcombe*, note 1, at 11.

63 *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.). For the procedure which governs an application for disclosure of information on the basis of the "innocence at stake" exception, see *Leipert, supra*, at 398. This procedure may be conducted *in camera* and the judge may inspect the material in private: *R. v. Chaplin*, note 5, at 237; *R. v. Fisk* (1996), 108 C.C.C. (3d) 63 (B.C.C.A.) at 78.

64 *R. v. Stinchcombe*, note 1, at 9, and 12; *Martin Committee Report*, note 7, at 214. Thus, in certain circumstances, Crown Attorneys may have to consider terminating proceedings in order to avoid the disclosure of information that would prejudice an ongoing investigation.

65 See: *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.), at 183; *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.) At 76, leave to appeal to the S.C.C. refused 50 C.R. (3d) xxv; *R. v. Durette* (1994), 88 C.C.C. (3d) 1 (S.C.C.), at 54 (per Sopinka J.) and at 29 (per L'Heureux-Dubé J., dissenting); *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.); *R. v. Rankine* (1986), 83 Cr. App. R. 18 (C.A.A.); *R. v. Brown* (1988), 87 Cr. App. R. 52 (C.C.A.); *R. v. Johnson* (1989), 88 Cr. App. R. 131 (C.C.A.); *R. v. Hewitt* (1992), 95 Cr. App. R. 81 (C.C.A.).

66 Attempts by the defence to compel this information into evidence may require a certificate under section 39 of the *Canada Evidence Act*. This would seldom arise.

67 Sections 37 and 38 of the *Canada Evidence Act* deal with the disclosure in court of this type of information. Any objection based on these grounds can only be reviewed by the Chief Justice of the Federal Court or a Justice of that Court designated by the Chief Justice (see s. 38 of the *Canada Evidence Act*). In such a case it is imperative that the Director be notified.

68 See *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.). See generally *Smith v. Jones*, [1999] 1 S.C.R. 455; *Descôteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.); *Solosky v. The Queen* (1980), 50 C.C.C. (2d) 495

(S.C.C.); *Idziak v. Canada*, [1992] 3 S.C.R. 631; *R. v. Creswell*, [1998] B.C.J. No. 1090 (Q.L.). Note that solicitor-client privilege is waived where the police or the Crown rely on confidential legal advice to defend an abuse of process application even in circumstances where only the existence, and not the contents, of the advice is disclosed: *Shirose, supra*.

69 Also referred to as "litigation privilege". See Watson, D. and Au, F., *Solicitor-Client Privilege and Litigation Privilege in Civil Litigation* (1998), 77 Can. B. Rev. 315 for a useful discussion of the differences between these related, yet distinct forms of privilege. See also materials above regarding information obtained during witness interviews.

70 *O'Connor*, note 4, at 45 (per L'Heureux-Dubé J.) and at 86 (per Major J.). However, the Crown is obliged to turn over drawings and statements made by witnesses to the prosecution during pre-trial interviews, if they are new or contain new information. See also the *Martin Committee Report*, note 7, at 251: *R. v. Brennan Paving and Construction Ltd.*, [1998] O.J. No. 4855 (C.A.); *R. v. Sungalia*, [1992] O.J. No. 3718 (Ont. Ct. (Gen Div.)); *R. v. Johal*, [1995] B.C.J. No. 1271 (Q.L.); *R. v. Willis* (1996), 38 C.R.R. (2d) 113 (Alta. Prov. Ct.).

71 *Martin Committee Report*, note 7 at 252.

72 *Martin Committee Report*, note 7 at 252. But see *R. v. Petersen* (1997), 155 Sask. R. 133 (Q.B.) where spreadsheets prepared by the police regarding different theories as to how the accused had committed a complex fraud were held to fall within the work product domain. See also *R. v. Stewart*, [1997] O.J. No. 924 (Q.L.) where the court recognized police and Crown work product in a database of electronic documents.

73 *Report of the Criminal Justice Review Committee*, Queen's Printer for Ontario, February 1999, at 48. See also the *Martin Committee Report*, note 7, at 272; *R. v. Blencowe, supra note* 25 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.

74 *Martin Committee Report*, note 7, at 272.

75 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 Director.

76 *Martin Committee Report*, note 7, at 273. No guidelines have been established in Prince Edward Island for the payment of these costs since the issue has seldom arisen. Extraordinary costs can be assessed on a case by case basis.

77 An accused is not entitled to insist upon a particular *form* of disclosure as a constitutional prerequisite: *R. v. Blencowe*, note 25, 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.

78 The discretion to delay disclosure is, of course, reviewable by the Court.

COMMUNICATIONS WITH THE MEDIA

Introduction

The obligation of those working in the justice system to inform the public is an essential ingredient of a fair and equitable justice system. Public confidence in the administration of justice depends on access to full and accurate information on court proceedings and where appropriate, the reasons for certain decisions. A misinformed media can convey misleading messages, thereby undermining public confidence.

By providing appropriate information, Crown Attorneys can help to ensure that citizens have a fair opportunity to determine whether the justice system is functioning effectively.

In some cases when policy or fiscal announcements are made on behalf of the Office of the Attorney General, communications with the media will be handled by the Communications Officer retained by the Department. In other situations such as court proceedings Crown Attorneys, who are often the most knowledgeable persons about the information requested, should be able to respond directly, to best ensure that accurate information is presented to the public.

Statement of the Policy

Subject to the overriding duty to the administration of justice to ensure that trials are fair, 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 Prince Edward Island is involved.

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.

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 counsel outside the courtroom), by telephone, or by electronic mail. In such situations, Crown Attorneys may not have the opportunity to consult before responding.

Contacts Initiated by Crown Counsel

Crown Attorneys may also identify a need to correct inaccuracies or provide information without being contacted by the media. This might be done, for example, through a letter to the editor of a

newspaper, by the issuance of a press release, or the holding of a press conference. In those situations, Crown Attorneys must consult with the Director regarding this type of communication.

One situation where Crown Attorneys may consider such measures is in the staying of proceedings or withdrawal of charges. In such circumstances, a statement in court may serve as the best means of communication.

Communications before Charges are Laid

Before laying charges, the media may seek to confirm that the police are investigating a specific individual or that charges are expected to be laid. It is a longstanding practice of the Crown Attorneys' Office 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 not to comment so as not to prejudice an ongoing investigation. The proper response is to advise that, as a matter of policy, the Attorney General of Prince Edward Island 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 counsel 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*; 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.

Guiding Principles

The following general principles should govern the Crown Attorney's approach to communication with the media:

- Give facts, not opinions - Crown Attorneys should provide information, and they should explain. They should not offer personal opinions about court decisions, or 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 in their names.

- Respect journalists' needs - It is important to recognize that journalists have a job to do, whether or not you assist them. Because 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, respecting where possible journalists' needs to meet deadlines. 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 Directions

The following sections are intended to provide, in a non-exhaustive way, guidance to Crown Attorneys as to how to apply the foregoing general principles.

Provision of Factual Information

Crown Attorneys may provide factual information, not opinions, concerning:

- cases before the courts;[1]
- 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";
- the role and responsibilities of the Attorney General.

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 or 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);
- the existence of any plea negotiations or possibility of a plea of guilty or other disposition.[2]

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 defence 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);
- 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 Director. Additionally, prosecutors may wish to refer calls to designated spokespersons for the Office of the Attorney General 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 Director on all media inquiries. Where a proceeding may receive media attention or create public controversy, the Attorney General personally may be called upon for comment. In such cases, counsel may be called upon to provide a briefing note to the Director. It should outline the facts, action taken to date, and the focus of media interest.

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;
- the issue or issues raised have previously generated public debate.

---

1 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 after its admissibility had been determined.

2 Note, however, that after a plea of guilty has been entered, Crown counsel may explain, for example, why a plea to a lesser included offence was accepted.

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*.[1]

Crown Elections in dual Procedure Offences

In dual procedure offences, Crown counsel has the discretion to proceed by summary conviction or indictment.[2] This discretion allows Crown Attorneys the flexibility of taking 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,[3] 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;
- 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;
- the effect that having to testify at both a preliminary inquiry and a trial may have on victims or witnesses (if procedure by indictment is chosen, this may lead to the preferring of a direct indictment[4]); and
- whether it would not be in the public interest to have a trial by jury.

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.[5]

Consenting to Re-election by an Accused

The relevant *Criminal Code* provisions on re-elections state:

> 561(1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect
>
> a. at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge;
>
> b. at any time before the completion of the preliminary inquiry or before the fifteenth day following the completion of the preliminary inquiry, as of right, another mode of trial other than trial by a provincial court judge; and
>
> c. on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor.

561(2) An accused who elects to be tried by a provincial court judge or who does not request a preliminary inquiry under subsection 536(4) may, not later than 14 days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so after that time with the written consent of the prosecutor.

565(2) If an accused is to be tried after an indictment has been preferred against the accused pursuant to a consent or order given under section 577, the accused is, for the purposes of the provisions of this Part relating to election and re-election, deemed both to have elected to be tried by a court composed of a judge and jury and not to have requested a preliminary inquiry under subsection 536(4) or 536.1(3) and may, with the written consent of the prosecutor, re-elect to be tried by a judge without a jury without a preliminary inquiry.

- **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. In some instances one of them may be decisive:

- the length 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 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
- 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. For example, it may be appropriate to direct

this requirement where someone who is normally involved in the administration of justice, such as a police officer, lawyer, or judge, is charged with a serious offence. It is important in those cases to ensure that the public has, and continues to have, confidence in the criminal justice system. It may also be appropriate to direct a jury trial where community standards are in issue, or where the guilt or innocence of the accused is of particular public importance. In addition, this provision may be used where jointly charged accused 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 Prince Edward Island, on the advice of the Director of Prosecutions.

---

1 Counsel should note that the wording of section s. 577 was substantially amended by S.C. 2002, c. 13 ("Bill C-15A").

2 See generally: *R. v. Smythe* (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 counsel 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*.

3 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.

4 See also materials in this Guide Book related to "Direct Indictments", and also materials related to "Victims of Crime".

5 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 that area, with each turning on its particular facts: see e.g.: *R. v. Quinn* (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 this Guide Book on "The Decision to Prosecute".

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*.

PLEA DISCUSSIONS AND AGREEMENTS

Introduction

In an environment of comprehensive and early disclosure of evidence, Crown Attorneys can often resolve issues of procedure, plea, facts and sentence to such an extent that running a case through the full criminal process would add little to what counsel achieve informally.

Discussions between Crown Attorneys and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid unnecessary litigation altogether, form an important and necessary part of the criminal justice system in Prince Edward Island.[1]

Discussions of this nature will be referred to throughout this section as "resolution discussions".[2] Though not defined in the *Criminal Code*, resolution discussions embrace several practices: which charges an accused may plead guilty to, how the case may proceed, what an appropriate sentence might be, what the facts of the offence are for the purposes of a guilty plea, and, if the case is to proceed to trial, how the issues might be narrowed so as to expedite the trial. Resolution discussions can also facilitate prompt, just disposition of cases in a manner more sensitive to the circumstances of the participants than would be possible in a formal trial.

Crown Attorneys are to make their best efforts to reach agreements on such issues as soon as possible. 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 acknowledgment of guilt by the accused. It must be emphasized, however, that any recommendations made to the court as part of a plea or sentence discussion are subject to the overriding discretion of the court to accept or reject any submission by counsel.[3] The test for whether a joint recommendation should be accepted depends upon if it is contrary to the public interest or would otherwise bring the administration of justice into disrepute.[4]

These guidelines are intended to clarify the issues which Crown Attorneys may attempt to resolve, and to help ensure consistency in approach.

Statement of Policy

Crown counsel's approach to resolution discussions must be based on several important principles: fairness, openness, accuracy, non-discrimination and the public interest in the effective and consistent enforcement of the criminal law.

Crown Attorneys may participate in resolution discussions where:

- the case meets the charge approval standard set out in this Guide Book as regards the Decision to Prosecute;

- the accused is willing to acknowledge guilt unequivocally; and

- the consent of the accused to plead guilty is both voluntary and informed.

Because of the importance of such discussions, Crown Attorneys should keep a record in respect of any offers made, or agreements reached.

Application of the Policy

The following guidelines are not designed to require a set form. Instead, they are intended to give Crown Attorneys some guidance as to how to engage in meaningful discussions.

Charge Discussions

Charge discussions may properly include the following:

- reducing a charge to a lesser or included offence;[5]

- 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.[6] (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.[7]).

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.

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 Prince Edward Island.[8]

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 for a range of sentence or for a specific sentence;
- 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 counsel cannot negotiate sentencing measures which apply by operation of law;[10]
- an agreement by Crown Attorneys not to seek more severe punishment by 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.

Conducting Sentence Discussions[12]

The following principles should inform Crown counsel's approach to sentence negotiation:

- Because of the benefits that flow to the administration of justice from early guilty pleas, Crown Attorneys should make their best offer to the accused as soon as practicable.[13] Absent a significant change in circumstances, the offer should not be repeated at later points in the process.[14]

- Crown Attorneys should initiate, as well as respond to, plea discussions;
- Crown Attorneys who conduct sentence negotiations shall have full authority to enter into binding agreements;[15]

- Where an accused changes counsel, Crown Attorneys should advise the new counsel of previous offers and the Crown's current position.

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:

- agreeing not to include in representations to the court embarrassing facts which are of little or not significance to the charge; and

- agreeing 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;

    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.

Pre-Trial Conferences[16]

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 80 of the *Rules of Court*.

Judicially supervised pre-trial conferences are now an entrenched and 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:

- 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;
- identifying before the pre-trial conference those areas in which agreements can be reached on issues which would shorten the proceedings.

Narrowing the Issues for Trial

For cases that are proceeding to trial, it is incumbent on Crown counsel to attempt to narrow the issues to be litigated as much as possible. Towards this end, 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;[17] and
- identify witnesses whose evidence may not be necessary, so that unnecessary subpoenas are not issued.

Consultation and Accountability

The resolution of cases and issues is often a difficult process and it is impossible to prepare precise instructions for prosecutors which predict and address the subtleties of every case. The guidance available to prosecutors is necessarily given in general terms with room for adaptability to the actual circumstances with which the prosecutors are faced. This is a process, however, in which experience can be valuable. The Law Reform Commission of Canada and the *Martin Report* have observed that

the criminal justice system should not be deprived of this experience in regard to prosecutorial decisions. Continuous consultation between prosecutors, supervisors, and experienced colleagues in regard to the resolution of cases helps to ensure consistency in approach, permits the sharing of knowledge and information, and enhances the professional development of Crown Attorneys.

It is not possible (and probably not desirable) to prepare an exhaustive list of cases and situations which should or must involve consultation and team work. 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. 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 cases:[18]

1. Crown Attorneys **must** consult with the Director in regard to the decision to terminate proceedings 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 the Director in regard to the decision to terminate proceedings 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 the Director and experienced colleagues in regard to the decision to terminate proceedings 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.

4. Crown Attorneys are strongly encouraged to consult with the Director and experienced colleagues before deciding to terminate proceedings in any case in which they are unsure of either the strength of the case or whether the evidential threshold is met.

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, counsel 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[19]. Pursuant to s. 606(1.1) of the *Criminal Code*, a court must be satisfied that pleas of guilty are made voluntarily and 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 counsel 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[20] 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.[21]

Accuracy

Crown Attorneys should maintain a complete record of all plea and sentence discussions or agreements on the file. This will promote a consistent and informed practice.

It is important to maintain detailed records of resolution discussions and the rationale for agreements. In this way, "Crown-shopping" will be discouraged and continuity in approach will be maintained. Accurate records also enhance the ability of the Crown Attorney's Office 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 which have occurred with defence counsel, any consultations with the Director or colleagues, and the rationale for the position taken. This is particularly important when the Crown Attorney has taken an "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. When a matter is resolved as a result of plea discussions and an agreement between counsel, this fact should be stated on the record in open court as a "joint submission".

Openness and Fairness

The general principles of openness and fairness apply to all forms of discussions referred to above. Both principles are explained here.

- **Openness**

Crown Attorneys should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case - - in particular, the victim (where there is one) and the police or other investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown Attorney.[22] If a plea agreement is reached, counsel should try to ensure that victims and investigating agencies understand the substance of the agreement and the reasoning behind it. The scope of this discussion may, in unusual circumstances, have to be limited by privacy or secrecy considerations in the accused's interest or in the general public interest.

Where a plea or sentence agreement has been reached, counsel should present the proposal to the trial judge in open court and on the record. This is often framed as a "joint submission". In certain circumstances, 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.[23] The best mechanism for this may be an *in camera* hearing. It is not acceptable, however, to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it.[24] 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 *Rules of Court*. Counsel may conduct sentence proceedings before the judge who presides over the pre-trial conference.

- **Fairness**

All negotiated plea or sentence agreements should be honoured by the Crown unless fulfilling the agreement would clearly be contrary to the public interest. For example, Crown Attorneys must not proceed with an agreement if counsel has reason to believe that the criteria set out in "The Decision to Prosecute" section of this Guide Book have not been met. Additionally, Crown Attorneys may be justified in refusing to fulfill an agreement if misled about material facts. The decision not to fulfill an agreement should only be made after consultation with, and approval of, the Director.

As well, if counsel disagrees with an agreement earlier reached by a colleague,[25] the matter should be referred to the Director, if the matter cannot be resolved between colleagues.

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[26] and the Director authorizes the appeal.

1 See, for example: *R. v. S.K.* (1995), 99 C.C.C. (3d) 376 at 382 (Ont. C.A.); Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (the *Martin Committee Report*), Ontario 1993, pp. 279-282; *R. v. Closs* (1998), 105 O.A.C. 392 (C.A.).

2 This subject matter is also dealt with in this Guide Book "Conduct of Criminal Litigation".

3 *R. v. Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.); *R. v. Pashe* (1995), 91 W.A.C. 212 (Alta. C.A.); *R. v. Winn* (1998), 38 O.R. (3d) 159 (Ont. C.A.), upholding 25 O.R. (3d) 750 (Ont. Ct. (Gen Div.)). See also: *R. v. Druken* 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271, (2006), 215 C.C.C. (3d) 394 (NLCA).

4 See the discussion of this subject by Rowe, J.A. in *R. v. Druken* 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271, 215 C.C.C. (3d) 394 at para 27-34.

5 This includes an offence arising out of the same transaction: *Criminal Code*, s. 606(4).

6 This practice is now regulated by s. 725 of the *Criminal Code*. For decisions which governed the practice prior to the enactment of s. 725, see *R. v. Garcia and Silva*, [1970] 3 C.C.C. 124 (Ont. C.A.); *R. v. Ness* (1987), 77 A.R. 319 (Alta. C.A.); *R. v. Getty* (1990), 104 A.R. 180 (Alta. C.A.).

7 As occurred in *R. v. Robinson* (1979), 49 C.C.C. (2d) 464 (Ont. C.A.), where the prosecution accepted a plea to robbery and relied on additional facts pertaining to a charge of rape that was withdrawn.

8 See also materials in this Guide Book regarding "Transfer of Charges" for the policy and procedure.

9 But see the mandatory aspects of some sentences such as impaired driving as set out in this Guide Book, and also Note 10.

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 in this Guide Book "Impaired Driving Cases: Notice to Seek Greater Punishment".

12 This section follows suggestions made by the *Report of the Criminal Justice Review Committee* (Ontario: Queen's Printer, 1999) p. 59.

13 In certain matters, because of the involvement of counsel during the investigative stage, discussions may take place before charges are laid.

14 This point is discussed further in these materials on, "Conduct of Criminal Litigation".

15 See, however, the commentary regarding the treatment of agreements entered into which are not in the public interest.

16 This section follows suggestions made by the *Report of the Criminal Justice Review Committee* (Ontario: Queen's Printer, 1999) pp. 66-68.

17 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.

18 These considerations and requirements to consult also pertain to the decision to prosecute. See materials in this Guide Book related to this subject.

19 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.

20 Such as a memorandum to file or, minimally, a detailed endorsement on the file.

21 See materials in this Guide Book regarding "Disclosure", and in particular on providing disclosure to an unrepresented accused.

22 See materials in this Guide Book regarding "Independence of the Attorney General in Criminal Matters".

23 Even then, it is preferable to have a court reporter present in chambers so that a complete and accurate record of the discussions can later be made available if necessary.

24 Pre-plea participation by the trial judge in charge of sentence negotiations has been universally condemned by the courts, and others: *R. v. Wood* (1975), 26 C.C.C. (2d) 100 at 108 (Alta. S.C.); *R. v. Dubien* (1982), 67 C.C.C. (2d) 341 at 346-7 (Ont. C.A.); *R. v. White* (1982), 39 Nfld. And P.E.I.R. 196 (Nfld. C.A.). Generally, see: G.A. Ferguson, "The Role of the Judge in Plea Bargaining", (1972-3), 15 Crim. L.Q. 26; Law Reform Commission of Canada, Working Paper 60, *Plea Discussions and Agreements*, at 12-15, and Recommendation 4; Curran, "Discussions in the Judges Private Room", [1991] Crim. L.R. 79.

25 In *Santobello v. New York* (1971), 404 U.S. 257 (U.S.S.C.) the court held that prosecutors must advise each other of commitments or agreements made with respect to sentencing. The fact that another prosecutor was not a party to the agreement is no excuse for defaulting on the agreement. See as well in this Guide Book, "Conduct of Criminal Litigation", regarding the circumstances in which it may be possible to depart from a previous agreement.

26 See *R. v. Wood, supra*, note 24 where the court held that the Attorney General is not barred from appealing a sentence based on a position taken at trial by a Crown Attorney. And see *R. v. Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.) where the court held that the appellate court will not necessarily hold the Crown to the position it agreed to take at trial but would determine whether the Crown should be bound by that position depending on the circumstances of each case; and *Attorney General of Canada v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.): The Crown, on appeal should not repudiate its position taken at trial except in specific circumstances. The circumstances are as follows:

a. imposition of an illegal sentence;

b. misleading of Crown counsel at trial;

c. public interest in the orderly administration of justice outweighed by gravity of crime and gross insufficiency of sentence.

But see *R. v. Agozzino*, [1970] 1 C.C.C. 380 (Ont. C.A.) and *R. v. Goodwin* (1981), 43 N.S.R. (2d) 106 (N.S.C.A.) where the courts held that the Crown could not, on appeal, repudiate the position it agreed to take at trial.

THE DECISION TO APPEAL

Introduction

This section of the Guide Book explains the criteria the Attorney General of Prince Edward Island applies in deciding whether to appeal an acquittal, judicial stay or sentence. It also identifies who should make the decision to appeal on behalf of the Attorney General and the process for deciding.

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, even 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 further defined in the *Code*, essentially the Crown is 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 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 60 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 unfavourable 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 applied consistently and is 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 for deciding whether to prosecute, but with two very important differences. First, since the facts have 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, because of the need to be selective in bringing appeals, 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 the following:

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?

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 counsel 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 responsible for appeals. The decision to appeal to the Trial Division is made by the Senior Crown Attorney responsible for appeals who may, depending on the circumstances, wish to consult with the Director.

Appeals raising significant public interest considerations should first be discussed with the Director of Prosecutions. The decision to appeal to the Supreme Court of Canada is made by the Director on the advice of the Senior Crown Attorney responsible for appeals.

Crown Attorneys should ensure that questions regarding whether a case should be appealed are brought to the attention of the Senior Crown Attorney as soon as possible so that adequate time will be available to file the notice of appeal. Crown Attorneys are obliged to bring significant adverse decisions to the attention of the Senior Crown Attorney or the Director 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 counsel'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[13] 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, Crown counsel's duty is to advance all reasonable arguments that may be made to support the decision of the court below, and to leave it to the appellate court to decide whether to allow the appeal.[14]

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 Director.[15]

Appellate counsel 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 the well-known four part test consistently used by the Supreme Court.[16] Counsel may well choose to consent to the admission of such evidence where it raises a substantial concern about an offender's innocence.[17]

Where counsel is of the view that an appeal ought to be conceded, further consultation with the Director is necessary. Before making such a recommendation, appellate counsel should seek the views of the trial counsel and, where appropriate, the investigative agency. The decision should be discussed with the Director. Where the concession is in a significant case,[18] consultation by the Director with the Attorney General may be necessary.

---

1 *Welch v. The King*, [1950] S.C.R. 412; *Dennis v. The Queen*, [1958] S.C.R. 473; *R. v. Meltzer* (1989), 49 C.C.C. (3d) 453 at 460-61 (S.C.C.).

2 *R. v. Meltzer*, *ibid*; *R. v. Robinson* (1990), 51 C.C.C. (3d) 452 at 463 (Alta. C.A.).

3 S.C. 1923, C. 41; *Cullen v. The King* (1949), 94 C.C.C. 337 at 340 (S.C.C.).

4 S.C. 1930, C. 11, s. 28; and see *R. v. Morgentaler* (1985), 22 C.C.C. (3d) 353 (Ont. C.A.), adopted by the Supreme Court of Canada at 37 C.C.C. (3d) 449 at 542 (per McIntyre, J. speaking for the unanimous Court on this issue).

5 See *Criminal Code*, para 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 C.C.C. 323 at 327 (Ont. C.A.); *The King v. Karn* (1903), 6 C.C.C. 479 at 484 (Ont. C.A.).

7 *Wexler v. The King* (1939), 72 C.C.C. 1 at 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."

8 *Rex v. Wilmot* (1940), 75 C.C.C. 161 esp. at 165 (S.C.C.).

9 (1949), 94 C.C.C. 337 at 345 (S.C.C.).

10 *Ibid*. at 347.

11 On the use of judicial resources, see *Borowski v. Attorney General of Canada* (1989), 47 C.C.C. (3d) 1 at 14-15 (S.C.C.); *R. v. Robinson* (1989), 51 C.C.C. (3d) 452 at 487 (Alta. C.A.); but see also materials in this Guide Book on "The Decision to Prosecute".

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 C.C.C. (3d) 193 (S.C.C.); *R. v. M. (C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.); *R. v. McDonnell* (1997), 114 C.C.C. (3d) 436 (S.C.C.). Special considerations also apply when the sentence was one which Crown counsel proposed at trial: see this Guide Book regarding, "Plea Discussions and Agreements".

13 The Supreme Court has been highly critical of concessions by Crown counsel that it felt should not have been made: see *Schacter v. The Queen*, [1992] 2 S.C.R. 679, and *Miron v. Trudel et al*, [1995] 2 S.C.R. 418 at 485-486.

14 Bearing in mind that many legal errors may be regarded as causing an accused no prejudice: *Criminal Code*, s. 686(1)(b)(iv).

15 Broader considerations may apply to such decisions requiring a consultation by the Director with the Attorney General.

16 See e.g., *R. v. Palmer and Palmer* (1979), 50 C.C.C. (2d) 193 (S.C.C.), *R. v. Stolar* (1988), 40 C.C.C. (3d) 1 (S.C.C.).

17 In this regard, see *Report of the Commission on Proceedings Involving Guy Paul Morin*, Toronto: Queen's Printer, 1998, Vol. 2, pp. 1170-1171. See also the Lamer Report 2006.

18 Broader considerations such as social or economic policy factors may apply to such decisions requiring a consultation with the Attorney General.

SPOUSAL VIOLENCE

Introduction

Although physical abuse of another person has always been a criminal offence, where such violence occurred in a domestic context, it has not always been treated as a crime. Today, the approach is different: spousal violence is recognized as intolerable, and is to be regarded as criminal activity.[1] At the same time, it is important to recognize some special features of spousal 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 than any sanctions imposed upon the offender may adversely affect the complainant as well.

Prince Edward Island has had a policy on "Spousal Abuse Police Charging" since October 1983 when the Prince Edward Island Minister of Justice and Attorney General requested that police forces institute a policy of laying charges in all domestic violence cases where there were reasonable and probable grounds to believe an assault had taken place. The policy was confirmed in May 1988. The policy was further updated effective October 1, 2004.

However, despite this commitment to vigorous action, the incidence of spousal violence remains unacceptably high. Further, it must also be recognized that policies themselves, when applied in an inflexible manner, may have unintended negative consequences for the victims of spousal violence. According, this policy attempts to draw on more recent experiences in seeking to attain the objective of reducing spousal violence.

Application of the Policy

This policy relates to **"spousal 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 domestic partners. "Domestic partners" includes current or previous husbands and wives, common law spouses and same sex couples. 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, the policy is not specifically designed for those situations.

This policy is intended to reflect the special circumstances of the areas in which it is applied. Such circumstances include the fact that in many small communities in Prince Edward Island, the options available to the victims of spousal violence may be limited, because, for example:

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 community.

The policy places primary responsibility for decision-making with the police and Crown Attorneys rather than with complainants. At all stages of the criminal process, Crown Attorneys shall engage in appropriate consultation with the police and the complainant to ensure that the complainant is protected, informed and supported.

The policy seeks to guide Crown Attorneys discretion, not remove it. Crown counsel must consider and apply other Guide Book policies, including the "Decision to Prosecute"[5] and "Victims of Crime"[6] policy while bearing in mind the strong public interest in the denunciation and deterrence of spousal violence.[7]

Judicial Interim Release[8]

Crown Attorneys should require from police sufficient information to determine whether releasing the alleged offender from custody would be an unreasonable risk to the safety of the complainant. 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;[9]
- custody and access arrangements through a neutral third party;
- non-attendance at or near the residence or place of work of the complainant; and
- surrender of all firearms, ammunition, explosives and Firearms Possession and Acquisition Certificates.[10]

The complainant in spousal 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, one must bear in mind that responsibility for investigation rests with police, and responsibility for prosecution with the Crown Attorney. 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 from the vantage point of the complainant, every reasonably effort should be made by Crown counsel to mitigate such intrusion and trauma. Simultaneously, however, Crown Attorneys must make every reasonable effort to secure a full and frank hearing of the evidence in respect of spousal violence offences. 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 counsel opposes release of an accused person charged with a spousal violence offence and the complainant is willing at that time to cooperate with the prosecution of the case, Crown counsel may deem it appropriate to elicit the complainant's evidence on the record, in order to secure a statement from the complainant which might be used at trial as substantive evidence should the legal requirements for its admission be met.

Court Brief

At a minimum the court brief should contain:

- a summary of the investigation;
- any utterances by the complainant to the 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 cooperate 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 spousal violence offences or other offences of violence;

- summary of past police involvement pertaining to this accused and the investigation or prior spousal violence offences; and

- the details of any attempt by the accused to contact the victim in violation of a court order.

Review of detention or conditions of release

Frequently, the complainant in a spousal 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. 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.

Violation of Release Conditions

Usually, a breach of bail terms imposed with respect to a spousal violence offence will be prosecuted, particularly where the breach involves another spousal 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, pursuant to s. 524(8) of the *Criminal Code*. Crown counsel shall also consider seeking a non-communication order under s. 515(12) of the *Criminal Code* where the accused is detained.

Preparation of Witnesses

Witness preparation is a pivotal function of Crown Attorneys prosecuting spousal violence offences, and counsel are often assisted in this task by Victim Services Workers. Crown Attorneys should attempt to provide support, encouragement and understanding; a non-judgmental attitude where the complainant/witness is reluctant, but assurance that it is wise and prudent for a fearful complainant 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 spousal 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 to what occurred;
- 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;
- confirm that the complainant has been made aware of available community services, including the services of a Victim Services Worker;
- 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

With respect to spousal violence offences, Crown Attorneys may find that many 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 Services Worker or other support person; and
- applications to the court pursuant to:
    a. subsection 486(1) (exclusion of public)
    b. subsection 486.2(1) (use of screen or closed circuit television where complainant is under 18 years of age)

c. subsection 486.4 (prohibition against publication or broadcast of complainant's identity in sexual offence cases).

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 counsel 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;
- asking for a warrant, where the complainant's evidence is crucial, no information is available concerning the reasons for non-appearance and the offence is a serious one; 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 governing each option should not be considered exhaustive. They are intended to underscore the fact that great care must be taken in reaching a decision.

Where counsel 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 Director.

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 Crown counsel is aware before trial that a witness is likely to refuse to answer questions before the witness testifies counsel 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

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 counsel 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 Courts' judgement in *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257;
- 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*; and
- seeking leave to cross-examine the complainant as an adverse witness pursuant to s. 9(1) of the *Canada Evidence Act*.

The recanting witness

On occasion, the complainant in a spousal violence case will indicate to police or Crown Attorney prior to completion of trial that the offences alleged did not occur, in whole or in part. Crown counsel must inform defence accordingly, in accordance with disclosure policies.[11]

Where the Crown Attorney is satisfied that the recantation is true (that is, that no spousal violence offence in fact occurred), then proceedings against the accused should be terminated at once and the matter referred to the police for consideration of criminal action against the complainant with respect to the initial complaint. Such a step may only be taken after consultation with the Director.

Where Crown counsel is not satisfied that the recantation is true but there is no longer a reasonable prospect of conviction, proceedings should be terminated. The fact of recantation does not in and of itself require termination of the proceedings. Crown Attorneys should consider the other means of presenting the case referred to immediately above.

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 counsel, 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[12] apply.

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 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 spousal violence offence 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 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.

Termination of Proceedings

After reviewing the prosecution brief and, where necessary, consulting with the police and interviewing the complainant, counsel may decide that the case is not appropriate for prosecution. In these circumstances, proceedings may be terminated but only after careful consideration of all aspects of the case including any alternatives with respect to presentation of evidence, as noted below. Less experienced counsel should terminate proceedings only after consultation with a Senior Crown Attorney or the Director.

The question of discontinuing proceedings may require reconsideration by Crown Attorneys at any point in the criminal proceedings. Once Crown counsel determines that there is no *reasonable likelihood of conviction* the prosecution should be terminated. Where the evidence is sufficient to warrant continuation, counsel should consider the following factors in determining whether the prosecution is in the public interest:

- the seriousness of the present assault;
- 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;
- 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 behaviour through counselling or some other treatment or program;
- whether the accused has prior convictions for spousal violence offences or other violent offences; and
- the impact that not prosecuting 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.[13]

Sentence

If an accused is found guilty Crown Attorneys shall recommend a sentence which, among other goals, reflects public denunciation of spousal violence offences. Crown Attorneys must also bear in mind changes to the *Criminal Code* in 1999 to enhance the role of victims in sentencing proceedings.[14] The following general considerations apply:

- Counsel should oppose recommendations for conditional or absolute discharges unless extraordinary and compelling circumstances are present.
- Counsel should bear in mind that s. 718.2(a)(ii) of the *Criminal Code* makes abuse of one's spouse, common law partner or child an aggravating feature on sentencing.
- Consideration should be given to a guilty plea as a mitigating factor. By their nature, spousal violence offences are largely unpredictable in terms of outcome. Reformation of the offender is more likely where the offence is admitted. 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 a spousal violence program.

Counsel should oppose recommendations for conditional or non-custodial sentences unless conditions can be imposed that will provide adequate protection for the complainant's safety. Counsel should not, however, consider incarceration the only appropriate solution; for example, counsel should bear in mind the principles in *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.), in relation to the incarceration of aboriginal offenders.

- Counsel 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 counsel must be able to advise the court in that regard.

- Counsel 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 Licence.
- Counsel should consider representations in support of an order for forfeiture of any weapon or ammunition used in the commission of a spousal violence offence: see s. 491 of the *Criminal Code*.

- Where the sentence imposed is erroneous in principle, an appeal should be considered.[15]

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* and referrals to Alternative Measures should rarely be pursued as an alternative in cases of spousal violence offences. Crown Attorneys should note on the file the reasoning behind the use of an 810 or referral to Alternative Measures on a spousal violence file.

---

1 See, generally, Final Report of the Ad Hoc 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 1993 Violence Against Women Survey reported that 29% of every married women (2.65 million) reported having experienced physical or sexual violence by their current or previous marital/common law partner.

3 Statistics Canada's Spousal Homicide Juristat (Vol. 14, No. 8, 1994) reported that 38% of adult female homicide victims were killed by their husbands.

4 A 1995 study on *only* the health-related costs of violence against women in Canada estimated that in 1992, 28% of battered women sought medical care due to the abuse at an estimated medical cost of $1.5 billion (excluding

costs for hospital admissions, and physicians services): see "The Health-Related Costs of Violence Against Women in Canada: The Tip of the Iceberg" by Tannis Day, Centre for Research on Violence Against Women and Children (London, Ontario) 1995, page 4. This does not address of course the huge emotional costs incurred by the victims of these crimes, costs related to the damage these crimes do to victims' children, or the resources contributed by society each year to investigate and prosecute spousal violence offences.

5 See materials in this Guide Book related to "The Decision to Prosecute".

6 See materials in this Guide Book related to "Victims of Crime".

7 See *Criminal Code* s. 718.2(a).

8 See materials in this Guide Book related to "Victims of Crime".

9 Even where an accused person is detained, non-communication orders may be imposed pursuant to s. 515(12) of the *Criminal Code*.

10 These conditions should be considered even where no firearms were involved in the incident, due to the tendency of spousal violence to escalate in seriousness.

11 See materials in this Guide Book related to "Disclosure".

12 See materials in this Guide Book related to "The Decision to Prosecute".

13 Crown Attorneys should have regard to **Directive #4**; "Termination of Proceedings", in the section of this Guide Book on the "Conduct of Criminal Litigation".

14 This subject is dealt with more extensively in the "Victims of Crime" section of this Guide Book.

15 In accordance with Guide Book materials regarding "The Decision to Appeal".

VICTIMS OF CRIME

Introduction

The Attorney General of Prince Edward Island has emphasized the need for heightened awareness on the part of all members of the justice community of the needs and perspectives of victims of crime.

In 1999, Parliament enacted amendments to the *Criminal Code* that addressed the situation of victims within the criminal justice system.[1] These amendments were the result of a comprehensive review by the Standing Committee on Justice and Human Rights, and built upon previous protections added to the *Criminal Code* in 1998 (e.g., victim impact statements), 1993 and 1997 (in relation to child victims). The amendment also sought to further implement the commitment to protection of victims made by Federal, Provincial and Territorial Ministers of Justice in their 1988 Canadian Statement of Basic Principles of Justice for Victims of Crime,[2] and updated in 2003

The preamble to the Statement of Principles noted that:

> ... the Parliament of Canada supports the principle that victims of and witnesses to offences should be treated with courtesy, compassion and respect by the criminal justice system ...

Elsewhere, the preamble noted that Parliament wished to:

- encourage and facilitate the participation of victims in the criminal justice system;
- ensure the protection of victims' rights;
- minimize the inconvenience to victims;
- ensure that victims' concerns are considered in decision-making that affects them; and
- ensure that victims are adequately informed.

This policy is intended to outline the ways in which Crown counsel can help achieve these goals, and underscore the importance of such efforts.

Application of the Policy

As a result of the 1999 amendments, "victim", is now defined in s. 2 of the *Criminal Code* as, "includes the victim of an alleged offence".[3] While any definition of victim would embrace not only

a person experiencing direct harm, but also friends, family and society at large, this policy is intended to deal primarily with those 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 has a clear understanding of the proper role of Crown Attorneys, particularly:

a. that the Crown Attorney does not represent him or her as their legal advisor in the proceedings; and

b. that Crown Attorneys must be scrupulously fair in presenting the case, which may include, for example, presenting evidence that is favourable to the accused.

Crown Attorneys must take every reasonable opportunity to invoke the mechanisms and procedures provided by law to attempt to ensure that justice is seen to be done in the eyes of victims in the proceedings.[4] 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 kept safe and protected, as much as possible, from justice process hardship. Crown Attorneys should be well versed in the aids and services available so that child witnesses might be assisted effectively.

Operation of the Policy

- **Special Needs of Victims**

While the needs and circumstances of each victim will be as unique as each individual and case, there are some general considerations Crown Attorneys should bear in mind in certain kinds of cases.

Where the victim of a crime is a child,[5] communication and protection take on special importance. Crown Attorneys must consider what measures ought to be invoked to ensure the victim appreciates any information that is conveyed. For example, Crown Attorneys should seek to use language appropriate to the maturity of the child, and may want to conduct interviews of the child in a place and manner more likely to achieve the victim's comfort and security. Children tend to be more dependant than adults and, accordingly, they tend to be more vulnerable. Crown Attorneys should always adopt 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. Much research in this area has been conducted and with resulting benefits to all participants.[6]

Where the crime is a spousal violence offence[7] Crown Attorneys should be aware of the dynamics commonly at play in respect of victims of these offences. The needs of spousal violence victims are discussed in the section of this Guide Book on "Spousal 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 counsel 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 crimes of violence victims often harbour a legitimate sense of violation, one that 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 security and comfort. Such measures should include 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.[8]

Crown Attorneys will often deal with victims who have special physical needs.[9] Similarly, in some cases the first language of a victim is not the same as that of Crown counsel or the language in which proceedings are conducted. These situations require special consideration and planning by Crown counsel to eliminate barriers that might impede involvement of victims in criminal proceedings.

Many victims may view court proceedings with suspicion because they feel people of their race, ethnic origin, 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.

- **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.[10] 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, in accordance with the Office of the Attorney General Policy on Alternative Measures, ensure consultation has occurred with the victim prior to determining whether an alternative to prosecution is appropriate. Where an alternative to prosecution is appropriate, care must be taken to ensure that the decision is explained to the victim, particularly how the disposition will protect the victim's interests.

- **Judicial Interim Release**

The 1999 amendments contain a number of provisions relevant to bail hearings with which Crown Attorneys should be familiar. These include provisions concerning:

- obligations imposed on peace officers and others to protect victim safety;[11]
- the conditions of a bail order relating to non-communication with the victim,[12] general powers to ensure the victim's security,[13] and possession of weapons,[14] and
- the test to be employed by the presiding judge in deciding whether to grant bail, which now explicitly requires consideration of the victim's safety.[15]

- **Safety Measures**

The role of Crown Attorneys in respect of protecting and considering victims goes beyond the conduct of criminal prosecutions. Crown counsel should 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, for example, seeking to prevent contact between potential victims and persons who may commit violent acts. Crown Attorneys should also consider in a criminal proceeding measures provided by law to protect potential victims as yet unknown: 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 generally where circumstances warrant.

- **Aids to Trial Testimony**

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 Crown counsel.

Prior to speaking to the Crown Attorney, victims often speak to a Victim Services Worker. Victims should be told about the availability of a Victim Services Worker. This should be done as early in the process as possible. It is usually carried out by the police in most parts of Prince Edward Island. Where possible, Crown Attorneys should speak with any victim of crime prior to his or her courtroom testimony, in order to:

- explain relevant prosecution policies (for example, in cases of spousal 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, before 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, counsel 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 Services Worker;
- 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 to describe the harm.

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. These measures include:

- the use of a screen or closed circuit television;[16]
- the services of a support person;[17]
- the use of pre-recorded video evidence;[18]
- the use of affidavit evidence;[19]
- *in camera* proceedings;[20]
- an order banning publication that might identify the victim;[21]
- opposing production to the accused of the victim's personal records;[22]
- opposing the admissibility of evidence of the victim's prior sexual conduct,[23] and
- preventing abusive cross-examination by self-represented accused.[24]

- **Participation in Court Processes**

There are ways other than testimony whereby a victim can participate in criminal proceedings. Crown Attorneys shall consider the victim in respect of the following:

- 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 amendments 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 offences alleged are consulted, where appropriate;

- where Crown counsel discloses to defence 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,[25]

- 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[26] or access to proceeds of crime that have been forfeited;[27] and

- participation of the victim in sentencing hearings, by means of *viva voce* testimony, a Victim Impact Statement[28] (which the victim should be advised can be read aloud if the victim so desires or presented by other means, e.g. by videotape)[29] or otherwise.

It is recognized that, in most cases, many of the above issues will be addressed by the Victim Services Worker.

- **Victim Fine Surcharges**

Under the 1999 amendments, victim surcharges are automatic where persons are convicted under the *Criminal Code*.[30] In addition, Crown counsel 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. Since convictions/acquittals and/or sentences may be appealed, the duty to inform victims includes explaining appeal processes, including, *inter alia*, the possibility of judicial interim release pending determination of appeal and of a new trial being ordered.

---

1 S.C. 1999, c. 25, *An Act to amend the Criminal Code (Victims of Crime) and another Act in consequence* (commonly referred to as "Bill C-79"), proclaimed in force December 1, 1999.

2 The Statement may be found on the Federal Department of Justice's website.

3 Please note that a definition of "victim" for the purposes of victim impact statements is found in s. 722(4) of the *Code*.

4 As recognized by the Supreme Court in *R. v. E. (A.W.)* (1993), 83 C.C.C. (3d) 462 at 493. This section should also be read in conjunction with materials in this Guide Book on "Spousal Violence".

5 "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.

6 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.*

7 This term is defined in the section of this Guide Book regarding "Spousal 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 domestic partners".

8 The victim may have to be advised about the availability of independent legal representation.

9 For example, when prosecuting the offence of sexual exploitation of a person with a disability under s. 153.1 of the *Criminal Code*.

10 In accordance with the Office of the Attorney General Policy on Alternative Measures.

11 See ss. 497(1.1)(a)(iv), 499(2)(c) and 499(2)(h) of the *Criminal Code*.

12 See ss. 515(4)(d), 515(4.2), 515(12), 516(2), 522(2.1), 522(3) of the *Criminal Code*.

13 See sections 515(4)(e.1), and 515(4.2) of the *Criminal Code*.

14 See section 515(4.1)(d) of the *Criminal Code.*

15 See s. 515(10)(b) of the *Criminal Code*.

16 See s. 486.2(2) of the *Criminal Code*.

17 See s. 486.1(1) of the *Criminal Code*. A support person is available for persons under 18 years, and those with mental or physical disabilities.

18 See s. 715.1 of the *Criminal Code*.

19 See s. 657.1 of the *Criminal Code*.

20 See s. 486(1) of the *Criminal Code.*

21 See s. 486.4 of the *Criminal Code*.

22 See s. 278.2 of the *Criminal Code*. The victim may wish independent representation on such issues.

23 See s. 276 of the *Criminal Code*. The victim may need independent representation on such issues.

24 See section 486.3 of the *Criminal Code*. See also s. 537(1.1) regarding abusive cross-examination at preliminary hearings.

25 See the section in these materials on the subject of "Disclosure".

26 See ss. 738-741.2 of the *Criminal Code*.

27 See s. 462.43 of the *Criminal Code*.

28 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 Office of the Attorney General has a form prescribed for this process.

29 See s. 722(2.1) of the *Criminal Code*.

30 See s. 737(1) of the *Criminal Code.*

TRANSFER OF CHARGES

Introduction

Offences are normally 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 sets out the policy on when the Attorney General of Prince Edward Island will consent to transfers.

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 must not be a section 469 offence;[1]
- the proceedings must have been instituted at the instance of the Government of Prince Edward Island and conducted by or on its behalf;
- the Attorney General of Prince Edward Island must consent to the transfer; and
- the accused must have agreed to plead guilty to the charge being waived.

Provincial offences cannot be transferred out of the province.

Statement of Policy

In general, the Attorney General or his designate will, upon the request of the accused, together with an undertaking to plead guilty, consent to a transfer of charges from one jurisdiction to another. However, where on the facts of a case or the circumstances surrounding it, a proposed transfer will not be in the public interest, consent should be refused.

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 jurisdiction to which it is proposed that the charge be transferred (the "receiving" jurisdiction)?

b. Are the sentencing practices and precedents in the receiving jurisdiction reasonably consistent with those of the jurisdiction from which the charge is to be transferred (the "originating" jurisdiction)?

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 significant aggravating or mitigating facts likely to be in issue, thus requiring the Crown to call *viva voce* evidence from the originating jurisdiction under the rule in *R. v. Gardiner*?[2]

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 "A" to this chapter. It should be noted that this protocol may address some situations which would not apply to Provincial prosecutions such as transfer of charges under the *CDS Act* or other proceedings prosecuted at the instance of the DPP Canada.

Procedure[3]

The *Application for Transfer*,[4] 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;

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*[5] 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 Director or designate of the originating office.

Besides the *Consent to the Transfer of Charges*, 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, if the charge(s) is under section 253 of the *Criminal Code*.

To ensure that the receiving court acquires these documents, the office in the originating jurisdiction must ensure that:

a. any inquiries concerning inter-provincial transfers be referred to the Transfer Coordinator. The Coordinator will then request the file from the Crown Office and the original information from the court. The P.E.I. Coordinator will send the entire package to the Transfer Coordinator in the receiving jurisdiction;

b. Crown counsel appearing in the receiving court obtains 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 counsel appearing in the receiving court receives a copy of any correspondence or notes made by the counsel 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 should be advised of the transfer.

It is important to note that a court hearing or an endorsement by a judge is not required.

Additional Matters

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 Transfer Coordinator to be forwarded to the originating province.

References

R. v. Parisien (1971), 3 C.C.C. (2d) 433 (B.C.C.A.): It is in the interest of the public that justice be speedily administered and that all known charges against an accused be disposed of as early as possible. Where the authorities of a province in which there are outstanding charges against an accused know that the accused is facing other charges or is imprisoned in another province, the authorities in the first province should take steps to ensure that the accused is aware of the outstanding charges. This would allow the accused to take advantage of subsection 478(3) of the *Criminal Code*.

R. v. Phillip (1989), 51 C.C.C. (3d) 488 (B.C.S.C.): The provincial court is a statutory court and there is no statutory or common law authority in a provincial court to stay execution of out-of-province warrants.

R. v. Fleming (1992), 72 C.C.C. (3d) 133 (Man. Q.B.): The courts will not interfere with the Attorney General's refusal to consent to a transfer unless it is arbitrarily exercised.

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.

---

1 In practical terms, this means that murder charges cannot be transferred: see *Criminal Code* section 469.

2 [1982] 2 SCR 368 at 413 ff.; 68 C.C.C. (2d) 477 at 513-15.

3 See also in this Guide Book materials related to "The Independence of the Attorney General in Criminal Matters".

4 A sample application for transfer is attached as Appendix "B".

5 A sample consent form is attached as Appendix "C".

Appendix "A"

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 (i.e. s. 334/s. 355; s. 253(a); s. 253(b)) 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.

Appendix "B"

Canada

Province of Prince Edward Island

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 the 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 _____ , 200__ .

_____ _____

Witness Applicant

Appendix "C"

CONSENT TO TRANSFER OF CHARGES

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 Prince Edward Island 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 Prince Edward Island;

NOW THEREFORE the undersigned consents to have the accused brought before a court in the Province of _____ 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 , 200 .

_____

Cyndria L. Wedge
Director of Prosecutions and
Agent for the Attorney General
of Prince Edward Island

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 such important subject-matter as workplace safety and environmental protection.

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 a different arm of the 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.

More recently, the Supreme Court of Canada has held:[2]

> 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.

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 or departmental counsel (usually a lawyer from Legal Services) 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 Attorneys may be called upon to advise the investigative agency. For example, Crown Attorneys may be called upon by investigators prior to the obtaining of a search warrant. As well, Legal Services counsel may be contacted by the department being searched during the execution of that warrant.

The Office of the Attorney General cannot provide legal advice to both the investigating agency and the department under investigation in such circumstances. Accordingly, the role of departmental counsel (usually from Legal Services) 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.

In both circumstances, Crown Attorneys will assess the proposed prosecution by applying the policy on "The Decision to Prosecute".[3] This will be done in consultation with the Director. In all such cases, an opinion may also be sought from counsel from the private bar ("outside counsel") or counsel for another provincial Attorney General who will be asked to apply the "Decision to Prosecute" criteria. Once opinions from both the Crown Attorney and outside counsel are obtained, the matter will be forwarded to the Director for a final decision.

---

1 *R.* v. *Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 238(S.C.C.).

2 *R.* v. *Shirose* (1999), 133 C.C.C (3d) 257 at 273 (SCC).

3 See also materials in this Guide Book related to the "Decision to Prosecute".

DIRECT INDICTMENTS

Introduction

The *Criminal Code* s. 577, permits the Attorney General or the Deputy Attorney General, to 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.

Such a power is a recognition of the ultimate 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. 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*; a preliminary inquiry, in, for instance, cases essentially founded on wire-tap evidence, may be considered by the Attorney General to be expensive and time consuming for no purpose. 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 Prince Edward Island when determining whether to consent to the preferment of an indictment pursuant to this provision. It will also describe 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 Prince Edward Island 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 resulting, for instance, from persistent collateral attacks on the 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 not be met unless the case is brought to trial forthwith;

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 in the section 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 requesting Crown Attorney must ensure preparation of the following:

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 be

sufficient to 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 will present the request to the Deputy. If the Deputy Attorney General accepts the recommendation, he will present the request to the Attorney General.

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, where the case is being sent directly to trial without a preliminary inquiry, there is a heightened need for early and full disclosure in accordance with the section in this Guide Book titled, "Disclosure". 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 Director 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, however, the accused may re-elect for trial by a judge without a jury, with the written consent of Crown counsel. 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 this Guide Book on "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 is intended to avoid the erroneous conclusion 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, as outlined in this Guide Book on "Elections and Re-elections", be expressly endorsed on the indictment.

---

1 *R.* v. *Charlie* (1998), 126 C.C.C. (3D) 513 at 521-522 (B.C.CA.)

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, for example, consideration of whether

> requiring the witness to testify about the same matters a number of times will cause harm to that person, or whether the circumstances will inhibit the presentation of candid and truthful evidence.

INFORMER PRIVILEGE

Introduction

This section of the Guide Book describes the rule and exceptions to the rule protecting the identity of police informers in prosecutions. The privilege is based on an important principle of public policy in the field of law enforcement. The Guide Book also sets out the Attorney General's policy on protecting the identity of such informers.

Importance of the Privilege

The modern statement of the privilege dates back to *Marks v. Beyfus*.[1] The leading case in Canada is the Supreme Court's decision in *R. v. Leipert*,[2] which contains a number of significant statements on the scope and application of the rule. The judgment stresses the significance of the rule:

> A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same.[3]
>
> In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it.[4]

Statement of Policy

Crown Attorneys have a duty to protect the identity of police informers.[5] Where the privilege applies, unless there is some other evidentiary basis to make an objection, Crown Attorneys must object to disclosure of information tending to reveal an informer's identity or status as an informer.

Crown Attorneys should discuss with the investigative agency whether there is likely to be any issue regarding use of informers in a proceeding.

Informer issues arise not only during court proceedings, but also affect pre-trial disclosure obligations.

Early discussions with investigators will also be beneficial in that counsel can learn the extent of any risk to the informer if disclosure is ordered by the court, determine whether it may be necessary to have a certificate prepared under section 37 of the *Canada Evidence Act*, or gather any other evidence to support the Crown's objection. (A selective list of authorities is attached to help in developing supporting arguments.).

Sometimes courts may, contrary to the position taken by the Crown, order the informer's identity revealed or order the informer to appear. Crown Attorneys have several options which may vary depending on the level of court at which the issue arises;

a. comply with the judge's ruling. Before doing so, counsel should consult with the police and the informer, where possible, to determine if the informer is likely to be subject to retribution if the judge's ruling is followed and, if so, whether the police can provide protection;

b. invoke section 37 of the *Canada Evidence Act*. Crown Attorneys can assert this claim personally,[6] however, it is preferable for a senior police officer to do so, as occurred in *R. v. Archer*;[7]

c. stay and re-commence proceedings. This was done in *R. v. Scott*.[8] The Supreme Court found this procedure justifiable in the unusual circumstances of the case, but it is clearly an extraordinary recourse and should be used only rarely and in compelling situations;[9] or

d. terminate the proceedings where necessary.[10]

Operation of the Privilege

The privilege belongs to the Crown, but the Crown (including the police) cannot waive the privilege without the consent of the informer.[11] Even if Crown Attorneys do not assert the rule, the court must apply it of its own motion.

Scope of the Privilege

The privilege protects more than the informer's name. *R. v. Leipert* makes it clear that it protects information which may tend to reveal the identity of the informer.[12] Thus, a witness cannot be asked questions which narrow the field of possible informers in a way that makes giving the informer's name redundant.

The privilege is closely related to the rule protecting disclosure of police investigative techniques, such as the location or type of audio or video surveillance equipment and the manner of surreptitious entry to install it.[13]

Situations Where the Privilege Might Not Apply

In *R. v. Leipert*,[14] the Court confirmed that the only exception to the privilege occurs where the accused's innocence is at stake. In *R. v. Scott*,[15] the Supreme Court of Canada identified three situations[16] in which the informer's identity or status as an informer may have to be disclosed:

a. where the informer is a material witness to the crime;[17]

b. where the informer has acted as an *agent provocateur*; that is, he or she played an instrumental role in the offence.[18] This exception could properly apply to cases where the accused intends to rely on the "defence" of entrapment; however, in order to rely on this exception, the accused will as a general rule be required to establish some evidentiary basis for the defence; and

c. where the accused seeks disclosure of the materials filed in support of a search warrant or wiretap application to establish that the search was not undertaken on reasonable grounds and therefore contravened section 8 of the *Charter of Rights and Freedoms*.[19]

In each instance, an accused must show "some basis" to believe his or her innocence is at stake. If that basis is shown, the court should "only reveal as much information as is essential to allow proof of innocence".[20]

Distinguishing Agents from Informers

One of the most difficult problems in this area of the law is determining when the privilege applies to the actions of persons cooperating with the police. The informer privilege does not apply when the information-provider is characterized as a "state police agent" or "*agent provocateur*", rather than an "informer".

The leading case on the distinction between informers and agents is the Supreme Court's decision in *R. v. Broyles*,[21] in which the following statement occurs:

> In determining whether or not the informer is a state agent, it is appropriate to focus on the effect of the relationship between the informer and the authorities on the particular exchange or contact with the accused. A relationship between the informer and the state is relevant for the purposes of s. 7 only if it affects the circumstances surrounding the making of the impugned statement. A relationship between the informer and the authorities which develops after the statement is made, or which in no way affects the exchange between the informer and the accused, will not make the informer a state agent for the purposes of the exchange in question. Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange. I would, accordingly, adopt the following simple test: would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?

Since the relationship between the police and the informer/agent is crucial to the determination of the person's status, it is essential that Crown counsel obtain a full understanding of the nature of that relationship from the police.

References

(I) Statements of the Rule

R. v. Leipert (1997), 112 C.C.C. (3d) 385 (S.C.C.)

Bisaillon v. Keable (1983), 7 C.C.C. (3d) 385 (S.C.C.)

R. v. Scott (1990), 61 C.C.C. (3d) 300 (S.C.C.)

Marks v. Beyfus (1890), 25 Q.B.D. 494 (C.A.)

Solicitor General of Canada v. Royal Commission of Inquiry into Confidentiality of Health Records in Ontario, [1981] 2 S.C.R. 494

Roviaro v. U.S. 353 U.S. 53 (1956)

(ii) Exceptions to the Rule

R. v. Davies (1982), 1 C.C.C. (3d) 299 (Ont. C.A.)

R. v. Hunter, supra

R. v. Garofoli (1990), 60 C.C.C. (3d) 161 (S.C.C.)

R. v. Parmar (1987), 34 C.C.C. (3d) 260 (Ont. H.C.)

Re Chambers and The Queen (1985), 20 C.C.C. (3d) 440 (Ont. C.A.)

R. v. Chiarantano, [1991] 1 S.C.R. 906

R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.)

R. v. Ramirez (1996), 97 C.C.C. (3d) 353 (B.C.C.A.)

R. v. Barzal (1993), 84 C.C.C. (3d) 289 (B.C.C.A.)

R. v. Kelly (1995), 99 C.C.C. (3d) 367 (B.C.C.A.)

(iii) Section 37 Canada Evidence Act

R. v. Archer (1989), 47 C.C.C. (3d) 567 (Alta. C.A.)

Goguen and Albert v. Gibson, [1983] 1 F.C. 872; aff'd 10 C.C.C. (3d) 492 (F.C.A.)

Re Kevork and The Queen (1984), 17 C.C.C. (3d) 426 (F.C.T.D.)

Bailey v. RCMP, (19 December 1990) (F.C.T.D.) [unreported]

R. v. Richards (1997), 115 C.C.C. (3d) 377 (Ont. C.A.)

A.G. Canada v. Sander (1994), 90 C.C.C. (3d) 41 (B.C.C.A.)

(iv) What Defence Counsel Needs to do to Establish an Exception to the Secrecy Rule

R. v. Leipert, supra

R. v. Collins (1989), 48 C.C.C. (3d) 343 (Ont. C.A.)

R. v. Scott, supra

R. v. Garofoli, supra

U.S. v. McManus 560 F. 2d 747 (1977, 6th Circ.)

In Re U.S., 565 F. 2d 19 (1977, 2nd Circ.)

Alvarez v. U.S., 529 F. 2d 980 (1976, 5th Circ.)

U.S. v. Tucker, 552 F. 2d 202 (1977, 7th Circ.)

Rugendorf v. U.S., 376 U.S. (528 (1964)

(vi) Protection of Secret Police Techniques

R. v. Durette (1994), 88 C.C.C. (3d) 1 (S.C.C.)

R. v. Finlay and Grellette (1985), 23 C.C.C. (3d) 48 (Ont. C.A.)

R. v. Playford (1987), 40 C.C.C. (3d) 142 (Ont. C.A.)

R. v. Johnson, [1989] 1 All E.R. 121 (C.A.)

Rogers v. Home Secretary, [1973] A.C. 388

Re Cadieux and Director of Mountain Institution (1984), 13 C.C.C. (3d) 330 (F.C.T.D.)

R. v. Thomas (1998), 124 C.C.C. (3d) 178 (Ont. Ct. (Gen. Div.))

(vii) Academic Works

L.E. Lawler, "Police Informer Privilege: A Study for the Law Reform Commission of Canada", (1986), 28 Crim. L.Q. 92

T.P. McCollum, "Sketching the Parameters of the Informer Privileges" (1975), 13 Am. Crim. L.R. 117

B.A. MacFarlane et al, *Drug Offences in Canada*, 3d ed. Aurora: Canada Law Book, 1996

---

1 (1890), 25 Q.B.D. 494.

2 (1997), 112 C.C.C. (3d) 385 (SCC).

3 *R. v. Leipert*, at p. 390.

4 *R. v. Leipert*, at p. 392.

5 *R. v. Leipert*, at 392-393; *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 14 (S.C.C.).

6 *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.).

7 (1989), 47 C.C.C. (3d) 567 (Alta. C.A.).

8 (1990), 61 C.C.C. (3d) 300.

9 Counsel considering this option should consult with the Director.

10 Crown Attorneys should have regard to **Directive #4**; "Termination of Proceedings", in the section of this Guide Book on the "Conduct of Criminal Litigation".

11 *R. v. Leipert*, at pp. 392-393.

12 *R. v. Leipert*, at pp. 393-394.

13 *R. v. Durette* (1994), 88 C.C.C. (3d) 1 at 29, 54 (S.C.C.); *R. v. Johnson*, [1989] 1 All E.R. 121 (C.A.); *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.); *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.); *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.). See also Part VII, Chapter 37, "Protecting Confidential Information under the *Canada Evidence Act*".

14 *R. v. Leipert*, at 394-395.

15 See note 8.

16 See B.A. MacFarlane et al, *Drug Offences in Canada*, 3d ed. Aurora: Canada Law Book, 1996 (looseleaf), at s. 18.900ff, in which the possibility of a fourth category, i.e., "where the informer is known to the defence", is discussed.

17 *R. v. Scott*, note 8, at 315; See also *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.); *Roviaro v. U.S.*, 353 U.S. 53 (1956). This exception may apply where, for example, the informant attends a meeting between an undercover officer and a drug trafficker.

18 See *R. v. Scott*, note 8, and *R. v. Davies*, note 17. This exception may apply where, for example, the informer knowingly introduces an undercover officer to a drug trafficker or makes a purchase of drugs at the request of the police to further an investigation.

19 See *R. v. Leipert*, at 396-397; *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.); and *R. v. Scott*, note 8.

20 *R. v. Leipert*, at 398.

21 (1991), 68 C.C.C. (3d) 308 at 318-319 (S.C.C.).

CONTACT WITH THE COURTS

Introduction

Because of the role of the Attorney General of Prince Edward Island,[1] situations can arise which raise questions about government influence on the courts and the possible impairment of judicial independence. To cite only the most obvious example, Office of the Attorney General 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 counsel 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 recognize the need to be careful and sensitive about contacts with courts and judges. Crown counsel, moreover, are well aware of the implications of their unique role and the importance of not acting in any way that would give rise to a suggestion that they have attempted to improperly influence or pressure the judiciary. Most of the time, common sense and our professional integrity should be a sufficient guide.[2] The materials set out in this section of the Guide Book will serve as a statement of our commitment to the important principles referred to above, and as a useful reminder of what is expected of all Crown Attorneys and employees of the Office of the Attorney General.

The objective of these guidelines is to help Justice Officials avoid situations that could give the impression that Crown Attorneys, the Office of the Attorney General, or the government is improperly attempting to influence or exert pressure on the courts or judges in the exercise of judicial functions. While all counsel must be sensitive to the propriety of their contacts with the courts and their relationship with the judicial branch of government and are expected to act ethically, Crown counsel and other officials, as representatives of the Attorney General, are in a unique position that requires particular caution in dealings with the courts.

Business or personal relationship with a judicial officer

Crown counsel 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 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 judicial officer in contested matters

In a contested cause of matter, Crown counsel 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

In discussing with judges and court officials matters of government policy that could affect the administration of the courts, 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.

Where there is doubt about whether a particular contact or action involving a Crown Attorney is appropriate, counsel shall refer the question to the Director.

---

1 See also in this Guide Book "The Independence of the Attorney in Criminal Matters".

2 See the CBA *Code of Professional Conduct.*

JAILHOUSE INFORMANTS

Introduction

At the *Sophonow Inquiry*[1] Commissioner Cory stated:

> Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they will seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually their presence as witnesses signals the end of any hope of providing a fair trial.[2]

Former Chief Justice of Canada, Lamer, sitting as Commissioner examining three cases in Newfoundland and Labrador, concluded that the use of a jailhouse informant contributed to a grave injustice.[3] He determined that the recommendations of Commissioner Cory in the *Sophonow Report* be incorporated into the policy and practices of Crown Attorneys in that Province.[4]

Together with all of the other considerations set out in this section, it is important to examine critical factors when the information-provider in question can be categorized as a "jailhouse" or "in-custody" informant. In this respect, notice should be taken of the definition of an "in-custody informer", as set out by the Honourable Fred Kaufman, C.M., Q.C. in his report on the Guy Paul Morin case:

> An in-custody informer 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 accused need not be in custody for, or charged with, the offences to which the statements relate. Excluded from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused (even if a portion of their evidence includes a statement made by the accused).

The use of in-custody informants has been identified as a significant contributing factor in many cases of wrongful conviction.[5] There are several issues to which Crown counsel should pay particular attention when dealing with a jailhouse informant.

Credibility

At pp. 486-487 of the *Kaufman Report*, it is stated that:

> Jailhouse informant evidence is intrinsically, though not invariably, unreliable and many of us have failed in the past to appreciate the full extent of this unreliability. It follows that prosecutors must be particularly vigilant in recognizing the true indicia detracting from, or supporting, their reliability.[6]

The *Kaufman Report* suggests that at a minimum the Crown should conduct a subjective assessment of the informant's proposed testimony. Counsel should examine: the details of the evidence; the motives for lying; and the possibility of collusion, where there is more than one in-custody informant".[7]

In order to assess credibility, Crown counsel should consider the following factors:

- The background of the informant, which could include an examination of his or her physical and mental profiles. Also relevant is whether or not the informant has claimed receiving in-custody statements in the past; whether or not his or her information has been reliable in the past; whether the informant has testified in the past; whether the informant has been convicted of offences including dishonesty;

- The circumstances of the informant's incarceration, including access to information about the crime in question;

- The circumstances surrounding the giving of the accused's alleged "confession" (when, where and how it was made);
- The circumstances surrounding the disclosure of the alleged statement to the Crown;

- The benefits sought or received;

- The use of tests to ensure reliability, e.g., polygraph examinations;

- The extent to which the statement is corroborated by other evidence. Where there is more than one in-custody informant, such corroboration should be independent of the other informer's statement;

- The specificity of the statement; does it contain details or leads known only to the culprit?

Relationship between the Informant and the Police

Very often in cases involving in-custody informants, the defence alleges that the Crown has taken questionable steps to elicit the testimony of the in-custody informant in order to bolster its own case. In order to assess the circumstances which gave rise to the informant's participation, Crown counsel should seek answers to the following questions:

- Was the evidence solicited by the police?

- Was there a prior association between the in-custody informant and the police officer involved with the investigation?

- Did the police approach the informant prior to his "receiving" the "confession"?

- What were the circumstances surrounding the placement of the informant within the prison facility?

- Did the police provide information to the informant prior to the making of the statement; did they ask leading questions, etc.?

Mandatory Considerations

Commissioner Cory in the *Sophonow Report* stated:

> Justice Kaufman in the Morin Inquiry dealt exclusively with jailhouse informants and the harm they occasion. His thoughtful and helpful recommendations are carefully set out in the report. I will adopt them but still go further in my recommendations on this subject.[8]

Crown Attorneys shall, in addition to the considerations set out above, be guided by the following;[9]

1. As a general rule, jailhouse informants should be prohibited from testifying.

   They might be permitted to testify in a rare case, such as kidnaping, where they have, for example, learned of the whereabouts of the victim. In such a situation, the police procedure adopted should be along the following lines.

   Upon learning of the alleged confession made to a jailhouse informant, the police should interview him. The interview should be videotaped or audio taped from beginning to end. At the outset, the jailhouse informant should be advised of the consequences of untruthful statements and false testimony. The statement would then be taken with as much detail as can be ascertained.

   Before it can even be considered, the statement must be reviewed to determine whether this information could have been garnered from media reports of the crime, or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place.

   If the police are satisfied that the information could not have been obtained in this way, consideration should then be given to these factors:

Has the purported statement by the accused to the informant:

a. revealed material that could only be known by one who committed the crime;

b. disclosed evidence that is, in itself, detailed, significant and revealing as to the crime and the manner in which it was committed; and

c. been confirmed by police investigation as correct and accurate?

Even then, in those rare circumstances, such as a kidnaping case, the testimony of the jailhouse informant should only be admitted, provided that the other conditions suggested by Justice Kaufman in his Inquiry have been met. In particular, the Trial Judge will have to determine on a voir dire whether the evidence of the jailhouse informant is sufficiently credible to be admitted, based on the criteria suggested by Justice Kaufman.

2. Further, because of the unfortunate cumulative effect of alleged confessions, only one jailhouse informant should be used.

3. In those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence. It may be advisable as well to point specifically to both the Morin case and the Sophonow case as demonstrating how convincing, yet how false, the evidence was of jailhouse informants.

4. There must be a very strong direction to the jury as to the unreliability of this type of evidence. In that direction, there should be a reference to the ease with which jailhouse informants can, on occasion, obtain access to information which would appear that only the accused could know. Because of the weight jurors attach to the confessions and statements allegedly made to these unreliable witnesses, the failure to give the warning should result in a mistrial.

Approval for the Use of the Jailhouse Informant

Where Crown Attorneys have addressed the factors set out above, and are satisfied that the informant evidence is credible, they may recommend to the Director that the informant be called as a witness.[10] No such witnesses may be called without written approval of the Director.

Informant Benefits

It is preferable that negotiation of such benefits should not be conducted by a Crown Attorney who is prosecuting the accused. The benefits should never be conditional on whether the Crown obtains a conviction of the accused.[11]

---

1 *The Inquiry Regarding Thomas Sophonow (2001)* referred to as the *Sophonow Report*, Commissioner Hon. Peter de C. Cory.

2 Ibid, page 63.

3 *Lamer Report (2006),* Office of the Queen's Printer NL.

4 Ibid, page 271.

5 See both the *Sophonow Report* note 1 above and the Commission on Proceedings Involving Guy Paul Morin. Toronto: Queen's Printer, 1998 Vol. I, p. 601. (The "*Kaufman Report*").

6 *Kaufman Report*, Vol. 1, p. 487.

7 *Kaufman Report*, Vol. I, pp 607-609. This part of the *Kaufman Report* was referred to with approval by Major J., dissenting in *R. v. Brooks*, [2001] 1 S.C.R. 237.

8 Note 1 at 63

9 Where these requirements pertain to investigators, Crown Attorneys must ensure that they are carried out.

10 The recommendation might be for immunity or some other benefit, depending on the circumstances. The Director may, after consultation, form an ad hoc committee to consider the issues outlined and make a recommendation.

11 *R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Ont. C.A.); but see *R. v. Naoufal* (1994), 89 C.C.C. (3d) 321 (Ont. C.A.).

TRAINING AND PROFESSIONAL DEVELOPMENT

Introduction

The role of the Crown Attorney is crucial to the administration of criminal justice. It has become much more challenging in recent years due to the introduction of the *Charter*, 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 and criticism especially in too many tragic 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 Crown Attorneys' Office in Prince Edward Island to foster a culture of individual excellence.

Senior Crown Attorneys must also be educated on a continuing basis so that a healthy, respectful and professional workplace will be maintained where individual prosecutors may achieve the highest standards.

Discussion

The need for training has been highlighted in recent years 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 counsel to minimize the risk that 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 counsel to be open to alternative theories of the case to avoid the development of "tunnel vision".[3] The Report urged prosecution services to educate Crown counsel on the causes and prevention of wrongful convictions and thus promote a stronger, fairer justice system.

In June of 2006 former Chief Justice of Canada The Right Honourable Antonio Lamer P.C., C.C., C.D., L.L.D., D.U. released the report of an inquiry into three prosecutions which led to injustices in Newfoundland and Labrador.[4] Among the many recommendations was the call for continuing education and the requirement that the Director of Prosecutions strive to establish and maintain a Crown culture that is sensitive to the opportunities to avoid injustice as well as to obtain convictions. In this endeavour, appropriate and continuing training and education are indispensable components.

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.

---

1 See three notable Inquiries 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 de C. Cory.

2 Ontario: Queen's Printer, 1998, vol. 2, pp. 1134-1138.

3 See Chapter 4 of the Report.

4 *Lamer Report (2006)*, Office of the Queen's Printer NL.