CONDUCT OF CRIMINAL LITIGATION

“Each problem that I solved became a rule which served afterwards to solve other problems.”

- Rene Descartes (1596-1650), "Discours de la Methode"

Basic Principles of the Policy

This section of the Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador provides Crown Attorneys and Senior Crown Attorneys with policy and practice directives 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 such as the RNC and RCMP.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.² 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.

Key aspects of the policy have been highlighted and framed as Directives³ to emphasize their imperative nature.

The criminal litigation policy is based on the following guiding principles:
• The criminal justice system in Newfoundland and Labrador needs to be efficient in its use of available resources and alert to avoid the possibilities of injustices and mistakes. New practices must be adopted to achieve this end.

• 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 achieved.

Critical Assessment of Charges

General Principles

Charge screening normally refers to the process by which a prosecutor, applying the “Decision to Prosecute” policy, 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. 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.

Early charge screening and critical assessment of cases are decisive points in the prosecution process and constitute cornerstones of the criminal litigation policy. Crown Attorneys involved in this initial process will have a crucial impact on the way cases are dealt with.
DIRECTIVE #1

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

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

- where a young person is charged, the availability of diversion as an alternative to the laying of, or 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.

DIRECTIVE #2

Every charge will be assessed as soon as reasonably possible and prior to setting the date for trial or preliminary inquiry. In complex or major cases, the assessment must be carried out before the indictment is preferred.

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

DIRECTIVE #3

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

Prosecutorial Independence

Charge screening and critical assessment is not a continuation of the investigation, but rather an opportunity for counsel to independently assess the merits of the Crown’s case before going forward with the prosecution.
Termination of Proceedings

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

DIRECTIVE #4

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

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

   (ii) There is no 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 Senior Crown Attorney, when circumstances permit, in any case which raises a doubt about the proper course to follow.

(b) Such consultation is particularly desirable in relation to a major charge or where special circumstances exist. Such circumstances might include the prosecution of a public official such as a police officer.

(c) The Director of Public Prosecutions may issue further directions, from time to time, as to when such consultation is required.

3. (a) Whenever a Crown Attorney terminates a prosecution under this Policy, a written report shall be provided to the Senior Crown Attorney that summarizes the circumstances and reasons for the decision that was taken.

(b) Such reports shall be filed in the DPP’s Office and made available to all Crown Attorneys to provide assistance in dealing with similar cases. They are not binding but are merely to provide guidance. They may also form the basis for developing more specific policies in future.

4. (a) As a general practice, the basic reasons for exercising the discretion addressed in this policy, should be expressed in open court. Where a stay of proceedings is entered, the basic reasons should be provided to the accused, the police and the victim, 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 provided to the Senior Crown Attorney.

It follows from this that in those cases where a stay of proceedings has been entered on the record it cannot be allowed to expire.
Instead, the proceedings must be terminated in accordance with the Directive above.

Reports are to be prepared pursuant to section 3 of Directive 4 whenever a charge is withdrawn, no evidence called or a stay of proceedings is filed. These shall be forwarded to the DPP within 30 days.

DIRECTIVE #5

Prosecutors must exercise independent judgment in deciding whether charges should be prosecuted.\(^{11}\)

Moreover, it is important that the Crown Attorney who carries out charge screening in any particular case not only exercise independent judgment, but also be perceived as exercising such judgment.

A perceived lack of independence may result from the nature or extent of the involvement of 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 Senior Crown Attorney or Director of Public prosecutions 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, for example on the basis of the record of decision referred to above, to having the charge screening decision referred to a counsel having had no involvement with the investigation.

DIRECTIVE #6

Senior Crown Attorneys or the Director of Public Prosecutions, shall ensure, in any given case and where special circumstances warrant, that means are taken to ensure that critical assessment is carried out in such a way that the necessary independence and appearance of Crown independence are preserved.
Charging Standards - Consistency

As stated in the “Decision to Prosecute” policy, the Attorney General of Newfoundland and Labrador will only prosecute cases where there exists a reasonable likelihood of conviction and where the public interest requires that the matter be prosecuted.

The “Decision to Prosecute” policy must be applied in all cases. Law enforcement officers should be encouraged to refer to the policy or to consult a Crown Attorney in case of doubt.12

**DIRECTIVE #7**

Police and the other investigative agencies should be encouraged to use, at the charging stage, the prosecution standards of the Attorney General of Newfoundland and Labrador and to seek in that regard the assistance of Crown Attorneys where required.

**Charging Practices**

Investigations may, on occasion, involve complex fact situations charging multiple accused. Such investigations may therefore target a number of individuals and result in a large number of offences. This will in turn present inherent challenges for the management of the case, not only for the Crown, but for the courts and the criminal justice system in general.

When dealing with cases of this magnitude and complexity, prosecutors will need to be particularly alive to issues such as the appropriate number of indictments and which accused should be regrouped within any given indictment. It is the responsibility of the Crown Attorney to decide how and on what basis the prosecution should proceed.13 This task requires consideration of a myriad of factors, including the resource implications of any given decision.

**DIRECTIVE #8**

Crown Attorneys will determine how to deal with the results of large and complex investigations so that the resulting prosecutions can be managed in the most effective way. Where trials are long or complex, adequate preparation time and the assistance of junior counsel, are imperative.
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 and that all directives are met.

DIRECTIVE #9

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 of a young offender is appropriate;
- what is the appropriate sentence for each alleged offender upon entry of an early guilty plea; and
- what additional information, if any, is required from law enforcement agencies to allow counsel to deal with any of the issues above.

Alternative Measures and Diversion

Individuals can be diverted from the criminal process either before or immediately after a charge has been laid, but only where they would otherwise properly be charged or prosecuted pursuant to the “Decision to
Prosecute" policy. The issue of diversion first arises at the beginning of the process and is one which, ideally, will be addressed by the prosecutor responsible for charge screening in the particular case in accordance with policy.\textsuperscript{14}

**Plea Discussions and Agreements**

**Introduction**

A large percentage of criminal cases are resolved by a guilty plea, which may result in substantial savings for the system in general. On the other hand, few accused would plead guilty if there were not some advantage in doing so. The courts now recognize that it is appropriate for the Crown to enter into plea discussions with the accused and to agree to a lesser sentence or a lesser charge in return for an acknowledgement of guilt by the accused. As noted by 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".\textsuperscript{15} Plea discussions provide an opportunity to explore the benefits of such a plea.

**DIRECTIVE #10**

*Crown Attorneys will seek, to the extent reasonably possible, to dispose of charges through plea discussions and agreements.*

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.
DIRECTIVE #10.1

Except in exceptional circumstances, Crown attorneys should not agree to exclude a request for a DNA Order as part of a plea discussion without first consulting with the Senior Crown Attorney.

The National DNA Databank is an invaluable tool for the identification of criminal offenders and the exoneration of innocent suspects. Prosecutors should remind judges of the requirement for DNA Orders in all mandatory primary offences. For secondary discretionary offences or hybrid DNA offences, prosecutors should perform an analysis of all relevant factors to determine the appropriateness of an application for a DNA Order.

DIRECTIVE #11

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 interests of justice, or the prosecution's interest in the early and conclusive resolution of cases.

DIRECTIVE #12

Where circumstances warrant, Crown Attorneys should initiate the appropriate plea comprehension inquiry, with special attention being given to the situation of unrepresented accused. Moreover, it is important to remember that the object of plea negotiations is to avoid the costs of unnecessary litigation, but only in cases where the accused is guilty, and willing to admit guilt.

DIRECTIVE #13

Crown Attorneys will 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.

DIRECTIVE #14

Crown Attorneys will inform the defence of their best offer in return for a guilty plea as early as reasonably possible in the criminal process.

DIRECTIVE #15

Senior Crown Attorneys will establish within their respective offices a practice aimed at ensuring that the Crown’s initial plea offer is communicated to the accused at the first reasonable opportunity.17

DIRECTIVE #16

Absent a change in circumstances, no subsequent offer of settlement made by the Crown should be more advantageous to the defence than the initial plea arrangement proposed.

DIRECTIVE #17

Senior Crown Attorneys will put in place practices in their respective offices to oversee when and how a prosecutor may depart from a previous assessment of the best possible offer18 or agree to negotiate a sentence for plea at any time after the trial date has been set.19

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.20 A late plea entered by an accused who has received timely disclosure does not reflect the element of reformation which is the usual basis for granting a benefit in return for the plea. Moreover, resource limitations within the criminal justice system are
now such that the system cannot afford to encourage late pleas by treating them in the same manner as early pleas.

**Agreed Statements of Fact**

It would in all cases be prudent for counsel involved in plea discussions to have a clear understanding, which is shared by the accused, as to what facts the parties have agreed upon for the purposes of making representations on sentence following the agreement as to plea.
DIRECTIVE #18

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.

DIRECTIVE #19

Crown Attorneys will 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.

DIRECTIVE #20

Crown Attorneys will, to the extent reasonably possible, pursue issue resolution at pre-hearing conferences and at other appropriate opportunities during the course of criminal proceedings.

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. It may also lead to a re-election before judge alone, thus avoiding the additional costs of a jury trial.

**DIRECTIVE #21**

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 may also result in a more efficient process, saving the time of both the court and the affected witnesses.

**DIRECTIVE #22**

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.

**DIRECTIVE #23**

Crown Attorneys will seek from the defence a clear indication of Charter and other legal issues likely to be raised, and endeavour to have these matters addressed at pre-hearing conferences.

**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.
DIRECTIVE #24

Discussions with unrepresented accused will be carried out in accordance with the rules of caution set out in the Guide Book on plea discussions and agreements with unrepresented accused.

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.

DIRECTIVE #25

In accordance with the Disclosure policy, disclosure will be provided as soon as it is reasonably possible.23

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 identity24, 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.

DIRECTIVE #26

Senior Crown Attorneys, will seek arrangements with law enforcement agencies by which the agencies will undertake to identify cases involving information which, in the public interest, should not be disclosed, or for which disclosure will require editing or other means to protect the public interest involved.
DIRECTIVE #27

Crown Attorneys involved in providing disclosure will be alive to the need to protect privileged information from disclosure and will discuss with the law enforcement agency involved the manner in which this information can be protected while still complying with the Crown's disclosure obligations.

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.25

DIRECTIVE #28

Senior Crown Attorneys will develop and enforce practices aimed at ascertaining and recording in any given case, what has been disclosed and what disclosure obligations or requests, if any, remain to be dealt with.

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.26

DIRECTIVE #29

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.\textsuperscript{27}

**DIRECTIVE #30**

The DPP will explore with law enforcement agencies how the use of available technology can provide more cost-effective means of providing disclosure.

**Complex Cases\textsuperscript{28}**

**Co-operation between Police and the Crown\textsuperscript{29}**

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.\textsuperscript{30}

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, bail, voir dires and the trial proper.
DIRECTIVE #31

Senior Crown Attorneys will meet with law enforcement agencies in their regions to discuss their priorities. This will enable them to identify:

- cases where dedicated prosecution resources may be required at the investigative stage;
- cases which will require substantial prosecution resources after charges are laid;
- cases where investigators should be preparing at the investigative stage materials for use in the judicial process.

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.

DIRECTIVE #32

The role of the Crown Attorney at the investigative stage is one of support and assistance. The components of that role may include:
• providing legal advice to investigators including guidance about potential Charter issues and the admissibility of evidence;

• assisting investigators in determining appropriate charges;

• assisting investigators in assessing the strength of the case, including the credibility of witnesses;

• advising investigators in the preparation of the court brief and the marshalling of the materials which will be required for various post-charge purposes such as disclosure, bail, 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.

DIRECTIVE #33

Senior Crown Attorneys and the DPP will seek to identify those cases where early involvement of an assigned prosecutor during the course of the investigation might best serve the interests of effective post-charge proceedings.

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.

DIRECTIVE #34

Senior Crown Attorneys 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.
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.\textsuperscript{32} 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.\textsuperscript{33}

**DIRECTIVE #35**

Specially assigned Crown Attorneys shall proceed during the course of the investigation in a way that will reduce as much as possible the risk of being called as a witness in the case.

**Major Case Assessment**

The effective management of complex cases requires close co-operation between Crown counsel and law enforcement agencies at the planning, the investigative and the prosecution stages. The level and effectiveness of a particular co-operative effort may vary from case to case, and there may be valuable lessons learned from each experience.

This suggests that it would be important to review the management of each significant case after it has been completed so that successful practices can be clearly recognized, as well as areas where greater efficiencies can be attained.

**DIRECTIVE #36**

Senior Crown Attorneys will ensure that an assessment is prepared regarding the effective management of each major case identified and treated as significant for the purposes of this policy.

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\textsuperscript{1} See also materials in this Guide Book related to the “Relationship between Crown Attorneys and the Police”.

\textsuperscript{2} For example, whereas this policy focuses to a large extent on the early disposition of routine cases as a means of freeing the resources required to deal with the more complex
cases, the Special Prosecutions Office may seldom deal with routine cases and different considerations would necessarily apply.

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

4 See materials in this Guide Book related to the “The Decision to Prosecute”.

5 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.

6 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.

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

8 See note 27

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

10 This Directive is taken from Recommendation # 23 of The Lamer Report (2006), Office of the Queen’s Printer NL p. 322.

11 Note, however, that the exercise of independent judgment by counsel does not preclude consultations with the relevant law enforcement agency where circumstances warrant. See “The Decision to Prosecute” policy set out in this Guide Book.

12 Absent agreement to the contrary, law enforcement agencies are free to apply or not the Attorney General’s “The Decision to Prosecute” policy. The RNC and RCMP will agree to do so and thus increase the likelihood that the charges laid can be prosecuted by the Crown.

13 As with other steps in the criminal prosecution process, consultations with the relevant law enforcement authorities may be warranted in deciding such issues.

14 Diversion is not intended to be available for every young offender in every case. Conditions for its use are set out in the “Youth Diversion” policy in this Guide Book
which guides individual prosecutors in the exercise of their discretion. It is important to note that, in the exercise of their own discretion, the police may apply a form of diversion which is not affected by the Attorney General’s guidelines in this regard.


16 The *Report of the Criminal Justice Review Committee* (Ontario: Queen’s Printer, 1999) goes further and recommends that plea comprehension inquiries be conducted in all cases where a guilty plea is entered (at pp. 55-56, Recommendation 6.2).

17 The means of communicating the Crown’s offer to the accused may vary with circumstances and local practice. For example the offer could be communicated to unrepresented accused through a police office at the time of first appearance. In Ontario, the *Report of the Criminal Justice Review Committee* (note 16, above, at p. 24) recommends that the Crown’s position on sentence not be given directly to accused persons. In any event, as is the case for other communications with an accused, it is good practice to keep a record of such communications. Judges in the Supreme Court of Newfoundland and Labrador Trial Division usually conduct this inquiry directly with the accused. See s.606(1.1) of the *Code*.

18 Additional information or factors raised by the defence may be relevant in this regard.

19 Although this policy does not preclude plea discussions after a date for trial has been set, such discussions should be the exception rather than the rule. To proceed otherwise might well defeat the very purpose of the policy, i.e. to encourage the earliest possible resolution of cases which do not need to go to trial.

20 The reasonableness of this position has been accepted by the Provincial and Supreme Courts throughout Newfoundland and Labrador.

21 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 sections 29 and 30 of the *Evidence Act*, and 657.1 and 657.3 of the *Criminal Code*.

22 Pre-hearing conferences are provided for at s. 625.1 of the *Criminal Code* and at Rule 15 of the *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, Canada Gazette Part II Volume 138, No.21.
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.

See also materials in this Guide Book related to “Informer Privilege”.

Checklists should be used to monitor the timing and content of disclosure.

Cooperation between Law Enforcement Agencies and the Crown is essential.

This requires, of course, that the police have access to and use the available technology to prepare their reports and briefs or, alternatively, that the police or the Crown Attorneys possess the means to transfer information from paper to the electronic format. Both the RNC and RCMP have made significant strides in this regard.

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

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

In this regard, in-house legal counsel employed by the RNC or RCMP should prove to be helpful. See also in this Guide Book “Relationship between Crown Attorneys and the Police”.

The DPP’s approach in this regard varies according to the particular fact situation and the policy considerations involved. The resources required for a prosecution will be a significant factor.

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, 1998, Vol.1, p.601. (The "Kaufman Report." ) See also The Lamer Report (2006), Office of The Queen’s Printer NL.

Subpoenas issued against Crown prosecutors have been quashed in cases such as R. v. Gervais (1992), 75 C.C.C. (3d) 61 (Que. C.A.); R. v. Harris (1994), 93 C.C.C. (3d) 478 (Ont. C.A.). It is also important to be aware of the possibility of “Tunnel Vision”. See materials in this Guide Book regarding “Duties and Responsibilities of Crown Attorneys”.

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