

The Relationship Between Crown Attorneys and the Police¹

Introduction

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

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

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

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

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

¹ While this chapter focuses primarily on the role of the RNC and RCMP, most of the principles discussed apply to peace officers and other investigators generally and can be applied to investigators who derive their powers from other Provincial or Federal statutes.

² *R. v. Regan* (2002), 161 C.C.C. (3d) 97 at para. 64.

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

The Common Law

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

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

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

I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

³ The Hon. R. Roy McMurtry, "Police Discretionary Powers in a Democratically Responsive Society" (1978), 41 RCMP Gazette no. 12 at 5-6.

⁴ [1968] 1 All E.R. 763 at 769 (C.A.).

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

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

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

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

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

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

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

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

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

During the Course of an Investigation

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

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

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

Advice Concerning Police Operations

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

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

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

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

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

- General warrants⁶
- Tracking warrants
- Dialed number recorder warrants
- DNA warrants
- Production orders

⁵ This type of agreement would be exceedingly rare and can be expected to give rise to complex considerations. Consultation with the Senior Crown Attorney is required.

⁶ Crown Attorneys will often appear before the Judge in Chambers with the investigator.

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

Access to Sealed Packets

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

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

Extensions of the Time the Seized Items May be Detained

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

The Criminal Code provides for three stages of detention:

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

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

⁷ *Criminal Code*, s. 490(1)(b).

⁸ *Criminal Code*, s. 490(2).

⁹ *Criminal Code*, s. 490(3).

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

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

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

Preparation of the Court Brief

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

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

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

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

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

Disclosure Procedures

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

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

- Providing advice on the general obligations to disclose as set out in case law;
- Providing advice and guidance on the structure of the disclosure process and strategy to ensure that the materials generated and collected by the investigators are in a form that meets prosecution needs and legal requirements;
- Providing advice on issues of privilege (such as police informer privilege¹²) and editing; and
- Providing advice on the scope of disclosure that is required in a particular case.

Interviewing of Witnesses Prior to Charges

Generally, Crown Attorneys do not interview witnesses before charges are filed.¹³ Crown Attorneys assess potential evidence by reviewing the material contained in the Court Brief, and in deciding whether the Decision to Prosecute¹⁴ criteria are met. This may include, for example, viewing videotaped statements of witnesses.

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

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

¹² See Chapter 30 of this Guide Book regarding “Confidential Informers”.

¹³ One reason for this is that if the purpose of the interview is to assess the person’s credibility, it may be difficult to accurately assess how that person will come across when testifying in the more stressful setting of the courtroom.

¹⁴ See also Chapter 6 of this Guide Book materials: "The Decision to Prosecute".

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

Critical Assessment of Charges

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

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

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

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

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

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

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

Statutorily Prescribed Pre-Charge Involvement of Crown Attorneys

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

- Obtaining authorizations for electronic surveillance pursuant to section 186 of the *Criminal Code*;
- Obtaining special search warrants and restraint orders pursuant to sections 462.32 and 462.33 of the *Criminal Code* in respect to suspected proceeds of crime; and,
- Obtaining management orders pursuant to section 490.81 of the *Criminal Code*.

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

Post Charge Proceedings

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

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

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

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

Disagreements between Crown Attorneys and Investigators

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

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

¹⁹ *Re Dowson and The Queen* (1981), 62 C.C.C. (2d) 286 at 288 (Ont. C.A.); approved (1983), 7 C.C.C. (3d) 527 at 535-36 (S.C.C.).

²⁰ See also Chapter 4 of this Guide Book: "Independence of the Attorney General in Criminal Matters".

²¹ See also Chapter 6 of this Guide Book: "The Decision to Prosecute".

²² See also Chapter 15 of this Guide Book: "Elections and Re-elections".

²³ See also Chapter 10 of this Guide Book: "Disclosure"

²⁴ See Note 11.

²⁵ See Chapter 6 of this Guide Book: "The Decision to Prosecute", particularly **Directive #4** in Chapter 12 "Conduct of Criminal Litigation".

²⁶ See also Chapter 2 of this Guide Book: "Independence of the Attorney General in Criminal Matters".