The Decision to Prosecute

Introduction

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

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

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

Statement of the Policy

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

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

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

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

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

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

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

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

Sufficiency of the Evidence

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

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

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

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

---

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

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

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

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

Critical Assessment of the Strength of a Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Interest Criteria

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

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

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

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

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

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

---

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

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

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

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

a. the seriousness or triviality of the alleged offence;

b. significant mitigating or aggravating circumstances;

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

d. the accused's background;

e. the degree of staleness of the alleged offence;

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

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

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

i. the availability and appropriateness of alternatives to prosecution;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Interest in the Regulatory Context

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

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

Irrelevant Considerations

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

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

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

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

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

Consultation

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

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

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

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

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

   (a) a death, or

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

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

   (a) criminal conduct involving group or organized activity;

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

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

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

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

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

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

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

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

Transparency

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

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

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

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

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

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