



Public Prosecution  
Service of Canada

Service des poursuites  
pénales du Canada

Public Prosecution Service  
of Canada

# DESKBOOK

Canada 

***Public Prosecution Service of Canada Deskbook***

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# PREFACE

Prosecutors possess significant discretion in the criminal justice system. To ensure public confidence in its administration, prosecutorial discretion must be exercised in a manner that is objective, fair, transparent and consistent.

The *Public Prosecution Service of Canada Deskbook (PPSC Deskbook)* is a means of achieving this goal. It is a compilation of the directives and guidelines that provide instruction and guidance to federal prosecutors, whether employees of the PPSC or private-sector agents, in the exercise of their prosecutorial discretion. It is therefore essential that the Deskbook be consulted, understood, and adhered to by federal prosecutors.

In applying the Deskbook to the case before them, federal prosecutors make decisions without the fear of political interference or improper or undue influence. They are, however, accountable to the Director of Public Prosecutions and, through the Director, to the Attorney General, Parliament and ultimately, the Canadian public for the way in which they have exercised this important responsibility.

The Deskbook is a permanent work in progress: all federal prosecutors should be conscious of the need to suggest changes where policies are unclear or outdated. PPSC managers are obliged to monitor application of the policies to ensure they are properly applied.

The *PPSC Deskbook* is divided into two parts: Part 1 contains directives of the Attorney General of Canada and guidelines of the Director of Public Prosecutions; Part 2 contains confidential legal memoranda.

**Part 1 — Directives and Guidelines.** Section 10(2) of the *Director of Public Prosecutions Act* (DPP Act) empowers the Attorney General to issue directives respecting the initiation or conduct of prosecutions generally.

Section 3(3)(c) of the DPP Act provides the Director of Public Prosecutions with a general power to issue guidelines respecting the conduct of prosecutions generally.

As neither the power to issue directives under section 10(2) nor guidelines under section 3(3)(c) extend to *Canada Elections Act* prosecutions, guidelines in respect of those prosecutions are issued by the Director under section 3(8) of the DPP Act.

**Part 2 — Confidential Legal Memoranda.** These memoranda are issued by the Deputy Directors of Public prosecution and supplement the directives and guidelines by providing legal advice to PPSC counsel. The memoranda are privileged and therefore not made available to the public.

The publication of the *PPSC Deskbook* is the culmination of years of review and consultation. For the first time in nearly a decade, the policy guidance directing federal prosecutors has been completely updated to reflect changes in legislation and in practice. This effort represents a significant step forward, both in respect of the prosecution function specifically and Canada's criminal justice system generally. I would like to thank all those involved in the preparation of this important document. I would like to offer a special word of thanks to Debbie Johnston for her tireless efforts in leading this project and seeing it through to completion.

Brian Saunders, Q.C.  
Director of Public Prosecutions

# PPSC DESKBOOK

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## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **1.1 RELATIONSHIP BETWEEN THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS**

#### **DIRECTIVE OF THE ATTORNEY GENERAL ISSUED UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. OVERVIEW OF THE RELATIONSHIP BETWEEN THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

#### 1.1. Creation of the Office of the Director of Public Prosecutions

The *Director of Public Prosecutions Act*<sup>1</sup> (DPP Act or the Act) established the Office of the Director of Public Prosecutions (ODPP). The DPP Act was designed to strengthen the twin goals of institutional independence and ultimate ministerial accountability.<sup>2</sup> On one hand, it was intended to enhance integrity in government by statutorily ensuring independence of the prosecution decision-making function from inappropriate political control, direction and influence. It enshrines in legislation the quasi-constitutional principle of independence of the prosecution function from the partisan political process. In this sense, it evokes the oft-quoted 1924 aphorism of Lord Chief Justice Hewart that

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<sup>1</sup> *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

<sup>2</sup> Government of Canada, *Federal Accountability Act* and Action Plan, “*Creating a Director of Public Prosecutions*”, online: Treasury Board of Canada Secretariat <[http://www.faa-lfi.gc.ca/fs-fi/13fs-fi\\_e.asp](http://www.faa-lfi.gc.ca/fs-fi/13fs-fi_e.asp)>. As the Minister of Justice put it, in speaking to the Senate on the bill that ultimately became the DPP Act, *supra* note 1: “Mr. Chairman, the government believes that the provisions of this bill strike an appropriate balance between independence and accountability in federal prosecutions. It ensures independence from unwanted control, direction and influence. At the same time, it ensures a substantial measure of accountability for the exercise of prosecutorial discretion.” Testimony of the Honourable Vic Toews, Minister of Justice before the Senate Standing Committee on Legal and Constitutional Affairs, 29 June, 2006 [Testimony of the Honourable Vic Toews].

“Justice should not only be done but should manifestly and undoubtedly be seen to be done.”<sup>3</sup>

At the same time, the DPP Act does not speak of absolute ODPP independence. Because the Attorney General is fully accountable to Parliament for the prosecution function, the Act ensures a measure of oversight for the exercise of prosecutorial discretion.<sup>4</sup> First, s. 3(3), which outlines the Director of Public Prosecutions’ (DPP) duties and functions, provides that the DPP acts “under and on behalf of the Attorney General.” Second, the Attorney General may issue directives in respect of specific prosecutions<sup>5</sup> or in respect of prosecutions more generally.<sup>6</sup> Third, as discussed below, ss. 13-15 of the Act require the DPP to notify the Attorney General about important questions of general interest, and give the Attorney General the power to intervene in proceedings or to assume conduct of prosecutions. In turn, the DPP Act counterbalances the Attorney General’s oversight function and safeguards DPP independence from the Attorney General by requiring that the issuance of s. 10 directives and assuming conduct of a prosecution under s. 15 be in writing and made public.

## 1.2. Role of the Attorney General

The DPP Act has not changed the Attorney General’s historical role as chief law officer of the Crown. The Attorney General retains jurisdiction to prosecute all non-*Criminal Code* federal offences (except those under the *Canada Elections Act*<sup>7</sup>) in the provinces and authority to prosecute both *Criminal Code* and non-*Criminal Code* offences in the three territories. Moreover, ss. 2(b.1)-(g) of the definition of “Attorney General” in the *Criminal Code* give concurrent jurisdiction to the Attorney General of Canada to prosecute certain *Criminal Code* offences including terrorism offences, organized crime offences, fraud, insider trading, and stock market fraud. However, under s. 3(3) of the Act, these powers have been delegated to the DPP, who exercises these general powers “under and on behalf of the Attorney General” independently, subject to directives issued by the Attorney General under s. 10, and subject to the Attorney General’s powers to intervene in<sup>8</sup> or assume conduct of<sup>9</sup> criminal proceedings. Because the Attorney General may also defend the constitutionality of federal legislation, the Attorney General may exercise the powers to take charge of a prosecution or intervene and thereby become a

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<sup>3</sup> *R v Sussex Justices Ex parte McCarthy*, 1924 1 KB 256, 1923 All ER 233; for a thorough consideration of this principle, see Philip C. Stenning, “Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere” (2010) 55 CLQ 449 [P. C. Stenning]; see also Hon. Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009) 34 Queen’s LJ 813-862 [Hon. M. Rosenberg].

<sup>4</sup> Testimony of the Honourable Vic Toews, *supra* note 2.

<sup>5</sup> DPP Act, *supra* note 1, s 10(1).

<sup>6</sup> *Ibid*, s 10(2).

<sup>7</sup> See DPP Act, *supra* note 1, s 3(8) which specifies that the DPP initiates and conducts, on behalf of the Crown, prosecutions with respect to offences under the *Canada Elections Act*.

<sup>8</sup> DPP Act, *ibid*, s 14.

<sup>9</sup> *Ibid*, s 15.

party to proceedings as appellant, respondent or, in the case of provincial *Criminal Code* prosecutions, intervener where the constitutionality of federal legislation is challenged.

It is a core constitutional tenet that the Attorney General, and by extension the DPP, are bound by the principle of independence in respect of the prosecution function.<sup>10</sup> As the Supreme Court stated in *Law Society of Alberta v Krieger*:<sup>11</sup> “It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.” However, it is quite appropriate for the Attorney General to consult with Cabinet colleagues before exercising his or her powers under the DPP Act in respect of any criminal proceedings. Indeed, sometimes it will be important to do so in order to be cognisant of pan-government perspectives. The Attorney General of England, Sir Hartley Shawcross (later Lord Shawcross) in 1951 best described the proper relationship between the Attorney General and Cabinet colleagues (and now, likewise, between the DPP, his or her designated agents and the departments that administer the statutes):

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.

In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.<sup>12</sup>

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<sup>10</sup> Hon. M. Rosenberg, *supra* note 3 at para 16.

<sup>11</sup> *Law Society of Alberta v Krieger*, 2002 SCC 65, [2002] 3 SCR 372 [*Krieger*]; see also Binnie J. in *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297 at paras 157-58 (dissenting on another point) [*Regan*] and *Miazga v Kvello Estate*, 2009 SCC 51, [2009] 3 SCR 339 at para 46.

<sup>12</sup> UK, H.C. Debates, vol 483, cols 683-84, (29 January 1951).

Since then, federal and provincial Attorneys General in Canada have adopted this statement, often referred to as the “Shawcross principle”.<sup>13</sup> Similarly, the judiciary has supported these principles,<sup>14</sup> as have leading authorities on the role of the Attorney General.<sup>15</sup>

### 1.3. Role of the Director of Public Prosecutions

The DPP has the power to make binding and final decisions to prosecute offences under federal statutes, stay proceedings or launch an appeal, unless otherwise instructed by the Attorney General under s. 10(1). The notion of DPP independence relates to the prosecutorial decision-making process – and all steps incidental to it.<sup>16</sup> The DPP is regarded as an independent officer, exercising quasi-judicial responsibilities.<sup>17</sup> Section 3(3) of the Act enumerates the duties and functions that are delegated to the DPP, which include the authority to:

- (a) initiate and conduct federal prosecutions subject to the Attorney General’s s. 15 power;
- (b) intervene in proceedings that raise a question of public interest that may affect the conduct of prosecutions or related investigations, subject to the Attorney General’s s. 14 power;

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<sup>13</sup> In 1978, the Attorney General of Canada, the Hon. Ron Basford referred to the Shawcross principle while explaining to the House of Commons a decision concerning a prosecution under the *Official Secrets Act*, Canada, HC Debates, vol 4 at 3881 (17 March 1978). One year later, Senator Jacques Flynn, then Attorney General of Canada, affirmed the Shawcross principle with respect to a proposed prosecution under the *Combines Investigation Act*. The statement was attached as an appendix to Canada, Senate Debates, 28 Elizabeth II at 126 (18 October 1979). Similar views have been expressed by the Hon. Mark MacGuigan in 1983: “The Position of the Attorney General of Canada on Certain Recommendations of the McDonald Commission” (unpublished, August 1983) at 6-9, the Hon. John Crosbie in 1988 (Canada, H.C. Debates, at 18437-38 (17 August 1988) and, in Ontario, by the Hon. Roy McMurtry in 1978 (Ontario Legislature Debates (23 December 1978) and the Hon. Ian Scott in 1987: “The Role of the Attorney General and the Charter”, (1986-87) 29 Crim LQ 187).

<sup>14</sup> *R v Smythe* (1971), 3 CCC (2d) 98 at 110 and 112, aff’d at 122, further aff’d by the Supreme Court of Canada at 3 CCC (2d) 366 esp. at 370; *Gouriet v Union of Post Office Workers*, [1977] 3 All ER 70 (HL); *Re Saikaly and the Queen* (1979), 48 CCC (2d) 192 at 196 (Ont CA); *Re M and The Queen* (1983), 1 CCC (3d) 465 at 468 (ON HC); *R v Harrigan and Graham* (1976), 33 CRNS 60 at 69 (Ont CA); *The Royal Commission on Civil Rights in the Province of Ontario* (Chief Justice McRuer, Chairman) (1968) Report No 1 at 933-4; *Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police* (Mr. Justice D.C. McDonald, Chairman) (1981) at 509.

<sup>15</sup> See generally Hon. M. Rosenberg, *supra* note 3; P. C. Stenning, *supra* note 3; K. Roach “Prosecutorial Independence and Accountability in Terrorism Prosecutions”, 2010 55 CLQ 486 at 496-497 in the context of terrorism prosecutions; D. Stuart “Prosecutorial Accountability in Canada” in P. C. Stenning, ed. “Accountability for Criminal Justice: Selected Essays (Toronto: University of Toronto Press, 1995) at 353; See also *Royal Commission on the Donald Marshall, Jr. Prosecution*, vol. V [Marshall Inquiry]; “Walking the Tightrope of Justice: An Examination of the Office of the Attorney General”, a series of opinion papers prepared by J.L.J. Edwards (1989) esp. at 128-146; Law Reform Commission of Canada, Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), esp. 8-14.

<sup>16</sup> See the PPSC Deskbook guideline [“2.1 Independence and Accountability in Decision-Making”](#).

<sup>17</sup> See *R v Logiacco* (1984), 11 CCC (3d) 374 (Ont CA).

- (c) issue general guidelines to prosecutors;<sup>18</sup>
- (d) advise law enforcement agencies on matters related to prosecutions generally and particular investigations that may lead to a prosecution;
- (e) communicate with the media and the public on prosecution matters; and
- (f) exercise the Attorney General's authority in respect of private prosecutions.

Section 3(3)(g) leaves open the possibility that the Attorney General may delegate additional functions to the DPP.<sup>19</sup> It provides that the DPP may exercise any other power, duty or function assigned by the Attorney General that is compatible with the Office of the DPP. In relation to the matters set out in s. 3(3), the DPP is accountable to the Attorney General and is the Deputy Attorney General of Canada for the purpose of performing these duties and functions.<sup>20</sup>

In Canada, the investigation and prosecution functions are separate and independent. The courts have affirmed this principle repeatedly.<sup>21</sup> Indeed, several commissions of inquiry into wrongful convictions, most notably the *Royal Commission on the Donald Marshall Prosecution*,<sup>22</sup> have insisted that a clear line of demarcation be drawn between the two functions. The DPP Act upholds this principle and does not confer on the DPP any investigative powers.<sup>23</sup> By the same token, the Attorney General cannot direct the DPP to work with the RCMP on a specific investigation. Police are independent from political control and from control by either the Attorney General or the DPP when investigating

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<sup>18</sup> Section 3(5) exempts from the requirements of the *Statutory Instruments Act* any guidelines the DPP issues under s 3(3)(c). As such, these guidelines need not be approved by a Parliamentary committee.

<sup>19</sup> For example, the Attorney General assigned to the DPP the responsibility of developing a set of best practices for prosecuting fraud involving governments (21 February 2007), the power, duty or function to conduct prosecutions the Attorney General of Canada is authorized to undertake under agreements with the provincial Attorneys General and to conduct, on the authority of provincial Attorneys General, prosecutions and related proceedings, including appeals, of charges that fall under the exclusive prosecutorial authority of the province (i.e., major-minor agreements) (21 February 2007), and the responsibility of administering the National Fine Recovery Program including initiating and conducting proceedings to enforce the collection of outstanding federal fines (20 September 2007), online: <<http://www.ppsc-sppc.gc.ca/eng/dia-dia/index.html>>. Other examples of the types of other duties or functions that could be assigned include special inquiries into prosecution-related issues, issue-driven forums with provincial, territorial or international prosecution agencies regarding prosecution-related issues, or reports on the prosecutorial impacts of policy initiatives.

<sup>20</sup> See DPP Act, *supra* note 1, s 3(4). Note, however, that where the Attorney General intervenes in a proceeding under s 14 or assumes conduct of a federal prosecution under s 15, the Deputy Minister of Justice assumes the role of Deputy Attorney General in respect of those matters.

<sup>21</sup> See, notably, the Supreme Court of Canada decisions in *Krieger*, *supra* note 11; *Regan*, *supra* note 11; and *R v Beaudry*, 2007 SCC 5, [2007] 1 SCR 190.

<sup>22</sup> Marshall Inquiry, *supra* note 15.

<sup>23</sup> This separation of investigation and prosecution functions is reinforced by s 3(3)(d) which states that the DPP "advises law enforcement agencies or investigative bodies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution".

crime.<sup>24</sup> In the same manner, the DPP is independent from police in the prosecution function. No investigative agency or investigating body within a government department may instruct the prosecution to pursue or discontinue a particular prosecution or to undertake a specific appeal. These decisions rest solely with the DPP (and his or her delegated agent), subject to the Attorney General's powers under ss. 10 and 15. Although the investigation and prosecution functions are distinct, there is nevertheless a great deal of cooperation and consultation between police, investigative agencies and prosecutors even at the investigative stage.<sup>25</sup>

#### 1.4. Guiding principles

Given their interconnected responsibilities, an effective relationship between the Attorney General and the DPP is of the utmost importance in ensuring that both can fulfill their important public duties while achieving the legislative goal of an independent, apolitical, and accountable prosecution service. The Attorney General is directly accountable to Parliament, while the DPP is indirectly accountable to Parliament. The DPP is required to report to Parliament annually on its activities through the Attorney General and the DPP may be called to appear before parliamentary committees. Thus, it is crucial that they work in a consultative way so their decisions are fully informed. To ensure prosecutorial independence and accountability, their relationship should be premised on the following principles:

1. Respect for the independence of the prosecutorial function - By virtue of s. 3(3)(c) and s. 10(2), the Attorney General and the DPP are jointly responsible for establishing general prosecution policy, but the DPP is responsible for the exercises of prosecutorial discretion pursuant to that policy (subject to the Attorney General's residual powers under ss. 10 and 15).
2. Notification on matters of significant public interest - The vast majority of prosecutorial decision-making and policy development requires no prior notice. However, the DPP should inform the Attorney General when the exercise of his or her duties raises issues that pertain to the Attorney General's functions. Notification in this regard comes within the DPP's duty to inform under s. 13 of the DPP Act,<sup>26</sup> which is designed to assist the Attorney General in deciding whether or not to issue a directive under s. 10(1), to exercise the authority under s. 14 to intervene in first instance or on appeal, or under s. 15 to assume carriage of a prosecution. Additionally, quite apart from the aforementioned DPP Act powers, the Attorney General must be adequately briefed on prosecutorial decisions that

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<sup>24</sup> In *R v Campbell*, [1999] 2 SCR 956, the Supreme Court of Canada affirmed that police officers are not government functionaries or agents of the Crown in performing law enforcement duties and cannot be directed by the executive to investigate or not investigate someone.

<sup>25</sup> See the PPSC Deskbook directive "[1.3 Consultation within Government](#)" and the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)".

<sup>26</sup> Consultation between the PPSC and the Department of Justice generally is dealt with in the PPSC Deskbook directive "[1.3 Consultation within Government](#)", *ibid*; see also the PPSC Deskbook directive "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)".

are expected to generate significant public interest in order to report to Parliament on the manner in which the prosecution function is exercised in his or her name.<sup>27</sup>

3. In the same vein, the Attorney General consults with the DPP on policy, legislative or litigation matters which may have a significant impact on prosecutions or police powers. It is understood that consultations with prosecutors from both provincial and federal prosecution services can provide crucial practical perspective on criminal law policy issues.
4. Periodic meetings and discussions -The Attorney General and the DPP are to meet on a regular basis to discuss prosecution-related issues. It is particularly important that this occur with respect to issues which may be the subject of policy directives<sup>28</sup> that have a broad operational impact. The DPP Act does not specify a frequency of meetings between the DPP and the Attorney General.<sup>29</sup> This allows for flexibility to suit the particular working relationship of successive DPPs and the Attorneys General.

## **2. POWERS, DUTIES AND FUNCTIONS UNDER THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

### **2.1. The exercise of the Director's duties and functions**

Section 3(3) of the DPP Act sets out most of the duties and functions of the DPP.<sup>30</sup> It provides that those duties and functions will be performed “under and on behalf of” the Attorney General, without further defining the words “under and on behalf of”. What this connotes is that the DPP is independent from influence in the decision-making process related to the prosecution function. However, the DPP has only the powers, duties and functions conferred by statute, he or she is accountable to the Attorney General, and, in turn, the Attorney General remains answerable to Parliament for the DPP's activities.

### **2.2. The power of the Attorney General to issue directives**

Prosecutorial decision-making must take place independently of the interests of the government of the day.<sup>31</sup> The historical practice of successive Attorneys General of

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<sup>27</sup> The DPP does not brief the Attorney General on *Canada Elections Act* matters in light of s 3(8) of the DDP Act, *supra* note 1 which specifies that the DPP initiates and conducts, on behalf of the Crown, prosecutions with respect to offences under the *Canada Elections Act*.

<sup>28</sup> In fact, s 10(2) of the DPP Act, *supra* note 1 requires the Attorney General to consult the DPP prior to issuing directives respecting the initiation or conduct of prosecutions generally.

<sup>29</sup> By contrast, *Public Prosecutions Act*, SNS 1990, c 21, s 6A requires the Nova Scotia DPP and the Attorney General to meet minimally 12 times per year preferably on a monthly basis.

<sup>30</sup> Pursuant to s 3(8), the Director also conducts on behalf of the Crown prosecutions under the *Canada Elections Act*; in this regard see the PPSC Deskbook guideline “[2.10 Application of the PPSC Deskbook in Respect of Canada Elections Act Prosecutions](#)”. Pursuant to s 3(9), the Director may also perform work for the Attorney General under the *Extradition Act* and the *Mutual Legal Assistance in Criminal Matters Act*”.

<sup>31</sup> See e.g. *Krieger*, *supra* note 11.



Canada has been to refrain from becoming involved in the day-to-day operational decision making of public prosecutions. In recognition of the Attorney General's powers of superintendence, s. 10 of the DPP Act allows the Attorney General to issue directives on the initiation or conduct of any specific prosecution,<sup>32</sup> and with respect to prosecutions generally.<sup>33</sup>

Section 10 is one of the hallmarks of independence of the prosecution function.<sup>34</sup> To safeguard the DPP's independence, s. 10 requires that directives respecting specific prosecutions and respecting prosecutions generally be in writing and published in the *Canada Gazette*. Mandatory publication of the directive assures transparency, and enables the Attorney General to be accountable for his or her decisions. Ultimately, this requirement for transparency serves as a strong deterrent against partisan political influence and pressure in prosecution-related decision-making. These directives are not intended to have the force of law and are exempt from review by Parliament's Standing Joint Committee for the Scrutiny of Regulations.<sup>35</sup>

The power to issue directives has been exercised sparingly in other jurisdictions in which this power exists.<sup>36</sup> Such a situation may arise, for example, where there is disagreement between the DPP and the Attorney General as to whether to proceed with certain types of prosecutions or whether to appeal in a particular case, based on divergent assessments of what the public interest demands in the particular circumstances of that case.

Section 11(1) authorizes both the Attorney General and the DPP to delay publication of a directive in a specific prosecution in the interests of the administration of justice. This measure of flexibility recognizes that occasionally the publication rule may have to yield to operational exigencies, for example, to ensure the integrity of an ongoing investigation or to avoid a negative impact on prosecutions or other proceedings that are still before the courts. This delay may not continue beyond the completion of the prosecution or any related prosecution.<sup>37</sup>

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<sup>32</sup> DPP Act, *supra* note 1, s 10(1).

<sup>33</sup> *Ibid*, s 10(2).

<sup>34</sup> The provinces of Nova Scotia, Quebec and British Columbia all have similar requirements in their legislation. The same is true of many other jurisdictions that have adopted a Director of Public Prosecutions model.

<sup>35</sup> Section 12 of the DPP Act, *supra* note 1 makes it clear that the directives issued under s 11 are exempt from the requirements of the *Statutory Instruments Act*. This exemption means that the directives issued by the Attorney General to the DPP in specific prosecutions and in relation to prosecutions generally need not be approved by a parliamentary committee before they have the force of law.

<sup>36</sup> For example, in British Columbia, previous Attorneys General have issued directives (i) to continue with a murder prosecution rather than accepting a guilty plea to the lesser and included offence of manslaughter, (ii) to appeal a manslaughter sentence, and (iii) to the Assistant Deputy Attorney General directing him to appoint a specified special prosecutor to conduct a charge assessment of alleged polygamy in Bountiful, British Columbia. As of March 31, 2010, The Attorney General of Quebec had issued no such directives to its Director of Public Prosecutions.

<sup>37</sup> See DPP Act, *supra* note 1, s 11(2).

### 2.3. The duty to inform

Under s. 13 of the DPP Act, the DPP has a duty to “inform the Attorney General in a timely manner of any prosecution, or intervention that the DPP intends to make, that raises important questions of general interest.”<sup>38</sup> This duty is fundamental to the relationship between the Attorney General and the DPP, since the Attorney General may use such information in deciding whether to issue a directive under s. 10, to intervene in proceedings under s. 14,<sup>39</sup> or to assume conduct of a prosecution under s. 15.

Although the Act sets out no corresponding duty on the part of the Attorney General, it is essential to a properly functioning relationship that information flow in both directions. For example, many civil cases raise constitutional, evidentiary or privilege issues which can have an important impact on the prosecution practice of the DPP.

### 2.4. The power of the Attorney General to intervene in proceedings

As the chief legal advisor to Cabinet and to the Government of Canada, the Attorney General has a broad perspective concerning the development of all aspects of law including matters that fall under the *Criminal Code* and other federal penal statutes. The legal challenges facing the Government of Canada are complex and multi-dimensional in nature. Their resolution requires that they be viewed through many lenses – whether policy, aboriginal, strategic, division of powers, or the *Canadian Charter of Rights and Freedoms* (Charter), to name but a few. As a result, the Attorney General may seek to intervene in criminal litigation, particularly if there is a constitutional challenge to federal laws.<sup>40</sup>

Section 14 of the DPP Act gives the Attorney General the power, after notifying the DPP, to intervene in proceedings at first instance or on appeal that, in his or her opinion, raise questions of “public interest”.<sup>41</sup> In theory, the Attorney General may intervene in prosecutions conducted by the DPP in order to present different views on an issue, for example proceedings that raise issues of informer privilege, broader issues of police conduct or cases that raise both Charter and division-of-powers issues. However, such interventions in federal prosecutions would be rare, in light of the power to take charge of a prosecution.<sup>42</sup>

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<sup>38</sup> See the PPSC Deskbook directive “[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)”, *supra* note 26.

<sup>39</sup> See the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”.

<sup>40</sup> For example, the Attorney General may decide that it is in the public interest to intervene in a prosecution that raises a division of powers issue, or that raises an issue regarding the scope of victims’ rights in criminal proceedings, so that the court may have the benefit of hearing the Attorney General’s perspective.

<sup>41</sup> Section 14: “When, in the opinion of the Attorney General, proceedings raise questions of public interest, the Attorney General may, after notifying the DPP, intervene in first instance or on appeal.”

<sup>42</sup> For a more in depth discussion of interventions, see the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”, *supra* note 39.

The DPP, or the Attorney General, may wish to intervene in a provincial matter. Typically the DPP, or Attorney General of Canada, will intervene in a provincial matter to support the province, since such federal interventions often involve challenges to the constitutionality of *Criminal Code* provisions. Like the ODPP, provincial prosecution services prosecute matters only where the prosecution is considered to be in the "public interest". On occasion, however, in view of the multifarious considerations that may come into play in a given case, the two levels of government may assess public interest considerations differently or the federal government may consider it important to advance a particular argument as intervener that may not be advanced by the provincial appellant.<sup>43</sup>

The Attorney General and the DPP cannot both intervene in a case prosecuted by a provincial Attorney General. Section 3(3)(b) of the DPP Act provides that the DPP can intervene unless the Attorney General has decided to intervene. Section 13 imposes a positive duty on the DPP to give advance notice, in a timely manner, of interventions that the DPP intends to make. Moreover, as a practical matter, most interventions at first instance or on appeal result from Notices of Constitutional Question (NCQ). By statute or by court rules,<sup>44</sup> an applicant who intends to challenge the constitutional validity or applicability of a particular piece of federal legislation or regulation, a common law rule or to claim a remedy under s. 24(1) of the Charter in relation to an act or omission of a federal government institution, must serve a NCQ on the Attorney General.<sup>45</sup> Thus, in effect, the Attorney General essentially has a "right of first refusal" in deciding whether or not to intervene in cases prosecuted by a provincial Attorney General.

## **2.5. The power of the Attorney General to assume conduct of proceedings**

Section 15 of the DPP Act sets out the power of the Attorney General to take over a prosecution from the DPP. However, the Attorney General must first consult the DPP regarding his or her decision to assume conduct of a prosecution and must publish the notice in the *Canada Gazette* "without delay",<sup>46</sup> unless either the Attorney General or the DPP considers a delay in notice to be justified "in the interests of the administration of justice".<sup>47</sup> The DPP must turn over the prosecution file to the Attorney General, where

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<sup>43</sup> See e.g. Robert J. Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 12-13.

<sup>44</sup> *Rules of the Supreme Court of Canada*, SOR/2002-156 amended by SOR/2006-203, rule 61. Similarly, provincial legislation provides that NCQs must be served on the relevant Attorney General; see e.g. *Courts of Justice Act*, RSO. 1990, c C-14, s 109; Nova Scotia Rules of Civil Procedure, NS Reg 420/2008, rule 31.19; *Constitutional Question Act*, RSBC 1996, c 68, s 8; Quebec Code of Civil Procedure, RSQ, c C-25, s 95.

<sup>45</sup> This requirement applies in respect of Supreme Court of Canada, but is not required in all provincial court rules.

<sup>46</sup> DPP Act, *supra* note 1, s 15(1).

<sup>47</sup> *Ibid*, s 15(3). It is anticipated that delays in publication would be exceptional and would only occur where necessary to protect the confidentiality of proceedings (such as proceedings that might compromise the identity of an informer or an ongoing investigation, especially given that by definition, a prosecution includes a prospective prosecution).

the latter assumes conduct of the case, and must provide any information that the Attorney General requires within the time specified by the Attorney General (s. 15(2)).

Section 15 reflects the fact that the Attorney General retains his or her criminal law related powers under the DPP Act. The foregoing power, like the power to issue directives, is one which is to be exercised sparingly in order to preserve the independence of the DPP.<sup>48</sup> Nevertheless, s. 15 recognizes that the Attorney General is ultimately accountable to Parliament for federal prosecutions. Accordingly, there must be a residual capacity in the Attorney General to ensure that decisions are taken in the public interest.

## **2.6. The duty to report**

Section 16 of the DPP Act requires the DPP to provide the Attorney General with an annual report not later than June 30 of every year. The Attorney General is then required to table that report in the Houses of Parliament within the first 15 sitting days immediately following receipt of the report. The DPP's annual report to Parliament is a key mechanism for ensuring transparency and public accountability for federal prosecutions. The report is required to provide a summary of the DPP's activities<sup>49</sup> of the year in review, and usually contains a review of the anticipated legal challenges and priorities for the future, and how public money was expended in carrying out the DPP's duties and functions.

## **2.7. Delegated decision-making**

Some offences in the *Criminal Code* and in other federal statutes can be prosecuted only with the prior consent of the Attorney General on whose behalf the prosecution will be conducted.<sup>50</sup> By virtue of s. 3(4) of the DPP Act, the DPP is Deputy Attorney General for the purpose of exercising the bulk of prosecution-related duties, functions and powers, which are set out in s. 3(3).<sup>51</sup> The principal significance of s. 3(4) is that it brings into play s. 2 of the *Criminal Code* which defines the Attorney General to include the Deputy Attorney General. Additionally, s. 3(3)(a) delegates to the DPP, as Deputy Attorney General, the Attorney General's power to initiate and conduct prosecutions. Thus, ordinarily, decisions statutorily requiring the "personal consent in writing" of the Attorney General or Deputy Attorney General, will be made by the DPP, being the Deputy Attorney General for the functions set out in s. 3(3)(c) of the DPP Act.

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<sup>48</sup> Testimony of Chantal Proulx, before Senate Standing Committee on Legal and Constitutional Affairs concerning Bill C-2, 29 June 2006.

<sup>49</sup> This excludes PPSC activities related to the *Canada Elections Act*.

<sup>50</sup> See the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)".

<sup>51</sup> The Deputy Attorney General's authority to act for the Attorney General is recognized in three ways: 1) specifically, in some statutory provisions (such as *Criminal Code*, s 577); 2) generally, in s 2 of the *Criminal Code*, through the definition of "Attorney General"; and 3) more generally, for all federal legislation, by virtue of s 24(2)(c) of the *Interpretation Act*.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **1.2 DUTY TO INFORM THE ATTORNEY GENERAL UNDER SECTION 13 OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

#### **DIRECTIVE OF THE ATTORNEY GENERAL ISSUED UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Section 13 of the *Director of Public Prosecutions Act*<sup>1</sup> (DPP Act) provides that the Director of Public Prosecutions (DPP) has a duty “to inform the Attorney General in a timely manner of any prosecution, or intervention that the Director intends to make, that raises important questions of general interest.” This duty arises from the relationship between the Attorney General and the DPP, since the Attorney General may rely upon information provided under s. 13 in deciding whether to issue directives to the DPP under s. 10(1), to intervene in proceedings under s. 14,<sup>2</sup> or to assume conduct of a prosecution under s. 15.<sup>3</sup>

Section 13 is not intended to be the exclusive mechanism for information flow between the DPP and the Attorney General in respect of prosecution matters. Rather, s. 13 is intended as a statutory guarantee that the DPP will inform the Attorney General to enable the Attorney General to properly execute his or her functions as chief law officer of the Crown. Section 13 notes are issued by the DPP and are intended for the Attorney General personally.

Section 13 does not apply to proceedings conducted by the Public Prosecution Service of Canada (PPSC) on behalf of the Attorney General in relation to his or her powers, duties and functions under the *Extradition Act*<sup>4</sup> and the *Mutual Legal Assistance in Criminal*

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<sup>1</sup> *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

<sup>2</sup> See the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”.

<sup>3</sup> Although s 13 does not limit the Attorney General’s power to issue directives or assume conduct of a prosecution.

<sup>4</sup> SC 1999, c 18.

*Matters Act*<sup>5</sup> pursuant to s. 3(9) of the DPP Act,<sup>6</sup> nor does it apply to prosecutions under the *Canada Elections Act*.<sup>7</sup>

## 2. TYPES OF CASES THAT SHOULD BE REPORTED UNDER SECTION 13

Section 13 notices are required in cases that raise “important questions” that are of “general interest”. The framers opted for the term “general interest” which is broader than “public interest”. As the legislative summary of Bill C-2, *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, explained:

A distinction is made between the term “public interest” and the broader term “general interest” (considered to subsume “public interest”) so that the DPP will have a broader duty to inform the Attorney General of important matters. The House Committee removed the need for questions of general or public interest to be “beyond the scope of those usually raised in prosecutions,” as it was considered to be unnecessary and unduly limit the ability of the Attorney General to intervene.<sup>8</sup>

The qualifier “important questions” acts as an additional threshold to distinguish matters of significance from more routine or recurring matters.

Examples of cases that may involve important questions of general interest and thus generally would be subject to a s. 13 notice include:

### 2.1. Prosecutions

- Cases giving rise to concerns regarding public confidence in the administration of justice, including the manner in which a prosecution is conducted insofar as the impartiality or independence of the PPSC is at issue;
- Cases that may have a significant impact on established jurisprudence;

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<sup>5</sup> RSC 1985, c 30 (4<sup>th</sup> Supp.).

<sup>6</sup>Section 3(9) of the DPP Act authorizes the DPP to exercise, under and on behalf of the Attorney General, any of the Attorney General’s powers, duties or functions under the *Extradition Act* or the *Mutual Legal Assistance in Criminal Matters Act*. The s 13 notice requirement is restricted to “prosecutions and interventions” and thus does not cover extradition and MLAT matters.

<sup>7</sup> Section 13 of the DPP Act requires notice specifically for “prosecutions and interventions”. The definition of “prosecution” in s 2 of the DPP Act expressly excludes *Canada Elections Act* (CEA) prosecutions under s 3(8) of the DPP Act, which stipulates that the DPP initiates and conducts CEA prosecutions, appeals and other prosecution-related CEA proceedings on behalf of the Crown. In contrast to the DPP’s other duties and functions as set out in s 3(3), s 3(8) prosecutions are not undertaken under and on behalf of the Attorney General.

<sup>8</sup>Footnote 45 of Bill C-2 Legislative Summary 39<sup>th</sup> Parl, 1st Sess, online: <[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?Language=e&Parl=39&Ses=1&Mode=1&ls=C2&source=library\\_prb](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=e&Parl=39&Ses=1&Mode=1&ls=C2&source=library_prb)>.

- National security prosecutions;
- War crimes, crimes against humanity and genocide prosecutions;
- Official languages issues in prosecutions;
- Prosecutions that involve novel aboriginal rights issues;
- Criminal organization prosecutions that raise “important questions of general interest” by virtue of the significance or novelty of the issues being litigated, or any broader government concerns such as border security;
- Environmental prosecutions that raise issues of national importance;
- Capital markets fraud cases of national significance;
- Cases with an international dimension;
- Constitutional challenges (*Canadian Charter of Rights and Freedoms* (Charter) or division of powers) to legislation or to federal government programs that are novel (i.e. notices would not be required on routine or recurring constitutional challenges); and
- Cases that give rise to sustained, significant and/or anticipated media interest and that also raise important questions, for example when a matter puts into question the public’s confidence in the administration of justice.

## **2.2. Appeals**

- Supreme Court of Canada appeals, whether on leave or as of right; and
- Other appeals, to provincial and territorial courts of appeal and summary conviction appeals, which raise “important questions of general interest”. They would include:
  - Cases involving constitutional challenges to legislation (Charter, division of powers, Aboriginal rights), official languages rights;
  - Cases that may have a significant impact on police and prosecutorial functions, duties and powers;
  - Cases that raise a significant impact on rules of procedure and evidence; and
  - Cases that raise other significant Charter issues.



### 2.3. Interventions

- Interventions to be made on behalf of the DPP or the Attorney General,<sup>9</sup> whether in the Supreme Court of Canada, in any court of appeal or at trial.

### 3. NOTICE AT THE PRE-CHARGE STAGE AND REGARDING DECISIONS NOT TO PROSECUTE

The s. 13 notice requirement is limited to “prosecutions and interventions”. Under s. 2 of the DPP Act, the term “prosecutions” is defined to include, not only a prosecution under the Attorney General’s jurisdiction, but also “a proceeding respecting any offence where the prosecution or prospective prosecution” comes within his or her jurisdiction. Generally, the DPP does not provide s. 13 notices in respect of investigations, in recognition of the independent investigative function.<sup>10</sup> However, the s. 2 reference to “prospective prosecutions” indicates that the s. 13 notice requirement extends to pre-charge “proceedings”. This would include various *ex parte* Crown applications to obtain judicial authorization to use investigative or enforcement techniques (wiretap authorizations, special search warrants, restraint orders and management orders). That said, it is anticipated that s. 13 notices in respect of *ex parte* Crown applications would be exceedingly rare at the pre-charge stage in large part because the fundamental principle of police independence at the investigative stage must inform what is an important question of general interest.

In most Canadian jurisdictions, decisions to decline prosecution are made post-charge and dealt with by way of a stay of proceedings or withdrawal of charges. Proceedings to stay or withdraw charges are subject to s. 13. However, by virtue of the s. 2 definition of “prosecutions” which is limited to “proceedings”, s.13 would not extend to prosecutorial decisions not to prosecute in pre-charge approval jurisdictions (Quebec, British Columbia and New Brunswick) because the prosecutorial decision-making is not a “proceedings”. For the same reason, s. 13 would not apply to decisions of the DPP not to consent to institute criminal proceedings.<sup>11</sup> That said, while such decisions to decline prosecution would not constitute “proceedings” and thus would fall outside the scope of s. 13, the DPP will apply the spirit of s. 13 and notify the Attorney General of such pre-charge

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<sup>9</sup> The Attorney General and the DPP cannot both intervene in a case prosecuted by a provincial Attorney General. Section 3(3)(b) of the DPP Act provides that the DPP can intervene unless the Attorney General has decided to intervene. Section 13 imposes a positive duty on the DPP to give advance notice, in a timely manner, of interventions that the DPP intends to make.

<sup>10</sup> The conduct of any investigation is the sole responsibility of the law enforcement agency involved. The law enforcement agency does not require authorization from the prosecution before commencing an investigation nor does the prosecution direct an investigation or prohibit the continuation of an investigation. In practice, of course, investigators may and regularly do consult the prosecution during the investigation.

<sup>11</sup> Certain *Criminal Code* offences require consent of the Attorney General to institute proceedings. Section 3(3)(a) of the DPP Act delegates this consent function to the DPP to “initiate prosecutions”.

decisions if they raise important questions of general interest so that the Attorney General may decide whether or not to issue a directive under s. 10(1) or to assume conduct of a prosecution under s. 15 where the DPP has declined to prosecute. It is conceivable, for example, that the Attorney General could reach a different conclusion in applying the “public interest” criteria of the decision to prosecute test.<sup>12</sup>

#### 4. TIMING OF NOTICE

Section 13 requires that notice be given “in a timely manner”. By necessity, the timelines for providing a s. 13 notice will vary from case-to-case in accordance with the particular facts, including any applicable time limitation periods.<sup>13</sup> That said, the s. 13 timeliness requirement must be interpreted to uphold the overarching principle that, to the extent possible, the Attorney General must be given sufficient opportunity to react.

Notices should be given in respect of prosecutions that raise important questions of general interest at various milestone stages of the prosecution, notably prior to initiating prosecutions, discontinuing proceedings, staying a prosecution, including a private prosecution, and prior to decisions to appeal or to intervene. The decision of whether to issue a notice (or a follow-up notice) should be made to give effect to the Attorney General’s role as chief law officer of the Crown, including the powers that the Attorney General may exercise pursuant to the DPP Act regarding directions given to the DPP (s. 10), assuming conduct of a prosecution (s. 15), and interventions by the Attorney General (s. 14).

#### 5. FORMAT OF NOTICE

Normally, counsel of record in the Regional Office will initiate the process and will prepare a draft s. 13 memorandum in accordance with the existing s. 13 notice templates available on the PPSC Intranet. The Chief Federal Prosecutor or his/her delegate, and a Deputy Director will approve the memorandum. The DPP will then sign the memorandum. The Ministerial and External Relations Section coordinates the transmission of s. 13 notices to the Attorney General’s Office.

Although the customary practice is for the Regional Office to commence the s. 13 process, Headquarters may request a s. 13 notice when a matter comes to the attention of the DPP or Deputy DPP.

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<sup>12</sup> See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”. For commentary on the public interest factor see Robert J. Frater *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 9-13: “The ‘guardian of the public interest’ role is particularly noteworthy in a federal state such as Canada, where there are many attorneys general and directors of public prosecution. Determining what the public interest demands in a particular situation is a subject on which reasonable people may sometimes differ, depending on how much weight they choose to attach to objectively relevant factors.”

<sup>13</sup> All appeals and interventions are governed by mandatory time limitation periods, usually 30 days except for leave applications in the Supreme Court of Canada which are 60 days.

The DPP Act does not preclude oral notices followed by written notices, and these may be given where it is appropriate or necessary to do so in light of time constraints.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **1.3 CONSULTATION WITHIN GOVERNMENT**

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The independence of the Attorney General of Canada, the Director of Public Prosecutions (DPP), and by extension Crown counsel, in deciding whether to prosecute is an important constitutional principle in Canada.<sup>1</sup> "Prosecutorial independence", however, does not mean regional or institutional isolation and does not exclude the notions of cooperation and consultation. Under the *Director of Public Prosecutions Act*<sup>2</sup> (DPP Act), the independence is that of the DPP who is ultimately accountable to the Attorney General,<sup>3</sup> to the public and to the courts for the prosecution function, and not of individual prosecutors. In some instances prosecutorial decision-making, including the determination of whether a prosecution best serves the public interest,<sup>4</sup> whether charges should be stayed, or a particular position on sentence taken, may warrant consultation with those who can provide Crown counsel with relevant information and expertise.

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<sup>1</sup> For a more detailed discussion of this principle, see the PPSC Deskbook directive "[1.1 Relationship between the Attorney General and the Director of Public Prosecutions](#)" and the PPSC Deskbook guideline "[2.1 Independence and Accountability in Decision-Making](#)".

<sup>2</sup> SC 2006, c 9 [DPP Act].

<sup>3</sup> With the exception of *Canada Elections Act* matters; see DPP Act, *ibid*, s 3(8).

<sup>4</sup> See the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)", for a discussion about the public interest criteria to be considered when deciding whether to prosecute.

The Public Prosecution Service of Canada (PPSC) is responsible for prosecuting offences under numerous federal statutes and for providing prosecution-related legal advice to law enforcement agencies in relation to these statutes. Cases prosecuted by the PPSC include those involving drugs, organized crime, terrorism, tax law, money laundering and proceeds of crime, crimes against humanity and war crimes, all *Criminal Code* offences in the territories, and a vast array of other offences under federal statutes. With such wide-ranging prosecutorial responsibilities, PPSC counsel require an effective consultation process.

Interdepartmental consultation is important because of the shared responsibilities among government departments for enforcing federal laws. Specific ministers and departments are responsible for administering and enforcing specific legislation that also contain offence provisions prosecuted by the PPSC. For example, the Minister of National Revenue is primarily responsible for administering and enforcing the *Income Tax Act*; the Minister of Transport administers and enforces the *Aeronautics Act*.

This directive describes the consultation process with other departments of the Government of Canada that are involved in the enforcement of federal statutes, and with Department of Justice centres of expertise. Other guidelines describe the consultation process within the PPSC, between PPSC Regional Offices and Headquarters, and with investigative agencies.<sup>5</sup>

## **2. CASES WHERE CONSULTATION IS HIGHLY RECOMMENDED**

Formal consultation may be warranted in cases that are of significant public interest, which raise legal issues of national importance or which involve certain specialized areas of the law. These include, but are not limited to: cases before the Supreme Court of Canada; larger scale environmental prosecutions; challenges to the constitutionality of federal legislation; war crimes, crimes against humanity and genocide prosecutions; and cases involving official language rights, aboriginal law or national security issues.

However, even if a case does not fall into one of the above categories, Crown counsel should consider whether consultation with the Department of Justice and/or other federal departments and agencies is necessary. In deciding whether to consult outside the PPSC on a case, counsel should consider a number of factors including:

- whether other branches of government are likely to have information that could be relevant to the issues arising in the prosecution;
- whether the decision to be made or the case itself is likely to have impact on the broader public interest; and

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<sup>5</sup> For discussion of the types and manner of consultation between Crown counsel and investigators, see the PPSC Deskbook guideline “[2.7 Relationship between Crown Counsel and Investigative Agencies](#)”. For a discussion of consultation within the PPSC, see the PPSC Deskbook guideline “[2.6 Consultation within the Public Prosecution Service of Canada](#)”.

- whether a proposed position is inconsistent with or likely to be inconsistent with the advice given by non-PPSC counsel to other government departments or agencies.

Where consultation is required, Crown counsel are expected to adhere to the process set out in the following paragraphs.<sup>6</sup>

### **2.1. Cases involving official languages issues**

Crown counsel must contact the Chief Federal Prosecutor (CFP) at the earliest opportunity of impending cases in which language rights issues are raised under the *Canadian Charter of Rights and Freedoms*, the *Official Languages Act* or any related legislation.

If warranted, the champion or co-champion of official languages will then consult with the Official Languages Law Section of the Department of Justice. That Section helps ensure government wide consistency and accuracy in positions being advanced respecting official languages.

For further information on the consultation process respecting official languages issues, see the PPSC Deskbook directive "[2.11 Official Languages in Prosecutions](#)".

### **2.2. Aboriginal law cases**

When Aboriginal law issues that are complex or novel arise in the course of a prosecution, Crown counsel must contact PPSC Headquarters counsel responsible for Aboriginal law issues in litigation.

If warranted, the Headquarters counsel will consult with the Aboriginal Law Portfolio in the Department of Justice. That Section provides legal advice on complex and emerging issues in the area of Aboriginal law.

### **2.3. Cases involving national security issues**

Crown counsel must be particularly sensitive to the need to protect information the disclosure of which would be injurious to national security. Any prosecution which involves the possible disclosure of such information requires a special consultative process.

When a national security interest arises, Crown counsel must advise at the earliest opportunity the CFP who, in turn, will advise the Headquarters Senior Counsel, National Security Issues. The latter will contact the head of the appropriate Legal Services Unit

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<sup>6</sup> Such cases frequently require the DPP to inform the Attorney General pursuant to s 13 of the DPP Act, *supra* note 2. For more information regarding s 13 notices, see the PPSC Deskbook directive "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)".



(for example, CSIS, CSE, or the RCMP), and the Department of Justice National Security Group, and the Privy Council Office as needed. The Senior Counsel, National Security Issues will also consult with the Deputy DPP.

For further information on the consultation process respecting national security issues, see the PPSC Deskbook guideline “[5.1 National Security](#)” and the PPSC Deskbook directive “[4.2 Protecting Confidential Information under Section 38 of the \*Canada Evidence Act\*](#)”.

### **3. CONSULTATION WITH ENFORCEMENT AUTHORITIES**

Most federal prosecutions stem from investigations conducted by federal department investigators or by the police. In some situations, Crown counsel will be aware of a case at the investigative stage because of a request for legal advice. Sometimes, Crown counsel will not learn of a case until after investigators have laid charges and sent the Report to Crown Counsel/Crown Brief to the Regional Office. In either situation, decisions will have to be made regarding the charges to pursue, the evidence to call, the legal arguments to make, the recommendations to make on sentence and the decision to appeal. In making these decisions, Crown counsel should consult, where appropriate, with the investigating officers where the investigative agency’s interests are engaged substantively.

Especially in the prosecution of offences under specialized statutes (for example, the *Canadian Environmental Protection Act, 1999*, *Immigration and Refugee Protection Act*, *Proceeds of Crime* (Money Laundering) *and Terrorist Financing Act* (PCMLTFA), *Aeronautics Act* and the *Migratory Birds Convention Act*, etc.), Crown counsel should review the compliance and enforcement policies developed by the department or agency responsible for the underlying legislation.

Counsel may communicate directly with the appropriate investigating authority.<sup>7</sup> In cases where consultation is warranted with senior managers of a government department or agency, as for example, where that department's or agency's policies or practices are challenged, where legislation is attacked or on the more technical aspects of regulatory statutes, Crown counsel may ask the Department of Justice Legal Services Unit for that department or agency to arrange the consultation. Ultimately however, the DPP is responsible for the conduct of litigation subject to any directives the Attorney General may issue under s. 10(1) of the DPP Act.

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<sup>7</sup> For more detail regarding consultation with investigative agencies, see the PPSC Deskbook guideline “[2.7 Relationship between Crown counsel and Investigative Agencies](#)”, *supra* note 5.

#### **4. CONSULTATION WITH DEPARTMENT OF JUSTICE GENERALLY**

In respect of criminal or regulatory offence proceedings, in addition to consulting with police officers and other investigators, it may be important for Crown counsel to consult with other centres of expertise within government, in order to:

- ensure an awareness of national policies and objectives that may be relevant to an individual case;
- be cognisant of broader pan-government perspectives; and,
- to draw on the specialized subject-matter expertise of counsel in specific areas of the law.

This type of consultation gives Crown counsel access to a wide range of viewpoints and expertise and helps ensure that prosecutorial decisions are made with knowledge of all relevant information. It is appropriate where circumstances warrant for Crown counsel to consult with Department of Justice counsel where specialized advice is required. Crown counsel should initiate the consultation process at the earliest possible stage in the proceedings to allow the consultation to be useful.

##### **4.1. Consultation process**

All consultation with the Department of Justice Headquarters normally should be routed, at least initially, through PPSC Headquarters counsel, who provide assistance on complex or novel prosecution issues. Crown counsel can identify the appropriate PPSC Headquarters counsel contact by reviewing the subject-matter experts on the PPSC intranet. If no subject-matter expert exists for the issue at hand, Crown counsel should contact their PPSC Headquarters counsel regional contact. PPSC Headquarters counsel will then contact subject-matter experts within the Department of Justice as needed.

##### **4.2. The Human Rights Law Section**

Crown counsel conducting prosecutions which raise human rights issues involving the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, the *Canadian Bill of Rights*, or international human rights law may receive assistance from the Human Rights Law Section (HRLS).

##### **4.3. The Constitutional, Administrative and International Law Section**

When prosecutions raise legal issues in the areas of constitutional law and the law relating to federal government institutions, such as the extent and level of delegation of authority and due process, Constitutional, Administrative and International Law Section (CAILS) counsel may assist Crown counsel.

#### **4.4. The Information Law and Privacy Section**

Crown counsel may wish to consult the Information Law and Privacy Section (ILAP) when litigation questions arise regarding disclosure of personal information in the Crown's possession that may be restricted under the *Privacy Act* or when other issues relating to the *Access to Information Act* and the protection of privacy under *Privacy Act* arise.<sup>8</sup>

#### **4.5. The Criminal Law Policy Section**

The Criminal Law Policy Section (CLPS) develops and implements policies related to the *Criminal Code* and other federal statutes involving the criminal law. In cases involving a constitutional challenge to a provision of the *Criminal Code* or other federal legislation, the CLPS can explain why the provision was adopted in its current form and assist in identifying material, such as transcripts of hearings before Parliamentary Committees that will assist in defending the legislation.

#### **4.6. The National Security Group**

The National Security Group (NSG) is the central coordinating office within the Department of Justice for s. 38 of the *Canada Evidence Act*, providing advice, receiving s. 38 CEA notices, and making recommendations to the Attorney General of Canada as to whether to consent to the disclosure of sensitive information in criminal proceedings. NSG counsel also provide legal advice on security and information-related issues under the *Security of Information Act*, the *Security Offences Act*, and the *Anti-terrorism Act* in general. The NSG must be consulted on issues relating to s. 38 notices.<sup>9</sup>

#### **4.7. The Criminal Litigation Division**

The Criminal Litigation Division within the Department of Justice's Litigation Branch conducts criminal litigation on behalf of the Attorney General of Canada. One of its primary functions is the conduct of extradition and mutual legal assistance proceedings.<sup>10</sup> Additionally, because the Attorney General defends the constitutionality of federal legislation, either the Attorney General or the DPP may seek to intervene in provincial *Criminal Code* prosecutions.

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<sup>8</sup> Such issues may arise, for example, in cases involving complainants and sexual assault charges.

<sup>9</sup> See also the PPSC Deskbook directive "[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)" and the PPSC Deskbook guideline "[5.1 National Security](#)".

<sup>10</sup> Counsel in the Criminal Litigation Division litigate these matters as agents of the Attorney General of Canada.

#### **4.8. The Department of Justice Legal Service Units**

Counsel in the Department's Legal Service Units have specialized subject-matter expertise and can assist PPSC counsel on technical or interpretation issues regarding the regulation or statutes in their respective areas of expertise.



# **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

## **2.1 INDEPENDENCE AND ACCOUNTABILITY IN DECISION-MAKING**

### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The principle of the independence of the Attorney General is firmly entrenched in our legal system, widely respected, and carefully safeguarded. Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown counsel. Crown counsel<sup>1</sup> exercise their independence as the representative of the Director of Public Prosecutions (DPP). As such, their “independence” is a delegated independence. This independence is institutional, rather than personal, and is aimed at safeguarding the independence of the Public Prosecution Service of Canada (PPSC). Crown counsel are obliged to make decisions in accordance with the directives of the Attorney General and the guidelines of the DPP,<sup>2</sup> and they act under the direction of Chief Federal Prosecutors (CFP), who are in turn responsible to the DPP and his or her Deputy DPPs.<sup>3</sup> That said, Crown counsel also retain a degree of discretion in individual cases.<sup>4</sup>

Crown counsel, like the Attorney General and the DPP, are accountable for their decisions. Since the Attorney General is accountable to Parliament, the courts and the public<sup>5</sup> for decisions made on his or her behalf, this means that the Attorney General may

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<sup>1</sup> The term “Crown counsel” used in this guideline includes both in-house federal prosecutors and private sector barristers and advocates retained to act as federal prosecutors under s 7(2) of the *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

<sup>2</sup> The directives are issued in accordance with s 10(2) of the DPP Act, *supra* note 1, and the DPP guidelines are issued in accordance with s 3(3)(c) of the DPP Act (*ibid*). These directives and guidelines constitute the PPSC Deskbook.

<sup>3</sup> See the PPSC Deskbook guideline “[2.6 Consultation within the Public Prosecution Service of Canada](#)”.

<sup>4</sup> Indeed some courts have indicated that policies that completely remove Crown counsel’s discretion are improper: see *R v Catagas* (1978), 38 CCC (2d) 296 (Man CA); *R v Wood* (1983), 31 CR (3d) 374 (NS Prov Mag Ct).

<sup>5</sup> The Attorney General may take steps to explain decisions to the public, in order to promote public confidence in the administration of justice: see the PPSC Deskbook guideline “[2.9 Communications with the Media](#).”

issue a directive to the DPP in a particular case,<sup>6</sup> though such situations would be relatively rare and any such directives must be published in the *Canada Gazette* in order to maintain transparency.<sup>7</sup>

The independence principle also does not mean that Crown counsel need not consult. Quite to the contrary, responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators.<sup>8</sup> Indeed prosecutorial discretion is not exercised in a vacuum. The principle of independence means that, subject to s. 10(1) of the *Director of Public Prosecutions Act* (DPP Act), the DPP does not take instructions as to how to exercise discretion in prosecution matters. Similarly, Crown counsel do not take instructions as to how to proceed, except from those in the line of authority leading ultimately to the Attorney General, including, the CFP, the Deputy DPPs, and the DPP who, for the purpose of performing the powers, duties and functions under s. 3(3) of the DPP Act, is the Deputy Attorney General.<sup>9</sup>

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

## 2. STATEMENT OF POLICY

Crown counsel are obliged to exercise independent judgment in making decisions. Because their decision-making powers are delegated to them by the DPP, whose own powers, duties and functions to act under and on behalf of the Attorney General are delegated under the DPP Act,<sup>10</sup> Crown counsel are accountable for their decisions, and they must consult where required. Prosecutorial independence is not a license to do as one wishes, but to act as the Attorney General and the DPP should act.<sup>11</sup>

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<sup>6</sup> See DPP Act, *supra* note 1, s 10 (1).

<sup>7</sup> See the discussion in *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (Ottawa: Law Reform Commission of Canada, 1990) at 16-17, 53-59.

<sup>8</sup> See the PPSC Deskbook guideline “[2.6 Consultation within the Public Prosecution Service of Canada](#)”, *supra* note 3.

<sup>9</sup> See DPP Act, *supra* note 1, s 3(4): Crown counsel act on behalf of the DPP who in turn, as the Deputy Attorney General, acts on behalf of the Attorney General of Canada with respect to all powers, duties and functions of the latter set out in the *Criminal Code* except for those that must be exercised by the Attorney General personally.

<sup>10</sup> See DPP Act, *supra* note 1, s 3(3).

<sup>11</sup> See Bruce A. MacFarlane, “Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency” (2001) 45 *Criminal Law Quarterly* 272 at 279: “[The] independence of the Attorney General to be free, in the decision-making process, from the partisan political pressures of the day...does not mean that an individual Crown attorney, in the discharge of his or her responsibilities as agent of the Attorney General, is free to do whatever he or she wishes, irrespective of the law, practice or the general guidelines or policies of the Attorney General.”

### 3. ACCOUNTABILITY

"Prosecutorial independence" is that of the DPP who is accountable to the courts and to the public for the federal prosecution function as explained below. Individual prosecutors are, in turn, accountable to their CFP, the Deputy DPPs and the DPP. Additionally, while the DPP Act creates the Office of the DPP,<sup>12</sup> the Attorney General of Canada remains the chief law officer of the Crown and is ultimately accountable to Parliament, the courts and the public for the federal prosecution function. The DPP's role is distinct from that of the Attorney General; it entails closer oversight and more frequent involvement in files.

This form of public accountability is crucial to a system of open justice, and Crown counsel must be cognizant of this fact. This explains the need to ensure that the DPP is well-briefed in order to fulfill his or her statutory responsibility to inform the Attorney General of prosecutions and interventions that raise important questions of general interest. This duty to inform also allows the Attorney General to provide answers to questions that may be posed in Parliament. The principle of public accountability is clearest in situations where Parliament has required that some prosecutorial decisions be made by the Attorney General (or Deputy Attorney General) personally; an example is the decision to lay war crimes/crimes against humanity charges under s. 9(3) of the *Crimes against Humanity and War Crimes Act*.<sup>13</sup>

An equally important form of accountability is internal accountability. All Crown counsel are accountable to their superiors for decisions taken.<sup>14</sup> The PPSC is organized to foster principled, competent and responsible decision-making. One of the goals of the DPP's guidelines is to assist counsel in making the numerous difficult decisions which arise in criminal litigation. In so doing, they set objective standards against which prosecutorial conduct may be measured.

Individual prosecutors are also subject to a form of public accountability through their membership in provincial law societies.<sup>15</sup> Another form of public accountability occurs through judicial review of a prosecutor's actions, for example, through the abuse of process doctrine, or judicial control of actions which may prejudice fair trial interests, such as inflammatory jury addresses. Accountability is also enhanced because of the availability to the public of the Attorney General's directives and the DPP's guidelines,

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<sup>12</sup> The Office of the DPP is known under the applied name of the "Public Prosecution Service of Canada" (PPSC).

<sup>13</sup> See the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)."

<sup>14</sup> See the PPSC Deskbook guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)", *supra* note 3; see generally the discussion in D. Stuart, "Prosecutorial Accountability in Canada," in P. Stenning, *Accountability in Criminal Justice* (Toronto: University of Toronto Press, 1995) at 336-339.

<sup>15</sup> See e.g. *Krieger v Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372. For example, law societies have at least some jurisdiction to deal with actions of a prosecutor *qua* lawyer, such as the duty not to engage in dishonourable conduct; see J.L.J. Edwards, "The Office of Attorney General - New Levels of Public Expectations and Accountability" *Accountability in Criminal Justice*, note 6 at 299-304.



since the public is able to assess the actions of Crown counsel against the standards set out in the directives and guidelines. Finally, recognition of the importance of public accountability imposes a duty on Crown counsel in certain circumstances to communicate the reasons for certain decisions to the public through the media.<sup>16</sup>

#### 4. DELEGATION OF DECISION-MAKING POWER

As a practical matter, Crown counsel exercise most of the functions assigned by the *Criminal Code* to the Attorney General. The DPP exercises delegated powers, duties and functions on behalf of the Attorney General by virtue of the DPP Act and, in turn, has delegated many of these powers<sup>17</sup> to Crown counsel, but retains a discretion to direct that a particular decision be made. Likewise, the Attorney General may direct that a particular decision be made in a specific prosecution under s. 10(1) of the DPP Act. Transparency is assured by making the Attorney General's action a matter of public record for such a directive must be in writing and published in the *Canada Gazette*.<sup>18</sup>

Sections 14 and 15 of the DPP Act recognize the power of the Attorney General both to intervene in criminal proceedings and to assume conduct of particular prosecutions. Where the Attorney General gives notice to the DPP that he or she intends to assume conduct of a prosecution, prosecutorial independence is safeguarded by the DPP Act which requires publication of the notice of intent in the *Canada Gazette*, making the Attorney General's action a matter of public record.<sup>19</sup>

#### 5. CONSULTATION<sup>20</sup>

Independence of the prosecution service from government does not mean that Crown counsel cannot consult others. They may, and in some cases shall, consult others for the purpose of determining whether it is in the public interest to prosecute a case. Examples of persons with whom counsel can, and in some circumstance should, consult include police officers or other investigators,<sup>21</sup> victims of crime,<sup>22</sup> and government departments or agencies<sup>23</sup>.

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<sup>16</sup> See the PPSC Deskbook guideline "[2.9 Communications with the Media](#)", *supra* note 5.

<sup>17</sup> As well as duties and functions under s 9(1) of the DPP Act, *supra* note 1.

<sup>18</sup> See DPP Act, *supra* note 1, s 10(1).

<sup>19</sup> Note that s 3(8) of the DPP Act, *supra* note 1, specifies that the DPP initiates and conducts, on behalf of the Crown, prosecutions with respect to offences under the *Canada Elections Act*.

<sup>20</sup> For a more thorough discussion on consultation, see the guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)", *supra* note 3.

<sup>21</sup> See the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)".

<sup>22</sup> See the PPSC Deskbook directive "[5.6 Victims of Crime](#)".

<sup>23</sup> See the PPSC Deskbook directive "[1.3 Consultation within Government](#)".

Consultation ensures that Crown counsel have access to a wide range of viewpoints and information so that their decisions are made with full knowledge of all the circumstances. This is particularly useful in regulatory prosecutions. However, prosecutorial independence means that government departments and police officers cannot dictate to Crown counsel that a certain course of action be followed.

Consultation within the PPSC rests on a somewhat different footing. The DPP exercises delegated powers, duties and functions on behalf of the Attorney General.<sup>24</sup> In turn, the DPP has delegated authority to Crown counsel under s. 9 of the DPP Act. Because Crown counsel, as a practical matter, act in the DPP's name, it is important that consultation be undertaken internally to ensure that the DPP is made aware of potential problems, and, in some cases, to direct that a particular course of action be undertaken. This is necessary to ensure consistent decision-making, and that the DPP approve of decisions for which he or she is publicly accountable.<sup>25</sup> This also allows the DPP to fulfill his statutory obligation under s. 13 of the DPP Act<sup>26</sup> to inform the Attorney General of prosecutions and interventions that raise important questions of general interest.<sup>27</sup>

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<sup>24</sup> See DPP Act, *supra* note 1, s 3(3).

<sup>25</sup> DPP Act, *supra* note 1, s 16 requires the DPP to provide an annual report to the Attorney General for tabling in Parliament.

<sup>26</sup> See the PPSC Deskbook directive "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act.](#)"

<sup>27</sup> See DPP Act, *supra* note 1, s 13.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.2 DUTIES AND RESPONSIBILITIES OF CROWN COUNSEL**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline describes the duties and responsibilities of Crown counsel<sup>1</sup> in carrying out their delegated functions under ss. 3(3) and 9(1) of the *Director of Public Prosecutions Act* (DPP Act).

### 2. THE CONDUCT OF CRIMINAL LITIGATION

Section 3(3)(a) of the DPP Act mandates the Director of Public Prosecutions (DPP) to initiate and conduct prosecutions under and on behalf of the Crown. The responsibilities placed on Crown counsel as law officers of the Crown flow from the special obligations resting on the Office of the Director of Public Prosecutions (ODPP) in the execution of this mandate.<sup>2</sup> As a result, Crown counsel are subject to certain ethical obligations which may differ from those of other litigants.<sup>3</sup>

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<sup>1</sup> The term "Crown counsel", as used in this guideline and throughout the PPSC Deskbook, is meant to refer to employed federal prosecutors and private sector agents retained to act as federal prosecutors under s 7(2) of the *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

<sup>2</sup> For a foundational discussion of the role of the prosecutor, see R. Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009), ch 1[*Prosecutorial Misconduct*] and Christine McGoey "The "Good" Criminal Law Barrister A Crown Perspective" (Paper presented to the Law Society of Upper Canada's Second Colloquia on the Legal Profession, March 2004) available online at [http://www.lsuc.on.ca/media/christine\\_mcgoye\\_good\\_criminal\\_lawyer\\_mar0504.pdf](http://www.lsuc.on.ca/media/christine_mcgoye_good_criminal_lawyer_mar0504.pdf) and see also *R v Proulx*, 2001 SCC 66, [2001] 3 SCR 9.

<sup>3</sup> *Re Skogman and The Queen*, [1984] 2 SCR 93 at 109, (1984), 13 CCC (3d) 161 [*Re Skogman*], which held that Crown counsel are in a different position from the ordinary litigant, for they represent the public interest in the community at large. See also Marc Rosenberg, "The Attorney General and the Prosecution Function in the Twenty-First Century" (2009) 43(2) Queen's LJ 813.

The DPP and his or her delegated Crown counsel are vested with very substantial discretionary powers.<sup>4</sup> Public interest considerations require Crown counsel to exercise judgment and discretion which go beyond functioning simply as advocates.<sup>5</sup> Counsel appearing for the DPP are considered "ministers of justice", more part of the court than proponents of a cause.<sup>6</sup> The Supreme Court of Canada articulated the duty on prosecutors in its landmark decision in *Boucher*:

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

In *Regan*,<sup>7</sup> the Supreme Court further explained that the "minister of justice" responsibility is not confined to the courtroom and attaches to Crown counsel in all dealings in relation to an accused person whether before or after charges are laid. The Court further described the "minister of justice" function as follows:

These statements suggest at least three related but somewhat distinct components to the "Minister of Justice" concept. The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus – either negative or positive – towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.

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<sup>4</sup> *R v Cook*, [1997] 1 SCR 1113 at para 19 [*Cook*].

<sup>5</sup> *Re Skogman*, *supra* note 3.

<sup>6</sup> *Boucher v The Queen*, [1955] SCR 16, (1954), 110 CCC 263 at 270 [*Boucher*]. Citing *Boucher, Rex v Chamandy* (1934), 61 CCC 224 at 227 (ON CA) and *R v Proctor*, [1992] 2 WWR 289, 69 CCC (3d) 436 (MBCA), Twaddle JA described the role in the following manner: "The role of prosecuting counsel in Canada is to promote the cause of justice. It is not his function to persuade a jury to convict other than by reason. His function is to ensure that all the proper evidence, and all the proper inferences that may be drawn from it, are placed before the jury, together with a reasoned argument as to the conclusion to which such evidence and inferences lead." See also Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2011) at 638-640 and, more generally, ch 12 "The Prosecutor".

<sup>7</sup> *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297 at paras 155-6 [*Regan*].

Fairness, moderation, and dignity should characterize Crown counsel's conduct during criminal litigation.<sup>8</sup> This does not mean that counsel cannot conduct vigorous and thorough prosecutions. Indeed, vigour and thoroughness are important qualities in Crown counsel. In fact, the Supreme Court of Canada affirmed that vigorous Crown advocacy is "a critical element of this country's criminal law mechanism" in *Cook*.<sup>9</sup>

Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence ... it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth .... Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function.

Criminal litigation on the part of the Crown, however, should not become a personal contest of skill or professional pre-eminence.<sup>10</sup>

The conduct of criminal litigation is not restricted to the trial in open court. It also encompasses Crown counsel's prosecutorial authority leading up to trial, for example, the decision to prosecute, referring an alleged offender to an alternative measures program, disclosure, decisions on judicial interim release, the right to stay proceedings or withdraw charges, elect the mode of trial, grant immunity to a witness,<sup>11</sup> prefer indictments, join charges and accused, consent to re-elections, and consent to the waiver of charges between jurisdictions. Both in and out of court, Crown counsel exercise broad discretionary powers. Courts generally do not interfere with this discretion unless it has been exercised for an oblique motive, offends the right to a fair trial or otherwise amounts to an abuse of process.<sup>12</sup> Accordingly, counsel must exercise this discretion fairly, impartially, in good faith and according to the highest ethical standards. This is particularly so where deci-

<sup>8</sup> *Ibid.* The Canadian Bar Association's Code of Professional Conduct captures the *Boucher* statement: See Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 2009, c 9 at para 9, online: The Canadian Bar Association <<http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf>>. See also *Côté c R*, 2007 QCCA 594, citing *Boucher* at para 29.

<sup>9</sup> *Cook*, *supra* note 4 at para 21.

<sup>10</sup> *Chamandy*, *supra* note 6: "It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth."

<sup>11</sup> See the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)".

<sup>12</sup> *R v Gill*, 2012 ONCA 607 at paras 50-56, *R v JSR*, 2012 ONCA 568 (CanLII), 2012 ONCA 568 at paras 118-134, *R v Nixon* 2011 SCC 34 [*Nixon*]; *R v Power*, [1994] 1 SCR 601 [*Power*]; *Krieger v Law Society of Alberta*, 2002 SCC 65 [2002] 3 SCR 372; *Miazga v Kvello Estate* 2009 SCC 51, [2009] 3 SCR 339 at paras 6-7.

sions are made outside the public forum, as they may have far greater practical effect on the administration of justice than the public conduct of counsel in court.<sup>13</sup>

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

### **2.1. The duty to ensure that the mandate of the Director is carried out with integrity and dignity**

Counsel fulfill this duty by:

- complying with their bar association's applicable rules of ethics;<sup>14</sup>
- complying with the Public Prosecution Service of Canada (PPSC) Code of Conduct;
- exercising careful judgment in presenting the case for the Crown, in deciding whether or not to oppose bail, in deciding what witnesses to call, and what evidence to tender;
- acting with moderation, fairness, and impartiality;<sup>15</sup>
- conducting oneself with civility;<sup>16</sup>
- not discriminating on any basis prohibited by s. 15 of the *Canadian Charter of Rights and Freedoms* (Charter);
- adequately preparing for each case;

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<sup>13</sup> See *Cunliffe and Bledsoe v Law Society of British Columbia* (1984), 13 CCC (3d) 560 (BCCA) [*Cunliffe and Bledsoe*]: It is extremely important to the proper administration of justice that Crown counsel be aware of and fulfill their duty to be fair.

<sup>14</sup> See e.g. *CBA Code of Professional Conduct*, ch 9, *supra* note 8 at para 9: "When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused. There is a clear distinction between prosecutorial discretion and professional conduct. Only the latter can be regulated by a law society. A law society has jurisdiction to investigate any alleged breach of its ethical standards, even those committed by Crown prosecutors in connection with their prosecutorial discretion."

<sup>15</sup> *Power*, *supra* note 12 at 19: The Attorney General reflects through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then and only then should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

<sup>16</sup> See *R v Felderhof* (2003), 68 OR (3d) 481; 180 CCC (3d) 498, 17 CR (6<sup>th</sup>) 20 (ONCA) at para 83.

- remaining independent of the police or investigative agency while working closely with it; and
- conducting resolution discussions in a manner consistent with the DPP guideline.<sup>17</sup>

## **2.2. The duty to maintain judicial independence<sup>18</sup>**

Counsel fulfill this duty by:

- not discussing matters relating to a case with the presiding judge without the participation of defence counsel unless there is a legal justification for such *ex parte* discussions such as portions of an application under s. 37 of the *Canada Evidence Act* or in addressing common law informer privilege;<sup>19</sup>
- not dealing with matters in chambers that should properly be dealt with in open court;
- avoiding personal or private discussions with a judge in chambers while presenting a case before that judge; and
- refraining from appearing before a judge on a contentious matter when a personal connection exists between Crown counsel and the judge that would compromise the independent function of either role.

## **2.3. The duty to be fair and to maintain public confidence in prosecutorial fairness<sup>20</sup>**

In order to maintain public confidence in the administration of justice, Crown counsel must not only act fairly; their conduct must be seen to be fair. One can act fairly while unintentionally leaving an impression of secrecy, bias or unfairness.

Counsel fulfill this duty by:

- making disclosure in accordance with the law;<sup>21</sup>
- bringing all relevant cases and authorities known to counsel to the attention of the court, even if they may be contrary to the Crown's position;
- not misleading the court;

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<sup>17</sup> See the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”.

<sup>18</sup> See the PPSC Deskbook guideline “[2.8 Contact with the Courts](#)”.

<sup>19</sup> *Canada (Minister of Citizenship and Immigration) v Tobias*, [1997] 3 SCR 391, 118 CCC (3d) 443.

<sup>20</sup> *Cunliffe and Bledsoe*, *supra* note 13 at para 41: It is extremely important to the proper administration of justice that Crown counsel be aware of and fulfill their duty to be fair.

<sup>21</sup> See the PPSC Deskbook guideline “[2.5 Principles of Disclosure](#)”; *R v Stinchcombe*, [1991] 3 SCR 326: The Crown is under a duty at common law to disclose to the defence all material evidence, whether favourable to the accused or not. Transgressions with respect to this duty constitute a very serious breach of legal ethics. See also *R v McNeil*, 2009 SCC 3, [2009] 1 SCR 66 [*McNeil*] regarding disclosure of police misconduct information and the Crown’s duty to make reasonable inquiries.



- not expressing personal opinions on the evidence, including the credibility of witnesses or on the guilt or innocence of the accused in court or in public. Such expressions of opinion are improper;<sup>22</sup>
- not advertng to any unproven facts, even if they are material and could have been admitted as evidence;
- asking relevant and proper questions during the examination of a witness and not asking questions designed solely to embarrass, insult, abuse, belittle, or demean the witness. Cross examination can be skilful and probing, yet still show respect for the witness.<sup>23</sup> The law distinguishes between a cross-examination that is “persistent and exhaustive”, which is proper, and a cross-examination that is “abusive”;<sup>24</sup>
- stating the law accurately in oral pleadings;
- respecting defence counsel,<sup>25</sup> the accused, and the proceedings while vigorously asserting the Crown's position, and not publicly and improperly criticizing defence strategy;
- respecting the court and judicial decisions and not publicly disparaging judgments; and
- avoiding themselves engaging in active “judge shopping”.<sup>26</sup>

#### **2.4. The duty to maintain objectivity**

Counsel fulfill this duty by:

- being aware of the dangers of tunnel vision and ensure they review the evidence in an objective, rigorous and thorough manner in assessing the strength of the evidence emanating from the police investigation throughout the proceedings;<sup>27</sup>
- exercising particular care regarding actual and perceived objectivity when involved in an investigation at the pre-charge stage;<sup>28</sup>
- making all necessary inquiries regarding potentially relevant evidence;<sup>29</sup>

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<sup>22</sup> *Boucher*, *supra* note 6 at 31; *R v Charest* (1990), 76 CR (3d) 63 (QCCA) [*Charest*]; *Regan*, *supra* note 7 at para 65, *R v Boudreau*, 2012 ONCA 830 at para 16 [*Boudreau*].

<sup>23</sup> *R v Robinson* (2001), 153 CCC (3d) 398 (ONCA).

<sup>24</sup> *R v Lowe*, 2009 BCCA 338 at para 51.

<sup>25</sup> *R v Mallory*, 2007 ONCA 46, 217 CCC (3d) 266 [*Mallory*].

<sup>26</sup> *Regan*, *supra* note 7 at paras 59-61.

<sup>27</sup> See the PPSC Deskbook directive “[2.4 Prevention of Wrongful Convictions](#)”. See also *R v Ahluwalia*, (2000), 149 CCC (3d) 193, 39 CR (5<sup>th</sup>) 35 (ON CA) [*Ahluwalia*].

<sup>28</sup> *Regan*, *supra* note 7 (complainant interviews); *R v Trang*, [2002] 7 WWR 157, 311 AR 284 (QB) (pre-charge advisory role).

<sup>29</sup> *Ahluwalia*, *supra* note 27; *McNeil*, *supra* note 21.

- never permitting personal interests or partisan political considerations to interfere with the proper exercise of prosecutorial discretion; and
- not exceeding the scope of appropriate opening remarks, for example elevating the role of Crown counsel in the eyes of the jury to the custodian of the public interest.<sup>30</sup>

#### 2.4.1. Inflammatory remarks and conduct

As part of the Crown's duty to be fair, counsel are obliged to ensure that any comments made during jury addresses are not "inflammatory".<sup>31</sup> Whether an address will be considered to be inflammatory is determined by looking at the number and nature of the comments, the specific language used and the overall tone of counsel's address. Inflammatory conduct or comments could render a trial unfair.<sup>32</sup>

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

- Expressions of personal opinion
  - These include opinions on the honesty and integrity of police witnesses; that Crown counsel does not believe the accused; or on the guilt of the accused.<sup>33</sup>
- Inappropriately negative comments about the accused's or a witness's credibility or character
  - Such comments include characterizations of the accused as a liar, excessive use of sarcasm, ridicule, derision or exaggeration in referring to the accused or defence witnesses, excessive reference to the accused's criminal record, native country.<sup>34</sup>

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<sup>30</sup> *R v Patrick*, 2007 CanLII 11724 (ONSC) at paras 3-7.

<sup>31</sup> While the potential impact may be greater before a jury, Crown counsel must avoid inflammatory comments in judge-alone proceedings as well. For a thorough discussion of inflammatory Crown comments see "Improper Jury Addresses" in *Prosecutorial Misconduct*, ch 7 and C" McGoey, *supra* note 2; *R v Munroe* (1995), 96 CCC (3d) 431 38 CR (4th) 68 [*Munroe*], *aff'd* without reasons [1995] 4 SCR 53. See also *Mallory*, *supra* note 25 at paras 330-345 and *Boudreau*, *supra* note 22 at para 16. See online: [http://www.lsuc.on.ca/media/christine\\_mcgoye\\_good\\_criminal\\_lawyer\\_mar0504.pdf](http://www.lsuc.on.ca/media/christine_mcgoye_good_criminal_lawyer_mar0504.pdf).

<sup>32</sup> See e.g. *Mallory*, *supra* note 25 at para 340.

<sup>33</sup> See e.g. *R v Michaud*, [1996] 2 SCR 458, (1996), 107 CCC (3d) 193; *R v McDonald* (1958), 120 CCC 209 (ONCA); *R v Murphy* (1981), 43 NSR (2d) 676 (CA); *Moubarak v R*; *Elzein v R*, [1982] QCCA 454, 1982 CarswellQue 771, JE 82-710.

<sup>34</sup> See e.g. *R v Dvorak* (2001), 156 CCC (3d) 286 (BCCA), *Pisani v The Queen*, [1971] SCR 738, (1970), 1 CCC (2d) 477; *Tremblay v The Queen* (1963), 40 CR 303 (QCCA); *R v Romeo*, [1991] 1 SCR 86, (1991), 62 CCC (3d) 1; *Charest*, *supra* note 22; *R v C (R)* (1999), 137 CCC (3d) 87 (BCCA).

- Observations or statements of fact not supported by the evidence
  - These situations include ones in which Crown counsel misstates the evidence in a way which impugns the accused's character.<sup>35</sup>
- Appeals to fear, emotion or prejudice
  - These comments are often *in terrorem* arguments in which Crown counsel urges the jury to protect society from the accused, who is portrayed in very unflattering terms.<sup>36</sup>
- Negative comments about defence counsel or defence strategy
  - Crown counsel shall not suggest that defence counsel have used improper tactics, presented illegal evidence or made other comments designed solely to portray defence counsel as being untrustworthy.<sup>37</sup>
- Inappropriate language, tactics, and conduct in general
  - Inappropriate tactics include:
    - not placing before the court all the circumstances surrounding the obtaining of statements from the accused;
    - in cross-examination of the accused, while professing to test his credibility, bringing various matters before the jury which have no relevance to the issues at trial;
    - at the conclusion of the evidence given by the accused in his defence, stating in the presence of the jury that the accused will be arrested for perjury;
    - improperly presenting evidence to the jury through the device of reading from reports of judgments of the Supreme Court of Canada and other courts;
    - raising a "concoction theory" based on Crown disclosure for the first time in the closing address.<sup>38</sup>

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<sup>35</sup> See e.g. *R v Rose*, [1998] 3 SCR 262 at para 107; *R v Trochym*, 2007 SCC 6, [2007] 1 SCR 239; *R v Wise*, 2002 BCCA 80, 162 CCC (3d) 1, aff'd [2003] 1 SCR 3.

<sup>36</sup> See e.g. *R v Swietlinski*, [1994] 3 SCR 481; *R v Drover* (2000), 45 WCB (2d) 264 (NLCA); *R v Labarre* (1978), 45 CCC (2d) 171 (QCCA); *R v Gratton* (1985), 18 CCC (3d) 462 (ONCA); *Moubarak*, *supra* note 33; *Munroe*, *supra* note 31, aff'd [1995] 4 SCR 53, 102 CCC(3d) 383.

<sup>37</sup> See *Landolfi v Fargione* (2006), 265 DLR (4<sup>th</sup>) 426 (ONCA); *Mallory*, *supra* note 25.

<sup>38</sup> *R v Peavoy* (1997), 34 OR (3d) 620, 117 CCC (3d) 226 cited in *R v Cavan* 1999 139 CCC (3d) 449; 126 OAC 201 and *R v Thain* (2009), 243 CCC (3d) 230, 247 OAC 55 "It is wrong to state as a general proposition that the credibility of an accused must be assessed "bearing in mind that his explanation comes long after disclosure was available to him."

### 3. CONFLICT OF INTEREST

The special ethical obligations on Crown counsel, as “ministers of justice” demand the highest standards of honesty and integrity. Crown counsel’s conduct should garner the public’s confidence and trust. Thus, it is important that Crown counsel avoid actual, perceived or potential conflicts of interest.<sup>39</sup> An easily identifiable conflict of interest may arise where, for example, counsel prosecutes a former client.

Crown counsel should not participate in any prosecution involving an accused, a victim or a material witness who is a relative, a friend, or anyone else in respect of whom there is an objectively reasonable perception of conflict of interest. If the matter is already before the court when the conflict becomes apparent, Crown counsel should notify defence counsel and the court and disqualify themselves from the case.

### 4. PROVIDING LEGAL ADVICE

Crown counsel provide legal advice to investigative agencies and departments within the federal government and to law enforcement agencies involved in enforcing federal law.<sup>40</sup> The primary purpose of providing this legal advice is to help ensure that evidence is gathered in a manner that will be admissible at trial. This involves compliance with the Charter, the *Canada Evidence Act* and other legal principles. Crown counsel may also advise on the sufficiency and relevance of evidence and identify areas that require investigative follow-up. Crown counsel may provide legal advice relating to police investigative techniques, which do not relate to a specific case, but may affect the admissibility of evidence in future prosecutions.

Counsel’s duty is to give independent legal advice on criminal law matters. In regulatory matters, this may include advising investigative agencies about the criminal law issues arising from an investigation, practice, or policy. Counsel have a further responsibility to discuss the public interest implications with a department or agency contemplating a prosecution and to apply the Attorney General’s directive regarding those interests.<sup>41</sup>

When advising investigative agencies, Crown counsel must always be mindful of the distinct roles of the investigator and the prosecutor in the administration of justice.<sup>42</sup> Given

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<sup>39</sup> Also of relevance in considering the issue of accepting a benefit is s 121(1)(c) of the *Criminal Code* (dealing with accepting benefits from persons having dealings with the government), s 122 of the *Criminal Code* (dealing with breach of trust by a public officer) and PPSC Code of Conduct (Conflict of Interest and Post-Employment).

<sup>40</sup> See DPP Act, *supra* note 1, s 3(3)(d).

<sup>41</sup> See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, for a list of public interest considerations and how they relate to the decision to prosecute. See also the PPSC Deskbook directive “[1.3 Consultation within Government](#)”.

<sup>42</sup> See the PPSC Deskbook guideline “[2.7 Relationship between Crown Counsel and Investigative Agencies](#)”.

the increasing complexity of law enforcement, counsel often become involved at the investigative stage to help ensure that the investigative strategies, techniques and procedures are consistent with the rules of evidence and with the Charter as well as to advise investigators on the nature of the evidence required, the scope and direction of the investigation, the use of investigative powers, the sufficiency of evidence and the quality of the witnesses. Effective management of complex litigation requires pre-charge cooperation between the police and Crown counsel. However, the existence of such cooperation does not diminish the need for an independent, impartial assessment of both the evidence and public interest considerations when the decision is made as to whether to prosecute.

#### 4.1. Solicitor-client privilege

Information that is subject to solicitor-client privilege, including Crown counsel's legal advice to government departments and investigative agencies, normally is exempt from the Crown's disclosure duty.<sup>43</sup> Consequently, Crown counsel may not release a legal opinion, refer to it, or describe it in any fashion to defence counsel<sup>44</sup> or the public unless the privilege has been waived or it meets the "innocence at stake" threshold. Crown counsel must be conscious of the fact that not everything they do will be covered by privilege – whether the privilege attaches depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought.<sup>45</sup> Crown counsel should be aware of internal policies of the relevant investigative agency and also ensure waivers of privilege are undertaken in accordance of the agency's internal policy.

With law enforcement agencies outside the Government of Canada, the privilege rests with the agency. With departments and agencies within the Government of Canada, the privilege rests with the Crown in right of Canada. In practical terms, however, decisions concerning privilege, such as waiver, are usually made by the government department or agency that received the advice. Counsel should be aware of internal policies of the relevant organization and ensure that any waivers of privilege are done in accordance with the organization's internal policy.

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<sup>43</sup> *Canada (Public Safety and Emergency Preparedness) v Information Commissioner of Canada*, 2013 FCA 104 (CanLII), *Stinchcombe*, *supra* note 21. See the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)", *supra* note 21. For a consideration of the scope of solicitor-client privilege in the context of advice within the PPSC, see *Auclair c R*, 2010 QCCS 3117; *Dorion c Entreprises Télé-Capitale Ltée*, [1992] JQ n° 1418; *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445: The solicitor-client privilege is a principle of fundamental importance to the administration of justice as a whole. Despite its importance, however, the privilege is not absolute and, in limited circumstances, may yield to allow an accused to make full answer and defence. The appropriate test for determining whether to set aside solicitor-client privilege is the innocence at stake test, which is stringent. The privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction. See also *R v Shirose*, [1999] 1 SCR 565 at 601, 611-615, (1999), 133 CCC (3d) 257 [Shirose]: solicitor-client privilege is waived where the police or the Crown rely on confidential legal advice to defend an abuse of process application even in circumstances where only the existence, and not the contents, of the advice is disclosed.

<sup>44</sup> See *Stinchcombe*, *supra* note 21 at 9-10. For further guidance on this issue when involved in a criminal prosecution, also see the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)", *supra* note 21.

<sup>45</sup> *Shirose*, *supra* note 43 at 602.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.3 DECISION TO PROSECUTE**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The decision whether to prosecute is among the most important decisions that will be made by Crown counsel. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute tend to undermine confidence of the community in the criminal justice system.

The Director of Public Prosecutions (DPP) under the authority of s. 3(3)(a) of the *Director of Public Prosecutions Act*<sup>1</sup> (DPP Act) initiates and conducts prosecutions on behalf of the federal Crown.<sup>2</sup> The DPP delegates this power and function to federal prosecutors who are appointed or retained for this purpose and act as the DPP's agents<sup>3</sup> when making a decision to prosecute.<sup>4</sup>

As part of their *quasi*-judicial role as “ministers of justice”,<sup>5</sup> Crown counsel ensure that prosecutions<sup>6</sup> based on sufficient evidence and which best serve the public interest are

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<sup>1</sup> *Director of Public Prosecutions Act*, SC 2006, c 9, s 3(3)(a) [DPP Act].

<sup>2</sup> See DPP Act, *ibid*, ss 10 to 15 regarding the requirements on the Attorney General of Canada in respect of directing or intervening in a particular prosecution.

<sup>3</sup> DPP Act, *ibid*, s 7.

<sup>4</sup> See the PPSC Deskbook guidelines “[2.1 Independence and Accountability in Decision-Making](#)” and “[2.2 Duties and Responsibilities of Crown Counsel](#)”.

<sup>5</sup> *Miazga v Kvello Estate*, 2009 SCC 51, [2009] 3 SCR 339 at para 47 [*Miazga*]; See also *Boucher v The Queen*, [1955] SCR 16 at 23-24; See the PPSC Deskbook guideline “[2.1 Independence and Accountability in Decision-Making](#)”, *supra* note 4.

<sup>6</sup> See DPP Act, *supra* note 1, s 2 for the definition of prosecution and s 3(8). A prosecution means a prosecution under the jurisdiction of the Attorney General of Canada or under the *Canada Elections Act*, a proceeding respecting any offence, the prosecution, or prospective prosecution, of which is under the jurisdiction of the Attorney General of Canada or under the *Canada Elections Act*, and any appeal related to such a prosecution or proceeding.



brought before the courts. In the exercise of this power, Crown counsel have a high ethical duty to act independently, fairly and objectively without either negative or positive *animus* towards the accused.<sup>7</sup>

At the same time, Crown counsel must recognize the independent functions of the police and investigative agencies, which decide what charges to recommend or lay in light of evidence gathered during an investigation, and of the courts, which determine the admissibility and weight of the evidence at trial and determine the guilt or innocence of an accused person.<sup>8</sup>

## 2. THE DECISION TO PROSECUTE TEST

When deciding whether to initiate and conduct a prosecution on behalf of the federal Crown, Crown counsel must consider two issues:

- Is there is a reasonable prospect of conviction based on evidence that is likely to be available at trial? If there is,
- Would a prosecution best serve the public interest?

If the answer to both questions is yes, the decision to prosecute test is met.<sup>9</sup> If not, and charges have been laid, the charges should be withdrawn or a stay of proceedings entered.

## 3. APPLICATION OF THE TEST

The test must be applied to each charge against each accused. This should take place in a timely manner following the laying of charges, or in pre-charge approval provinces, upon the referral of charges by the police or the investigative agency.

If requested by the police or investigative agency, Crown counsel may provide a preliminary assessment on whether the test would be met prior to charges being laid or referred for approval. However, it is preferable that the advice be given once the investigation has been completed.

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<sup>7</sup> Use of the term “accused” includes persons who have not yet been formally charged, but in relation to whom Crown counsel must make the decision to prosecute; *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at paras 3, 29-30, 32, 48 [*Krieger*]; and *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297 at paras 43, 70, LeBel J and paras 156-57, Binnie J dissenting [*Regan*].

<sup>8</sup> *Regan*, *ibid* at paras 64, 66, 67, 70 LeBel J and at paras 159-161 Binnie J dissenting; *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Justice G. Arthur Martin, Chair), 1993 at 25, 26, 32, 35-39, 42, 51 [Martin Report].

<sup>9</sup> See Martin Report, *ibid* at 51.

### 3.1. Reasonable Prospect of Conviction

Crown counsel must objectively assess the whole of the evidence likely to be available at trial, including any credible evidence that would favour the accused, to determine whether there is a reasonable prospect of conviction. This assessment should be made on the assumption that the trial will unfold before an impartial trier of fact acting in accordance with the law.

A reasonable prospect of conviction requires that there be more than a bare *prima facie* case, or in other words, it requires more than evidence that is capable of making out each of the necessary elements of the alleged offence against an accused.<sup>10</sup> However, the test does not require a probability of conviction, that is, it does not require a conclusion that a conviction is more likely than not.<sup>11</sup>

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 counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction; for example, the existence of a violation of the *Canadian Charter of Rights and Freedoms* that will undoubtedly lead to the exclusion of evidence essential to sustain a conviction. Crown counsel must also zealously guard against the possibility that they have been afflicted by “tunnel vision,” through close contact with the police or investigative agency, or victims, such that the assessment is insufficiently rigorous and objective.<sup>12</sup>

In assessing the sufficiency of the evidence, Crown counsel should take care to not usurp the role of the court. The Supreme Court of Canada explained this in *Miazga v Kvello Estate*<sup>13</sup>:

... the Crown prosecutor who harbours personal doubt about the guilt of the accused cannot substitute his or her own views for those of the judge or jury in making the threshold decision to go forward with a prosecution. The Martin Report explains as follows, at pp. 71-72:

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<sup>10</sup> *Mezzo v The Queen*, [1986] 1 SCR 802.

<sup>11</sup> For a discussion of the distinction between a reasonable prospect of conviction and probability of conviction (also known as the “51 per cent rule”) see: *Report of the Law Reform Commission of Canada: Controlling Criminal Prosecutions: the Attorney General and the Crown Prosecutor, Working Paper 62*, (Justice Canada, 1990), 81-82 [LRC on Prosecutions]; Martin Report, *supra* note 8 at 51, 58-59, 63; *Report of Commissioner Stephen Owen on the Discretion to Prosecute Inquiry*, 1990, at 102-104 [Owen Report]; and John L. J. Edwards, *The Attorney General, Politics and the Public Interest* (London Street & Maxwell, 1984) at 413-414.

<sup>12</sup> The concept of “tunnel vision” is discussed extensively in the Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, “The Path to Justice: Preventing Wrongful Convictions” (2011), online: <<http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/index.html>>

<sup>13</sup> *Miazga*, *supra* note 5 at para 66.

Crown counsel need not and ought not to be substituting his or her own views for those of the trial judge or jury, who are the community's decision makers. It cannot be forgotten that much of the public's confidence in the administration of justice is attributable to the trial court process that ensures that justice is not only done, but is seen to be done...

The evidential standard must be applied throughout the proceedings – from the time the investigative report is first received until the exhaustion of all appeals. When charges are laid, the test may have to be applied primarily on the basis of the investigative report, although it is certainly preferable – especially in borderline cases – to look beyond the statements of the witnesses. Later in the proceedings, counsel may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and of course there can never be an assurance that a prosecution will result in a conviction.

### **3.2. The Public Interest**

It is a well-accepted principle of law in Canada and throughout the Commonwealth that a prosecution should be undertaken only where the requisite evidence exists and a prosecution would best serve the public interest. It has never been the rule that a prosecution will occur solely on the basis that there is sufficient evidence to support a charge.<sup>14</sup>

Consequently, if there is sufficient evidence, Crown counsel must then consider whether, in all of the circumstances, a prosecution would best serve the public interest. Crown counsel consider the public interest only when satisfied that the evidentiary foundation to support a charge has been met as “no public interest, however compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction.”<sup>15</sup> If there is a reasonable prospect of conviction, “the public interest in the due enforcement of the criminal law will in most cases, without more, require that the matter be brought before the courts for a decision on the merits.”<sup>16</sup>

As at the evidentiary stage, Crown counsel must review the public interest in light of emerging developments. On the basis of the available material, Crown counsel must continually assess at each stage of the process whether the prosecution is in the public interest.

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<sup>14</sup> See LRC on Prosecutions, *supra* note 11 at 82; Martin Report, *supra* note 8 at 74; Owen Report, *supra* note 11 at 104, 117. See also the 1951 statement of Lord Hartley Shawcross, then Attorney General of England and Wales, to the House of Commons of the United Kingdom of Great Britain and Northern Ireland, UK, HC Parliamentary Debates, vol 483, col 681, (29 January 1951).

<sup>15</sup> Martin Report, *supra* note 8 at 76.

<sup>16</sup> *Ibid* at 102.

Crown counsel should take into account the matters set out below when considering the public interest. Factors that are commonly relevant to these matters are also listed. It would be impossible to catalogue every conceivable factor that could be relevant in every situation. Special considerations may arise in specific types of cases. As well, the relevance of, and the weight to be attached to, the factors vary from case to case. Crown counsel should also consult other relevant directives and guidelines to inform their consideration of the public interest.

### **1) The nature of the alleged offence**

- a. Its seriousness or triviality. The more serious the alleged offence, the more likely the public interest will require that a prosecution be pursued. However, where the alleged offence is not so serious as to plainly require a prosecution, Crown counsel must consider their duty to uphold the laws enacted by Parliament<sup>17</sup> and any important public interest served by conducting a prosecution, for example ensuring compliance with a regulatory regime through prosecution;
- b. Significant mitigating or aggravating circumstances related to the underlying conduct, for example those set out in the *Criminal Code* or other acts of Parliament;
- c. The prevalence and impact of the alleged offence in the community and the need for general and specific deterrence;
- d. The likely sentence in the event of a conviction;
- e. The delay between the commission of the alleged offence and the time of the charging decision. Considerations relevant to the impact of any delay include the responsibility of the accused for the delay, the discoverability of the alleged offence by the police or investigative agency, and the complexity and length of the investigation; or
- f. The law that is alleged to have been breached is obsolete or obscure.

### **2) The nature of the harm caused by or the consequences of the alleged offence**

- a. The nature of the harm includes loss or injury caused by the alleged offence and relevant consequences to the victim, the community, the environment, natural resources, safety, public health, public welfare or societal, economic, cultural or other public interests;
- b. Whether the alleged offence engenders considerable concern in the community;
- c. The entitlement of any person to criminal compensation, reparation or forfeiture if a prosecution occurs; or

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<sup>17</sup> *R v Catagas* (1977), 38 CCC (2d) 298 (MBCA) at para 2, Freedman CJ; *R v Morgentaler*, [1988] 1 SCR 30 at paras 60-62, Dickson CJ.

- d. The availability of civil remedies is not a factor that militates against a prosecution.

### **3) The circumstances, consequences to and attitude of victims**

Although Crown counsel do not act as lawyers for victims,<sup>18</sup> the effect of the alleged offence on victims is relevant to the public interest.

- a. The attitude of the victim of the alleged offence to a prosecution. This may include the attitude of the victim's family members;
- b. The impact of the alleged offence on the victim and their family including any loss, injury or harm suffered;
- c. The youth, age, intelligence, vulnerability, disability, dependence, physical health, mental health, and other personal circumstances of the victim;
- d. Whether the victim was serving the public or was a public official; or
- e. Whether a prosecution is likely to have an adverse effect on the victim's physical or mental health.

### **4) The level of culpability and circumstances of the accused**

- a. The accused's degree of responsibility, level of involvement and whether they were in a position of authority or trust;
- b. The harm the accused caused, especially to vulnerable victims or persons;
- c. The accused's motivation, and in particular any bias, prejudice or hate based on race, national or ethnic origin, language, religion, gender, age, mental or physical disability, sexual orientation, or any other similar factor;
- d. The accused's agreed upon co-operation with the investigation or prosecution of others, or the extent to which they have already done so;
- e. The accused's age, intelligence, physical or mental health or infirmity; or
- f. The accused's background, including their antecedents and the likelihood of future illegal conduct.

### **5) The need to protect sources of information<sup>19</sup>**

Whether prosecuting would require or cause the disclosure of information that should not be disclosed in the public interest, for example it would be injurious to:

- a. Confidential informants;

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<sup>18</sup> See PPSC Deskbook directive "[5.6 Victims of Crime](#)".

<sup>19</sup> See PPSC Deskbook directive "[4.2 Protecting Confidential Information under Section 38 of the \*Canada Evidence Act\*](#)".

- b. Ongoing investigations;
- c. International relations;
- d. National defence; or
- e. National security.

#### **6) Confidence in the administration of justice**

- a. Whether a prosecution would maintain public confidence in the government, courts, a regulatory regime, and the administration of justice or have the opposite effect;
- b. The likelihood of achieving the desired result and requisite level of specific and general deterrence and denunciation without a prosecution through available alternative measures, non-criminal processes or a prosecution by a provincial prosecution service;
- c. The effect on the administration of justice of committing resources to conduct the proceedings when considered in relation to the seriousness or triviality of the alleged offence, the likely sentence that would result from a conviction, and the attendant public benefit(s); or
- d. Whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive.

#### **3.3. Irrelevant criteria**

A decision whether to prosecute must clearly not be influenced by any of the following:

- a. The race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;
- b. Crown counsel's personal feelings about the accused or the victim;
- c. Possible political advantage or disadvantage to the government or any political group or party; or
- d. The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

#### **3.4. Consultation<sup>20</sup>**

Crown counsel who are faced with difficult decisions regarding either branch of the test should consult with experienced colleagues and supervisors or managers. Where

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<sup>20</sup> See the PPSC Deskbook directive "[1.3 Consultation within Government](#)" and the PPSC Deskbook guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)".

decisions could have a significant impact on other prosecution decisions regarding a class of cases, the enforcement practices or policies of the police or investigative agency, a regulatory enforcement/compliance regime, or provincial or national practice, the Chief Federal Prosecutor (CFP) must consult with the appropriate Deputy Director of Public Prosecutions (Deputy DPP).

In some cases it will be appropriate for Crown counsel to obtain the views of the police, the investigative agency or the victim when determining whether the institution or continuation of prosecution best serves the public interest.

Consultation with counsel within the federal government, particularly with a Department of Justice Legal Services Unit that advises a federal department or agency that has an enforcement mandate, may also be warranted as they may be particularly sensitive to the nature, philosophy and objectives of the enforcement regime and its remedial options, from warnings to administrative measures. In prosecutions relevant to regulatory statutes, investigative agencies often have views about the enforcement of their regulatory schemes and should be consulted in the event that the public interest factors weigh against a prosecution.

In the event that the police or investigative agency disagrees with the decision to not prosecute a referred charge or a laid charge, Crown counsel advises the CFP or their designate, who may communicate with the police or investigative agency at the appropriate level. Where necessary, in cases of national importance, the CFP consults with the relevant Deputy DPP.

Ultimately, however, Crown counsel or the relevant manager within the Public Prosecution Service of Canada (PPSC) must decide independently of the police or investigative agency whether a prosecution is warranted.

### **3.5. Reasons for Decision**

Where a decision is made to not institute proceedings, Crown counsel should keep an appropriate record of the reasons for that decision as well as consultations made in reaching that decision.

In appropriate cases, reasons to explain a decision not to prosecute should be provided in order to maintain confidence in the administration of justice.

Reasons are provided to the police or the investigative agency in serious matters or those of significant public interest when a decision not to prosecute has been made. Reasons that reflect sensitivity to the police or investigative agency's mandate support the proper administration of justice.

A victim of crime may also feel aggrieved by decisions not to prosecute, or decisions to prosecute when they do not favour a prosecution. Crown counsel should keep the victim appropriately informed in a timely fashion of the decision.

Finally, the need to maintain confidence in the administration of justice may also necessitate, in some circumstances, public communication of the reasons for not prosecuting.<sup>21</sup> This communication may occur by way of a statement in court at the time charges are stayed or withdrawn, or a news release. In providing reasons, Crown counsel should consider the privacy interests of victims, witnesses and accused persons, and where requested by a victim, protect their identity from public exposure.

### **3.6. Delegated Matters**

Where a charge has been delegated from a provincial attorney general to the DPP for prosecution, Crown counsel makes the decision to prosecute in accordance with the applicable provincial decision to prosecute test.

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<sup>21</sup> See the PPSC Deskbook guideline “[2.9 Communications with the Media](#)”.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.4 PREVENTION OF WRONGFUL CONVICTIONS**

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Crown counsel play an important role in the prevention of wrongful convictions. Crown counsel assess the evidence in a given case to determine if there is a reasonable prospect of conviction, and must continue to assess the evidence on an ongoing basis to determine whether to continue with the prosecution.<sup>1</sup> It is thus crucial that Crown counsel are aware of the factors and circumstances that have been identified as common in wrongful conviction cases, and take all necessary steps within their mandate to help ensure that innocent persons are not convicted of crimes they did not commit.

The primary purpose of this directive is to apprise Crown counsel of the factors that have been identified as contributing causes in wrongful conviction cases,<sup>2</sup> to highlight best

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<sup>1</sup> This directive should be read in conjunction with related PPSC Deskbook guidelines and directives, including: “[2.3 Decision to Prosecute](#)”, “[2.2 Duties and Responsibilities of Crown Counsel](#)” and “[2.7 Relationship between Crown Counsel and Investigative Agencies](#).”

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

practices that can assist Crown counsel in preventing miscarriages of justice, and to bring to the attention of Crown counsel the extensive research in this field. Bearing in mind that all cases are different, the following information is intended to provide general guidance to federal prosecutors.

Wrongful convictions are usually the result of a combination of errors; one or more of the following elements may be a contributing factor:<sup>3</sup>

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

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

- Public pressure to convict in high-profile cases;

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<sup>3</sup> In his 1932 pioneering study, Borchard observed that the causes of wrongful convictions were most often mistaken identification, circumstantial evidence that resulted in incorrect inferences, perjury, or some combination of these factors, *supra* note 2. See more recently two FPT reports that have surveyed the research, and include individual chapters on all of the perceived common factors in these cases: The 2005 *Report on the Prevention of Miscarriages of Justice*, FPT Heads of Prosecutions Committee Working Group, 2005 [2005 *FPT Report*], is available online at: <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/toc-tdm.html>>. The 2011 update to this report, *The Path to Justice: Preventing Wrongful Convictions*, is available on the PPSC internet site, online: <<http://www.ppsc-sppc.gc.ca/eng/>>. Click on Publications. These are excellent resource documents, which not only include separate chapters on factors recognized as common in wrongful conviction cases, but set out best practices for police and Crown counsel. The PPSC issued an information bulletin to its prosecutors in January 2005, summarizing the findings of the 2005 *FPT Report* and the recommendations and best practices of most relevance to Crown counsel. For further reading, see for example Bruce A. MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System," (2005) 31 *Manitoba L.J.*, No 3 at 443; Jon B. Gould and Richard A. Leo, "One-Hundred Years Later: Wrongful Convictions After a Century of Research," (2010) 100 *Journal of Criminal Law & Criminology*, No 3 at 825; and Samuel R. Gross and Michael Shaffer, "Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations," a joint project of the University of Michigan Law School and the Centre on Wrongful Convictions at Northwestern University School of Law. The Registry can be found online: <[www.exonerationregistry.org](http://www.exonerationregistry.org)>. The US-based Innocence Project is also a wealth of information, research and statistics regarding the various mistakes and factors that have consistently played a role in wrongful convictions, online: <<http://www.innocenceproject.org/>>.

- An unpopular defendant, who is a member of a minority group and often perceived as an outsider;
- A legal environment or culture that focuses on winning; and
- The presence of what has been labelled “noble cause corruption,” the belief that the end justifies the means and that improper practices are acceptable to ensure a conviction because the accused committed the crime.<sup>4</sup>

## 2. TUNNEL VISION

Tunnel vision by the police, or the Crown, or both, in a given case, has been identified as a contributing factor in wrongful convictions in Canada and elsewhere.<sup>5</sup>

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

Crown counsel must not only watch for signs of tunnel vision among the police officers involved in the investigation of the case, but they must also constantly guard against developing it themselves. One of the greatest safeguards for Crown counsel is to bear in mind the key principles regarding the role of the Crown so clearly articulated in the classic case of *Boucher v The Queen*.<sup>7</sup> In their review of the evidence in a given case, Crown counsel must remain cognizant of their duty to be fair and impartial, and to ensure they review the evidence in an objective, rigorous and thorough manner. Crown counsel fulfil

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<sup>4</sup> See MacFarlane, *supra* note 3 at 435-443.

<sup>5</sup> 2005 *FPT Report*, *supra* note 3 at c 4 and the 2011 update to c 4. See in particular the paper by Bruce A. MacFarlane, “Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System,” released with the 2008 Inquiry Into Pediatric Forensic Pathology in Ontario, “the Goudge Inquiry,” available online: <<http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html>>. See also Keith Findlay and Michael Scott, “The Multiple Dimensions of Tunnel Vision in Criminal Cases,” (June 2006) University of Wisconsin Law School, Legal Studies Research Paper Series, Paper No 1023 at 291. Recent illustrations of tunnel vision by the police and the Crown can be found in the 2006 Lamer Commission of Inquiry Pertaining to the cases of Ronald Dalton, Gregory Parsons and Randy Druken, particularly the case of Gregory Parsons, online: <<http://www.justice.gov.nl.ca/just/publications/index.html#g6>>. See also The Commission on Proceedings Involving Guy Paul Morin, Toronto: Queen's Printer, 1998, online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>>.

<sup>6</sup> The Morin inquiry, *ibid*. This definition is contained in Recommendation 74.

<sup>7</sup> [1955] SCR 16. This case is discussed in the PPSC Deskbook guideline “[2.2 Duties and Responsibilities of Crown Counsel](#)”. See, in particular, the discussion of the Crown’s duty to be fair. On the role of Crown counsel, see also an excellent article by Robert J. Frater, “The Seven Deadly Prosecutorial Sins,” (2002) 7 Can Crim L Rev 209.

a gatekeeper function by virtue of the Crown's duty to critically and independently assess the evidence presented by the police.<sup>8</sup>

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

Public Prosecution Service of Canada (PPSC) managers and Crown counsel should also strive to create a workplace atmosphere that encourages questions, consultations and frank discussion and debate among Crown counsel and that is receptive to the expression of alternative views regarding a case.<sup>10</sup>

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

Mentoring should be encouraged regarding various aspects of Crown counsel's role, such as the importance of the independent role of Crown counsel vis-à-vis the police, and the appropriate limits of Crown advocacy.<sup>11</sup>

### 3. INCOMPLETE DISCLOSURE

Incomplete disclosure by the police and/or the Crown has been a factor in some wrongful conviction cases in Canada.<sup>12</sup> Crown counsel must ensure they fully understand the

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<sup>8</sup> See the 2005 *FPT Report*, *supra* note 3 at 39. See also the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)".

<sup>9</sup> See the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)", *supra* note 1.

<sup>10</sup> 2005 *FPT Report*, *supra* note 3 at 40.

<sup>11</sup> Concerns about the nature of Crown advocacy were discussed at length in the Parsons case, which is one of the three cases examined in the Lamer Inquiry, *supra* note 5.

<sup>12</sup> 2005 *FPT Report*, *supra* note 3 at c 11. See also c 11 in the updated version of this report, which was released in September 2011. While lack of disclosure played a role in a number of historic cases of wrongful convictions in Canada, such as those of Donald Marshall Jr., online: <[http://novascotia.ca/just/marshall\\_inquiry/docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution\\_findings.pdf](http://novascotia.ca/just/marshall_inquiry/docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf)> and of Thomas Sophonow, online: <<http://www.gov.mb.ca/justice/publications/sophonow/intro/index.html>>, see more recently the Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007), online: <<http://www.driskellinquiry>.

breadth of Crown counsel's disclosure obligations under the law and that they adhere strictly to them.<sup>13</sup> Crown counsel's disclosure obligations are discussed in the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)". Crown counsel must remain mindful that the Crown's disclosure obligation continues after conviction, including after appeals have been decided or the time for appeal has elapsed. Consequently, whenever Crown counsel receives information suggesting that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred, Crown Counsel should immediately report the matter to the Chief Federal Prosecutor (CFP) for whatever further investigation or action may be required.

#### 4. EYEWITNESS MISIDENTIFICATION

Eyewitness misidentification has been identified as the single most important factor leading to wrongful convictions, indeed the overwhelming factor.<sup>14</sup> Eyewitness misidentification was a key factor in a number of Canadian cases of wrongful convictions.<sup>15</sup> In one American study, eyewitness misidentification, either mistaken or intentional, was a factor in at least 94 per cent of the exonerations for sexual assault, child sexual abuse and robbery.<sup>16</sup>

When the identification of the perpetrator is at issue, Crown counsel must assess eyewitness identification evidence carefully, and be cautious regarding its use, despite its potential value.

The Canadian judiciary has acknowledged the inherent frailties of identification evidence, due to the unreliability of human observation and recollection.<sup>17</sup> Honest and confident

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[ca/pdf/final\\_report\\_jan2007.pdf](#)> and the Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard (2008), online: <<http://www.justice.gov.sk.ca/milgaard/home.shtml>>. In the Lamer Inquiry report, *supra* note 5, Lamer identified inadequate disclosure as an issue in two of the three cases examined. See also the discussion of inadequate disclosure as a factor in wrongful conviction cases in Bruce A. MacFarlane, "Convicting the Innocent," *supra* note 3 at 450. This topic is discussed and referenced further in the section on Official Misconduct.

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

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

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

<sup>16</sup> Gross and Shaffer, *supra* note 3 at 52.

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

witnesses, who believe they recall an incident correctly, make convincing witnesses, but they can be wrong. Crown counsel must be wary of eyewitness evidence, particularly single-witness identification where there is no corroboration and be attuned to the fact that confidence does not necessarily equate with accuracy.

Crown counsel should remain mindful that a description of the offender given to the police shortly after the event, when the witness's memory is fresh and the description is less likely to be tainted by suggestions from others or other outside influences, is the most reliable.

Crown counsel must keep current regarding developments in this area and familiarize themselves with the relevant case law,<sup>18</sup> as well as the best practices recommended for police forces and Crown counsel.

The PPSC has endorsed the following best practices, which are explained in greater detail in the 2011 report, *The Path to Justice, Preventing Wrongful Convictions*:<sup>19</sup>

- Assume the identity of the accused is always at issue unless the defence admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial;
- Be wary of the weaknesses associated with certain types of single-witness identifications, e.g., where there was a poor opportunity to observe or no prior contact with the identified person. While not required by law to secure a conviction, corroboration of an eyewitness's identification can overcome deficiencies in the quality of that evidence;
- Be familiar with the identification procedures used by the police force in the case and critically assess the extent to which these procedures are in line with recognized best practices, and how any shortcomings impact the quality of the identification evidence;
- Do not condone or participate in a "show-up" line-up (presenting a single suspect in person to the witness at some point during the pre-trial investigation and asking if the witness recognizes the individual);
- Never show a witness an isolated photograph or image of an accused during the interview; and

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<sup>18</sup> The PPSC has amassed considerable information on this important topic, including valuable training materials that can be provided upon request. In addition, the two FPT HOP reports, *supra* note 3, have chapters on this subject. Finally, the following cases are of particular relevance to prosecutors regarding the circumstances where out of court statements of identification may be admitted for the truth of their contents. See *R v Starr*, [2000] 2 SCR 144 and *R v Tat* (1997), 117 CCC (3d) 481 (ONCA).

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

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

## 5. FALSE CONFESSIONS, FALSE ACCUSATIONS OR PERJURY

Crown counsel must remain alive to the fact that for a variety of reasons individuals sometimes confess to crimes they did not commit.

The Supreme Court of Canada has acknowledged that false confessions are a problem within the criminal justice system,<sup>20</sup> and that innocent people make false confessions more frequently than those unfamiliar with the phenomenon might expect.<sup>21</sup> False accusations and perjury have also been identified as factors in wrongful conviction cases, and particularly common in homicide and child sex abuse cases,<sup>22</sup> although these factors tend to have received less attention in the studies and academic literature to date.

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

Canadian commissions and inquiries into wrongful convictions have consistently recommended the audio-visual recording of police interviews of chief suspects and witnesses in

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

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

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

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

<sup>24</sup> *Oickle*, *supra* note 20 at para 42. See also Sarah Burns, *The Central Park Five* (New York: Alfred A. Knopf, 2011), which examines why five black and Latino teenagers falsely confessed to the beating and rape of a female jogger in Central Park.

<sup>25</sup> See for example *Hanemaayer*, *supra* note 14.



serious crimes, including the interviews of youthful and other vulnerable witnesses.<sup>26</sup> The Canadian judiciary has increasingly encouraged and, in some instances, has stopped just short of insisting on, the recording of statements from suspects.<sup>27</sup>

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

## 6. GUILTY PLEAS

Members of the Canadian judiciary have expressed concern about cases where defendants have pleaded guilty to serious criminal offences they did not commit to avoid the risk of a potentially lengthier sentence if convicted after trial. In such cases, although the guilty pleas were valid in the legal sense,<sup>28</sup> fresh evidence admitted on appeal established that the guilty pleas should be set aside as miscarriages of justice.<sup>29</sup> Crown counsel must be fully aware of this risk during plea resolution discussions. Crown counsel is bound by relevant Director of Public Prosecutions' (DPP) guidelines regarding the limits of plea resolution discussions,<sup>30</sup> as well as ethical obligations outlined by law societies across Canada. Law society rules of professional conduct, as well as those of the Canadian Bar Association, identify the general duties of prosecutors, which include the duty to act fairly<sup>31</sup> and honourably.<sup>32</sup>

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

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

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

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

<sup>30</sup> See the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)."

<sup>31</sup> See for example the BC Law Society Professional Conduct Handbook, c 8, Rule 18, Duties of Prosecutor.

<sup>32</sup> Law Society of Upper Canada, Rules of Professional Conduct, Rule 4.01(3). See also the PPSC Deskbook guideline "[2.2 Duties and Responsibilities of Crown Counsel](#)", *supra* note 1.

## 7. IN-CUSTODY INFORMERS

Crown counsel must be particularly cautious when assessing the evidence of jailhouse or in-custody informers, who are notoriously unreliable witnesses.<sup>33</sup> The use of evidence from in-custody informers (which later turns out to be false) has been a contributing factor in wrongful convictions, both in Canada and elsewhere.<sup>34</sup> Even experienced police officers and prosecutors can be fooled by such witnesses.<sup>35</sup> Crown counsel must assess the evidence of in-custody informers with the utmost care and be satisfied that the evidence of the informer is credible before calling him or her as a witness. If Crown counsel is satisfied that the witness is credible, he or she should recommend to the CFP that the informer be called as a witness. If the CFP believes it is an appropriate case for the use of the in-custody informer, the CFP should seek the advice of the Major Case Advisory Committee before making a final decision. If the Committee and the CFP disagree, the matter should be directed to the appropriate Deputy DPP for a final decision. The role of the Committee is discussed in the PPSC Deskbook guideline “[3.1 Major Case Management](#)”.<sup>36</sup>

## 8. FORENSIC EVIDENCE AND EXPERT TESTIMONY

Faulty forensic procedures, unreliable science and/or flawed expert opinion testimony have been factors in a number of wrongful conviction cases in Canada.<sup>37</sup> Crown counsel, who deal with experts from a diverse range of disciplines, must be cognizant of the risks associated with the use of forensic evidence and expert testimony. Depending on their practice, Crown counsel may develop a sound understanding of the domain of various

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<sup>33</sup> This section of this directive should be read in conjunction with the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”, in particular section 7, which concerns information provided by a jailhouse or in-custody informer, as well as section 8 regarding out-of-custody co-operating witnesses. An in-custody informer, as defined by the Honourable Fred Kaufman, CM, QC, in his report on the case of Guy Paul Morin, *supra* note 5, vol 1, chapter III, section C at 598, is someone who allegedly receives statements from an accused while both are in custody in relation to offences that occurred outside of the custodial institution. The accused does not have to be in custody for, or charged with, the offences to which the statements relate. This definition does not include informers who allegedly have direct knowledge of the offence independent of the statements of the accused.

<sup>34</sup> 2005 *FPT Report* at 75, and its 2011 update, *supra* note 3. See also the inquiries concerning Sophonow, *supra* note 12 and Morin, *supra* note 5 and more recently the Lamer Inquiry, *supra* note 5 and the Driskell Inquiry, *supra* note 12.

<sup>35</sup> See The Inquiry Regarding Thomas Sophonow, *supra* note 12.

<sup>36</sup> See the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)” for a full detailing of the PPSC Policy concerning the use of jailhouse informers, including the factors Crown counsel should consider when assessing their credibility and the nature of the relationship between the informer and the police.

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

experts with whom they interact routinely. However, the ability to remain current on significant developments in forensic science is a challenge, particularly where novel areas of expertise and science are to be relied upon in specific prosecutions.

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

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

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

1. The validity of the science;
2. The qualifications of the expert;
3. The quality and validity of the testing procedures;
4. The objectivity and independence of the opinion;
5. Whether a proper evidentiary foundation can be laid; and
6. The relevance of the evidence to an issue in dispute.<sup>39</sup>

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

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

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

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

Provided Crown counsel exercise due care and diligence in presenting the expert opinion, establishing the sufficiency of the factual underpinning supporting it, with the fairness of the trial process in mind, the possibility of a miscarriage of justice arising from its use can be reduced.<sup>41</sup>

### 8.1. DNA evidence

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

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

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

## 9. CONDUCT OF POLICE AND COUNSEL

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

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

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

<sup>43</sup> Section 487.051.

<sup>44</sup> See c 8 in the 2005 *FPT Report* and in its 2011 update, *supra* note 3.

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

<sup>46</sup> See Gould and Leo, *supra* note 3 at 854-855. See also MacFarlane, *supra* note 3 at 450-452, and Kathleen M. Ridolfi & Maurice Possley, "Preventable Error: A Report on Prosecutorial Misconduct in Califor-

The conduct of defence counsel, which can include conduct that may be perceived in retrospect, to be ineffective, erroneous or missteps, has also been identified as relevant in some wrongful conviction cases in the US and Canada.<sup>47</sup> In *R v GDB*,<sup>48</sup> the Supreme Court of Canada held that the right to effective assistance of counsel is a principle of fundamental justice; however this right will be seen to be violated in law only if the conduct is unreasonable and incompetent and results in a miscarriage of justice. If Crown counsel develops concerns in a particular case that an accused is not being effectively represented, Crown counsel should consult his or her CFP or the CFP delegate to discuss the appropriate course of action.

## 10. CONCLUSION

Like other key criminal justice system participants, Crown counsel should become familiar with the factors that have been widely recognized as contributing factors in wrongful conviction cases, and keep abreast of the relevant jurisprudence and the best practices that have been associated with their prevention. In addition, training in relation to the prevention of wrongful convictions should be provided to federal prosecutors.<sup>49</sup> Indeed, the education of criminal justice system participants has been identified as a key aspect of the prevention of wrongful convictions.<sup>50</sup>

When a particular file raises concerns, Crown counsel should consult experts, colleagues and superiors.<sup>51</sup>

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nia, 1997-2009,” (October 2010), Northern California Innocence Project, Santa Clara University School of Law. This study is characterized as the most in-depth statewide review of prosecutorial misconduct in the United States. See also the discussion in the Lamer Commission of Inquiry, *supra* note 5, concerning the role of the Crown in the case of Gregory Parsons at 134-156, and Robert J. Frater, *Prosecutorial Misconduct*, *supra* note 7.

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

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

<sup>49</sup> For example, training on this topic is routinely provided at the PPSC annual School for Prosecutors.

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

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





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.5 PRINCIPLES OF DISCLOSURE**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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## 1. INTRODUCTION

In the seminal case on the Crown's disclosure obligations, *R v Stinchcombe*,<sup>1</sup> the Supreme Court of Canada set out the duty on the part of the Crown to provide disclosure to an accused person. The Supreme Court makes it clear that the obligation, though broad, is not absolute, but is subject to Crown counsel's discretion with respect to both the timing of disclosure and the withholding of information for valid purposes, including the protection of police informers, cabinet confidences and national security, international relations and national defence information.<sup>2</sup> The obligation is also subject to the limitation that the accused has no right to information that would distort the truth-seeking process.<sup>3</sup>

## 2. STATEMENT OF POLICY<sup>4</sup>

There is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused<sup>5</sup> even if the Crown does not propose to adduce it. While the Crown must err on the side of inclusion, it need not produce evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged.

It is the Crown's obligation to disclose all information, whether inculpatory or exculpatory, that could "reasonably be used by the accused either in meeting the case for

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<sup>1</sup> [1991] 3 SCR 326.

<sup>2</sup> See *Canada Evidence Act*, RSC 1985, c C-5, ss 37, 38 and 39. See the PPSC Deskbook directives "[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)", "[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)" and "[4.3 Protecting Cabinet Confidences under Section 39 of the Canada Evidence Act](#)". See also the PPSC Deskbook guidelines "[3.11 Informer Privilege](#)" and "[5.1 National Security](#)".

<sup>3</sup> *R v Mills* [1999] 3 SCR 668; (1999), 139 CCC (3d) 321 at 363-4.

<sup>4</sup> This guideline assumes that the accused is before a court in Canada charged with an offence in a domestic criminal proceeding. If charges were laid but the accused fled Canada or for some other reason is not before a Canadian court, there is no obligation to provide full disclosure. It may, however, be appropriate to provide counsel with a brief summary of the case. Where an accused absconds during a preliminary hearing or trial, and the hearing is continued in his absence pursuant to ss 475 and 544 of the Code, the obligation to make disclosure to his counsel continues if counsel continues to act.

<sup>5</sup> Information which "may assist the accused" is not always easily recognizable. It is difficult to provide 'bright line' guidelines respecting disclosure of the 'unused' material in the Crown's file. Counsel are expected to exercise good judgment and consult with senior managing lawyers in assessing what should and what need not be disclosed. The purpose of this requirement is to avoid a miscarriage of justice on the basis of non-disclosure.

the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.”<sup>6</sup> Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence.<sup>7</sup>

In all cases, whether a request has been received or not, Crown counsel should disclose any information, within their knowledge, tending to show that the accused may not have committed the offence charged. The inability of the Crown to make such disclosure may require a Crown stay or withdraw the charges or request a judicial stay of proceedings.<sup>8</sup>

The purpose of disclosure is two-fold:

1. to ensure that the accused knows the case to be met, and is able to make full answer and defence; and
2. to encourage the resolution of facts in issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings.

The information to be disclosed need not qualify as evidence; that is, it need not pass all of the tests concerning admissibility.<sup>9</sup> It is sufficient if the information is relevant, reliable and not subject to some form of privilege. Second-hand information that is unconfirmed may or may not be disclosed, depending on counsel's assessment of the issues in the case.

Crown counsel's disclosure obligation is a continuing one and relates to information that comes to the attention of or into the possession of Crown counsel throughout the process and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.<sup>10</sup>

### 3. INCLUSIONS

Crown counsel shall, as soon as reasonably practicable,<sup>11</sup> provide disclosure. In most cases, this will mean that the defence will be given at least the following, subject to

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<sup>6</sup> See *R v Egger*, [1993] 2 SCR 451 at 466-67.

<sup>7</sup> *Stinchcombe*, *supra* note 1 at 340.

<sup>8</sup> See *R v Carosella*, [1997] 1 SCR 80 for a discussion of lost or destroyed evidence.

<sup>9</sup> *R v O'Connor*, [1995] 4 SCR 411; (1995), 103 CCC (3d) 1 at 20 [*O'Connor*].

<sup>10</sup> *Stinchcombe*, *supra* note 1 at 14. See also the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, (Queen's Printer for Ontario, 1993) at 206-208 [*Martin Committee Report*]. The purpose of this section is to underscore the proposition that disclosure is not a 'one-shot' deal.

<sup>11</sup> The phrase "as soon as reasonably practicable" is intended to provide a degree of flexibility based on the facts in individual cases. The right to disclosure is triggered by a disclosure request made by or on behalf of the accused, though the practice of waiting for the request by defence appears to differ across Canada. Where there has been a timely request, disclosure should be made before plea or election or any resolution

editing for statutory or common law privilege or a determination by Crown counsel that the information is irrelevant.<sup>12</sup>

### 3.1. Charging Document

A copy of the information or indictment;

### 3.2. Particulars of the Offence

Particulars<sup>13</sup> of the circumstances surrounding the offence. This may include a Report to Crown Counsel (RTCC), an analytical document prepared by the investigative agency, which sets out the evidence relating to the elements of the offences and the investigators' theory of the case;

### 3.3. Witness Statements

Copies of the text of all written statements concerning the offence which have been made to the police or a person in authority by a person with relevant information to give; where the person has not provided a written statement, a copy or transcription,<sup>14</sup> if available, of any notes that were taken by investigators when interviewing the witness; if there are no notes, a 'will-say' or summary of the anticipated evidence of the witness. This requirement includes statements provided by persons whether or not Crown counsel proposes to call them as witnesses;

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discussions: *Stinchcombe*, *supra* note 1 at 14. Where the request is not timely, disclosure must be made as soon as reasonably practicable and in any event before trial. See section 4.3 of this guideline, regarding unrepresented accused. Usually, disclosure will occur after the investigators have given Crown counsel the details of the case. In view of the respective roles played by investigators and Crown counsel in the criminal justice system, the investigative agency is in a unique, if not an exclusive, position to give Crown counsel the information required to be disclosed under this guideline. If the agency fails to do so, Crown counsel may need to assess the extent to which the accused is able to have a fair trial and decide whether, in the circumstances, an adjournment, stay of proceedings or other remedy is required or appropriate. The investigative agency, although operating independently of the prosecution, has a duty to disclose to Crown counsel, without prompting, all relevant information uncovered during the investigation of a crime, including information which assists the accused: *Martin Committee Report*, *supra* note 10 at 167. See also *R v T (L.A.)*, (1993) 84 CCC (3d) 90 (Ont CA) at 94; *R v V (W.J.)*, (1992) 72 CCC (3d) 97 (Nfld CA) at 109; *R v McNeil* 2009 SCC 3 [*McNeil*].

<sup>12</sup> The 'shopping list' of information set out in this section is information that would normally be disclosed in a given case. Subject to the limitations in section 5 of this guideline, it is more in the nature of a minimal statement of disclosure on behalf of the prosecution. It is not intended to be exhaustive, see section 3.18 of this guideline regarding other material. Counsel should take into account the disclosure requirements described by provincial appellate courts and the Supreme Court of Canada when assessing the scope of disclosure required in any given case.

<sup>13</sup> 'Particulars' is not intended in the sense that it is used in s 587 of the Code. Rather, it contemplates the provision of details or information concerning the circumstances surrounding the offence.

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

### **3.4. Audio/video evidence statements by witnesses**

An appropriate opportunity<sup>15</sup> to view and listen to, in private, a copy of any audio or video recording of any statements made by a witness other than the accused to a person in authority.<sup>16</sup> This does not preclude Crown counsel, in his or her discretion, from providing copies of any video or audio recording or a transcript, where available and appropriate, but with appropriate disclosure conditions that take into account the sensitivity of the material. Where defence counsel is unwilling to accept the disclosure conditions, Crown counsel should seek to impose conditions by court order;

### **3.5. Statements by the accused**

A copy of all written, audio or video recorded statements concerning the offence which have been made by the accused to a person in authority; in the case of oral statements, a verbatim account, where available, including any notes of the statement taken by investigators during the interview; if a verbatim account is not available, an account or description of the statement; and a reasonable opportunity to view and listen to, any original audio or video recorded statement of the accused to a person in authority. Copies of all such statements or access thereto should be provided whether or not they are intended to be relied upon by the Crown;<sup>17</sup>

### **3.6. Accused's criminal record**

Particulars of the accused's and any co-accused's criminal record;<sup>18</sup>

### **3.7. Expert witness reports**

As soon as available, copies of all expert witness reports in the possession of Crown counsel relating to the offence, whether helpful to the Crown or not, should be disclosed. Counsel should pay close attention to s. 657.3 of the *Criminal Code* (Code), which requires notice to be given where an expert is to be called as a witness at trial;

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<sup>15</sup> In most instances, it will be appropriate to provide this access under the supervision of an investigator or Crown counsel.

<sup>16</sup> This section was not intended to require full access to, for instance, intercepted private communications made between co-conspirators, one of whom has now agreed to testify on behalf of the Crown. With respect to intercepted private communications generally, see section 3.11 of this guideline.

<sup>17</sup> Absent unusual circumstances, recordings made by a potential Crown witness through an electronic body pack should be disclosed. Special considerations may apply where counsel for the accused seeks access to intercepted private communications involving the accused. See sections 3.8, 3.9 and 3.11 of this guideline in this regard. *Stinchcombe*, *supra* note 1 requires disclosure of notes prepared during a custodial interview. Absent unusual circumstances, copies of undercover notes outlining conversations involving the accused should similarly be provided.

<sup>18</sup> Foreign convictions, if known, should also be disclosed. In some instances, they may be available through the Interpol office at RCMP Headquarters. In the case of foreign convictions, however, special care must be taken to confirm the proper identity of the person convicted.

### **3.8. Documentary and other evidence**

Where reasonably capable of reproduction, copies of (or access to) all documents, photographs, audio or video recordings of anything other than a statement of a person, should be provided whether or not they are intended to be relied upon by the Crown. Where there exists a reasonable privacy or security interest of any victim(s) or witness(es) that cannot be satisfied by an appropriate undertaking from defence counsel, Crown counsel should seek to impose conditions by court order;

### **3.9. Exhibits**

An appropriate opportunity<sup>19</sup> to inspect any case exhibits,<sup>20</sup> i.e., items seized or acquired during the investigation of the offence which are relevant to the charges against the accused;

### **3.10. Search warrants**

A copy of any search warrant, whether relied on by the Crown or not, and, subject to relevance and the limitations in section 5 of this guideline, the information in support unless it has been sealed pursuant to a court order,<sup>21</sup> and a list of the items seized thereunder, if any;

### **3.11. Authorizations to intercept private communications**

If intercepted private communications will be tendered, a copy of the judicial authorization or written consent under which the private communications were intercepted,<sup>22</sup>

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<sup>19</sup> As in the case of recorded statements of a witness (see section 3.4 of this guideline), steps should be taken to ensure that access is provided under controlled circumstances which preserve the integrity of the case exhibit. How this can be achieved will depend on the circumstances in each case, although it may be appropriate to provide access only under the supervision of an investigator or employee of the investigating agency.

<sup>20</sup> Where a case exhibit is detained by police pursuant to a court order, counsel for the accused may, depending on the circumstances, be required to obtain an order under s 490(15) of the Code before it can be examined.

<sup>21</sup> Requests for production of the information in support of a search warrant that has been sealed pursuant to a court order under s 487.3 of the Code will be governed by the substantive law and procedure set out in that section, and the case law as it is developing in this area. See the PPSC Deskbook guideline "[3.4 Sealing Orders and Publication Bans](#)".

<sup>22</sup> The wiretap logs and session lists should be a routine part of the disclosure provided to the accused in every wiretap case, subject to editing for privilege and subject to appropriate undertakings or court-ordered conditions.

### 3.12. Similar fact evidence

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

### 3.13. Identification evidence

Particulars of any procedures used outside court to identify the accused;<sup>23</sup>

### 3.14. Witnesses' criminal records<sup>24</sup>

Information regarding criminal records of material Crown or defence witnesses that is relevant to credibility may have to be disclosed.<sup>25</sup> This includes disciplinary records of police witnesses where those records fall within the scope of the Crown's disclosure obligation pursuant to *McNeil*.<sup>26</sup> There is no obligation to do a criminal record check on all Crown witnesses.<sup>27</sup> Special care must be taken with police agents and other potentially disreputable witnesses, particularly foreign ones. A reliable copy<sup>28</sup> of the person's criminal record, and relevant information<sup>29</sup> relating to any outstanding criminal charges against the witness, must be disclosed. Crown counsel must request such information in

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<sup>23</sup> This is especially important in undercover cases: disclosure should be made of any identification evidence such as license plate numbers, business cards, the post-operation "roundup". Evidence or information of this nature often is not included in the brief to Crown counsel. Counsel should, therefore, ask the investigators to provide a briefing on the means by which the person arrested was identified as the person involved in the impugned transaction.

<sup>24</sup> If the accused is seeking access to a youth criminal record, Crown counsel should refer to the *Youth Criminal Justice Act*, SC 2002, c 1 which governs disclosure of youth criminal records.

<sup>25</sup> Crown counsel have a discretion (reviewable by the trial judge) to determine whether information regarding a criminal record of a proposed witness is relevant to that witness's credibility. Crown counsel will have to exercise discretion when assessing whether to disclose old criminal convictions or convictions for offences which could not really assist in the impeachment process. For example, a criminal conviction for impaired driving 10 years ago could hardly assist in impeaching the credibility of a witness in a drug trafficking trial. Furthermore, in northern regions, the automatic disclosure of criminal records of victims or witnesses may be problematic as it may stigmatize unnecessarily the witnesses. On the other hand, convictions for offences of dishonesty will almost always be relevant, regardless of when they were entered. The balance to be struck on this issue centers around the privacy interests of the witness, as measured against the accused's right to test the Crown's case.

<sup>26</sup> In *McNeil*, *supra* note 11 the Court emphasized that the Crown has a significant role to play as "gatekeeper" with respect to disclosure of police misconduct information. Prosecutors have an obligation to review misconduct material prior to disclosure to the accused. This role does not involve a wholesale turning over of material provided by the police but rather a "studied analysis" to determine if it is relevant to the defence."

<sup>27</sup> This obligation is limited to material witnesses whose credibility is in issue. See the *Martin Committee Report*, *supra* note 10 at 243.

<sup>28</sup> In Canada, this means a printout of the record held by the Canadian Police Information Centre (CPIC); for foreign witnesses, this means the CPIC equivalent.

<sup>29</sup> "Relevant information" means the nature of the charges, the court, and the status of the proceedings.

writing from the relevant police authority<sup>30</sup> and place the letter and response on the file. Such information should be adduced by the Crown in the examination-in-chief of the witness.

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

### **3.15. Material relevant to the case-in-chief**

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

### **3.16. Impeachment material**

Any information in the possession of Crown counsel which the defence may use to impeach the credibility of a Crown witness in respect of the facts in issue in the case;<sup>31</sup>

### **3.17. Information obtained during witness interviews<sup>32</sup>**

Crown counsel has an obligation to disclose any additional relevant information received from a Crown witness during an interview conducted by Crown counsel in preparation for trial. Additional relevant information includes information inconsistent with any prior statement(s) provided to the investigative agency, e.g., a recantation. Such information should be promptly disclosed to the defence or an unrepresented accused, subject to any

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<sup>30</sup> "Relevant police authority" means the investigative agency which has been the primary contact with the witness in relation to the information at issue. For example, where the witness is being "handled" by a foreign investigative agency, the request should be made directly to that agency, and copied to the Canadian investigative agency in charge of the Canadian investigation.

<sup>31</sup> This is a 'catch-all' provision, intended to require disclosure of (a) any other evidence forming part of the Crown's case and (b) information that could be helpful for impeachment purposes. Counsel is expected to exercise careful judgment in assessing the extent to which background information concerning a witness need necessarily be disclosed. For production to be required, impeachment information must be capable of affecting the credibility of the witness with respect to some fact in issue in the case. Some information may be very invasive of privacy rights, e.g., information concerning a mental disorder which may bear upon the capacity of a witness to be sworn. Disclosure of records containing personal information in the possession of Crown counsel for which there is a reasonable expectation of privacy is governed by ss 278.1 to 278.9 of the Code unless the witness to whom the record relates has expressly waived the application of those sections. In most instances, this section will require disclosure of the basic terms of the arrangement between the Crown and any co-operating accomplice expected to testify on behalf of the Crown, subject to the limitations in section 5 of this guideline. See section 3.14 of this guideline for information regarding criminal records of material Crown or defence witnesses.

<sup>32</sup> This section does not require the disclosure of information protected by work product privilege. See section 5.8 in this regard.

limitations contemplated by section 5 of this guideline. To avoid the possibility of Crown counsel being called as a witness, interviews should be conducted in the presence of a police officer or other appropriate third person, where practical to do so;<sup>33</sup>

### **3.18. Information obtained by Crown Witness Coordinators**

In Canada's three territories, Crown counsel work closely with Crown Witness Coordinators (CWCs). CWCs are in frequent contact with victims and witnesses throughout the court process and often receive information from these sources between the time of initial contact and the trial or sentencing hearing.

The Crown's disclosure obligation includes any additional relevant information received by CWCs from victims and civilian witness during interviews or other contacts with such persons. Crown counsel and CWCs must always ensure that any additional relevant information provided by victims and civilian witnesses is properly documented and if necessary disclosed. This will also allow Crown counsel to determine if it is necessary to ask police to interview the victim or civilian witness regarding the additional information;

### **3.19. Other material**

Additional disclosure beyond that outlined in sections 3.1 to 3.17 above may be made at the discretion of Crown counsel. In exercising this discretion, Crown counsel shall balance the principle of fair and full disclosure, described in section 1 and 2 of this guideline, with the need, in appropriate circumstances, to limit the extent of disclosure, as outlined in section 5 of this guideline;

## **4. EXCEPTIONAL SITUATIONS**

### **4.1. Third party information**

Information in the possession of third parties such as boards, social agencies, other government departments, rape crisis centres, women's shelters, doctors' offices, mental health and counselling services or foreign law enforcement agencies is not in the possession<sup>34</sup> of Crown counsel or the investigative agency for disclosure purposes. Where Crown counsel receives a request for information not in their possession or the possession of the investigative agency, the defence should be advised that these records are in the possession of a third party in a timely manner in order that the defence may take such steps to obtain the information as they see fit. Even where third party records are

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<sup>33</sup> Thus, if any new information comes to light, the officer or other third person can make notes to facilitate disclosure, and give whatever testimony may be necessary at trial in relation to that information.

<sup>34</sup> The concept of possession, in law, requires control. Without control there is no duty to disclose on the part of Crown counsel or the police. Records held by foreign law enforcement agencies are not in the possession or control of the Crown for disclosure purposes. A Canadian court has no jurisdiction to order anyone in the United States to disclose anything to the RCMP, the Crown or an accused directly: *R v Lore* (1997), 7 CR (5<sup>th</sup>) 190 (Que CA) at 200.



physically in the possession of the Crown, disclosure is not automatic. Unless the person to whom the information pertains has waived his or her rights, that person still has a privacy interest in the records.

If the Crown is put on notice or informed of the existence of potentially relevant information in the hands of a third party, including information pertaining to the credibility or reliability of the witnesses in a case, the Crown's duty to make reasonable inquiries of that third party is triggered.<sup>35</sup> The third party is not obligated to provide them to the Crown on request. Crown counsel must disclose the request to the defence who may choose to bring an application for disclosure of the third party records.<sup>36</sup>

## **4.2. Protecting witnesses against interference**

If the defence seeks information concerning the identity or location of a witness, Crown counsel must consider four factors : first, the right of an accused to a fair trial and to make full answer and defence; second, the principle that there is no property in a witness;<sup>37</sup> third, the right of a witness to privacy and to be left alone until required by subpoena to testify in court; fourth, the need for the criminal justice system to prevent intimidation or harassment of witnesses or their families, danger to their lives or safety, or other interference with the administration of justice.<sup>38</sup>

### **4.2.1. Consent release of information concerning a witness**

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

### **4.2.2. Witnesses refusing to be interviewed**

Where a witness does not wish to be interviewed by or on behalf of an accused,<sup>39</sup> or where there is a reasonable basis to believe that the fourth consideration referred to in

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<sup>35</sup> See *McNeil*, *supra* note 11.

<sup>36</sup> See *McNeil*, *ibid* and *O'Connor*, *supra* note 9.

<sup>37</sup> See *R v Gibbons*, (1947) 86 CCC 20 (Ont CA) at 28; *Smith v Jones*, [1999] 1 SCR 455.

<sup>38</sup> The Supreme Court of Canada has recognized the right of an individual to be left alone and the appropriateness of preventing the unnecessary invasion of witnesses' privacy: *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at para 153 per Binnie J. concurring and *R v Rodgers* 2006 SCC 15, [2006] 1 SCR 554 at para 36 per Charron J. for the majority; *R v Duarte*, [1990] 1 SCR 30, (1990), 53 CCC (3d) 1 at 11 and 15; *R v Wong*, [1990] 3 SCR 36, (1990), 60 CCC (3d) 460 esp at 483; *R v Seaboyer*, [1991] 2 SCR 577, (1991), 66 CCC (3d) 321 at 387; *Stinchcombe*, *supra* note 1 at 8-9. The Supreme Court of Canada has also recognized that Crown witnesses are not the property of the Crown whom Crown counsel can control and produce for examination by the defence: *R v Khela*, [1995] 4 SCR 201, (1995), 102 CCC (3d) 1 at 10.

<sup>39</sup> While Crown counsel and the investigators may wish to ask if a witness wants to be interviewed by the defence, care should be taken to ensure that the witness understands that he or she is fully entitled to be

section 4.2 (interference with witnesses or their families) may arise on the facts of the case,<sup>40</sup> Crown counsel may hold back information concerning the identity or location of the witness unless a court of competent jurisdiction orders its disclosure.<sup>41</sup> Nevertheless, defence counsel must be advised of the existence of the witness and his or her relevant information.

#### **4.2.3. Controlled interviews**

Where a witness is willing to be interviewed, but there nonetheless exists a reasonable basis to believe that the disclosure of information concerning the identity or location of the witness may lead to interference with the witness or with the administration of justice as described above, including situations where the witness is in a Witness Protection Program, Crown counsel may decide to arrange for an interview by defence counsel at a location and under circumstances that will ensure the continued protection of the witness.<sup>42</sup> If the witness is protected under a Witness Protection Program, the agreement of the police agency administering the program will be required.

#### **4.3. Unrepresented accused**

An unrepresented accused is entitled to the same disclosure as a represented accused in order to make full answer and defence. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of Crown counsel based on the facts of the case.

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interviewed or not to be interviewed. It should not be suggested (directly or indirectly) that it would be better not to be interviewed.

<sup>40</sup> There is a two-pronged test for determining whether information concerning whereabouts or identity should be withheld: first, has the witness expressed a desire not to be interviewed by the defence? Second, is there a reasonable basis to believe that the witness may be interfered with? The basis for the belief in a potential witness must be real, not imagined. The information available in each case should be examined carefully. Wherever reasonably practicable, Crown counsel should request a written threat assessment from the investigators where limits on disclosure are being considered on this basis. An adjournment may be necessary in these circumstances to ensure a fair trial. The threat assessment may, itself, be the subject of a disclosure request. Absent extraordinary circumstances, disclosure of this assessment should be resisted on the basis that confidential information is necessary in order to ensure that the discretion to produce or withhold is exercised properly. If the defence presses with this request, counsel should consult with the Chief Federal Prosecutor who may consult and, ultimately, the appropriate Deputy Director of Public Prosecutions. In some instances, resort may have to be made to s 37 of the *Canada Evidence Act*, *supra* note 2 to protect the confidential nature of this information. See the PPSC Deskbook directive “[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)”, *supra* note 2.

<sup>41</sup> An adjournment may be necessary in these circumstances to ensure a fair trial.

<sup>42</sup> In some instances, a controlled interview will provide the necessary balance between the right of the accused to full answer and defence and the need to protect the witness against interference or threats. The circumstances surrounding the interview should be agreed upon by Crown counsel and the investigators in advance of the interview. This could, in some situations, permit the presence of counsel for the witness or Crown counsel, and include a method of recording the interview.

If an unrepresented accused indicates an intention to proceed without counsel, Crown counsel shall advise the accused of the right to disclosure and how to obtain it.<sup>43</sup> This requirement does not preclude a guilty plea without disclosure, for example, where the accused simply wishes to dispose of the charge as quickly as possible. Disclosure does not form a condition precedent to the entry of a guilty plea. However, an unrepresented accused must clearly indicate that he or she does not wish disclosure before a guilty plea is entered.<sup>44</sup>

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

If there are reasonable grounds for concern that leaving disclosure materials with an unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials. Special care may be required where an unrepresented accused personally seeks access to evidence where the integrity of that evidence may be placed in issue at trial, e.g., the drug exhibit, taped private communications.

Counsel should ensure that, where disclosure is made to an unrepresented accused, it is made subject to conditions governing the appropriate uses and limits upon the use of disclosure material. In cases in which there are no sensitive disclosure materials, these basic conditions provide fair warning for accused persons that the disclosure material is not to be disseminated or used for purposes other than to assist them in making full answer and defence in the prosecution. Violations by an accused of the conditions (contained in a cover letter) would likely give rise to a Crown request to impose those conditions on the accused by court order. Any breach of the court order could be dealt with pursuant to the court's contempt powers. Counsel should be particularly mindful of the sensitivity of *McNeil* disclosure information, when dealing with self-represented accused persons.

In some cases, there may be sensitive disclosure materials, as well as some basic, non-sensitive, disclosure material. If the latter material can be separated from the rest of the disclosure it can be given to the accused with disclosure conditions. The sensitive portions of the disclosure could be dealt with by providing the accused either with access

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<sup>43</sup> The precise method by which the accused is informed of the availability of disclosure may vary from region to region. In some instances, the summons or appearance notice may provide this information. In others, Crown counsel may wish to provide the accused with a written or oral notification in court. In some regions, the judge presiding over first appearances may tell the accused that disclosure is available from the Crown.

<sup>44</sup> See section 3.1 on unrepresented accused in the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)".

to the material in a private room in a police station or with the disclosure material subject to restrictive court-ordered conditions.<sup>45</sup>

Special care may also be required where an unrepresented accused is incarcerated. Incarcerated unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial officials. Arrangements can be made with the jail to facilitate adequate and private electronic access to the disclosure materials.

Crown counsel must place a note on the Crown file concerning the nature, extent and timing of disclosure to an unrepresented accused, including any representations about disclosure made to the accused in court. This is especially important given the prospects of a *Stinchcombe* review of the decisions made by Crown counsel on the issue of disclosure.

#### **4.4. Voluminous documentary evidence**

In document heavy cases, counsel must particularly ensure that the disclosure provided to defence is well organized and capable of being searched. In other words, it must be reasonably accessible. As noted in *Dunn*,<sup>46</sup> “the greater the volume of material disclosed, the greater the need for organization and reasonable search capabilities”.

### **5. EXCLUSIONS**

The Crown’s obligation to disclose is not absolute: only relevant information need be disclosed, and information which is relevant to the defence may be withheld on the basis of the existence of a legal privilege.<sup>47</sup>

Where Crown counsel decides not to disclose relevant information on the grounds of privilege, defence counsel should be advised of the refusal, the basis of the refusal (i.e., type of privilege alleged) and the general nature of the information withheld to the extent possible. However, in some circumstances, even the acknowledgement that information exists (i.e., information related to international relations, national defence or security or information regarding a police informer or an ongoing police investigation) would cause the harm that the privilege is seeking to prevent. In such circumstances, counsel are expected to exercise good judgment and consult with their chief federal prosecutor to assess what is an appropriate course of action. If the fact of the existence of the privileged information cannot be disclosed, a stay of proceedings may be required.

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<sup>45</sup> Due to the sensitive nature of the disclosure on some files, Crown counsel should consider whether or not it is appropriate to provide disclosure to an out-of-custody self-represented accused by disk, hard drive or other electronic storage device.

<sup>46</sup> *R v Dunn*, 2009 CanLII 75397 (ONSC) at para 59. See also *Beaulieu c R*, 2011 QCCS 639 (CanLII) at para 32.

<sup>47</sup> See *Stinchcombe*, *supra* note 1 at 340.

Where disclosure of information is delayed to protect the safety or security of witnesses pursuant to section 4.2 of this guideline or to complete an investigation pursuant to section 5.3, Crown counsel must disclose the information as soon as the justification for the delay in disclosure no longer exists. The fact that some disclosure is being delayed should be communicated to the defence without revealing the reason for the delay.

### **5.1. Police informers<sup>48</sup>**

Disclosure of information that may tend to identify a confidential police informer is not permitted. The Crown like the Court is under an obligation to protect the identity of a confidential police informer. The privilege cannot be waived unilaterally by the informant or by the Crown. This obligation is not limited to protecting the name of the informer: it extends to any information that may tend to reveal the identity of the person who provided information to the police. The vetting process must be done in close consultation with the police who are better placed to assess the degree of risk in unredacted information. The police informer privilege is subject to only one exception: where the accused's factual innocence is at stake.

### **5.2. Reply evidence**

During trial, Crown counsel must disclose any previously undisclosed information in Crown counsel's possession, as soon as reasonably possible after it becomes apparent that the information is relevant. However, pre-trial disclosure is not required of reply evidence that could be tendered by the Crown in response to issues raised by the accused at trial, where the relevance of that evidence only becomes apparent during the course of the trial itself.<sup>49</sup>

For example, Crown counsel is not generally required to disclose evidence in his or her possession regarding the accused's bad character. However, if the accused indicates that reliance will be placed on good character evidence in support of the defence advanced and the Crown becomes aware of information either rebutting or confirming the defence, the information must be promptly disclosed to the defence.<sup>50</sup> There is a general obligation to disclose any relevant information resulting from an investigation prompted by an accused's pre-trial disclosure of a defence.

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<sup>48</sup> For a more complete discussion of this issue, see the PPSC Deskbook guideline "[3.11 Informer Privilege](#)", *supra* note 2.

<sup>49</sup> *Martin Committee Report*, *supra* note 10 at 202. In general, the Crown's obligation is to adduce evidence that is relevant to an element of the offence that the Crown must prove, and not adduce evidence in chief to challenge a defence that an accused might possibly raise: *R v Chaulk*, [1990] 3 SCR 1303; (1990), 62 CCC (3d) 193 at 237 ff. Crown counsel cannot be expected to disclose information relevant to an issue not reasonably anticipated before trial. See also *R v Wilson* (1994), 87 CCC (3d) 115 (Ont CA).

<sup>50</sup> See *R v Hutter* (1993), 86 CCC (3d) 81 (Ont CA) at 89-90, leave to appeal to the SCC refused and *Martin Committee Report*, *supra* note 10 at 206.

### 5.3. On-going investigations

Information that may prejudice an ongoing police investigation should not be disclosed.<sup>51</sup> It is important to note that the Crown may delay disclosure for this purpose but cannot refuse it, i.e., withhold disclosure for an indefinite period.

### 5.4. Investigative techniques

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

### 5.5. Cabinet confidences<sup>52</sup>

Information that constitutes a confidence of the Queen's Privy Council for Canada pursuant to s. 39(2) of the *Canada Evidence Act*<sup>53</sup> must be protected from disclosure.

### 5.6. International relations/national security/national defence<sup>54</sup>

Section 38 of the *Canada Evidence Act* creates a scheme for the protection of 'sensitive information' and 'potentially injurious information', as defined in that section, with respect to international relations, national defence or national security.

### 5.7. Solicitor-client privilege

Information protected by solicitor-client privilege<sup>55</sup> cannot be disclosed, subject to waiver or any of the exceptions.

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<sup>51</sup> See *Stinchcombe*, *supra* note 1 at 9 and 12; *Martin Committee Report*, *supra* note 10 at 214. Thus, in certain circumstances, Crown counsel may have to consider staying a charge in order to avoid the disclosure of information that would prejudice an ongoing investigation.

<sup>52</sup> For a more complete discussion of this issue, see the PPSC Deskbook directives "[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)", "[4.2 Protecting Confidential Information under Section 38 of the Canada Evidence Act](#)" and "[4.3 Protecting Cabinet Confidences under Section 39 of the Canada Evidence Act](#)", *supra* note 2.

<sup>53</sup> RSC 1985, c C-5.

<sup>54</sup> *Ibid.*

<sup>55</sup> See *R v Campbell*, [1999] 1 SCR 565. See generally *Smith v Jones*, [1999] 1 SCR 455; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860; *Solosky v The Queen*, [1980] 1 SCR 821; *Idziak v Canada*, [1992] 3 SCR 631; *R v Creswell*, [1998] BCJ No 1090 (QL). Note that solicitor-client privilege is waived where the police or the Crown rely on confidential legal advice to defend an abuse of process application even in circumstances where only the existence, and not the contents, of the advice is disclosed: *Campbell*, (*ibid.*).

## 5.8. Work product privilege<sup>56</sup>

This privilege, whose object is to ensure the efficacy of the adversarial process, protects information or documents obtained or prepared for the dominant purpose of litigation, either anticipated or actual. Thus, Crown counsel generally need not disclose any internal notes, memoranda, correspondence or other materials generated by the Crown in preparation of the case for trial unless the work product contains material inconsistencies or additional facts not already disclosed to the defence.<sup>57</sup> As a general rule, work product applies to matters of opinion as opposed to matters of fact.<sup>58</sup> This privilege does not exempt disclosure of medical, scientific, or other experts' reports.<sup>59</sup> Unlike solicitor-client privilege, this privilege has a limited lifespan and comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege.<sup>60</sup>

## 6. DISCLOSURE COSTS

An accused person or his or her counsel shall not be charged a fee for 'basic disclosure' materials.<sup>61</sup>

"Basic disclosure" materials include the information, a synopsis, copies of witness statements or will-says, the Report to Crown Counsel, if one exists, and copies of documents, photographs and the like, that Crown counsel intends to introduce as exhibits in the Crown's case. Each accused is entitled to one copy of 'basic disclosure' materials. Where an accused person requests an additional copy or copies, the accused may be charged a reasonable fee for this service.<sup>62</sup>

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<sup>56</sup> Also referred to as 'litigation privilege'. See also section 3.17 of this guideline, regarding information obtained during witness interviews.

<sup>57</sup> *O'Connor*, *supra* note 9 at 45 (per L'Heureux-Dubé J.) and at 86 (per Major J.). However, the Crown is obliged to turn over drawings and statements made by witnesses to the prosecution during pre-trial interviews, if they are new or contain new information. See also the *Martin Committee Report*, *supra* note 10 at 251.

<sup>58</sup> *Martin Committee Report*, *ibid* at 252.

<sup>59</sup> *Martin Committee Report*, *ibid* at 252. But see *R v Petersen* (1997), 155 Sask R 133 (QB) where spreadsheets prepared by the police regarding different theories as to how the accused had committed a complex fraud were held to fall within the work product domain. See also *R v Stewart*, [1997] OJ No 924 (QL) where the court recognized police and Crown work product in a database of electronic documents.

<sup>60</sup> See *Blank v Canada (Minister of Justice)*, [2006] 2 SCR 319.

<sup>61</sup> *Report of the Criminal Justice Review Committee*, (Queen's Printer for Ontario, February 1999) at 48. See also the *Martin Committee Report*, *supra* note 10 at 272; *R v Blencowe* (1997), 118 CCC (3d) 529 (Ont Ct (Gen Div)) at 537. The rule here is two-pronged: documents and photographs that will form part of the Crown's case should be copied and provided to the accused at the expense of the government or the investigative agency. Documents the Crown does not intend to rely upon need not be copied, although upon request defence counsel should be provided with access to case exhibits not intended to be adduced at trial. See section 3.9 of this guideline regarding access to case exhibits.

<sup>62</sup> Where defence counsel withdraws from the case, there is a professional obligation to pass disclosure on to new counsel representing the accused, or to return the disclosure to the Crown, if the disclosure

Costs associated with the preparation of copies of materials that are not part of ‘basic disclosure’, e.g., photographs that will not be introduced as exhibits by Crown counsel, should be considered on a case-by-case basis. In instances of unfocused or unreasonable requests involving substantial numbers of documents, it may be appropriate to shift the resource burden to the defence, by requiring that the costs be borne by the accused.<sup>63</sup> Failing agreement, simple access without copies may be provided.

## 7. FORM OF DISCLOSURE<sup>64</sup>

Crown counsel may provide the defence with copies of documents that fall within the scope of ‘basic disclosure’ materials as defined in section 6 of this guideline in either a paper format (e.g., photocopies), an electronic format (e.g., by CD-ROM) or a web-based format. Where the accused is unrepresented, Crown counsel should use his/her judgment as to whether copies of such documents should be provided in a paper format.

Where disclosure is in one of the two official languages, it does not need to be translated.

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conditions so direct. Accordingly, disclosure need not be copied a second time. Unusual situations should be discussed with the Chief Federal Prosecutor.

<sup>63</sup> *Martin Committee Report*, *supra* note 10 at 273.

<sup>64</sup> An accused is not entitled to insist upon a particular *form* of disclosure as a constitutional prerequisite: *R v Blencowe*, *supra* note 61 at 539. Nor does an accused have an absolute right to disclosure or production of original material: *Stinchcombe*, *supra* note 1. However, where the original is within the possession of either Crown counsel or the investigative agency, there is an obligation to allow the defence inspection of or access to the original.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.6 CONSULTATION WITHIN THE PUBLIC PROSECUTION SERVICE OF CANADA**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline describes the consultation process within the Public Prosecution Service of Canada (PPSC). More specifically, the guideline focuses on consultation between PPSC Regional Offices and Headquarters. Other guidelines describe the consultation process with other federal government departments that enforce federal statutes, with Department of Justice centres of expertise, and with investigative agencies.<sup>1</sup>

### 2. ACCOUNTABILITY FOR THE PROSECUTION FUNCTION

The independence of the Director of Public Prosecutions (DPP), and by extension Crown counsel, in exercising prosecutorial discretion free from partisan political influence is an important constitutional principle in Canada.<sup>2</sup> Crown counsel act independently of investigative agencies<sup>3</sup> and other government departments.<sup>4</sup> "Prosecutorial independence" is ultimately that of the DPP who is accountable to the courts and to the public for the

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<sup>1</sup> For a discussion of the types and manner of consultation between prosecutors and investigators, see the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)" and the PPSC Deskbook directive "[1.3 Consultation within Government](#)".

<sup>2</sup> For a more detailed discussion of this principle, see the PPSC Deskbook directive "[1.1 Relationship between the Attorney General and the Director of Public Prosecutions](#)" and the PPSC Deskbook guideline "[2.1 Independence and Accountability in Decision-Making](#)"; see also Hon. Marc Rosenberg "*The Attorney General and the Administration of Criminal Justice*" (2009), 34 Queen's LJ 813.

<sup>3</sup> See the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)", *supra* note 1.

<sup>4</sup> See the PPSC Deskbook directive "[1.3 Consultation within Government](#)", *supra* note 1 and the PPSC Deskbook guideline "[2.2 Duties and Responsibilities of Crown Counsel](#)".

federal prosecution function. Individual Crown counsel are, in turn, accountable to the DPP. Additionally, while the *Director of Public Prosecutions Act*<sup>5</sup> (DPP Act) creates the Office of the DPP (ODPP), the Attorney General of Canada remains the chief law officer of the Crown and is ultimately accountable to Parliament for the federal prosecution function. The DPP's role is distinct from that of the Attorney General; it entails closer oversight and more frequent involvement in files.

In acting as public prosecutors, Crown counsel exercise a delegated function on behalf of the DPP.<sup>6</sup> The “independence” of the prosecutor is nothing more, but also *nothing less*, than the institutional independence of the Office of the DPP and ultimately of the Attorney General. Prosecutorial independence must be properly understood as flowing from the offices of the Attorney General and the DPP. For this reason, Crown counsel are accountable to the DPP and the DPP in turn to the Attorney General for their prosecutorial decision-making.<sup>7</sup>

Accountability in federal prosecutions is maintained through the hierarchical management structure within the PPSC. Crown counsel are directly accountable to their team leaders, Deputy Chief Federal Prosecutors (or General Counsel, Legal Operations) and Chief Federal Prosecutors (CFP), for the decisions which they make in prosecutions. The CFPs, in turn, are accountable to the Deputy DPPs who report to the DPP. The DPP is responsible for the manner in which the prosecution function is carried out on behalf of the Attorney General of Canada. The DPP performs the duties and functions set out in s. 3(3) of the DPP Act under and on behalf of the Attorney General.<sup>8</sup> Finally, the Attorney General is answerable to Parliament for the decisions made on his or her behalf.

### **3. THE PURPOSE OF CONSULTATION BETWEEN PPSC REGIONAL OFFICES AND HEADQUARTERS**

In some instances, prosecutorial decision-making, including the determination of whether the prosecution threshold has been met,<sup>9</sup> whether or not charges should be stayed, or a

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<sup>5</sup> *Director of Public Prosecutions Act*, s 121 being Part 3 of the *Federal Accountability Act*, SC 2006, c 9 [DPP Act].

<sup>6</sup> Section 9(1) of the DPP Act, *supra* note 5 permits the DPP to delegate prosecutorial functions to federal prosecutors.

<sup>7</sup> For a good discussion of the relationship between the prosecutor and the DPP or Attorney General and the appropriate balance between prosecutorial independence and the right of the DPP to direct decision-making on the DPP's behalf, see Robert J. Frater *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 9-15.

<sup>8</sup> Section 16 of the DPP Act, *supra* note 5 requires the DPP to provide the Attorney General with an annual report not later than June 30 of every year. The Attorney General is then required to table that report in the Houses of Parliament within the first 15 sitting days immediately following receipt of the Report. The DPP's annual report to Parliament is a key mechanism for ensuring transparency and public accountability for federal prosecutions.

<sup>9</sup> See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” for a discussion about the public interest criteria to be considered when deciding whether to prosecute.

particular position on sentence taken, requires consultation with those who can provide Crown counsel with additional relevant information and expertise.

For the purposes of this guideline, the term “consultation” is used to refer to (i) information briefings from a Regional Office to Headquarters regarding a particular matter, (ii) counsel in a Regional Office seeking advice or support from Headquarters counsel, (iii) Headquarters counsel consulting with Regional Offices regarding operational matters and matters of prosecution policy and (iv) informal consultation within regional offices.

Reciprocal consultation between PPSC Regional Offices and Headquarters counsel is essential for a number of reasons including the need to ensure:

- that the DPP, who is accountable for the prosecution function, is kept abreast of developments in PPSC prosecutions when appropriate (“briefing up”) and on cases that give rise to sustained, significant and/or anticipated media interest or public interest;
- that the Attorney General is briefed on cases of “general interest” requiring notice under s. 13 of the DPP Act;<sup>10</sup>
- coordinated and consistent national policy in discharging the DPP’s mandate;
- consistent positions in prosecutions across the country;
- effective legal risk management; and
- that CFPs and Crown counsel in the Regional Offices learn of cases of significant public interest, relevant legal precedents, and emerging legal issues or trends in other parts of the country and internationally.

Communicating a consistent and coordinated message to investigators and Crown counsel in respect of approaches to be applied in the interpretation of legislation, or to types of litigation, is a critical component of the DPP’s role. Achieving this consistency is a challenge that requires cooperation across the organization given that its services are delivered by hundreds of prosecutors across all regions of the country within a diversity of litigation environments.

#### **4. THE ROLE OF THE HEADQUARTERS COUNSEL GROUP**

The Headquarters Counsel Group comprises counsel within both the Drug, National Security and Northern Prosecutions Branch and the Regulatory and Economic Prosecutions Branch. Headquarters counsel focus on operational issues arising from federal prosecutions.

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<sup>10</sup> See the PPSC Deskbook directive “[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)”.

The work of the Group can be categorized as falling within one of three major areas:

- strategic direction, litigation risk management and support to particular types of litigation or cases;
- general support to frontline prosecutors; and
- support to the DPP, the Deputy DPPs, and to concerned federal departments and agencies.

For the Drug, National Security and Northern Prosecutions Branch, the Group's work includes issues related to the investigation and prosecution of offences under the *Controlled Drugs and Substances Act*,<sup>11</sup> proceeds of crime/money-laundering cases, national security matters and *Criminal Code* prosecutions in the North. The Regulatory and Economic Prosecutions Branch focuses on *Criminal Code* capital market fraud cases and on all other federal offences such as those under the *Competition Act*,<sup>12</sup> the *Income Tax Act*,<sup>13</sup> the *Fisheries Act*,<sup>14</sup> the *Immigration and Refugee Protection Act*,<sup>15</sup> the *Canadian Environmental Protection Act*,<sup>16</sup> and the *Copyright Act*.<sup>17</sup>

Headquarters counsel have responsibility for the coordination of legal advice and the development of prosecutions policy for the ODPP. Along with the National Prosecution Policy Committee (NPPC) and the Major Prosecutions Advisory Committee (MPAC), counsel in this group help ensure consistency in the positions being advanced in federal prosecutions.<sup>18</sup> They do this by tracking similar or related cases, coordinating positions,

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<sup>11</sup> SC 1996, c 19.

<sup>12</sup> RSC 1985, c C-34.

<sup>13</sup> RSC 1985, c 1 (5th Supp).

<sup>14</sup> RSC 1985, c F-14.

<sup>15</sup> SC 2001, c 27.

<sup>16</sup> SC 1999, c 33.

<sup>17</sup> RSC 1985, c C-42.

<sup>18</sup> The mandates of these two committees are as follows:

The Major Prosecutions Advisory Committee serves as a senior advisory body whose members have specialized expertise in major prosecutions. The Committee ensures consistency of PPCS approaches regarding major prosecutions throughout the country, including in respect of work done by agents. To this end, the Committee:

- Reviews and recommends for approval by the Deputy DPP prosecution plans for major prosecutions cases;
- Identifies regional practices or approaches that may be of national interest and makes recommendations for their broader diffusion;
- Makes recommendations regarding the need for prosecution policies or practice directives in respect of the management of major prosecutions; and
- Reviews any national policies and practice directives regarding major prosecutions.

developing practice directives, collaborating with regional counsel in the development of facts to address evolving or novel areas of the law, and advising on implementation and interpretation of significant pieces of new legislation affecting federal prosecutors.

Their responsibilities, in ensuring DPP accountabilities and that Headquarters is a useful resource centre for Crown counsel in the regions, for investigative agencies and for senior management, include:

- Offering subject-matter expertise;
- Providing specific prosecution-related advice to Crown counsel, federal investigative agencies, and Department of Justice legal service units;
- Offering coordination and strategic direction, litigation risk management and litigation support to frontline prosecutors conducting litigation that is of national interest, by virtue of the significance of issues being litigated, the magnitude of a case, the emergence of a particular issue nationally, or because of a novel constitutional challenge;
- Ensuring that the DPP and Deputy DPPs are kept informed of cases of importance, which include, but are not limited to those:
  - with novel, complex and/or constitutional legal issues;
  - where there is a national or regional interest in the outcome;
  - where federal legislation is attacked;
  - where the investigative agency's policies, practices or enforcement powers are challenged;
  - where there is significant public or media interest;<sup>19</sup>
  - where there is potential for a negative judicial ruling or comment against a Crown counsel personally or the PPSC generally, or a step by the prosecution;

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The National Prosecution Policy Committee serves as a senior advisory and decision-making body on matters that affect PPSC nationally and which are not related to a specific on-going prosecution, investigation, appeal or intervention. More specifically, the Committee:

- Reviews proposed confidential advice and guidelines to federal prosecutors and makes recommendations for the Deputy DPP and the DPP approval regarding such directives;
- Occasionally examines legal issues that are not contemplated for a formal practice directive, but for which its views are sought;
- Considers and recommends for the Deputy DPP and the DPP approval revisions to the PPSC Deskbook;
- Monitors emerging trends in federal prosecution practice and makes recommendations as to how the PPSC should adjust to such trends; and
- Provides a forum for resolution of divergent views on legal issues so as to ensure consistency in the arguments advanced by Crown counsel or agents on behalf of the DPP.

<sup>19</sup> See the PPSC Deskbook guideline “[2.9 Communications with the Media](#)”.

- Developing policy with respect to prosecutorial operational issues;
- Liaising and facilitating communication with counsel in the Department of Justice, departmental enforcement officers and investigative agencies on non-case specific matters;<sup>20</sup>
- Providing prosecutorial perspective and advice on criminal law policy development;
- Providing input on legislative, enforcement and funding initiatives of other departments as these relate to and impact upon prosecutions; and
- Recommending direct indictments and other statutory consent matters.

#### **4.1. Providing advice on prosecutions policy to the DPP and Deputy DPPs**

As mentioned, the DPP is ultimately accountable to the public and to the courts for the conduct of Crown counsel who act in his or her name. Yet, because of the sheer volume of cases it would be impracticable for the DPP to be directly involved in all federal prosecutions. The DPP does not typically become involved in routine matters. However, the DPP may become involved in a prosecution matter because the nature of the matter requires closer monitoring of the exercise of prosecutorial discretion for which the DPP is accountable. Some examples of the types of cases that would warrant closer monitoring are listed in the bullets under heading 6.5. Additionally, the DPP may become involved in a prosecution matter because of a statutory consent requirement. For example, the DPP's consent is required to prefer a direct indictment and to institute proceedings in respect of certain types of offences.<sup>21</sup>

When the DPP or a Deputy DPP is involved in the decision-making on a prosecution file, they rely on both regional counsel and Headquarters counsel for advice. In this capacity, Headquarters counsel add a national perspective to a legal issue and, because of their coordination role, in some cases they may be aware of particular interests of other government departments and agencies. Headquarters counsel normally respond to requests for advice from the DPP and Deputy DPPs. Requests for information from Headquarters counsel to the regions are in effect requests from the DPP or a Deputy DPP. Regional offices will normally prepare the materials outlining the nature of the case and key considerations, and may receive requests for additional information or, on occasion, be required to provide some of the original documents upon which their recommendation is made.

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<sup>20</sup> See the PPSC Deskbook directive "[1.3 Consultation within Government](#)", *supra* note 1.

<sup>21</sup> For the list of matters requiring DPP consent or some form of delegated consent, see the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)".

## 5. CONSULTATION WITH HEADQUARTERS

Whether or not counsel in PPSC Regional Offices should consult with PPSC Headquarters respecting a particular prosecution will necessarily involve an exercise in judgment. When in doubt, counsel should seek the advice of their Associate or CFP at the earliest opportunity. On some occasions, consultation is mandatory; on others, while not mandatory, counsel may wish to consult PPSC Headquarters.

The following are examples of the types of files on which Crown counsel must consult with Headquarters counsel:

- Cases involving terrorism offences or that otherwise have a national security aspect;
- Cases having precedential value in terms of sentence or legal argument;
- Cases having novel legal arguments;
- Large scale complex prosecutions;<sup>22</sup>
- Cases that give rise to sustained, significant and/or anticipated media interest;
- Regulatory prosecutions of a large magnitude, that are complex or that raise issues of national importance or novel issues;
- International assistance requests in respect of proceeds of crime targeting property that, if seized/blocked/forfeited in Canada, would require an undertaking or the approval of the Deputy DPP; and
- Proposals to depart from the PPSC Deskbook.

The following are examples of the types of files on which Crown counsel may wish to consult with Headquarters counsel:

- Legal advice on non case-specific files;
- Proposed decisions respecting appeals to provincial and territorial courts of appeal;<sup>23</sup> and
- Proposed plea resolutions that are especially sensitive including homicide prosecutions wherein the Crown is agreeing to a plea on a lesser count than that which was charged or where there is to be a joint position on sentence;

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<sup>22</sup> Normally, cases of this nature will be brought to the attention of the Major Prosecution Advisory Committee; see the PPSC Deskbook guideline “[3.1 Major Case Management](#)”.

<sup>23</sup> On routine matters, Crown counsel in the regions should simply inform Headquarters of proposed appeals.



Crown counsel should bring to the attention of Headquarters counsel all such cases at the earliest reasonable opportunity.<sup>24</sup> Crown counsel need not consult on more routine prosecutions unless they require advice or precedents.

Crown counsel may contact one of designated subject-matter experts in the Headquarters Counsel Group. Where there is no identified subject-matter expert, counsel in the PPSC Regional Offices should contact the Headquarters Counsel Regional Contact.

## **6. CONSULTATION WITHIN AND BETWEEN REGIONAL OFFICES**

Consultation encompasses not only horizontal consultation within the PPSC and across government, but also includes consultation locally with one's direct colleagues in a particular regional office and between regional offices. Crown counsel should consult regularly with their regional office colleagues. In fact, Crown counsel are not only entitled to consult on difficult questions, they are expected to consult with colleagues who have more experience or who may have grappled with similar issues in the past. Crown counsel should bear in mind that they are not alone, and that consultation does not mean abdication of prosecutorial independence. For example, divining the public interest in cases involving complex social issues can be a challenging task, particularly in the regulatory and economic field. The lone Crown counsel should consult colleagues on such matters.

CFPs are encouraged to develop policies for their offices regarding the types of matters that require consultation in their regional office and the appropriate consultation mechanisms for that office.

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<sup>24</sup> Crown prosecutors should bring to the attention of a counsel from the Headquarters Counsel Group a criminal, regulatory or economic prosecution that is large-scale, complex or that involves novel issues.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.7 RELATIONSHIP BETWEEN CROWN COUNSEL AND INVESTIGATIVE AGENCIES**

**GUIDELINE OF THE DIRECTOR ISSUED UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Administration of criminal justice is a continuum. At one end, the police investigate criminal offences and arrange for suspected offenders to appear in court. At the other, Crown counsel are responsible for presenting the Crown's case in court. Their roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work in cooperation to administer and enforce criminal laws effectively. As the Supreme Court of Canada has stated, "the proper functioning of the criminal justice system requires (...) that all actors involved be able to exercise their judgment in performing their respective duties, even though one person's discretion may overlap with that of another person."<sup>1</sup>

This guideline describes the respective responsibilities of the investigative agencies and of Crown counsel, emphasizing the role of each in the administration of justice. It should

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<sup>1</sup> *R v Beaudry*, 2007 SCC 5, [2007] 1 SCR 190 at para 48.

be read in conjunction with the Public Prosecution Service of Canada's (PPSC) service standards.

## **2. ROLE OF LAW ENFORCEMENT AGENCIES AND INVESTIGATIVE AGENCIES: THE AUTHORITY TO INVESTIGATE AND TO LAY CHARGES**

### **2.1. The common law principle**

Maintaining the independence of law enforcement agencies from direct political control is fundamental to our system of criminal justice. Under the common law, the police could not be directed by the Executive or by Parliament to start an investigation, much less lay charges. As one former Ontario 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".<sup>2</sup> In *R v Metropolitan Police Commissioner, ex parte Blackburn*,<sup>3</sup> 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.

### **2.2. Statutory exceptions**

For certain offences under the *Criminal Code* (Code) and other federal statutes, for example, corruption of judicial officers<sup>4</sup> or offences on territorial seas,<sup>5</sup> war crimes,<sup>6</sup> the *Canada Labour Code*,<sup>7</sup> the *Canada Human Rights Act*,<sup>8</sup> terrorism offences and offences

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<sup>2</sup> Royal Canadian Mounted Police, *Police Discretionary Powers in a Democratically Responsive Society*, vol 41, no 12 (Ottawa: RCMP Gazette, 1978) at 5-6.

<sup>3</sup> [1968] 1 All ER 763 at 769 (CA).

<sup>4</sup> *Criminal Code*, s 119.

<sup>5</sup> *Ibid*, s 477.2.

<sup>6</sup> *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, s 9(3).

<sup>7</sup> RSC 1985, c L-2.

<sup>8</sup> RSC 1985, c H-6; see the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)" for a more complete list.

against non-Canadians committed outside of Canada, the consent of the Director of Public Prosecutions (DPP)<sup>9</sup> or minister of the Crown is required to lay an information.

### **3. ROLE OF CROWN COUNSEL BEFORE AND AFTER CHARGES ARE LAID**

#### **3.1. Introduction**

Crown counsel and investigative agencies play complementary roles in the criminal process. They both have roles to play before and after charges are laid.

While the involvement of the Crown is not required at the pre-judicial stage, the practice is increasingly common. The authors Michael Code and Patrick Lesage have noted this phenomenon and explained it as follows:

There has been a natural evolution towards much closer police and Crown pre-charge collaboration over the past 20 to 30 years. As noted above, criminal procedure had become much more complex than it was in an earlier era. Police investigative procedures are now the subject of pre-trial motions to determine whether there has been a Charter violation, whether evidence will be admitted under the new "principled approach" and whether a statutory process, such as a wiretap authorization or search warrant, has been properly followed. The police have increasingly turned to Crown counsel for pre-charge legal advice in order to navigate these difficult waters... It is simply not feasible in the modern era to expect the police and Crown to work in entirely separate silos, as they once did.<sup>10</sup>

Cooperation and consultation between law enforcement agencies and the Crown are essential to the proper administration of justice, since investigators must gather evidence that is both admissible and relevant. Later, when deciding whether to prosecute, consultation becomes useful for assessing the sufficiency of the evidence and the public interest criteria.<sup>11</sup> This cooperation is even more important in complex cases.

Accordingly, Crown counsel should be available for consultation during an investigation and before charges are laid. This will encourage investigators to ask for advice. In complex cases, Crown counsel may be required to work closely with the police to identify and collect cogent and relevant evidence. However, this does not mean that Crown counsel must take on the work of the investigators. At the end of an investigation, the role of Crown counsel is to give the investigators a fair and objective assessment of

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<sup>9</sup> Under s 3(3) of the *Director of Public Prosecutions Act*, SC 2006, c 9 this power to initiate prosecutions was delegated by the Attorney General to the DPP, who exercises this power independently "under and on behalf of the Attorney General".

<sup>10</sup> Ministry of the Attorney General of Ontario, *Report of the Review of Large and Complex Criminal Case Procedures*, (Toronto: 2008) at 25 (Hon. Patrick Lesage and Prof. Michael Code).

<sup>11</sup> See the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)".

the quality of the evidence and the appropriateness of proceeding. In conducting this assessment, counsel must be vigilant and take care to avoid "tunnel vision", meaning the loss of the ability to conduct an objective assessment of the case through contact with the investigators.<sup>12</sup>

### 3.2. Statutory involvement before charges are laid

In some instances, Crown counsel become involved in an investigation because of statutory requirements. These include:

- Obtaining wiretap authorizations pursuant to s. 186 of the Code;
- Obtaining special search warrants and restraint orders pursuant to ss. 462.32 and 462.33 of the Code regarding suspected proceeds of crime;<sup>13</sup>
- Obtaining restraint orders pursuant to s. 14 of the *Controlled Drugs and Substances Act*<sup>14</sup> regarding suspected proceeds of crime;
- Obtaining management orders pursuant to s. 490.81 of the Code, s. 14.1 of the *Controlled Drugs and Substances Act*, and in certain circumstances, s. 6 of the *Seized Property Management Act*;<sup>15</sup>
- Obtaining orders for the disclosure of tax information pursuant to s. 462.48 of the Code;
- Enforcing orders on behalf of foreign governments or the Government of Canada when property is found abroad, for the seizure, restraint or forfeiture of offence-related property or proceeds of crime pursuant to s. 9.3 of the *Mutual Legal Assistance in Criminal Matters Act*.<sup>16</sup>

In all these situations, Crown counsel may assist in preparing the necessary materials and making the application to court, where applicable.

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<sup>12</sup> 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, c 4 (Ottawa: Justice Canada, 2004), online: <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/toc-tdm.html>>. The 2011 update to this report, The Path to Justice: Preventing Wrongful Convictions, is available on the PPSC internet site, on line: <<http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/index.html>>. For more detailed guidance on this issue, see also the PPSC Deskbook directive "[2.4 Prevention of Wrongful Convictions](#)".

<sup>13</sup> Section 462.331 of the *Criminal Code* also provides that if a management order is needed with respect to property seized under s 462.32 of the *Criminal Code* or restrained under s 462.33 of the *Criminal Code*, the application is to be made by the Attorney General or a person acting with the written consent of the Attorney General. For more details, see the PPSC Deskbook guideline "[5.3 Proceeds of Crime](#)".

<sup>14</sup> SC 1996, c 19.

<sup>15</sup> SC 1993, c 37.

<sup>16</sup> RSC 1985, c 30 (4<sup>th</sup> Supp).

### **3.3. Non-statutory involvement**

Crown counsel can provide a wide range of assistance to investigators. In most non-statutory roles, Crown counsel play a supporting role by providing advice to ensure the rule of law.

#### **3.3.1. Advice concerning the operational plan**

The police have complete autonomy to decide whom to investigate and for what suspected crimes. They also have the discretion to decide how to structure the investigation and which investigative tools and techniques to use.

However, prior to undertaking an investigation or in its early stages, investigators may wish to consult with Crown counsel 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, it may be prudent to consult Crown counsel 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.

#### **3.3.2. Immunity agreements – Investigative assistance agreements**

Crown counsel must be involved in the granting of immunity from prosecution, and any agreement must be in writing.<sup>17</sup>

#### **3.3.3. Preparation of search warrant material**

Although investigators may apply for certain judicial authorizations without the advice of Crown counsel, Crown counsel can provide advice when requested to do so.

Crown counsel may give advice on various types of warrants and orders,<sup>18</sup> including:

- General warrants;
- Tracking warrants;
- Dialled number recorder warrants;
- DNA warrants;
- Production orders pursuant to ss. 487.012 and 487.013 of the Code; and
- Search warrants to be executed in law offices.

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<sup>17</sup> See the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”.

<sup>18</sup> In some jurisdictions, judges only meet with investigators in the presence of Crown counsel. In those jurisdictions, Crown counsel will appear with the investigator.



Crown counsel should be prepared to advise whether a judicial authorization is required, what judicial authorization is required, whether the threshold for the application is met, and whether a publication is appropriate. Normally the police draft the materials in support of a judicial authorization. Only exceptionally will Crown counsel be involved.

#### **3.3.4. 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 counsel may appear on those applications.

The decision as to whether the sealing order should continue or whether to allow a partial disclosure of information is made jointly by investigators and Crown counsel.

#### **3.3.5. Extensions of the time periods seized items may be detained**

Investigations are becoming more complex, and investigators often need to extend the time seized items may be detained or retained under s. 490(2) of the Code. In many cases, the investigation may continue for a lengthy time after the search.

The *Criminal Code* provides for three stages of detention:

1. The first three months - ordered by the justice who receives the Form 5.2 report;<sup>19</sup>
2. The next nine months;<sup>20</sup> or
3. A period longer than one year from the date of seizure.<sup>21</sup>

Section 490 allows Crown counsel or a peace officer to present applications for detention. In the vast majority of cases, peace officers are able to deal with these applications without the involvement of Crown counsel. However, in some cases, the application to extend can be a very complex procedure. Issues regarding the protection of ongoing investigations, informers and other related issues may arise. The individual subject to the search may attempt to use the detention hearing as a means of gaining access to the investigation file long before charges are laid.

Crown counsel may play a role in these hearings, in particular by:

- Reviewing the affidavit prepared by investigators or participating in its preparation (even where Crown counsel will not appear at the hearing);
- Providing advice to investigators concerning the type of information to detain or to return;<sup>22</sup> or

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<sup>19</sup> *Criminal Code*, s 490(1)(b).

<sup>20</sup> *Ibid*, s 490(2).

<sup>21</sup> *Ibid*, s 490(3).

- Appearing at contested hearings, where it is anticipated that complex issues will arise.<sup>23</sup>

### **3.3.6. Preparation of the Crown brief**

The Crown brief is one of the most important documents an investigator will prepare during an investigation.<sup>24</sup> It is through this brief that the investigator presents his or her theory of the case and demonstrates the existing evidence to prove that theory.

Crown counsel may assist in the preparation of the brief in a number of ways, including:

- Providing advice on how to structure the brief during the planning stages;
- Providing advice on areas of the brief that should be improved or corrected, in particular, evidence collected to establish grounds regarding the commission of the offence; and
- Providing advice on the use of electronic briefs.

### **3.3.7. Disclosure management**

Except in the most routine cases, disclosure management is key to an effective prosecution. Unless planning and thought is given to developing a disclosure strategy and incorporating it into the operational plan, significant obstacles may arise and prevent the court from hearing the case in a timely manner.

Crown counsel may assist in disclosure management in various ways, including providing advice on:

- the general obligations to disclose as set out in the case law;
- the structure of the disclosure management strategy to ensure that the materials generated and collected by the investigators are presented in a form that meets prosecution needs and legal requirements;
- issues of privilege (for example, police informer privilege) and editing;
- the scope of disclosure that is required in a particular case; and
- the application of the decision in *R v McNeil*<sup>25</sup>.

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<sup>22</sup> The assistance Crown counsel may provide 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.

<sup>23</sup> Crown counsel would appear in most cases where the application is brought in the superior court. When the case proceeds to another court, Crown counsel's appearance will depend on the nature of the case.

<sup>24</sup> The Report to Crown Counsel/Crown Brief (RTCC/CB) guide explains the PPSC's national approach regarding the RTCC/CB and outlines our expectations of the police. It is not about the format the RTCC/CB is to be provided, but on its substantive content.

### 3.3.8. Interviewing potential witnesses before charges are laid

Generally, Crown counsel do not participate in the interviewing of witnesses before charges are laid.<sup>26</sup> Crown counsel assess potential evidence by reviewing the Crown brief,<sup>27</sup> documentary evidence and videotaped witness statements.

However, in some circumstances, it may be appropriate for Crown counsel to interview a witness before charges are laid. In these situations, the investigator or the Crown witness coordinator normally should be present during the interview. Situations in which such involvement may be appropriate include:

- Where the prosecution will depend on witnesses with unsavoury backgrounds, such as police agents or jailhouse informers. Given issues of credibility that arise with such witnesses, it is generally prudent to conduct an examination before charges are laid;<sup>28</sup>
- Where the prosecution will depend on witnesses who may be reluctant to testify, given their lack of familiarity with the court system or the nature of the offence committed. For example, in cases of sexual assaults or in those involving young children, it may be appropriate for Crown counsel to meet with the witness to explain the process and the safeguards for the witness. In these cases, caution must be exercised to avoid Crown counsel taking on the role of investigator, rather than simply providing the witness additional information about the process;<sup>29</sup>
- Where the case involves particularly problematic *Canadian Charter of Rights and Freedoms* issues that require closer examination of the evidence;
- To interview a wiretap application affiant prior to approving the charges; and
- Where there is a statutory requirement for the Crown to consent to the laying of charges,<sup>30</sup> and
- When taking « KGB » statements.<sup>31</sup>

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<sup>25</sup> 2009 SCC 3, [2009] 1 SCR 66.

<sup>26</sup> One of the reasons 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 context of the courtroom. On this, see *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297 [*Regan*].

<sup>27</sup> See PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, *supra* note 11.

<sup>28</sup> See procedure established for “jailhouse informers” set out in the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”, *supra* note 17.

<sup>29</sup> See generally, the PPSC Deskbook directive “[5.6 Victims of Crime](#)”.

<sup>30</sup> As set out in the PPSC Deskbook guideline “[3.5 Delegated Decision-Making](#)”, *supra* note 8.

<sup>31</sup> *R v B(KG)*, [1993] 1 SCR 740, 79 CCC (3d) 257 at 299.

### 3.4. Charge review

During the investigation, investigators are not only entitled, but are encouraged to consult with Crown counsel 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 cases) to consult with Crown counsel 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, the police 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 stay proceedings if charges are laid.

In practice, a form of pre-charge screening or "charge approval" occurs in Quebec, New Brunswick and British Columbia. Under these systems, charges can be laid only if Crown counsel reviews and approves them.<sup>32</sup>

When the DPP chooses to participate in a process of pre-charge approval of charges, the DPP will apply the charge approval standard established in the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)" to all proceedings proposed to be commenced at the instance of the Government of Canada. Consideration should be given to whether counsel who advises the investigative agency during the investigation (the pre-charge advisory Crown) should be different from counsel who conducts the screening process (the pre-charge approval or screening Crown). There is no iron clad rule in this respect. Factors to consider in making this decision include the effective and efficient prosecution of the matter, the orderly transition of the file, the length of time and extent of involvement of the pre-charge Crown counsel, the need to avoid preconceived notions, exclusion if called as a witness, and the value of fresh eyes assessing the case.

### 3.5. After charges are laid

Generally, just as peace officers are independent from political control when laying charges, Crown counsel are independent from the police in the conduct of prosecutions.<sup>33</sup> Crown counsel's independence applies, for example, to assessing the strength of the case,<sup>34</sup> electing the mode of trial,<sup>35</sup> providing disclosure to the accused,<sup>36</sup> assessing the witnesses (including decisions about immunity from prosecution),<sup>37</sup> deciding how to

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<sup>32</sup> Discretion to Prosecute Inquiry, *Commissioner's Report* (British-Columbia, Ministry of the Attorney General of British-Columbia, 1990) (Chair: Stephen Owen) at p 25; *Royal Commission into the Prosecution of Donald Marshall, Jr.*, Inquiry Report, vol 1 at 232.1, D Geoffrey Cowper, QC "A Criminal Justice System for the 21<sup>st</sup> Century" Final Report of the BC Justice Reform Initiative to the Minister of Justice and Attorney General Honourable Shirley Bond, August 27, 2012).

<sup>33</sup> See the PPSC Deskbook guideline "[2.1 Independence and Accountability in Decision-Making](#)".

<sup>34</sup> See the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)", *supra* note 11.

<sup>35</sup> See the PPSC Deskbook guideline "[3.10 Elections and Re-elections](#)".

<sup>36</sup> See the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)".

<sup>37</sup> See the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)", *supra* note 17.

present the evidence,<sup>38</sup> negotiating and repudiating plea agreements,<sup>39</sup> and deciding if the public interest warrants continuing or staying a prosecution.<sup>40</sup>

When charges are laid, full responsibility for the proceedings shifts to the DPP. The police must, on request, carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court. The DPP also has the authority to control the proceedings after charges are laid. This authority extends to conditions of bail, staying or withdrawing charges and representations on sentencing. This role should, whenever reasonably possible, be carried out in consultation with the investigators, but the consultation (much less agreement) is not required by law.

#### **4. RESOLVING DISAGREEMENTS BETWEEN CROWN COUNSEL AND INVESTIGATORS ON WHETHER TO PROCEED**

In cases where a disagreement between investigators and Crown counsel on whether to lay charges or not occurs, the issue should be resolved according to any existing agreements between the two organizations or through discussions at successively more senior levels on both sides.

The decision whether a case should commence or continue should be made at the regional level. Disagreements should be referred to the team leader and then, if necessary, to the Deputy Chief Federal Prosecutor (or General Counsel, Legal Operations) and to the Chief Federal Prosecutor (CFP). When the unresolved disagreement is between a Crown agent and the police, the matter should be referred to the agent supervisor at the regional office. If the issue cannot be resolved at this level, it should be referred to the CFP.

In rare circumstances, senior managers at PPSC Headquarters may need to review a case in which there is a disagreement. The CFP should refer the case to the appropriate Deputy DPP for assessment.

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<sup>38</sup> *R v Cook*, [1997] 1 SCR 1113.

<sup>39</sup> *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566.

<sup>40</sup> *Criminal Code*, s 579; see also the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, *supra* note 11.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.8 CONTACTS WITH THE COURTS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The principle of judicial independence is a pillar of our justice system.<sup>1</sup> As a result, Crown counsel must be careful and sensitive when in contact with courts and judges. Counsel, moreover, must be aware of the implications of their unique functions and the concomitant importance of avoiding remarks that would give rise to a suggestion that they have attempted to influence improperly or pressure the judiciary. Most of the time, common sense and professional integrity will be a sufficient guide.

However, ambiguous and complex situations arise. When this occurs, it may be necessary to refer the matter to the Chief Federal Prosecutor (CFP) who will ensure that proper action, if any, is taken, including referring the matter to the Director of Public Prosecutions (DPP).

### 2. OBJECTIVE

The purpose of this guideline is to help Public Prosecutions Service of Canada (PPSC) officials avoid situations that could give the impression that the PPSC or its prosecutors are improperly attempting to influence or exert pressure on the courts or judges. While all lawyers must be sensitive to the propriety of their contacts with the courts and their relationship with the judiciary, and are expected to act in accordance with their law society codes of conduct, Crown counsel and other PPSC employees, as representatives of the DPP, are in a unique position that requires particular caution in their dealings with the courts.

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<sup>1</sup> For a thorough discussion of the principle of judicial independence and the rules of conduct that counsel must follow in order to uphold that principle, see generally *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 at paras 67ff, 118 CCC (3d) 443.



### **3. GUIDELINES**

#### **3.1. Business or personal relationships with judges and judicial officers**

Crown counsel shall not appear before a judge or judicial officer when he or she has a business or personal relationship with that person that might reasonably be perceived to affect the impartiality of Crown counsel, the judge or the officer.

#### **3.2. Improper attempts to influence a judge or judicial officer**

Crown counsel shall not attempt, or knowingly allow anyone else to attempt, to influence the decisions or actions of a judge or judicial officer, directly or indirectly, except by legitimate means of open persuasion as an advocate.

#### **3.3. Communicating with judges or judicial officers in contested matters**

Crown counsel shall not communicate, directly or indirectly, with a judge or any judicial officer except

- in open court;
- with the consent of, or in the presence of, the other parties or their respective counsel;
- in writing, provided a copy is given at the same time to the other parties or their respective counsel; or
- in *ex parte* matters, as permitted by law.

#### **3.4. Meetings in relation to administrative matters**

In discussing with judges, judicial officers, and other court officials matters of government policy that could affect the administration of the courts, Crown counsel shall conduct themselves so as to avoid any possible suggestion that they are improperly attempting to influence or exert pressure on the courts or individual judges in the exercise of their judicial functions.

#### **3.5. Referral to the Chief Federal Prosecutors**

Where there is doubt about whether a particular contact or action involving a judge or judicial officer is appropriate, counsel shall consult with the CFP.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.9 COMMUNICATIONS WITH THE MEDIA**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

An informed public is an essential element of a transparent, fair and equitable justice system. By providing accurate and timely information on behalf of the Director of Public Prosecutions (DPP), Crown counsel can help ensure that citizens have a fair opportunity to determine whether the justice system is functioning effectively. Access to full and accurate information on court proceedings, in effect, enhances public confidence in the administration of justice.

As set out in s. 3(3)(e) of the *Director of Public Prosecutions Act*<sup>1</sup> (DPP Act), the DPP may communicate with the media and the public on all matters that involve the initiation and conduct of prosecutions. This authority is delegated to Crown counsel, who are accountable for the cases and proceedings in which they are involved.<sup>2</sup> Crown counsel should be accessible and responsive to the media and the public regarding the cases they prosecute. They are the Public Prosecution Service of Canada's (PPSC) spokespersons

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<sup>1</sup> *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

<sup>2</sup> Responsibility is delegated by virtue of s 9(1) of the DPP Act, *supra* note 1. For a brief discussion of Crown counsel's delegated responsibilities, see the PPSC Deskbook guideline "[2.2 Duties and Responsibilities of Crown Counsel](#)".

and the first point of contact in respect of specific prosecutions assigned to them. Crown counsel are considered to be “authorized spokespersons” within the meaning of s. 8.17 of the PPSC Code of Conduct “on cases for which they are responsible”.<sup>3</sup>

This guideline applies to contacts initiated by the media and to contacts initiated by Crown counsel.

## **2. STATEMENT OF POLICY**

The PPSC’s media communications policy is founded upon three cornerstone principles: accessibility, transparency and responsiveness. The PPSC strives to enhance public understanding of, and confidence in, the administration of justice by providing accurate and relevant information in a timely manner. Subject to the overriding duty to the administration of justice to ensure that trials are fair, Crown counsel shall provide the media with timely, complete and accurate information on matters relating to the administration of criminal justice in which they are involved.

It must be recognized, however, that in their role as “ministers of justice”,<sup>4</sup> Crown counsel have a responsibility to relate to the media and the public in a manner that is courteous, dispassionate, free from provocative rhetoric. In making a public statement, Crown counsel must ensure that the privacy interest of third parties are protected, that common law and statutory confidentiality obligations are respected, including publication bans, and that the fair trial rights of an accused are not jeopardized.

## **3. HANDLING MEDIA ENQUIRIES**

Crown counsel should, on cases for which they are responsible, make reasonable efforts to respond directly to media enquiries relating to court proceedings in relation to routine matters (e.g. scheduling), questions relating to the status of a prosecution or appeal and matters of criminal procedure.

When in doubt about any aspect of a media inquiry, including the reasonableness of the request or how to handle a particular media inquiry, Crown counsel should seek the advice of the Communications Group and consult with their Chief Federal Prosecutor (CFP). Crown counsel may also simply refer calls to the Communications Group, which has a coordinating role in these matters. Referring the inquiry to the Communications Group will often be advisable when for example: a) the matter is particularly controversial; b) a PPSC spokesperson has already handled media inquiries regarding the

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<sup>3</sup> Section 8.17, Publicly Commenting for the PPSC states that “Only authorized spokespersons may issue statements or comments on the PPSC’s position on a given subject. PPSC prosecutors are authorized to act as spokespersons on cases for which they are responsible. If asked for the PPSC’s position, employees who are not spokespersons must refer the inquiries to their manager or to the Communications Group.”

<sup>4</sup> See the PPSC Deskbook guideline “[2.2 Duties and Responsibilities of Crown Counsel](#)”, *supra* note 2.

same subject; c) Crown counsel is under time constraints, or d) there are security concerns in the case, for example, for the personal safety of Crown counsel.

#### **4. EXPLAINING PROSECUTORIAL DECISION-MAKING**

There is no “freestanding principle of fundamental justice” requiring Crown counsel to justify and explain the exercise of prosecutorial discretion to the court and indirectly to the public.<sup>5</sup> The principle of prosecutorial independence is firmly entrenched in our legal system. Nonetheless, while the Crown is not legally required to give reasons for its core decision-making, it may be advisable in certain circumstances to offer an explanation for decisions in order to help maintain public confidence in the administration of justice. As Doherty JA stated in *R v Gill*:<sup>6</sup> “By offering an explanation, the prosecutor clearly enhances the transparency of his or her decision-making process and, hence, the fairness of the proceeding.”

Crown counsel should provide an explanation for a particular decision when it is public interest to do so, for example where (i) the basis is not self-evident and (ii) it is reasonably foreseeable that the lack of an explanation would lead the court or members of the public to draw conclusions that attribute erroneous and improper motives to the Crown’s exercise of prosecutorial discretion. Prior to giving reasons in respect of these decisions, Crown counsel must consult with and seek prior approval of their CFP or supervisors.

#### **5. TYPES OF COMMUNICATION**

##### **5.1. Contacts initiated by the media**

Media representatives may seek information in various ways, including questioning counsel outside the courtroom. When this occurs, Crown counsel may not have the opportunity to consult before responding. Crown counsel should provide the media with accurate and factual information in a timely manner. When information is not readily available, Crown counsel should make reasonable efforts to gather the required information and answer questions directly, or refer questions to the Communications Group.

##### **5.2. Contacts initiated by Crown counsel**

The PPSC may, on occasion, identify a need to correct inaccuracies or to provide information without being contacted by the media. This might be done, for example, by a simple call or message, through a letter to the editor of a media outlet (print, radio, TV or social media) by a handout, or a fact sheet. Depending on the circumstances, it may be

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<sup>5</sup> See e.g. *R v Gill*, 2012 ONCA 607 at para 75.

<sup>6</sup> *Ibid* at para 77.

appropriate to distribute information more broadly. In those situations, Crown counsel must consult with their CFP, their supervisors, or with the Communications Group with respect to the appropriate means of communication and its content.

### **5.3. Media requests requiring consultation**

From time to time, Crown counsel may be invited to participate in a more lengthy or detailed interview regarding a prominent case or issue. Some of these cases may also be the subject of multiple requests for PPSC comment. Crown counsel must therefore consult with their CFP on these matters. The CFP must bring these requests to the attention of the Communications Group and to the appropriate Deputy DPP, to ensure the matter is appropriately resolved.

Such cases include those in which:

- the prosecution involves significant constitutional questions, federal-provincial or international relations, government operations, or national security;
- the accused is a public figure; or
- the issues raised have previously generated public debate.

### **5.4. Social media**

Social media<sup>7</sup> has added a new dimension to the way information is disseminated to the public. It is important to note that anything Crown counsel says should be considered “on the record” and may end up in the public domain. A comment to a local blogger may be picked up by a national broadcast media outlet. Therefore, Crown counsel must exercise the same care and attention when dealing with anyone seeking information, and not just traditional media outlets.

### **5.5. Communications before charges are laid**

Before charges are laid, the media may seek to confirm that a specific matter or person is under investigation or that charges are imminent. The PPSC does not comment on such matters.

To deny the existence of an investigation at one time, and to decline to comment later, says as much as an affirmation. It is best not to comment so as to not prejudice a potential or ongoing investigation, or any possible proceedings. The proper response is to state as a matter of policy that the PPSC does not and will not discuss such matters.

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<sup>7</sup> Social media refers to electronic networks or channels where content is exchanged in virtual communities between individuals or organizations, including media or government agencies.

## **5.6. Investigative agency news releases**

Some investigative agencies issue news releases at the time that charges are laid or at a particular stage in the proceedings such as a guilty plea or finding of guilt after trial. Unless they relate specifically to elements of a prosecution or are subject to a general agreement between agencies, these news releases are issued independently of the PPSC and Crown counsel cannot dictate to an investigative agency the content the of its announcements.<sup>8</sup>

## **5.7. Communicating with the media in one's personal capacity**

Crown counsel, like all government employees, are subject to certain limitations when communicating with the media in their personal capacity.<sup>9</sup> This is especially true for those who perform their duties in the public eye. In this respect, Crown counsel must familiarize themselves with ss. 8.16 and 8.17 of the PPSC Code of Conduct. Crown counsel must not make statements that would:

- compromise their ability to do their job in the future by commenting publicly and critically on the wisdom of a particular offence or specific law, a federal government policy, position or proposal;
- discourage public respect for the administration of justice or weaken the public's confidence in legal institutions, for example, by publicly commenting on or criticizing a judge's decision in another case in a manner that could bring about either of these results;
- contravene professional codes of conduct; or
- constitute opinions on matters of public interest where the opinion is sought or is relevant because of the nature of a person's position as Crown counsel.

## **6. GUIDING PRINCIPLES**

The following general principles must govern Crown counsel's approach to communications with the media:

- Give facts, not opinions - Crown counsel should provide information, and they should explain. They should not offer personal opinions about court decisions, or laws or governmental policies. The goal is to foster understanding, not to create sensation.

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<sup>8</sup> See the PPSC Deskbook guideline "[2.7 Relationship Between Crown Counsel and Investigative Agencies](#)".

<sup>9</sup> See also the PPSC Code of Conduct, at s 8.16 for Public Criticism of the PPSC and the Federal Government and at s 8.17 for Publicly Commenting for the PPSC.



- Speak for attribution - All communications with the media should be considered “on the record”. Crown counsel must assume that any comments they make to journalists can be attributed to them in their names.
- Respect journalists’ needs - It is important to recognize that journalists have a job to do, whether or not you assist them. Because they will pursue the story, it is usually better to respond to their questions. It is also necessary to bear in mind journalists’ deadlines in attempting to respond.
- Be responsive - “No comment” is not an acceptable response to a request for information. If the particular question posed cannot be answered because it calls for an opinion, invites comment on matters under judicial consideration, or attempts to confirm the existence of a police investigation, explain to the questioner why it would be inappropriate to comment.
- Do not express satisfaction or dissatisfaction with an outcome – In response to questions such as “Are you happy with the outcome?” or “How do you feel about the acquittal?”, Crown counsel should respond that the Crown does not express satisfaction or dissatisfaction with particular trial outcomes, our role is to put before the court all available, relevant, and admissible evidence necessary to enable the court to determine the guilt or innocence of the accused.<sup>10</sup>
- Educate the public - The media, and the public generally, may not understand the complexities of the justice system. Crown counsel should explain aspects of the system such as the role of the prosecutor or the appeal process, in a clear, concise and comprehensible way.
- Be timely - Misinformation, left uncorrected, can be harmful to people and institutions. Seek to prevent an inaccurate public record by providing information in a timely way, respecting where possible journalists’ needs to meet deadlines. Where comment is to be made after the appearance of a misleading or inaccurate story, a representative of the PPSC should set the record straight as soon as possible.
- Protect the integrity of the trial - Any comment that prejudices the right of an accused to a fair trial must be avoided.

## **7. SPECIFIC DIRECTION**

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

### **7.1. Provision of Factual Information**

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

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<sup>10</sup> *Boucher v The Queen*, [1955] SCR 16 at 23-24.

- cases before the courts;
- documents filed in open court and otherwise available to the public;
- the prosecution policies in the PPSC Deskbook (for example, explaining the “reasonable prospect of conviction” standard in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”);
- the process or procedures of the criminal justice system and how they apply to specific proceedings;
- the role of prosecutors at the PPSC. Crown counsel may also refer to the PPSC Annual Report or [www.ppsc-sppc.gc.ca](http://www.ppsc-sppc.gc.ca) for more detailed explanations;
- the meaning of a court decision, without commenting on whether it is “right”, “wrong”, “good” or “bad”;
- the role and responsibilities of the DPP.

## **7.2. Information which Cannot be Provided**

Crown counsel should not comment on:

- the possibility of charges being laid;
- cases under review or ongoing investigations;
- speculation as to what may happen during any stage of ongoing proceedings;
- privileged information, such as advice given to, or discussions held with, the PPSC, colleagues, foreign officials, or members of an investigative agency, whether or not such advice or discussions are privileged;
- any information the disclosure of which is prohibited by law (e.g. by virtue of the *Privacy Act*<sup>11</sup>, *Youth Criminal Justice Act*<sup>12</sup>) or by a court-imposed publication ban;
- policies, procedures or decisions of investigative agencies (such inquiries should be directed to the investigative agency);
- the wisdom or efficacy of federal or provincial policies, programs or legislation;
- the strength or weakness of the Crown or defence case during a trial;
- the appropriateness of a judge's charge to the jury, particular rulings, the verdict of a jury, the sentence or any comments made by the judge;
- whether a decision will be appealed or not (however, the procedure for considering whether or not to appeal may be explained); or
- the guilt or innocence of an accused.

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<sup>11</sup> RSC 1985, c P-21.

<sup>12</sup> SC 2002, c 1.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.10 APPLICATION OF THE PUBLIC PROSECUTION SERVICE OF CANADA DESKBOOK IN RESPECT OF *CANADA ELECTIONS ACT* PROSECUTIONS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(8) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

I hereby direct that federal prosecutors and persons acting as federal prosecutors, when initiating and conducting prosecutions on behalf of the Crown with respect to any offence under the *Canada Elections Act*,<sup>1</sup> as well as any appeal or other proceeding related to such a prosecution, are to be guided by the policies and guidelines for the exercise of prosecutorial authority set out in the Public Prosecution Service of Canada Deskbook.

This guideline is issued pursuant to s. 3(8) of the *Director of Public Prosecutions Act*<sup>2</sup> to federal prosecutors and persons retained to act as federal prosecutors within the meaning of s. 7 of the Act.

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<sup>1</sup> SC 2000, c 9.

<sup>2</sup> SC 2006, c 9.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **2.11 OFFICIAL LANGUAGES IN PROSECUTIONS**

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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## **1. PURPOSE OF DIRECTIVE**

This directive is intended to assist Crown counsel in applying the language provisions of the *Criminal Code* (the Code) (ss. 530, 530.01, 530.1, 530.2, 531 and 849(3) of the Code), in particular, those dealing with the language of the trial.

## **2. PURPOSE OF PART XVII OF THE *CRIMINAL CODE***

The purpose of s. 530 of the Code is to provide equal access to the courts to accused persons who speak one of the official languages of Canada.<sup>1</sup> These linguistic provisions are distinct from the principles of fundamental justice such as the right to a fair trial.<sup>2</sup> Section 530 of the Code sets out the procedure whereby an accused can apply to be tried before a court who speaks the official language of the accused or both official languages. Once an order has been made under s. 530 of the Code, s. 530.1 of the Code sets out how the proceedings are to be conducted.

## **3. APPLICATION PERTAINING TO LANGUAGE OF TRIAL UNDER SECTION 530 *CRIMINAL CODE***

### **3.1. Accused whose language is one of the official languages**

For the language of trial provisions of the *Criminal Code* to be triggered, the accused whose language is one of the official languages of Canada must make an application under s. 530(1) of the Code for an order that the accused be tried before a judge or a judge and jury who speak the official language of the accused or, if the circumstances warrant, both official languages of Canada. This is a substantive right and not a procedural one.<sup>3</sup>

### **3.2. Accused whose language is not one of the official languages**

When an accused does not speak one of the official languages, a judge may grant an order under s. 530(2) of the Code directing that the accused be tried before a judge or a judge and jury who speak the official language in which the accused, in the opinion of the judge, can best give testimony or, if the circumstances warrant, who speak both official languages.

### **3.3. Accused must be informed of right to apply for order**

The judge, before whom an accused first appears, whether or not the accused is represented, must ensure that the accused is advised of his or her right to apply for an

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<sup>1</sup> *R v Beaulac*, [1999] 1 SCR 768 at para 34, 173 DLR (4th) 193 [*Beaulac*]. These language provisions are distinct from the principles of fundamental justice such as the right to a fair trial (*Ibid* at para 41).

<sup>2</sup> *Ibid*.

<sup>3</sup> *Ibid* at paras 28 and 31.

order and of the time before which such an application must be made (s. 530(3) of the Code).

Crown counsel should be mindful of the obligation of the justice of the peace or provincial court judge before whom the accused first appears to inform the accused of his or her right to apply for an order under s. 530(1) and (2) of the Code and of the time before which such an application must be made.<sup>4</sup>

### **3.4. Time frame for making the application**

An accused's language of trial application must be made not later than:

- (a) the time of the appearance of the accused at which his trial date is set, if
  - (i) he is accused of an offence mentioned in s. 553 of the Code or punishable on summary conviction, or
  - (ii) the accused is to be tried on an indictment preferred under s. 577 of the Code;
- (b) the time of the accused's election, if the accused elects under s. 536 of the Code to be tried by a provincial court judge or under s. 536.1 of the Code to be tried by a judge without a jury and without having a preliminary inquiry, or
- (c) the time when the accused is ordered to stand trial, if the accused
  - (i) is charged with an offence listed in s. 469 of the Code,
  - (ii) has elected to be tried by a court composed of a judge or a judge and jury, or
  - (iii) is deemed to have elected to be tried by a court composed of a judge and jury.

### **3.5. Application made outside time frame**

Section 530(4) of the Code applies where an accused's application is made outside the prescribed time frame.

In that case, if the court before which the accused is to be tried is satisfied that it is in the best interests of justice that the accused be tried before a court that speaks the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language in which the accused can best give testimony, the court may remand the accused to be tried before a court that

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<sup>4</sup> *Criminal Code*, RSC 1985, c C-46, s 530(3). Given the nature of language rights, the requirement of substantive equality and the purpose of s 530 of the Code, the violation of the language provisions was characterized by the Supreme Court as a substantial wrong and not a procedural irregularity; see *Beaulac*, *ibid* at para 54. The violation of s 530 of the Code is not a breach of s 15 or ss 16(1) or 16(3) of the Charter. Accordingly, the violation of s 530 of the Code does not give rise to a remedy under s 24(1) of the Charter; see *R v MacKenzie*, 2004 NSCA 10, 181 CCC (3d) 485, 221 NSR (2d) 51, 697 APR 51, 116 CRR (2d) 63.



speaks that language or, if the circumstances warrant, that speaks both official languages of Canada.

To determine the best interests of justice, the court must consider the reasons for the delay and then the factors that relate to the conduct of the trial. Institutional inconvenience, the ability of the accused to understand the other official language and the fairness of the trial (which is distinct from the language rights granted under s. 530 of the Code) must not be taken into account. The additional difficulties caused by an untimely application and the reasons for the delay are relevant factors.<sup>5</sup>

The basic principle is that, generally, owing to the importance of language rights and the stated intention of the legislator to ensure the equality of French and English, the best interests of justice will be better served by an order allowing the application by the accused to be tried in his or her official language. The denial of the application is exceptional, and the burden of justifying it falls on the Crown.<sup>6</sup>

### **3.6. Amending the order**

Pursuant to s. 530(5) of the Code, an order under s. 530 of the Code that a trial be held in one of the official languages may, if the circumstances warrant, be varied by the court to require that it be held in both official languages, and vice versa.

### **3.7. Waiver**

The rights provided in s. 530 and 530.1 of the Code may be waived. The accused must know and understand the rights he or she is waiving as well as the consequences of such waiver.<sup>7</sup>

Crown counsel should ensure that proceedings are conducted in an official language that the accused person understands. Accordingly, Crown counsel should ask that the waiver of one of the rights provided in ss. 530 and 530.1 of the Code be noted on the record, especially if the accused is unrepresented.

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<sup>5</sup> “... mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.” *Beaulac*, *supra* note 1 at paras 36-41.

<sup>6</sup> *Ibid* at para 42.

<sup>7</sup> *R v Dow*, 2009 QCCA 478, [2009] RJQ 679, 245 CCC (3d) 368.

## **4. LANGUAGE OF TRIAL**

### **4.1. Trial in one of the two official languages**

For the purposes of s. 530 of the Code, the language of the accused is the official language with which the accused has a sufficient connection. It does not have to be the accused's dominant language. If the accused has sufficient knowledge of an official language to instruct counsel, the accused may assert that that language is his or her language, regardless of his or her ability to speak the other official language. The onus is on the Crown to show that this assertion is unfounded. The court will satisfy itself only that the accused is able to (i) instruct counsel and (ii) follow the proceedings in the chosen language. The dominant cultural identity and the personal language preferences of the accused are not relevant.<sup>8</sup>

It should be noted that ss. 530.1(a) and (b) of the Code provide that both the accused and counsel for the accused have the right to use either official language during the preliminary inquiry and trial. Thus, the language used by the accused or his or her counsel may not be invoked by Crown counsel to challenge the accused's choice of language of trial.

Crown counsel cannot contest the choice of official language of the accused unless the accused clearly has insufficient knowledge of the chosen official language to instruct counsel and to follow the proceedings in that language.

Crown counsel cannot contest the accused's statement that he or she will best be able to give testimony in one of the official languages when neither official language is the language of the accused unless the accused clearly has insufficient knowledge of the chosen language to instruct counsel and to follow the proceedings in that language.

### **4.2. Trial in both official languages ("bilingual trial")**

#### **4.2.1. Single accused**

A judge may order that the accused be tried before a judge or a judge and jury who speak both official languages if the circumstances warrant. For example, such circumstances may occur when an accused requests a trial before a judge who speaks only one official language but the evidence is in the other official language or witnesses speak the other official language.

#### **4.2.2. Co-accused**

Section 530(6) of the Code<sup>9</sup> is intended to clarify the specific situation of co-accused who are to be tried jointly but who do not have the same official language. Prior to the coming

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<sup>8</sup> *Beaulac*, *supra* note 1 at para 34.

<sup>9</sup> In effect October 1, 2008.

into effect of this provision on October 1, 2008, the courts had taken different approaches regarding separate trials where co-accused exercised their right to be tried in the official language of their choice, which was not the same. Section 530(6) of the Code provides that the fact that two or more accused who are to be tried together are each entitled to be tried before a judge or judge and jury who speak one of the official languages and that these official languages are different may constitute circumstances that warrant that an order be granted directing that they be tried before a judge or a judge and jury who speak both official languages. This order reconciles the language rights of the accused with the principle of one trial for co-accused.<sup>10</sup>

Where co-accused who do not have the same official language exercise their respective right to be tried before a judge or a judge and jury who speak their official language, Crown counsel should try to avoid separate trials and obtain an order for a bilingual trial. This constitutes circumstances that warrant such an order under s. 530(6) of the Code.

## **5. EFFECTS OF ORDER PERTAINING TO LANGUAGE OF COURT AND OF CROWN COUNSEL**

Once an order has been made under s. 530 of the Code, it takes effect immediately, and the scheme created by ss. 530 to 530.1 of the Code applies.

The specific rights listed in s. 530.1 of the Code also apply where a bilingual trial is ordered.<sup>11</sup>

### **5.1. Judge, judge and jury must speak same official language as accused**

The judge or judge and jury must speak the official language of the accused or both official languages, as the case may be, at the preliminary inquiry and the trial.<sup>12</sup>

### **5.2. Crown counsel must “speak” same official language as accused**

#### **5.2.1. Institutional obligation**

Section 530.1(e) of the Code imposes a specific obligation on Crown counsel by providing that the accused has the right to have Crown counsel who “speaks” the same official language as the accused or both official languages, as the case may be. This includes an implicit requirement that Crown counsel in fact uses this language.<sup>13</sup> Consequently, every time an order is made under s. 530 of the Code, Crown counsel responsible for the file must ensure that he or she has sufficient command of the official language stated in the order.

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<sup>10</sup> *R v Bellefroid*, 2009 QCCS 3193.

<sup>11</sup> *Beaulac*, *supra* note 1 at para 49.

<sup>12</sup> *Criminal Code*, *supra* note 4, ss 530(1), 530 (2), 530(4) and 530.1(d).

<sup>13</sup> See *R v Potvin* (2004), 69 OR (3d) 654 (ON CA).

Section 530.1 of the Code creates an institutional obligation. Thus, if Crown counsel on the file is not capable of or does not consent to arguing the case in the official language of the accused, he or she must inform his or her superior (or, in the case of an agent, the agent supervisor), who then has the responsibility of assigning the case to another counsel who is capable of and consents to proceed in the language chosen by the accused.<sup>14</sup> In the case of a bilingual trial, Crown counsel must either be bilingual or be assisted by a bilingual Crown counsel.

### **5.2.2. When to “speak” the same official language as the accused**

The language rights guaranteed by ss. 530 and 530.1 of the Code apply at the preliminary inquiry and the trial.<sup>15</sup>

Where an order is made under s. 530 of the Code, Crown counsel must use the official language of the accused in all oral submissions and during any examination of the accused.

Where an order has been made for a trial before a judge or a judge and jury who speak both official languages (“bilingual trial”), the judge presiding over a preliminary inquiry or trial may, at the start of the proceeding, make an order setting out the circumstances in which and the extent to which Crown counsel and the judge may use each official language at the hearing (s. 530.2(1) of the Code).

This order must, to the extent possible, respect the right of the accused to be tried in his or her official language (s. 530.2(2) of the Code).

Where a bilingual trial has been ordered, Crown counsel must ensure that the judge makes an order at the start of the proceeding that provides for the use of both official languages and that respects, to the extent possible, the right of the accused to be tried in his or her official language.

Crown counsel must use both official languages in a balanced fashion, depending on the unique circumstances of each trial. This means, generally, that accused persons must each be examined in their own official language while oral argument must be divided in a balanced fashion between the two official languages unless the judge has ordered otherwise.

On the other hand, where an order for a “bilingual trial” is made, but there is only one accused or the accused persons all speak the same official language, arguments and

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<sup>14</sup> It may be necessary to seek an adjournment. If another Crown counsel willing to speak the language of the accused is not assigned to the case within a reasonable time, the trial judge may order a stay of the proceedings; see *R v Cross*, [1998] RJQ 2587 at 2594 (QC CA).

<sup>15</sup> *Criminal Code*, *supra* note 4, s 530.1(d) and (e).

examinations must be conducted in that language only unless the judge has ordered otherwise.

Sections 530.1(c) and 530.1(c.1) of the Code, provide that witnesses have the right to give evidence in either official language during the preliminary inquiry and at trial and that the judge may, if the circumstances warrant, authorize Crown counsel to examine or cross-examine a witness in his or her official language even where that language is not the language of the accused or the one in which the accused can best give testimony.

Obviously, the criminal process consists of a number of steps, other than the preliminary inquiry and the trial, during which the accused's rights may be affected, but they are not subject to the language scheme under ss. 530 to 531 of the Code

Once an order is made under s. 530 of the Code that the accused will be tried before a judge or a judge and jury who speak the official language of the accused, Crown counsel must, where possible and appropriate, use the official language of the accused not only at the preliminary inquiry and trial stages but also in all proceedings at the trial level at which the accused is present unless the parties have agreed otherwise.<sup>16</sup>

### 5.2.3. Written pleadings

Under s. 849(3) of the Code, the forms set out in Part XXVIII of the *Criminal Code* (for example: summons, search warrant) must be printed in both official languages.<sup>17</sup>

Section 530.01(1) of the Code states that, if an order is granted under s. 530 of the Code Crown counsel is required, on application by the accused, to cause the portions of the information or indictment against the accused that are in an official language that is not that of the accused or that in which the accused can best give testimony, to be translated into the other official language and to provide the accused with a written copy of the translated text at the earliest possible time.

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<sup>16</sup> However, this directive is applied only if the relevant provincial or territorial statutes permit the use of the official language of the accused. Since the use of French and English in proceedings other than the trial and the preliminary inquiry is not governed by the *Criminal Code*, the provincial or territorial statutes must be consulted to determine the law on this point. The law may vary considerably from one province or territory to another. In certain provinces and territories, the Constitution or the provincial or territorial statutes provide that English and French may be used in oral and written pleadings in any court of justice in criminal proceedings (Yukon, N.W.T., Nunavut (Court practice directive), Saskatchewan, Alberta, Manitoba, Ontario, Quebec and New Brunswick). On the other hand, others allow only English to be used (British Columbia). Lastly, in some provinces, the law is uncertain or is silent on this point.

<sup>17</sup> Most courts have held that the fact that s 849(3) of the Code is expressed in mandatory terms does not automatically lead to a nullity. If the accused has not been prejudiced, this defect may be corrected by an amendment; see *R v Goodine* (1992), 112 NSR (2d) 1, 71 CCC (3d) 146, 307 APR 1 (NS CA); *Lavoie v R* (1990), 58 CCC (3d) 246, JE 90-874 (QC SC); *R v Cotton* (13 March 1991), Hull 550-36-000038-909, JE 91-735 (QC SC); *R v Sorensen* (1990), 59 CCC (3d) 211, 75 OR (2d) 659 (Ont Gen Div Ct); *R v S(H)* (1995), 87 OAC 114, 27 OR (3d) 97 and 116, 105 CCC (3d) 461 (Ont CA) [*R v S(H)*], leave to appeal to the SCC dismissed [1996] SCCA No. 86. However, there is a minority view to the effect that failure to comply with s 849(3) of the Code results in a nullity because the provision confers an imperative language right; see *R v Keenan* (1990), 84 Man R (2d) 1 (Man Prov Ct).

Crown counsel must ensure that portions of informations or indictments are in the official language chosen by the accused if such a choice has been made.

If the official language of the accused is not known, Crown counsel should ensure that the accused is clearly informed by the court on the record that a translation may be obtained, within a reasonable time, in the official language chosen by the accused.

As stated above, s. 530.1(e) provides that Crown counsel must “speak” the same language as the accused or both official languages, as the case may be. This means that Crown counsel must actually use that language in oral representations, and as mentioned in section 5.2.2 of this directive, in written representations as well, both at the preliminary inquiry and at trial.

After an order has been made under s. 530 of the Code, Crown counsel must use the official language of the accused in both oral and written representations. Specifically, motions and written arguments must be provided in the official language of the accused.

Where an order has been made pursuant to s. 530 of the Code for a “bilingual trial,” but there is only one accused or the accused all speak the same official language, the documents prepared by Crown counsel must be in the official language of the accused unless the judge orders otherwise.

Where an order has been made pursuant to s. 530 of the Code for a “bilingual trial,” and there are Francophone and Anglophone accused, the documents prepared by Crown counsel must be in both official languages where practicable and unless the judge orders otherwise.

Crown counsel must file case law, literature and legislation in the official language of the original documents. As well, quotations must be reproduced in the original official language.

Where a version of these texts is available in the official language of the accused, that version must also be filed with the court. Similarly, where a quotation is written in an official language other than the language of the accused, the passage must, where practicable, be translated with the notation [TRANSLATION].<sup>18</sup>

Where an order has been made under s. 530 of the Code, Crown counsel must, where possible and appropriate, prepare documents in the official language of the accused not only at the preliminary hearing and trial stages but also in all proceedings at the trial level at which the accused is present unless the parties have agreed otherwise.<sup>19</sup>

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<sup>18</sup> See *Charlebois v Saint John (City)*, 2005 SCC 74, 3 SCR 563, 261 DLR (4th) 1.

<sup>19</sup> See *supra* note 17.

## 6. OTHER EFFECTS OF ORDER

Where an order is made under s. 530 of the Code, the court is required to make interpreters available to assist the accused, his or her counsel or any witness during the preliminary inquiry or trial (s. 530.1(f) of the Code)

In certain cases, the trial may be held in another territorial division if an order made under s. 530 cannot conveniently be complied with in the territorial division in which the offence would otherwise be tried (s. 531 of the Code).

## 7. EVIDENCE

### 7.1. Disclosure

In interpreting the language rights in the *Criminal Code* or of any other constitutional language rights provisions, courts have not imposed a legal obligation on the Crown to provide a translation of evidence disclosed to the accused into the official language of the accused, or into the official language of counsel retained by the accused.<sup>20</sup>

In exceptional circumstances, however, the right to make full answer and defence may entitle the accused to obtain an order for translation of a portion or summary of the evidence into his or her official language.<sup>21</sup> Insofar as the issue is no longer the application of language rights, properly speaking, but the principles of fundamental justice, the approach should be the same whatever the language of the accused may be. This question should be decided on a case-by-case basis, and even exhibit by exhibit.<sup>22</sup>

### 7.2. Documentary evidence

Crown counsel may file any documentary evidence in the official language in which it is supplied to them, without the need for translation. The provisions of s. 530.1(g) of the Code require only that the documentary evidence be filed in the record at the preliminary hearing and at trial in the language in which it was tendered. There again, as with

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<sup>20</sup> *R v Rodrigue* (1994) 91 CCC (3d) 455 (YTSC), aff'd on other grounds by 95 CCC (3d) 129, 26 CRR (2d) 175 (YTCA), leave to appeal to the SCC dismissed [1995] SCCA No. 83; *R v Breton* (9 July 1995), Whitehorse TC-94-10538 (YTSC); *R v Mills* (1994), 124 NSR (2d) 317, 345 APR 317 (NSSC); *R v S(H)*, *supra* note 17, application for leave to appeal to the SCC dismissed [1996] SCCA No 86; *R v Stockford* 2009 QCCA 1573 (CanLII) at para 13, *R v Potvin* (2004), 186 CCC (3d) 257 (ONCA); *R v Schneider* (2004), 188 CCC (3d) 137 (NSCA); *Deschambault v R*, 2010 QCCS 6851 (CanLII).

<sup>21</sup> *R v Stadnick*, [2001] QJ No 5226 (QC SC), leave to appeal to the SCC dismissed [2002] SCCA No 413; *R v Hunt* 2007 QCCQ 1405.

<sup>22</sup> Before agreeing to having any evidence translated into English or French, Crown counsel should apply a test that would consist in considering what parts of any evidence that had been obtained in a language other than English or French would have to be translated to enable the accused to be able to make full answer and defense.

disclosure of documents, there may be some circumstances that justify a court ordering that an exhibit be translated into the language of the accused, not based on the language rights in the *Criminal Code*, but rather on the principles of fundamental justice.

## 8. APPEAL PROCEEDINGS

There is no legal obligation on Crown counsel to use the official language of the accused in appeal proceedings. As indicated above, ss. 530 and 530.1 of the Code apply only to the preliminary inquiry and the trial.

In appeal proceedings, Crown counsel must, where possible and appropriate, use the official language chosen by the defence for the purposes of the appeal, for both oral and written submissions.<sup>23</sup>

Where the Director of Public Prosecutions (DPP) initiates the appeal, it is assumed that the language of the proceeding will be the same as in the earlier judicial proceeding unless the parties have agreed otherwise.

Where the DPP is an intervener, Crown counsel must also use the official language chosen by the defence for the purposes of the appeal.<sup>24</sup> In cases involving more than one accused or where there is reason to assume that both official languages will be used, Crown counsel must, where possible and if appropriate, file written argument in both official languages. In oral pleadings, Crown counsel must use the official language chosen by the defence. If counsel for the accused persons do not all use the same official language in oral argument, Crown counsel must use the language that appears to be most appropriate in the circumstances.

## 9. OTHER ASPECTS OF OFFICIAL LANGUAGES

Under the Constitution, French and English have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada, in federal statutes and in the Federal Courts and, subject to certain limitations, in communications between the public and federal institutions.<sup>25</sup> The Constitution also guarantees certain language rights with respect to the legislatures and courts of Quebec, Manitoba and New Brunswick.<sup>26</sup>

Certain spheres of federal jurisdiction, the *Official Languages Act*<sup>27</sup> specifies the rights of the public and the obligations of federal institutions with respect to the use of both

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<sup>23</sup> *Supra* note 17.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 s 16-20; *The Constitution Act, 1867 (UK)*, 30 & 31 Victoria, c 3, s 133.

<sup>26</sup> See *supra* note 1; *Manitoba Act, 1870*, RSC 1970, App II, No 8, s 23.

<sup>27</sup> RSC 1985, c 31 (4th Supp).



official languages in parliamentary proceedings (Part I), in legislative and other instruments (Part II), in the administration of justice (Part III), in communications with and services to the public (Part IV) and in the work environment of federal institutions (Part V).

#### **10. OFFICIAL LANGUAGES LAW GROUP OF THE DEPARTMENT OF JUSTICE (OLLG)**

This group at the Department of Justice headquarters is responsible, in particular, for developing a consistent and coordinated approach to the conduct of language litigation involving the federal Crown, including assisting in framing the Crown's position and providing specialized litigation support.

Crown counsel must inform their Chief Federal Prosecutor (CFP) of all prosecutions where language rights are at issue. The CFP shall determine whether the OLLG should be informed. If the CFP determines that the OLLG should be informed he or she shall do so; however, any subsequent dealings with the OLLG will be conducted by Crown counsel who will keep the CFP informed of the progress of the file.

#### **11. SUMMARY OF QUESTIONS TO CONSIDER ON RECEIPT OF AN APPLICATION UNDER SECTION 530 OF THE *CRIMINAL CODE***

- What is the language of the accused?
- What is the accused's stated preference in the application?
- Does the accused have sufficient knowledge of the chosen official language to instruct counsel and follow the proceedings in that language?
- The following factors are not relevant:
  - the fact that the accused can speak the other official language as well as or better than his or her own,
  - the official language of counsel for the accused or the ability of counsel to understand the proceedings in the other official language;
- Do the co-accused, where applicable, have different official languages, which would warrant an order for a trial before a judge or a judge and jury who speak both official languages?
- Might substantial or material parts of the evidence be tendered in the official language that is not the official language chosen by the accused? Where that is the case, should the order provide that the trial be held before a judge or a judge and jury who speak both official languages?
- Are interpreters available?

- Are the forms in Part XXVIII of the *Criminal Code* printed in both official languages?
- Should portions of the informations or indictments be translated?
- Should portions of the evidence disclosed or presented in court be translated to ensure that the accused is guaranteed the right to a fair trial?



# **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

## **3.1 MAJOR CASE MANAGEMENT**

### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The administration of justice may be severely strained by trials that stretch over an extended period of time and involve many accused facing several charges. As the Ontario Court of Appeal has observed, "[u]ntil relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years."<sup>1</sup>

While major cases can arise for various reasons and have various characteristics, three features in particular commonly exist. First, they result from lengthy investigations, often involving wiretapping. Second, they generally concern joint enterprises. This usually means that there will be more than one accused, each facing many serious charges. Third, the cases are characterized by voluminous evidence. Because they deal with serious crime committed by persons who use sophisticated methods of avoiding detection and/or are engaged in extensive criminality, proof of the Crown's case may involve production of thousands of pages of wiretap transcripts, surveillance reports, business documents, witness statements and other documentary evidence. Because the Crown's disclosure obligations extend beyond the evidence the Crown intends to lead in proof of its case, the volume of disclosable material will be even greater.

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<sup>1</sup> *R v Felderhof* (2003), 180 CCC (3d) 498, 68 OR (3d) 481 (ONCA) at para 40.

For the purpose of the application of this guideline, all cases rated as “High Complexity” are to be considered a major case. At the discretion of the Chief Federal Prosecutor (CFP), the components of this guideline may be applied to cases other than those rated as “High Complexity”.

## **2. PURPOSE OF THE GUIDELINE**

The purpose of this guideline is primarily to function as a legal risk management tool to address the legal, financial and strategic risks associated with major cases. In so doing it will ensure a consistent approach is taken, one that serves to support the Director of Public Prosecutions (DPP) in respect of his or her responsibility for prosecutions by generating specific recommendations as to how particular major cases should be managed. The special challenges posed by these cases must be identified at an early point and a plan of action created and approved to ensure that key strategic choices are made throughout the investigative process in a timely way.

## **3. THE MANAGEMENT OF A MAJOR CASE**

### **3.1. The relationship with the investigative agency<sup>2</sup>**

The principle of the investigative independence of the police is firmly entrenched in this country.<sup>3</sup> That principle seeks to ensure that investigative decisions will not be subject to improper political control. The Supreme Court of Canada has also recognized that both investigative and prosecutorial functions should be exercised independently, but the same court has refused to dictate how the relationship between investigators and prosecutors should be structured.<sup>4</sup>

While prosecutors and investigators continue to be independent when discharging their respective functions, a sense of partnership must permeate the relationship. This is particularly true in major cases. Accordingly, the Public Prosecution Service of Canada’s (PPSC) involvement in major cases should be characterized by early, continuous and close involvement with the investigative agency.

### **3.2. Providing legal assistance to the investigative agency**

As early as possible in the investigation, the CFP should discuss with the investigative agency the need to assign the services of one or more counsel on an ongoing basis to provide advice. These counsel should have the experience necessary to ensure that any advice given is in accordance with best prosecutorial practices. It is important that these ad-

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<sup>2</sup> See also the PPSC Deskbook guideline “[2.7 Relationship between Crown Counsel and Investigative Agencies](#)”.

<sup>3</sup> See e.g. *R v Campbell*, [1999] 1 SCR 565 at paras 33-36.

<sup>4</sup> *R v Regan*, [2002] 1 SCR 297 at para 64; *R v Beaudry*, [2007] 1 SCR 190 at para 48.

visory counsel be experienced, and that they consult with CFPs, team leaders, or senior colleagues (particularly those who may be assigned to conduct the prosecution down the road) on potentially problematic issues, in order to ensure consistency in positions taken throughout the duration of the case.

Crown counsel's assistance to investigators should be offered on several fronts,<sup>5</sup> such as:

- providing advice on the legality of investigative measures;
- assisting in the development of a strategic plan that will result in a manageable prosecution or prosecutions;
- drafting immunity agreements with co-operating witnesses, where necessary;<sup>6</sup> and
- reviewing or assisting in the drafting of search warrants or other applications, where appropriate
- disclosure.

It should be emphasized that Crown counsel's role is to provide appropriate legal and strategic advice. This will include advising investigative agencies as to how investigative choices will impact on any future prosecution, and may also involve asking hard questions designed to ensuring the investigation remains focused.

### **3.3. Input into the formation of the investigative agency's operational plan**

The formation and structure of an operational plan is the exclusive responsibility of the investigating agency. Involvement from the very outset of the investigation by Crown counsel can, however, assist the investigators in achieving the ultimate objective of the plan, which will often be to debilitate a criminal organization. Crown counsel can offer insight as to how the choice of particular instruments (e.g., the number of accused, the type of charges, measures other than prosecution) may affect fulfillment of the plan.

Where prosecutions are to proceed, they must be financially and legally manageable.<sup>7</sup> Crown counsel can assist the investigators by, for example: a) identifying aspects of the operational plan that may present difficult problems of proof, particular disclosure obligations, or lead to unwieldy prosecutions; and b) analyzing whether the operational plan takes account of significant resourcing issues.<sup>8</sup> While Crown counsel can offer advice to focus the investigation, it is not the role of counsel to make choices such as who should be investigated, and what techniques should be used. It is crucial that the PPSC be alerted

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<sup>5</sup> The type of assistance that may be given at the pre-trial stage is dealt with more fully in the PPSC Deskbook guideline "[2.7 Relationship between Crown Counsel and Investigative Agencies](#)", *supra* note 2.

<sup>6</sup> See the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)".

<sup>7</sup> "Legally manageable" includes ensuring that the case that is not so large in terms of number of accused and charges that it becomes incomprehensible to the trier of fact.

<sup>8</sup> For example, the transcription of wiretaps and appointment of a disclosure co-ordinator.

to the likelihood that significant human and financial resources may need to be allocated to the case. The need to seek additional resources has to be identified as early as possible in order to make sure the projected resource requirement is properly addressed; if the resources will not be available, the investigative agency must be advised.

### **3.4. Disclosure management**

The most effective way of satisfying Crown counsel's ethical obligation to make full disclosure of the Crown's case<sup>9</sup> is to be involved at an early stage and continue to be involved throughout the investigation.<sup>10</sup>

The responsibility for the preparation of disclosure materials should be viewed as a joint one between Crown counsel and the investigative agency. Crown counsel must give the investigative agency advice and direction to ensure that the investigators produce a well-organized package that is as complete as possible and in a user-friendly format before charges are laid.<sup>11</sup> The assistance provided should seek to enable the police to produce both excellent Crown briefs and complete disclosure packages for the defence.

Crown counsel can assist the investigative agency in numerous ways,<sup>12</sup> for example, by:

- providing legal advice as to what material is privileged or non-disclosable for any other reason;
- ensuring that the disclosure package contains a summary of the case against each individual (which will be particularly important for charge screening);
- assisting with the preparation of separate disclosure packages to be used for bail hearings; and
- ensuring the investigative agency prepares the package in a user-friendly way by, for example, cataloguing wiretap material according to its relevance to common issues such as investigative necessity, knowns/unknowns.

### **3.5. Charge management**

Effective charge management assumes an ongoing level of cooperation with the investigative agency such that the agency will not be seeking to proceed on a prosecution or prosecutions that are unwieldy in terms of the number of accused or the number of charg-

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<sup>9</sup> *R v Stinchcombe*, [1991] 3 SCR 329 at 339.

<sup>10</sup> See in this regard, the Rapport Final du Comité ad hoc du Comité en Droit Criminel sur les Mégaprocès (Barreau du Québec, fev 2004) at 2.

<sup>11</sup> Bearing in mind that post-arrest statements and other investigative developments will require vigilant monitoring to ensure that the continuing disclosure obligation is met.

<sup>12</sup> Such assistance would encompass training. The responsibility for file management is that of the investigative agency, but prosecutors can play an important role in training exercises designed to show what a "user-friendly" disclosure package may consist of.

es. Crown counsel and investigators should work at developing a common understanding at as early a stage as the circumstances of the investigation permit as to what charges against which subjects are likely to go forward, so as to permit both parties to work on issues such as disclosure and the preparation of the Crown brief in a meaningful way, as early as possible. The investigative agency has the final say, however, as to all strategic choices on the structure of the investigation itself.

Crown counsel are required, on an ongoing basis, to assess every case according to the reasonable prospect of conviction/public interest test set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#).”<sup>13</sup> Charge review in the major case context requires strict attention to the difficult choices that must be made, and Crown counsel must objectively review the case to determine whether a prosecution would best serve the public interest, as the “Decision to Prosecute” guideline demands.

First, to the extent possible, charge review should be done before charges are laid. This assumes that there has been co-operation with the investigative agency, particularly with respect to the preparation of a package for Crown counsel that gives a comprehensive overview of the investigation and a detailed summary of the evidence against each individual. Meaningful charge review cannot take place without receiving such information, and prosecutions cannot proceed where a high standard of disclosure is not met.

Second, the consideration of the “public interest” factor in the “Decision to Prosecute” guideline must take into account what will be practically feasible. The fact that many charges meet the “reasonable prospect of conviction” test does not necessarily mean that all criminal acts by all accused must be prosecuted; difficult choices must be made. Counsel must bear in mind the potential number of accused and the evidence available in deciding what combination of accused and charges will give rise to a prosecution or prosecutions that can be successfully mounted and will be most likely to advance the strategic goals of the investigation and prosecution.

The charge review process will also necessitate paying close attention to the desirability of encouraging early resolution discussions, and using other appropriate measures short of prosecution. Crown counsel should have a comprehensive view of appropriate dispositions for each accused, in order to encourage early resolution and reduce the number of accused as appropriate. As set out in other policies,<sup>14</sup> Crown counsel should make, as soon as practicable, a time-limited offer. This offer should reflect that generally a plea of guilty is a mitigating factor on sentence, especially where the accused pleads guilty at the earliest opportunity. Absent a significant change in circumstances, this offer should not be repeated at subsequent stages in the trial process (e.g., after a preliminary hearing, on the day of trial). Due to the substantial public resources typically at stake in major case prosecutions, it is particularly important in such cases that Crown counsel make reasonable efforts to resolve cases at an early stage, in a manner consistent with the public interest.

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<sup>13</sup> See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

<sup>14</sup> See the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”.



### 3.6. Composition of the prosecution team

A major case will sometimes require deployment of a multidisciplinary team to address the numerous challenges that will arise. Managers must pay attention to a wide variety of factors in considering the composition of the prosecution team, including the personal compatibility of the individuals selected. Depending on the needs of the particular case, the various parts of the team will include:

- advisory counsel, to work closely with the investigative agency; and
- lead and assisting counsel, to perform the charge screening and conduct preliminary hearings and trials;

And also may include any or all of the following:<sup>15</sup>

- bail counsel, to deal specifically with initial bail hearings and subsequent bail reviews;
- counsel with specific expertise, to deal with specific issues such as *Canadian Charter of Rights and Freedoms* motions, claims of prosecutorial misconduct, or funding of the defence, for example;
- paralegals and other administrative support personnel to assist counsel with all of the foregoing functions;
- a project manager to handle matters like the scheduling and attendance of witnesses, materiel requirements, accommodation, and other logistical issues;
- communications persons, who can assist prosecuting counsel with the demands for information, or provide media training to prosecuting counsel;
- information management experts, to ensure that systems are in place to properly manage electronically-stored information;
- non-departmental personnel, should contracting out of photocopying be necessary, for example.

## 4. THE CROWN'S PROSECUTION PLAN

Development of a prosecution plan should be seen as an essential part of the prosecution function in major cases. It is incumbent on CFP's to identify potential major cases as early as possible, and ensure that a prosecution plan is developed and approved by the CFP. As noted in section 1 of this guideline, "major cases" include all prosecutions rated as "High Complexity". At the CFP's discretion, prosecution plans may be required in cases not rated as "High Complexity". A prosecution plan helps to focus counsel's and management's attention on potential issues and ensure an understanding of the theory of the

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<sup>15</sup> These are intended as examples only. A "team" may include some or all in any given case, and some may be part of the team for a brief time or only for highly specific purposes.

case at an early stage, and also to provide a roadmap for the subsequent conduct of the case.

In addition to review by the CFP, prosecution plans must be referred to the Major Case Advisory Committee (MCAC) in all cases involving national significance, exceptional complexity, or very substantial resource implications. Other cases may be referred to the MCAC for its review at the discretion of the CFP.

#### **4.1. Early warning**

In the early stages of the investigation, while it would be unreasonable to expect a detailed prosecution plan, it is nonetheless important for the CFP to provide the relevant Deputy Director of Public Prosecutions (Deputy DPP), as soon as practicable, with a “heads up” when it becomes clear that the investigation will likely develop into a major case involving national significance, exceptional complexity, or very substantial resource implications. This may involve, for example, an assessment of the investigative agency's operational plan and its potential impact on the PPSC. As well, the note should describe what steps the PPSC is taking, or should take, to manage the potential risk.

#### **4.2. Development of the prosecution plan**

It is up to the CFP, or the Deputy DPPs, to decide at what stage a prosecution plan should be prepared. As a general rule however, the prosecution plan should be developed within a time frame that will permit the plan to be reviewed effectively by the CFP and/or the MCAC, and the resource requirements to be addressed properly. Accordingly, the prosecution plan should be developed as soon as the unfolding investigation permits a strategy to be defined.

The prosecution plan must be sufficiently descriptive of the nature of the investigation so that it can be objectively reviewed. It must address issues such as:

- the nature of the investigation and the key evidence in the case to the extent known;
- the likely resource demands of the case, including an analysis of whether those demands can be satisfied by the regional office in question;
- the general contours of the prosecution, including the number of potential accused and charges, and the number of prosecutions
- particular legal challenges likely to arise;
- an assessment of how effectively information is being managed, so that disclosure will be able to be made as soon as practicable after arrest.

## **5. MAJOR CASE ADVISORY COMMITTEE**

The DPP has responsibility for prosecutions and needs to be satisfied that resources are being effectively used.

To support the DPP and the Deputy DPPs in this responsibility, the PPSC has created the MCAC, composed of senior prosecutors from across the country with extensive trial and appellate experience and expertise relevant to the key cases. Members are chosen by the Deputy DPPs after consultation with CFPs. The MCAC exercises a review and challenge function in regard to major cases involving national significance, exceptional complexity, or very substantial resource implications. In addition, the MCAC will provide that review and challenge function in regard to other cases referred to it by a CFP or Deputy DPP.

### **5.1. Recommendation to the Deputy Director of Public Prosecutions**

A matter must be submitted in time to allow for meaningful review and ultimate approval by the responsible Deputy DPP. The MCAC exercises a challenge function with respect to strategic planning on major cases; it does not "approve" plans. The MCAC provides advice to the major case team and to the CFP based on its objective assessment of the case, and provides recommendations to the relevant Deputy DPP. As a result of the challenge, the CFP may choose to make modifications to the plan before the committee makes its recommendations to the Deputy DPP.

The lead prosecutor on any major case submitted to the MCAC, and his or her CFP, should present the plan to the Committee. It should be viewed by the prosecution team and the CFP as an opportunity to get advice on the overall approach to the case, or any particularly troublesome aspects of the case. The co-chairs of the MCAC and the CFP will provide written recommendations to the appropriate Deputy DPP with respect to the latest version of the prosecution plan. If the plan is approved, the CFP remains responsible for ensuring the execution of the plan.

Counsel may use the MCAC as a source of advice, for example, in assessing the legal strategy and any significant legal risks as they arise. Requests for assistance may also encompass seeking the advice of the MCAC on particular legal issues. It is up to counsel's CFP to determine when an issue should be referred to the Committee. The MCAC may also provide advice on revisions to the prosecution plan.

### **5.2. The MCAC's litigation monitoring function**

Apart from the specific mandate of the Committee with respect to major cases, the Committee may exercise additional functions in support of the DPPs' responsibility for the prosecution function, and in cooperation with CFP's and HQ Counsel Group, including:

- monitoring emerging trends in federal prosecution practice and making recommendations as to how the PPSC should adjust to such trends;

- ensuring consistency of approaches by the PPSC throughout the country, including in respect of work done by agents;
- identifying regional practices or approaches that may be of national interest and make recommendations for their broader diffusion.

### **5.3. Post-case assessment**

Upon the conclusion of any prosecution arising out of projects which have been reviewed by the MCAC, a debriefing exercise should be conducted. The purpose of this exercise is to assist the Major Case Advisory Committee in assessing the utility of its recommendations, developing a better understanding of the challenges and best practices involved in the conduct of large and complex prosecutions, and providing advice and assistance on future cases.

The report should be completed by the lead prosecutor upon the completion of the prosecution and forwarded to the co-chairs of the MCAC. Upon receipt of the completed report, a teleconference may be scheduled to further discuss counsel's experience with the case and any observations they may have on what worked or didn't work and their suggestions for future cases.

In other cases in which the CFP thinks it is advisable, or in addition to the debriefing referred to above, a "lessons learned" exercise may be conducted after the completion of the prosecution. These post-case assessments should be conducted in cooperation or consultation with the investigative agency.

The CFP, who has the responsibility for ensuring these exercises take place, should consult with the head of the local investigative agency so that they can jointly determine how to conduct an effective post-case assessment.

Questions that should be addressed include: the adequacy of the resources deployed, the effectiveness of the cooperation with the investigative agency before and during the prosecution; the ability of the prosecution team to identify and effectively manage the legal risks presented by the case; the use of the MCAC and support by other areas of the PPSC.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.2 DESIGNATION OF THE PARTIES AND THE PROSECUTORS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

When counsel introduce themselves to a court, they also identify the party for whom they act.<sup>1</sup> The purpose of this guideline is to clarify who is the proper party and to explain how federal prosecutors and agents acting as federal prosecutors should identify themselves and whom they represent in all written pleadings<sup>2</sup> and in court.

The Public Prosecution Service of Canada (PPSC) is a federal government organization, created on December 12, 2006, when Part 3 of the *Federal Accountability Act*<sup>3</sup> received Royal Assent, bringing the *Director of Public Prosecutions Act*<sup>4</sup> (DPP Act) into force. The applied name of this federal government office under Treasury Board's Federal Identity Program is the Public Prosecution Service of Canada, whereas its legal name is the Office of the Director of Public Prosecutions (ODPP).<sup>5</sup>

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<sup>1</sup> Most court rules require court documents to have a "general heading" or "style of cause" which identify the parties before the court; they will often be identified as either applicant or respondent or intervener, or as appellant or respondent. This note is concerned with the proper use of names in the general heading as well as with how counsel identifies themselves in signature blocks and orally in court.

<sup>2</sup> "Pleadings" is used expansively to include all types of material filed in courts, including, without limiting the generality of it, indictments, applications and motions, affidavits, facts and written submissions, and orders.

<sup>3</sup> SC 2006, c 9.

<sup>4</sup> Section 121 being Part 3 of the *Federal Accountability Act*, SC 2006, c 9.

<sup>5</sup> An applied title is the approved name used in the signature to identify an institution, program or activity. This title should be used in all communications. By contrast, the legal title is the name that appears in the enabling legislation, proclamation, order in council, or other instrument used to create a branch of government.

In criminal proceedings, the prosecuting party is Her Majesty the Queen,<sup>6</sup> or the Crown. This title emanates from the concept of state legal authority within a constitutional monarchy whereby the Queen, or “the Crown”, is the legal representative of the executive branch of government. Within the Canadian federation, the Queen, or the Crown, operates both at the federal level as “Her Majesty in Right of Canada” and at the provincial level as “Her Majesty in Right of” each province. The Crown may, in a given case, be an applicant, respondent, appellant or intervener, depending on the nature of the proceeding.

The Director of Public Prosecutions (DPP) is not a party to a prosecution. Rather, the DPP is the legal agent of the Crown, or counsel for the Crown. The DPP may, “under and on behalf of the Attorney General”, initiate and conduct prosecutions “on behalf of the Crown.” When exercising purely prosecutorial functions, federal prosecutors,<sup>7</sup> in turn, act as “delegated agents” for the DPP.<sup>8</sup>

## 2. THE CROWN AS PARTY TO THE PROCEEDINGS

Whenever the Crown is the proper party named in the general heading of the court documents, which is the case for prosecutions and related proceedings,<sup>9</sup> federal prosecutors act as “agents of the DPP”, reflecting the language in s. 9(2) of the DPP Act, or “Counsel for Her Majesty the Queen”, or “Crown counsel”.

Thus, the proper description of counsel in documents which initiate a proceeding, or are a form of pleading, is “counsel for Her Majesty the Queen”, “counsel for the Crown” or “agent for the Director of Public Prosecutions”.<sup>10</sup> Unless the DPP is named as a party to a proceeding, written submissions and facts filed with the court should be signed with the

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<sup>6</sup> Also referred to as “Regina”, hence the use of the abbreviation “R” in criminal styles of cause; e.g. *R v John Doe*.

<sup>7</sup> This is the expression used by Parliament in ss 7 and 9 of the DPP Act to designate the prosecutors acting on behalf of the Federal Crown; the French version uses the term “procureurs de l’État”.

<sup>8</sup> Section 9(1) of the DPP Act authorizes the DPP to delegate any of his or her powers, duties or functions (with the exception of the actual power to delegate), to employed federal prosecutors and to agents retained under s 7(2).

<sup>9</sup> For example, an application for a management order pursuant to s 6 of the *Seized Property Management Directorate Act*, brought on consent of the Attorney General, is a step within the trial process and falls within the purview of s 3(3)(a) of the DPP Act (conducting prosecutions). Thus, a federal prosecutor applying for a management order, applies as agent of the DPP or counsel for the Crown because the Crown is the proper party, even though the law specifies that the Attorney General makes the application. Similarly, the Attorney General or the Deputy Attorney General (*i.e.*, the DPP for this function) must authorize in writing a direct indictment under s 577 of the *Criminal Code*. Nevertheless, the proper party is the Crown and the federal prosecutor will sign the direct indictment as “agent of the Director of Public Prosecutions” and not as “agent of the Attorney General of Canada”.

<sup>10</sup> Note that, while the term “agent of the DPP” is technically accurate in pleadings, prosecutors more commonly employ the term “Crown counsel” as it identifies the actual party to the proceeding, rather than the party’s counsel (*i.e.*, DPP and his or her agent).

identifier “counsel for Her Majesty the Queen”, “counsel for the Crown”, or “Crown counsel”, unless “counsel for the appellant” or “counsel for the respondent” is more appropriate and in keeping with the local practice of a particular court. In the same vein, unless the DPP is party to a proceeding, federal prosecutors should introduce themselves to the court as “counsel for the Crown”, “Crown counsel” or “counsel for the federal Crown”,<sup>11</sup> or words to the same effect. The cover page of written pleadings should identify counsel as being with the PPSC.

In all written pleadings, counsel should indicate the date and place of signature above or below the signature block. Some court rules require it.

In regulatory matters, some related proceedings are brought at the instance of the investigating agency.<sup>12</sup> Others are brought by persons attacking procedures instituted by the investigating agency. In those situations, where PPSC counsel are acting as advisory counsel to the regulatory agency, the general heading of the court documents will name the person identified by the relevant statute as the applicant. Counsel will identify themselves as “counsel for the applicant” (or respondent, as the case may be). However, the back page and other locations in the court documents requiring identification of the law firm and its address for service, counsel should indicate that they are from the ODPP, with their relevant branch or group and their own business address.

### **3. THE DPP AS PARTY TO THE PROCEEDINGS**

Where the DPP is named as a party to a proceeding, federal prosecutors act as counsel for the DPP. In these circumstances, written submissions and facts should be signed “counsel for the Director of Public Prosecutions” and federal prosecutors should introduce themselves as “counsel for the Director of Public Prosecutions”. Examples of situations in which the DPP is a party to the proceedings are interventions in provincial prosecutions<sup>13</sup> and appeals made under s. 3(3)(b) of the DPP Act; extraordinary remedies sought against the DPP under Part XXVI of the *Criminal Code* (i.e., certiorari, habeas corpus, prohibition and mandamus); and judicial reviews of decisions made by the DPP.

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<sup>11</sup> Note that, while there is no juridical party named the “federal Crown”, federal prosecutors commonly use this vernacular term to introduce themselves to the court, as distinct from their provincial counterparts, and it has been accepted.

<sup>12</sup> See e.g. applications to a superior court by the Commissioner of Competition for search warrants or production orders under ss 15 and 11, respectively, of the *Competition Act*, RSC 1985, c C-34, as amended.

<sup>13</sup> Counsel for the province in these matters represents the Crown, whereas the DPP becomes party to the proceedings as intervener.



#### **4. *R v R* PROSECUTIONS: A GOVERNMENT DEPARTMENT AS DEFENDANT**

A government department or agency does not generally have distinct legal personality and therefore does not have the capacity to be a defendant in criminal proceedings.<sup>14</sup> All prosecutions either commenced by, or taken against, the federal Crown, are conducted in the name of Her Majesty the Queen. Thus, insofar as a statute binds Her Majesty in right of Canada,<sup>15</sup> Her Majesty can be prosecuted under that statute for the criminal conduct of her servants. In these situations the Queen finds herself on both sides of the prosecution. The Queen is represented by her Ministers for different purposes in a “*R v R*” prosecution. The Queen is represented for the prosecution by her Minister, the Attorney General of Canada, whose prosecution authority is delegated to the DPP by virtue of s. 3(3) of the DPP Act. In her defence, Her Majesty is represented by the Minister who is responsible for the defendant government institution. The defendant is “Her Majesty the Queen as represented by the Minister of [name of the department/agency]”.

Where a defendant in a federal prosecution or a respondent to a government application is a government department or agency whose legislation does not give it the capacity to sue or be sued or otherwise has no legal personality, the proper style of cause is “*Her Majesty the Queen v Her Majesty the Queen*”, “*Regina v Regina*”, or “*R v R*” for short. Similarly, the same practice applies in respect of certain other government entities that have no governing legislation and merely operate within the legislative mandate of another government department.<sup>16</sup>

#### **5. OTHER SCENARIOS**

##### **5.1. Direct indictments with both provincial and federal charges**

Any direct indictment containing provincial charges must have the consent of the respective provincial Attorney General, or Deputy Attorney General, even if the provincial counterpart delegates the prosecution of those charges to the federal prosecutor.

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<sup>14</sup> *Munro v Canada*, (1992), 11 OR (3d) 1 (Gen Div) at 10-13. See also *Conseil des ports nationaux v Langelier*, [1969] SCR 60 at 71; *Glaxo Canada Inc v Canada* (1987), 11 FTR 121 at 125; *Re Air India* (1987), 62 OR (2d) 130 (HC); *Robichaud v Canada (Attorney General)* (1991), 44 FTR 172 at 177.

<sup>15</sup> Section 17 of the *Interpretation Act*, RSC 1985, c I-21 provides that “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment.” For example, s 5 of the *Canadian Environmental Protection Act*, 1999, SC 1999, c 33 provides that “This Act is binding on Her Majesty in right of Canada or a province.”

<sup>16</sup> For example, Service Canada operates within the legislative mandate and framework of the *Department of Human Resources and Skills Development Act* and the *Department of Social Development Act*. It has delegated authorities to execute its mandate and functions.

When filing a direct indictment containing both federal and provincial charges, counsel should sign the document as “agent for the Director of Public Prosecutions” with respect to the federal charges, and “agent for the Attorney General of [name of province]” with respect to the provincial charges. When jointly prosecuting federal and provincial charges, counsel should introduce themselves as appearing “for the Crown”, and so indicate in written submissions.<sup>17</sup>

## **5.2. Federal prosecutor as agent of the Attorney General of Canada**

A federal prosecutor would almost never act as counsel or agent for the Attorney General, because this would suggest that the prosecutor could take directives directly from the Attorney General. This would go against the underlying purpose of the DPP Act which is to insulate the prosecution function from the Attorney General and the political process. Where the Attorney General intervenes in a prosecution or an appeal under s. 14 of the DPP Act, or assumes conduct of a prosecution under s. 15 of the DPP Act, normally counsel from the Department of Justice would act as agent of the Attorney General in that prosecution, intervention or appeal. The only rare situation where a federal prosecutor would be counsel for the Attorney General would be where the Attorney General appointed a federal prosecutor to act on behalf of the Attorney General in a s.14 intervention or a s. 15 prosecution.<sup>18</sup> This type of appointment would require prior approval of the DPP and, if approved, would involve certain administrative steps in order to formalize the fact that a federal prosecutor (who acts pursuant to s. 9 of the DPP Act) is no longer agent for the DPP when acting on behalf of the Attorney General of Canada in relation to a specific file.

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<sup>17</sup> The authority of Crown counsel to prosecute a matter or institute an appeal need not be proved as part of the case at trial or on appeal. There is a presumption that when counsel attends to prosecute matters in a particular court and describes herself or himself as “Crown counsel” or “the Crown” or “agent for the DPP”, they are cloaked with the proper authority to do so. The court is entitled to rely on that presumption unless and until there is an objection taken. In the event of a technical challenge to jurisdiction, Crown counsel, as officer of the court, may confirm his or her authority and file any written documentation purporting to be signed by the relevant authorizing person that confirms that authority. See *R v Chen* (2006), 209 CCC (3d) 534, 205 Man R (2d) 157 at para 12, *R v Lemay (No 2)* (1951), 100 CCC 365 (BC CA), and *R v Elliott* (2003), 181 CCC (3d) 118 (ONCA).

<sup>18</sup> In *R v Marshall*, 2002 NSSC 233, the Nova Scotia Supreme Court considered the right of the DPP to cross-appoint counsel from the provincial justice department to argue an appeal. The Court dismissed the application for judicial review. It found no conceptual difficulty with the cross-appointment but acknowledged that the situation may have been more difficult if the DPP had appointed counsel to conduct a trial.

## **APPENDIX A**

### **Sample signature blocks**

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at [city, province/territory] this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

#### **At first instance**

\_\_\_\_\_  
[Name of counsel]  
Counsel for Her Majesty the Queen

Or

\_\_\_\_\_  
[Name of counsel]  
Crown Counsel

Or

\_\_\_\_\_  
[Name of counsel]  
Agent of the Director of Public  
Prosecutions

#### **On appeal**

\_\_\_\_\_  
[Name of counsel]  
Counsel for the Appellant/Respondent

\_\_\_\_\_  
[Name of co-counsel (if applicable)]  
Counsel for the Appellant/Respondent

Or

\_\_\_\_\_  
[Name of counsel]  
Counsel for Her Majesty the Queen

\_\_\_\_\_  
[Name of co-counsel (if applicable)]  
Counsel for Her Majesty the Queen

Or

\_\_\_\_\_  
[Name of counsel]  
Agent of the Director of Public  
Prosecutions

\_\_\_\_\_  
[Name of co-counsel (if applicable)]  
Agent of the Director of Public  
Prosecutions

**DPP as intervener**

\_\_\_\_\_  
[Name of counsel]  
Counsel for the Intervener\*

\_\_\_\_\_  
[Name of co-counsel (if applicable)]  
Counsel for the Intervener

Or

\_\_\_\_\_  
[Name of counsel]  
Counsel for the Director of Public  
Prosecutions

\_\_\_\_\_  
[Name of co-counsel (if applicable)]  
Counsel for the Director of Public  
Prosecutions

Note that, in these interventions, counsel for the appellant or respondent Attorney General will be “counsel for Her Majesty the Queen”.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.3 IMMUNITY AGREEMENTS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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## 1. INTRODUCTION

Those who have violated the law should be held accountable for their crimes. However, some crimes can be proved only by the testimony or cooperation of individuals who are implicated in the same crime or in some other criminal activity and who seek immunity from prosecution in exchange for their testimony and/or their cooperation with the police. Emphasis by investigating agencies on the investigation of the upper echelons of criminal organizations often heightens the need to rely on the evidence or assistance of co-operating accomplices, or other persons with outstanding charges, to prove offences.

While the cooperation of these individuals has been recognized as a very powerful tool in the battle against crime, it brings with it the very real risk that individuals will falsely accuse others and/or minimize their own culpability in the hope of securing immunity. Great care therefore must be taken in dealing with individuals seeking immunity.

## 2. PURPOSE OF THE GUIDELINE

The purpose of this guideline is to:

1. set out the applicable criteria in determining whether the Crown should enter into an immunity agreement with someone who may otherwise be prosecuted;
2. provide guidelines for Crown counsel on the proper handling of co-operating information-providers<sup>1</sup> both in and out of court;
3. distinguish the role of Crown counsel from that of the investigating agency in the immunity-seeking process.

While the focus of this guideline is on immunity agreements with potential Crown witnesses, the principles, procedures and criteria described here apply, with necessary adaptations, when the Crown is contemplating granting other forms of consideration (including *use immunity*) in exchange for providing testimony, information, assistance or other forms of cooperation with the Crown and/or investigative agency.

This guideline must be applied in conjunction with the PPSC Deskbook guideline “[3.11 Informer Privilege](#)”.<sup>2</sup>

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<sup>1</sup> The term “information-provider” will be used as a generic description of the person seeking some form of immunity, as opposed to “witness” or other description.

<sup>2</sup> See the PPSC Deskbook guideline “[3.11 Informer Privilege](#)”.

### 3. DEFINITION OF "IMMUNITY AGREEMENT"

The term "immunity agreement" in this guideline refers to any agreement by the Crown to refrain from prosecuting someone for a crime or crimes or to terminate a prosecution (including appeals), in return for providing testimony or other valuable information, co-operation or assistance.

A checklist of issues to address in the agreement and a sample immunity agreement, are included as Appendices "A" and "B" to this guideline.

### 4. TYPES OF IMMUNITY

Courts have recognized the legal basis of a power to grant immunity despite the absence of any express provision in the *Criminal Code* (Code) authorizing the practice.<sup>3</sup> There are various mechanisms by which the Crown can confer immunity under Canadian criminal law.

#### 4.1. Stay of proceedings

Pursuant to s. 579 of the Code, the Director of Public Prosecutions (DPP) or his or her delegate has the statutory power to stay existing criminal proceedings in appropriate cases. If the Crown wishes to recommence the prosecution, the Crown must notify the clerk of the court of the recommencement of the stayed proceedings within a period of one year from the date of the entry of the stay. Crown counsel must be conscious of this time limitation in drafting immunity agreements, particularly where the terms of the agreement require that the information provider do something or refrain from doing something during that period.

The authority of the DPP to stay proceedings does not include the power to stay prosecutions conducted by provincial prosecution authorities, unless there is *ad hoc* or standing delegated authority for the provincial charges (for example a major-minor agreement between prosecution services).<sup>4</sup> Accordingly, the agreement must be worded carefully so as to make the extent of the immunity clear and unambiguous. Counsel for the information-provider should be referred to the provincial attorney general if his or her client desires immunity from offences prosecuted by a provincial attorney general. Crown counsel may respond to a request for consultation from the provincial representative, or initiate consultation with provincial authorities where appropriate.

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<sup>3</sup> *R v Edward D* (1990), 73 OR (2d) 758 (ONCA); *Bourrée v Parsons* (1987), 29 CCC (3d) 126 (Ont Dist Ct); *R v Betesh* (1975), 30 CCC (2d) 233 (Ont Co Ct).

<sup>4</sup> See the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)" at section 5.



#### **4.2. Immunity from future prosecutions**

The DPP is also entitled to provide an assurance of immunity against future prosecution<sup>5</sup> for crimes that the information-provider is known to have already committed, but for which no charges have yet been laid.

#### **4.3. "Use immunity" investigative assistance agreements**

Traditionally, requests for immunity were made upon completion of the investigation. In recent years, however, Crown counsel and investigative agencies increasingly have had far greater contact during investigations in an effort to enhance the ability of the state to effectively fight crime, and present prosecution cases that are ready to proceed efficiently from the time charges are laid.

With respect to offers of immunity, this may require that Crown counsel be involved in discussions with the investigating agency before an investigation is complete in order to offer assurances to persons who may have valuable information to provide to the investigating agency. So, for example, persons may be willing to give details of their knowledge of criminal activity in audiotaped or videotaped interviews, where they receive assurances that information provided will not be used directly against them for investigative purposes.

This form of immunity agreement is referred to as "use immunity". It differs somewhat from immunity agreements discussed elsewhere in this guideline in that it focuses on the uses that may be made of the information provided, rather than acts which will not be prosecuted. It is appropriate for Crown counsel to engage in discussions with investigating agencies, and sign formal "Investigative Assistance Agreements" which bind the DPP. A sample is found as Appendix "C".

Investigative Assistance Agreements must be approved by Crown counsel in consultation with their Chief Federal Prosecutor (CFP) or Deputy CFP.<sup>6</sup> The CFP should retain a copy of such agreements.

#### **4.4. Guarantees of immunity for *Competition Act* offences**

Pursuant to the Competition Bureau's *Immunity Program*, persons or corporations with information concerning anti-competitive business practices such as bid-rigging and price fixing are encouraged to make disclosure to the Competition Bureau. The policy respecting immunity agreements in relation to *Competition Act* investigations and offences is set out in a separate PPSC Deskbook guideline entitled "[5.2 Competition Act](#)".

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<sup>5</sup> The form of the assurance is an undertaking not to prosecute or to stay any prosecution once initiated.

<sup>6</sup> In the case of legal agents, the agreement must be approved by the Agent Supervisor in consultation with the Chief Federal Prosecutor (CFP).

## 5. CRITERIA TO APPLY REGARDING OFFERS OF IMMUNITY

Immunity from prosecution is provided only where the information or co-operation is of such value that it is clearly in the public interest not to hold a person accountable for criminal activity. However, immunity should be the exception rather than the norm. The DPP is responsible for the conduct and supervision of all federal prosecutions in Canada. Thus, only the DPP through Crown counsel, and not the investigating agency, is entitled to confer immunity from prosecution.<sup>7</sup>

In determining whether immunity may be appropriate, Crown counsel should weigh all relevant circumstances, including the following:

### 5.1. Seriousness of the offence

Generally, immunity should be considered only when the information provided relates to the commission of a serious offence, or when the prosecution of a case is otherwise important in achieving effective enforcement of the law. As a rule, it should not be considered in relatively minor cases.

### 5.2. Reliability of the person

The dangers associated with reliance upon immunity-seekers are well known.<sup>8</sup> The person may be attempting to purchase lenient treatment by falsely accusing others. Being familiar with the circumstances surrounding the offence, the witness is in a position to attribute certain acts to innocent persons. The witness may also minimize his or her own role in the transaction and transfer the primary blame to others.

Before offering immunity, Crown counsel should assess the truthfulness and candour of the information-provider. If the person is to testify, Crown counsel should be satisfied that a properly instructed jury would likely view the witness as credible.<sup>9</sup>

However, truthfulness should not be equated with moral character, as Toy J. pointedly observed in *Re Meier*.<sup>10</sup>

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<sup>7</sup> This is not to say that investigating agencies do not have the discretion to exercise a form of immunity by deciding not to lay charges.

<sup>8</sup> See the PPSC Deskbook directive “[2.4 Prevention of Wrongful Convictions](#)”.

<sup>9</sup> By putting the witness forward, counsel does not vouch for the credibility of the witness on all points. Where counsel has called a witness who has stated facts incorrectly, counsel can call other witnesses to ensure an accurate version of events emerges: *R v Burns*, [1994] 1 SCR 656; *R v Ewert*, [1992] 3 SCR 161; *R v Precourt* (1976), 39 CCC (2d) 311 at 325 (ONCA).

<sup>10</sup> (1 March 1982) (BCSC) [unreported]. The same point was made by Barrette-Joncas, J, in *R v Dubois*:<sup>10</sup> In criminal matters, and particularly in cases of murder, it is not always possible to have a bishop (priest) for a witness as the Crown did in the case of *R v Vaudry*, 500-9-8144-773, also before this court.

The state when it moves in to prosecute those who have allegedly committed crimes does not have the luxury of picking and choosing their witnesses. The state may have to rely on drunks, prostitutes, criminals, perjurers, paid informers as well as solid citizens to prove their case.

Counsel should be cautious in providing immunity to persons with a history of serious criminal activity. While it may sometimes be appropriate to provide immunity to such persons in order to prosecute more serious offenders, counsel must be aware the person's testimony will be viewed with great caution by the trier of fact; in some circumstances, reliance on such a witness may be damaging to the Crown's case.

### **5.3. Reliability of the anticipated evidence**

Crown counsel should be satisfied that the anticipated evidence is reliable. Crown counsel should ensure that the investigating agency has attempted to confirm the reliability of the information provided and that the most knowledgeable investigators on the case have reviewed all the facts and circumstances of the case that are known to the Crown. This usually involves Crown counsel conducting a thorough examination of all documents, exhibits, seizures, surveillance reports and wiretap interceptions, as well as the statements of the other witnesses. The object is to determine the extent to which, if at all, the proposed evidence is consistent with the balance of the case for the Crown. Particular attention should be paid to intercepted communications, to which the potential witness was a party, things that were seized from him or her or from a place under his or her control, and any police surveillance that focused on his or her activities.

### **5.4. Full and candid disclosure**

The information-provider must be candid about his or her involvement in criminal activity.<sup>11</sup> When meeting with the information-provider respecting potential immunity, Crown counsel must ask the person whether he or she has been: a) convicted of any criminal offence; b) charged with any criminal offence; and, c) knowingly the object of a criminal investigation. If the person subsequently testifies, Crown counsel will be required to place the person's full criminal record before the court.<sup>12</sup> Crown counsel must also be satisfied that the information-provider has made full and candid disclosure of all information pertaining to the activity in question or likely to affect the credibility of the information-provider. Such disclosure may relate to criminal activity in Canada or to criminal activity abroad, over which the DPP lacks prosecutorial authority. The information-provider must be advised that the DPP cannot bind other prosecutorial authorities.

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<sup>11</sup> Where the information-provider is the officer of a corporation, "involvement in criminal activity" includes criminal activity of the corporation, of which the officer is aware.

<sup>12</sup> *R v Ahluwalia* (2000), 149 CCC (3d) 193 (ONCA) [*Ahluwalia*].

### **5.5. The Importance of the person's testimony or co-operation**

Crown counsel should also assess the relative strength of the case for the prosecution with and without the information provider's testimony or other evidence, and should be satisfied that the person is able and prepared to provide reliable evidence on significant aspects of the case. Counsel should also consider whether the same evidence can be obtained from another source not requiring an assurance of immunity. The fact that the information-provider's testimony will corroborate otherwise uncorroborated evidence from other witnesses may make it sufficiently important to warrant immunity.

### **5.6. The nature and extent of the person's involvement in the offence**

Crown counsel should compare the degree of the information-provider's culpability with that of others being prosecuted. In the absence of unusual circumstances, it is generally not in the public interest to rely on the testimony of a high-ranking member of a criminal organization to convict a minor figure in the organization.

A co-operating accomplice is not, by reason only of involvement in the crime, incompetent to testify at the trial of former confederates.<sup>13</sup> Nor does the fact that the accomplice has been indicted separately for the offence, or for some other offence, render the accomplice non-compellable at the instance of the Crown.<sup>14</sup> The accomplice's evidence is, however, viewed with great caution.<sup>15</sup> Crown counsel must be conscious of the danger that the accomplice's evidence may become tainted during the process of conversion from accomplice to Crown witness.<sup>16</sup>

### **5.7. Other forms of reward**

The public interest may not be served by providing immunity against prosecution to a person who has committed a particularly serious offence. Lesser forms of "reward" such as a joint submission for a reduced sentence should also be considered.<sup>17</sup>

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<sup>13</sup> *Canada Evidence Act*, RSC 1985, c C-5, s 3; *USA v Sheppard*, [1977] 2 SCR 1067; *R v Cruikshanks* (1990), 58 CCC (3d) 26 (BCCA).

<sup>14</sup> *Jobin v The Queen*, [1995] 2 SCR 78; *R v RJS*, [1995] 1 SCR 451 (SCC); *R v Mazur* (1986), 27 CCC (3d) 359 (BCCA), lv ref 20 May 1986; *Ruben v The Queen* (1983), 24 Man R (2d) 100 (QB); *Re Crooks and The Queen* (1982), 2 CCC (3d) 57 (Ont HC), aff'd 64n (Ont CA); *R v Walters* (1982), 2 CCC (3d) 512 (BCCA). However, see *Praisoody v R* (1990), 3 CR (4th) 91 (Ont Ct J) and *R v Zurlo* (1990), 57 CCC (3d) 407 (Que CA).

<sup>15</sup> *Vetrovec v The Queen*, [1982] 1 SCR 811.

<sup>16</sup> For a discussion of the potential for witness contamination before trial by police and/or Crown, see the Ontario Superior Court decision in *R v Spence*, [2011] OJ No 2051. See also *R v Buric*, [1997] 1 SCR 535, affirming 106 CCC (3d) 97 (Ont CA) [*Buric*].

<sup>17</sup> In accordance with the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)", *supra* note 4.

### **5.8. The person's history of co-operation**

Counsel should consider whether the person has co-operated with law enforcement officials in the past, either as a witness or an informer, and whether the person has previously entered into immunity arrangements. In particular, counsel should consider whether and to what extent the proposed witness has previously, on being arrested, sought immunity through offers of co-operation. The expectation of immunity should not be allowed to become a license to commit crime.

### **5.9. Protection of the public**

"Public protection" is a concept somewhat narrower than, but certainly related to, "the public interest". The fundamental question is whether the protection of the public would be better served through prosecution (and possible imprisonment) of the proposed information-provider than by relying on that person as a witness in the prosecution of another accused.

### **5.10. Disclosure prior to detection**

In cases that are covert or difficult to detect, full and candid disclosure of conduct before its detection is an important consideration in favour of granting immunity. For example, competition offences such as price-fixing may continue unabated for some time unless one of the parties to the price-fixing scheme comes forward voluntarily. The grant of immunity should reflect the significant benefit to the legislative goals in such circumstances.

### **5.11. Inappropriate criteria**

The decision to confer or withhold immunity should never be improperly influenced by factors such as race, nationality, or religion. Nor may these decisions be influenced by partisan political considerations. Crown counsel must remain objective in deciding whether to grant immunity.

## **6. THE CONDUCT OF NEGOTIATIONS**

In negotiating immunity agreements, Crown counsel have numerous responsibilities. More particularly, Crown counsel should:

1. strongly encourage the immunity-seeker to obtain the assistance of legal counsel before entering into any immunity agreement and negotiate through this lawyer;
2. whenever possible, limit his or her meetings with the person and deal primarily with the other lawyer until the agreement is finalized and ready for signature;
3. never meet the immunity-seeker alone (i.e., the investigating officer should always be in attendance);

4. maintain detailed records of all negotiations with the immunity-seeker and his or her lawyer leading up to the agreement;
5. be diligent not to expose the immunity-seeker to facts or evidence about the prosecution to which his or her testimony, information, assistance or cooperation will apply;
6. canvass the areas usually explored in cross-examination before deciding whether to conclude the agreement;
7. be fully aware of the circumstances, such as who approached whom, the numbers of interviews and the parties attending, whether the interviews were recorded;
8. explore whether, during the debriefing process, the information-provider consciously or unconsciously may have absorbed facts previously unknown to him or her, that investigators had obtained from other sources;<sup>18</sup>
9. make it clear that he or she does not have unfettered discretion to approve any immunity agreement that is negotiated; rather any such agreement must be approved in accordance with the procedures outlined in this guideline;
10. be familiar with the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”;<sup>19</sup>
11. reduce to writing any immunity agreement that is negotiated and ensure that the written agreement is signed by the immunity-seeker and, if applicable, his or her lawyer;
12. avoid agreeing to grant complete immunity from criminal responsibility unless it is absolutely necessary in order to obtain the required testimony, information, assistance or cooperation. The granting of a limited form of immunity is generally preferred;
13. Crown counsel should explore the following potential, and non-exhaustive, terms of any immunity agreement:
  - a. dropping charges;
  - b. reducing charges;
  - c. dropping or reducing the charges of others, such as family members or friends;
  - d. agreeing to a lesser sentence;
  - e. the timing of dealing with outstanding charges;
  - f. the resolution of pending applications for the return of offence-related property or proceeds of crime;

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<sup>18</sup> This danger may arise, for example, where the person was given something by the investigating agency designed to “prompt” memory on certain matters, including investigative aids such as flow charts. This may also include items received by way of Crown disclosure when the person was charged. This is not to suggest it is never proper to show the person business records, for example, but simply to emphasize that care must be taken. As to “witness tainting” generally, see *Buric, supra* note 16.

<sup>19</sup> See the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”, *supra* note 4.

- g. reward money; and
- h. the circumstances under which the agreement could be terminated.

Additionally, certain factors over which Crown counsel have no control may be appropriately contained within immunity agreements. Crown counsel should also be aware of certain matters that arise in the immunity agreement negotiations between the investigators and the information-provider, including:

- a. circumstances prompting relocation;
- b. providing of a new identity;
- c. all payments of money (lump sum, monthly allowance, relocation expenses);
- d. assistance in securing employment; and
- e. special privileges while in jail or under the control of the police pursuant to s. 527(7) of the Code;

#### **6.1. Consultation required before concluding an agreement**

Granting immunity can be, and usually is, a complex process involving several offices with differing mandates. Consequently, consultation on at least four levels may and often will be required.

First, Crown counsel<sup>20</sup> must consult with the CFP before entering into an immunity agreement. In cases of significant public interest, the CFP should consult the appropriate Deputy Director of Public Prosecutions (Deputy DPP) before finalizing an arrangement. As well, before taking recourse in other proceedings against a person who has breached the immunity agreement, CFPs must consult the appropriate Deputy DPP.

Second, in most cases, the immunity process begins with discussions between the information-provider and the case investigators without prior consultation with Crown counsel. Following these discussions, investigators usually approach the prosecutor. Crown counsel rely on the investigating agency's input in weighing the relevant public interest criteria. Crown counsel should be satisfied that the agency's lead investigator responsible for overseeing such agreements has reviewed and approved the proposed agreement. The investigating agency makes a recommendation to Crown counsel. However Crown counsel bears the ultimate responsibility for deciding who is prosecuted and who is called as a witness.

Third, where the offence for which immunity is being offered is alleged to have been committed in multiple provinces or territories, Crown counsel may wish to consult with other Regional Offices either (a) to ascertain whether that office, or the local police

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<sup>20</sup> Legal agents must always consult the Agent Supervisor, who will in turn consult the CFP.

forces, may have information relevant to the immunity seeker's reliability or (b) to ascertain whether there may be any outstanding charges in iCase.<sup>21</sup>

Fourth, although the agreement signed on behalf of the DPP does not extend to prosecutions that may be commenced by provincial authorities, or to crimes undisclosed by the witness, it will sometimes be desirable to discuss the proposed immunity agreement with provincial authorities if the provincial Attorney General (or DPP) has jurisdiction to prosecute other offences committed by the person. Whether and to what extent Crown counsel should become involved in these discussions, or whether Crown counsel should leave them entirely to counsel for the person should be decided on a case-by-case basis.

## 7. THE "JAILHOUSE" OR "IN-CUSTODY" INFORMER<sup>22</sup>

When the information-provider in question can be categorized as a "jailhouse" or "in-custody" informer, together with all of the other considerations set out in this chapter, it is important to examine additional factors. Notice should be taken of the definition of an "in-custody informer", as set out by the Honourable Fred Kaufman, C.M., Q.C. in his report on the Guy Paul Morin case:<sup>23</sup>

An in-custody informer is someone who allegedly receives one or more statements from an accused while both are in custody, and where the statements relate to offences that occurred outside of the custodial institution. The accused need not be in custody for, or charged with, the offences to which the statements relate. Excluded from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused (even if a portion of their evidence includes a statement made by the accused).

The use of in-custody informers has been identified as a significant contributing factor in cases of wrongful conviction.<sup>24</sup> There are four issues to which Crown counsel should pay particular attention when dealing with an in-custody informer.

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<sup>21</sup> The prosecuting Regional Office should verify the name of the individual seeking immunity in iCase. If additional files are identified, counsel should consult the regional office where those files are located.

<sup>22</sup> For a more thorough discussion of the in-custody informer, see the PPSC Deskbook directive "[2.4 Prevention of Wrongful Convictions](#)", *supra* note 8.

<sup>23</sup> Canada, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin*, vol 1 (Toronto: Queen's Printer, 1998) at 601. [*Kaufman Report*], online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>>.

<sup>24</sup> See the PPSC Deskbook directive "[2.4 Prevention of Wrongful Convictions](#)", *supra* note 8. See also F/P/T Heads of Prosecution Committee, Report of the Working Group "The Path to Justice: Preventing Wrongful Convictions", 2011, ch 7, online: <<http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/toc.html>>.



## 7.1. Credibility

As stated in the *Kaufman Report*:

Jailhouse informant evidence is intrinsically, though not invariably, unreliable and many of us have failed in the past to appreciate the full extent of this unreliability. It follows that prosecutors must be particularly vigilant in recognizing the true indicia detracting from, or supporting, [their] reliability.<sup>25</sup>

At a minimum, Crown counsel should subjectively assess the jailhouse informer's proposed testimony and examine the details of the evidence, possible motives for lying, and the possibility of collusion, where there is more than one in-custody informer."<sup>26</sup>

In addition to the factors listed in sections 5.1-5.6, in assessing credibility, Crown counsel should consider the following factors:

- The jailhouse informer's background, including
  - his or her psychological and psychiatric profiles;
  - any prior claims of having received in-custody statements;
  - reliability of any previous information;
  - any prior testimony;
  - any convictions for offences involving dishonesty;
- The circumstances of the informer's incarceration, including the placement of the informer within the prison facility and access to information about the crime in question;
- Relationship between the informer and the police and the circumstances surrounding the giving of the "confession", including
  - When, where and how was the statement made?
  - Did the police solicit the evidence?
  - Any prior association between the in-custody informer and the police officer involved with the investigation?
  - Did the police approach the informer prior to "receiving" the "confession"?
  - Did the police provide information to the informer prior to the making of the statement?
  - Did the police ask leading questions?

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<sup>25</sup> *Kaufman Report*, vol 1 at 487, *supra* note 23.

<sup>26</sup> *Kaufman Report*, *ibid* at 607-609. This part of the *Kaufman Report* was referred to with approval by Major J, dissenting in *R v Brooks*, [2000] 1 SCR 237.

- The circumstances surrounding the disclosure of the alleged statement to the Crown;
- The benefits sought or received in return for the information;
- External corroboration
  - The use of tests to ensure reliability (e.g., polygraph examinations);
  - The extent to which the statement is corroborated by other evidence.<sup>27</sup>
- The specificity of the statement; for example, does it contain details or leads known only to the culprit?

## **7.2. The approval process for the use of the in-custody informer**

Where Crown counsel has addressed the factors set out above, and is satisfied that the informer evidence is credible, Crown counsel should recommend to the CFP that the informer be called as a witness.<sup>28</sup> The CFP makes the final decision.

## **7.3. Informer benefits**

Crown counsel who is prosecuting the accused should not conduct the negotiation of such benefits. Furthermore, the benefits should never be conditional on whether the Crown obtains a conviction of the accused.<sup>29</sup> The benefits ultimately agreed upon are subject to disclosure.

# **8. OUT-OF-CUSTODY COOPERATING WITNESSES**

Out-of-custody cooperating witnesses are not subject to the same pressures and opportunities to seek favourable treatment or special privileges in jail, as are in-custody witnesses. The fact that a cooperating witness is not in jail does not obviate the need for the Crown to exercise a high degree of care in assessing the reliability of the evidence and the other factors outlined above, including those highlighted in respect of in-custody cooperating witnesses. There is always a concern in relation to the potential for the fabrication of evidence whenever any witness is offering information in a context in which he or she may receive a benefit- whether money, privilege, immunity or a reduced sentence- as a result of their cooperation.

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<sup>27</sup> Where there is more than one in-custody informer, such corroboration should be independent of the other informer's statement.

<sup>28</sup> The recommendation might be for immunity or some other benefit, depending on the circumstances. If the CFP believes it is an appropriate case for use of the informer, the CFP should seek the advice of the Major Case Advisory Committee before making a final decision. Should the Committee and the CFP disagree, the matter should be directed to the appropriate Deputy DPP for a final decision. The role of the Committee is discussed in the PPSC Deskbook guideline "[3.1 Major Case Management](#)".

<sup>29</sup> *R v Xenos* (1991), 70 CCC (3d) 362 (Ont CA); but see *R v Naoufal* (1994), 89 CCC (3d) 321 (Ont CA).

While each case will be fact-specific, Crown counsel should consult their CFP where their careful assessment of the out-of-custody cooperating witness' credibility has identified matters of concern. A case in which Crown counsel is uncertain as to whether the testimony of the witness is sufficiently corroborated by other evidence would clearly fall within this category.

The CFP may also refer cases to the Major Case Advisory Committee<sup>30</sup> for its consideration.

## 9. BREACH OF AGREEMENTS

It may become necessary to seek a remedy against a person previously granted immunity where that person:

- withdraws promised co-operation with the Crown;
- fails to be truthful when testifying;<sup>31</sup>
- has wilfully or recklessly misled the investigating agency or Crown counsel about material facts concerning the case including factors relevant to that person's reliability and credibility as a witness; or
- has sought immunity by conduct amounting to a fraud or an obstruction of justice.

Whether the person should be charged if this occurs, either for the offence for which he or she sought immunity or for some other offence, will depend on the circumstances of each case. The terms of the agreement with the person and the manner in which it was breached will be important considerations.<sup>32</sup> In some circumstances, the laying of charges against the witness (or the recommencement of proceedings under s. 579(2) of the Code) may amount to an abuse of process.<sup>33</sup>

## 10. FILING OF THE AGREEMENT IN COURT

In all cases in which a Crown witness testifies as part of an immunity agreement, Crown counsel will provide the agreement to the defence as part of pre-trial disclosure, and seek to file the agreement with the Court as an exhibit when the person testifies.

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<sup>30</sup> For a description of the Committee, see the PPSC Deskbook guideline "[3.1 Major Case Management](#)", *supra* note 28.

<sup>31</sup> See e.g. *Ahluwalia*, *supra* note 12 where the Crown was criticized for failing to fully investigate the lack of full disclosure of a witness's criminal record. See also the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)", for Crown Counsel's disclosure obligations in this regard.

<sup>32</sup> In one case, the witness deceived investigators concerning his real involvement in the crime. The Ontario Court of Appeal held that he was properly indicted by the Attorney General on the basis of facts subsequently discovered to be true: *R v MacDonald* (1990), 54 CCC (3d) 97.

<sup>33</sup> *R v Kearney*, [1992] 3 SCR 807; *R v Conway*, [1989] 1 SCR 1659, 49 CCC (3d) 289 (SCC); *R v Cutforth* (1987), 61 CR (3d) 187 (Alta CA); *R v TCD* (1987), 61 CR (3d) 168 (Ont CA).

## **APPENDIX "A" – AGREEMENT CHECKLIST**

### **CONTENTS OF IMMUNITY AGREEMENTS: A CHECKLIST**

An immunity agreement must be executed before a witness testifies. It must be in writing, be signed and be given to the witness before testifying, and must include the following information:

1. the names of all parties to the agreement to obtain immunity;
2. the name of any other person intended to benefit from the agreement;
3. the acts or omissions in respect of which the immunity is provided;
4. the scope of the agreement, e.g., that it does not extend to prosecutions that may be commenced by provincial authorities, or to crimes undisclosed by the witness;
5. the form the immunity will take (e.g., staying existing charges, undertaking not to proceed on potential charges);
6. the evidence, information, co-operation, assistance or other benefit to be exchanged for the immunity;
7. any additional commitments made by the parties, including the specifics of any expenditures to be made by the Crown;
8. a general description of what will amount to a breach of the agreement, and the consequences of such a breach; and
9. a stipulation that information or evidence provided under an agreement must be truthful.

## APPENDIX "B" – IMMUNITY AGREEMENT

### SAMPLE IMMUNITY AGREEMENT

NOTE: The contents of an immunity agreement will vary according to the facts of each case. The following is a sample only; when drafting agreements, counsel should review the issues described in Appendix "A" to ensure completeness. The document should be drafted in a legal format, and not in the form of a letter to the witness.<sup>34</sup>

John Doe agrees to:

[set out all details of proposed co-operation]

The Director of Public Prosecutions agrees to:

It is understood by John Doe and the Director of Public Prosecutions that:

1. Full and frank disclosure regarding [state in general terms] by John Doe forms an essential term of this agreement;
2. The failure to provide truthful evidence at the trial of the accused results in the termination of this agreement, and may lead to the prosecution of John Doe for perjury, the giving of contradictory evidence, obstructing justice, public mischief, or some related offence. It may also result in charges against John Doe for other offences described above;
3. Immunity from prosecution under this agreement is confined to the offence described above. It does not extend to offences not disclosed in writing by John Doe to [name of Crown counsel] before entering into this agreement. Nor does it extend to offences that John Doe may commit after this agreement is signed, or to any offence that may be prosecuted by the Attorney General of a province.

The understanding described in this memorandum is the complete agreement between the Director of Public Prosecutions and John Doe.

Dated at the City of \_\_\_\_\_, in the Province/Territory of \_\_\_\_\_, the \_\_\_\_ day of \_\_\_\_, 201\_\_.

\_\_\_\_\_  
John Doe Counsel agent of the Director of Public Prosecutions and Deputy Attorney General of Canada

\_\_\_\_\_  
Counsel for John Doe

I received a copy of this agreement on the \_\_\_\_ day of \_\_\_\_, 201\_\_.

\_\_\_\_\_  
John Doe

<sup>34</sup> Note that there are specialized competition law immunity agreements; see the PPSC Deskbook guideline "[5.2 Competition Act](#)".

## **APPENDIX "C" – INVESTIGATIVE ASSISTANT AGREEMENT**

### **SAMPLE INVESTIGATIVE ASSISTANCE AGREEMENT**

NOTE: The contents of an immunity agreement will vary according to the facts of each case. The following is a sample only; when drafting agreements, counsel should review the issues described in Appendix "A" to ensure completeness. The document should be drafted in a legal format, and not in the form of a letter to the witness.

#### **1. PARTIES TO THE AGREEMENT**

**THIS AGREEMENT** is between

1. the Crown in Right of Canada, as represented by the Director of Public Prosecutions, or his/her delegated agent and by the investigating agency, namely the \_\_\_\_\_; and \_\_\_\_\_;  
(name of information-provider)

#### **2. RECITALS**

**WHEREAS** the \_\_\_\_\_ [the investigating agency] have been and are continuing to investigate the following persons or activities, namely \_\_\_\_\_ [the investigation] and whereas counsel for \_\_\_\_\_ has advised the investigating agency that [name] is willing to give the investigating agency any and all information in his/her possession concerning the subject-matter of the investigation in return for assurances that this information will not be used against him/her except in the circumstances detailed in writing in this agreement or as may be later mutually agreed; and

**WHEREAS** the investigating agency, having consulted with the delegated agent of the Director of Public Prosecutions, wishes to receive this information and, together with the Director of Public Prosecutions, is prepared to give these assurances on behalf of the Crown in Right of Canada, in return.

#### **3. OBLIGATIONS**

**THEREFORE** [name] and the Crown in Right of Canada hereby agree as follows:

3.1 [name] agrees to:

3.1.1 attend on the investigating agency at a place of mutual convenience for the purposes of giving them all information (including documents) in his/her knowledge, possession, or control with respect to the acts, statements, and communications of himself/herself and others in all matters about which that investigating agency may inquire;

3.1.2 be sworn or affirmed in any manner that may be binding under Canadian law, to receive and acknowledge all cautions or warnings that may have to be administered under

that law, and to answer all questions that may be posed during the course of one or more interviews that will be videotaped and/or audiotaped;

3.1.3 disclose all information and to produce the original (or a true copy) of any document that is in his/her knowledge, possession or control concerning all matters about which the investigating agency shall inquire, in as true complete, and unequivocal a manner as it is known or available to him/her;

3.1.4 keep confidential and not disclose, except to his or her counsel or a court of law, all questions asked and all answers given during the course of these interviews, including any information pertaining to the state of the investigation or the nature and extent of police knowledge, opinions, and theories about the subjects of the investigation and their activities;

3.1.5 testify fully and truthfully in any proceeding to which he or she is subpoenaed as to all matters within his or her knowledge that arise out of the subject-matter of this investigation; and

3.1.6 notify \_\_\_\_\_ of the \_\_\_\_\_ (or any other investigator who may be specified from time to time), in writing within forty-eight (48) hours of the signing by [name] of this agreement, of his or her current residence, postal address, and telephone number, and to advise that police officer in writing and within a similar time period, of any changes in them, as they may occur.

3.2 THE CROWN IN RIGHT OF CANADA agrees that:

3.2.1 No statements made by [name] during the one or more interviews held by virtue of this agreement, will be used in evidence against [name] in any criminal proceedings prosecuted by or on behalf of the Director of Public Prosecutions, in which [name] is charged as an accused person except in the case of:

- a) [name] subsequently giving, in any trial, hearing, or proceeding (including any in which he/she is an accused), evidence that is materially different from that given by him/her under this agreement, or
- b) [name] being charged, as a result of anything said or done by him/her during the course of these interviews, with one or more offences of committing perjury, giving contradictory evidence, fabricating evidence, obstructing a peace officer, obstructing justice, or committing public mischief by false statement.

3.2.2 No original or copy of a document provided by [name] during the course of the one or more interviews held by virtue of this agreement, or given later to the investigating agency as a direct result of any request made by them at such interview(s), will be used in evidence against [name] in any criminal proceedings prosecuted by or on behalf of the Director of Public Prosecutions, in which [name] is charged as an accused person, except in the case of the events set out in paragraphs 3.2.1 (a) or (b) above, occurring. This applies as well to any copy made by the Crown in Right of Canada of any document furnished by [name].

#### 4. LIMITATIONS

4.1 Nothing in this agreement affects the right of the Crown in Right of Canada to make use of any information or document provided by [name] under this agreement in order to discover or acquire derivative information or documents from a source other than [name].

4.2 Nothing in this agreement affects any use that the Crown in Right of Canada may make of any information or document obtained from a source other than [name], notwithstanding:

1. that the form or content of that information or document may be similar or identical to that of any information or document provided by [name] under this agreement, or
2. that any information or document provided by [name] under this agreement led directly or indirectly to the discovery or acquisition of the information or document obtained from the other source.

4.3 Nothing in this agreement affects the right of the Crown in Right of Canada to determine, what, if any, criminal charges may be laid and prosecuted against any person, including [name], in relation to this investigation.

#### 5. BREACH

5.1 It is fundamental to this agreement that [name] disclose to the investigating agency fully, straightforwardly, and truthfully, all the information and documents that [name] knows, possesses, or controls in relation to the subject-matter of the investigation; do so in the form and manner required by this agreement; maintain all confidence imposed by this agreement; and testify fully and truthfully when so obliged in relation to the subject-matter of the investigation. A failure or refusal to do any of these things, or a failure or refusal to do them to the extent or in the manner required by this agreement, will constitute a breach of this agreement.

5.2 It is also fundamental to this agreement that [name] comply in a timely and accurate fashion with the obligations set out in paragraph 3.1.6 of the section **OBLIGATIONS** as well as those contained in any provisions of this agreement governing pleas of guilty, positions to be taken on sentence, compliance with sentences imposed including payment of fines in full within such times as may be allowed or extended by the courts, and the execution of any consent or authorizations as may be requested of [name] in order to permit access by the investigating agency to evidence, interviews, testimony, statements, or documents given to any other person or body in Canada or elsewhere. A failure or refusal to do any of these things, or a failure or refusal to do them to the extent or in the manner required by this agreement, will, at the option of the Crown in Right of Canada, constitute a breach of this agreement.



## 6. ACKNOWLEDGEMENT BY [NAME]

I acknowledge that I have received a copy of this agreement, have read it, where necessary I have had it explained to me in whole or in part, and I understand it. I further acknowledge that it fully sets forth the terms of my agreement with the Crown in Right of Canada in respect of my providing information and/or documents to the investigating agency in respect to the subject investigation. There have been no promises or representations made to me that are not disclosed in this agreement. I have been fully advised of my rights by counsel of my own choice. I am aware of the legal consequences under Canadian law for those who would knowingly provide false, misleading, or incomplete information under these circumstances. Finally, I acknowledge that I fully understand my rights under Canadian law and I am entering into this agreement voluntarily.

DATED at the City of \_\_\_\_\_, in the Province / Territory of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
for the Director of Public Prosecutions

\_\_\_\_\_  
(name)

\_\_\_\_\_  
for the Investigating Agency

\_\_\_\_\_  
Counsel for (name)





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.4 SEALING ORDERS AND PUBLICATION BANS**

**GUIDELINE OF THE DIRECTOR ISSUED UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The “open court principle” establishes a presumption of public access to court proceedings and court records, and has been described as a “hallmark of a democratic society”.<sup>1</sup> One aspect of the open court principle, freedom of the press, is a constitutional right under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (Charter). Any restriction on the open court principle must be based on equally sound principles and values accepted in our democracy.

Displacing the open court principle in order to prevent or restrict access to court documents and court proceedings requires a balancing against the countervailing interests. The purpose of this guideline is to identify occasions where this balancing is required and the applicable considerations.

Among the interests which may be taken into account are the need to protect an ongoing covert police investigation, the need to protect informer privilege, and the need to protect the privacy rights of persons affected by the court proceeding in question.

In some areas Parliament has already determined the balance, for example, with respect to wiretap packets, where sealing of the packet is statutorily required, or with respect to proceedings under the *Youth Criminal Justice Act*,<sup>2</sup> where publication of the accused’s

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<sup>1</sup> *Vancouver Sun (Re)*, 2004 SCC, [2004] 2 SCR 332 at para 23. See also: *A.B. v Bragg Communications Inc*, 2012 SCC 46, [2012] 2 SCR 567 at para 11.

<sup>2</sup> SC 2002, c 1.

identity is actually a criminal offence. In other areas the balancing must be done case by case, for example, with respect to a ban on the publication of a complainant's or witness's identity under s. 486.5 of the *Criminal Code* (Code), where the court must determine the balance by reference to enumerated criteria.

## **2. SEALING ORDERS FOR MATERIAL FILED IN SUPPORT OF *EX PARTE* JUDICIAL AUTHORIZATIONS**

In the case of court materials filed in support of *ex parte* judicial authorizations such as search warrants, production orders and wiretap authorizations, the presumption of public access applies. However, common law authority and statutory rules exist which may either require or permit sealing of the material in question.

As well, there is a common law rule that the material filed in support of a search warrant or similar judicial authorization should remain sealed from public view until the warrant or order is executed and the police make a "report to justice".<sup>3</sup> Where a search has been executed but nothing has been seized, the common law also establishes that only affected persons may have access to the material in question.<sup>4</sup>

It should be understood that when a sealing order is made, or automatic sealing is required as discussed in the next section in the case of wiretap materials, this does not restrict the ability of law enforcement officials to continue to use and share as necessary the content of the information subject to sealing. The sealing order – or automatic sealing – applies to the actual documents in question and not to the information, which may exist in another form as work product.

### **2.1. Mandatory sealing of documents supporting a wiretap authorization**

Section 187 of the Code mandates that all documents relating to an application under Part VI (which generally deals with wiretaps) must be sealed and kept by the court in a place with no public access, subject only to further order of a court. A specific sealing order is therefore not required.

However where a wiretap authorization includes judicial authority for other investigative measures (e.g. a general warrant or an assistance order) wiretap agents normally should draft the proposed authorization to include a sealing order covering those aspects of the material.

Opening a sealed wiretap packet for the purposes of making *Stinchcombe* disclosure is discussed below.

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<sup>3</sup> *A.G. (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175.

<sup>4</sup> *Ibid*; *Michaud v Québec (A.G.)*, [1996] 3 SCR 3.

## **2.2. Discretionary sealing in other cases of ex parte judicial authorization**

Section 487.3 of the Code gives the issuing justice authority to order the sealing of material filed in support of an *ex parte* application for a warrant under the *Criminal Code* or any other federal statute, a production order under ss. 487.012 or 487.013 of the Code, or a *Feeney* warrant under s. 529 of the Code. Sealing is not automatic. The application for the sealing order will usually be made by the peace officer applying for the warrant or order, at the same time, and can be granted on the grounds set out in s. 487.3 of the Code.

The peace officer applying for the warrant or production order in question is therefore expected to provide affidavit material that details how and why one or more of the grounds mentioned in s. 487.3(2) justifies a sealing order. The most common grounds will be: to protect an ongoing police investigation; and to protect informer privilege.

Where the peace officer has neglected to obtain a needed sealing order at the time the warrant was issued, or later decides that a sealing order should now be sought, s. 487.3 is still available as the section specifically says that the sealing order may be granted by the provincial court judge or justice “on application made at the time of issuing a warrant [or other order]...or at any time thereafter”. In such a case, Crown counsel may be consulted to assist in the application.

Different courts across Canada have different procedures in place to handle sealing orders. In every case, however, the sealing order should result in the material being kept in a secure location not subject to public access.

In some jurisdictions the issuing justices grant sealing orders for a limited time, e.g. one year from the date of issuance. This is to be discouraged, as if the grounds for sealing are to protect informer privilege, it may never be safe to unseal the original unvetted material. Crown counsel are encouraged to advise their enforcement agencies to seek sealing orders of unlimited duration.

Procedures for unsealing warrant materials are discussed below.

## **2.3. Common law authority to seal in other cases of ex parte judicial authorization**

Section 487.3 of the Code specifically applies to warrants and the orders mentioned in the section. There are other *ex parte* proceedings not specifically mentioned, and here the court’s inherent jurisdiction (in the case of the superior court) or its ability to control its own process (in the case of a statutory court such as the provincial court) can be engaged.

For example, s. 462.48 of the Code allows for an *ex parte* application by the Crown for an order to obtain tax information in certain cases related to proceeds of crime, money laundering, organized crime, and terrorism. This type of application is usually brought early in the stages of the criminal investigation and is therefore sensitive. A sealing order for the supporting material will invariably be desired in order to protect both the ongoing

investigation and the identity of confidential informers. As this particular application is brought *ex parte* before a judge of the superior court, the inherent jurisdiction of the superior court can be relied upon for the issuance of a sealing order, as the *Criminal Code* is silent on the point. The grounds for the sealing order will no doubt parallel those set out in s. 487.3, discussed above. Again, it is important that the Crown be able to overcome the presumption of public access under the open court principle.

#### **2.4. Unsealing for disclosure purposes: procedure and policy**

In the case of wiretap packets, ss. 187(1.3) and (1.4) of the Code authorize a provincial or superior court judge to order that the packet be unsealed for the purposes of copying and examination. The section goes on to provide that the Crown has the right to edit the packet materials to protect informer privilege, ongoing investigations, sensitive police techniques, and the interests of innocent persons: ss. 187(2) – (4). The section goes on to require the original material to be resealed: s. 187(6).

With respect to informations to obtain search warrants and other orders, s. 487.3(4) of the Code contemplates that the issuing justice, or a judge of the court before which resulting criminal proceedings are underway, may vary the sealing order issued under s. 487.3 as discussed above.

Section 187(1.4) of the Code in relation to the sealed wiretap packet assumes that trial proceedings are underway and that the accused has applied to obtain a (vetted) copy of the affidavit material. Section 487.3(4) is less restrictive. Modern practice, largely in view of the Crown's obligation to make disclosure pursuant to *Stinchcombe*, now usually means that Crown counsel will initiate the unsealing application at the appropriate time, i.e. when the material can safely be vetted and disclosed to the defence.

Unsealing applications can usually be made by Crown counsel *ex parte*, on the ground that unsealing the material for the purpose of making *Stinchcombe* disclosure is in the interests of the accused. Proceeding *ex parte* also gives Crown counsel appropriate control of the application. On the other hand, forcing the accused to bring the application puts the accused in control of the timing and manner of the proceeding and may increase the risk of disclosing sensitive information such as informer privilege or ongoing investigations. This is a particular risk in smaller jurisdictions where court staff may not be familiar with the requirements that the Crown be notified of an application to unseal and be given an opportunity to vet the copied material before it is disclosed, or that the original unvetted material must be resealed.

As a matter of policy, therefore, Crown counsel in an individual case has the discretion to determine when to bring an application to unseal the material filed in support of a wiretap Authorization, search warrant, or other order. In exercising this discretion, and determining whether and when to bring an unsealing application, Crown counsel should consider:

- a. the interests and views of the investigating authority, particularly in respect of the sensitivity of information that may tend to identify a confidential informer or compromise an ongoing investigation;
- b. the timing of the application: there may be a tension between the need to make *Stinchcombe* disclosure and the sensitivity of information, which sensitivity may attenuate as time passes; and
- c. the stage of the proceedings: e.g., on the eve of trial, the accused may force an adjournment if he or she has not received disclosure of sealed material filed in support of a judicial authorization (a wiretap Affidavit, or information to obtain); equally, the accused may decline to make election or plea until sealed material is unsealed, vetted, and disclosed.

As to the last item, the stage of the proceedings, once a matter is set down for preliminary inquiry or trial, Crown counsel should promptly initiate unsealing in order to avert last-minute adjournments.

### **3. PUBLICATION BANS**

#### **3.1. Introduction**

As discussed above, the open court principle presumes public access to all court proceedings, and freedom of the press – *i.e.*, the media's right to publish details of court proceedings – is also engaged. However countervailing interests may justify restrictions on the publication of court proceedings in their entirety or in part.

As with sealing orders, publication bans require a balancing of the open court principle against the countervailing interests. In some cases Parliament has already established the balance – e.g. statutorily requiring a ban on publication of evidence taken at a judicial interim release hearing, or making it a criminal offence to publish the name of the accused in proceedings under the YCJA – while in other cases the presiding judge must make a case-by-case analysis – e.g. a ban on publishing the identity of a juror in certain circumstances.

#### **3.2. Requirement to notify the media**

Unless the publication ban is mandatory, as discussed below, Crown counsel must advise the court if necessary of the common law rule that the media must be notified before any publication ban is ordered: *Dagenais v C.B.C.*, [1994] 3 SCR 835. This is because any publication ban interferes with the constitutionally protected right to freedom of expression under s. 2(b) of the Charter.



In some jurisdictions the courts and/or media have arranged for a procedure where notice of application for a publication ban may be given to a central clearing house.<sup>5</sup>

### 3.3. Mandatory publication bans

The *Criminal Code* and the YCJA provide for mandatory publication bans in several areas:

- *Criminal Code*:
  - s. 276.3(1) – ban on publication of proceedings on application by accused to cross-examine regarding complainant’s sexual activity under s. 276.1 – automatic;
  - s. 486.4(2) – ban on publication of the identity of complainant or child witness in sexual offence cases, upon application of the prosecutor, complainant or witness – mandatory;
  - s. 486.4(3) – ban on publication of the identity of a witness under 18 years of age or of any person who is the subject of child pornography, in offences relating to child pornography under s. 163.1, upon application of the prosecutor, complainant or witness – mandatory;
  - s. 517 – ban on publication of evidence, information, submissions and judicial reasons at judicial interim release hearing – mandatory if the accused requests a ban, and discretionary if the prosecutor requests it;
  - s. 539(1)(b) – ban on publication of evidence taken at preliminary inquiry – mandatory if the accused requests a ban, and discretionary if the prosecutor requests it;
  - s. 542(2) – ban on publication of the fact of or details of any confession tendered at a preliminary inquiry – automatic;

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<sup>5</sup> See e.g. :

- British Columbia, Publication Ban Notification Project – Expansion to New Westminster, on line : <[http://www.courts.gov.bc.ca/supreme\\_court/publication\\_bans/2007%20-%20Publication%20Ban%20Notification%20Project%20-%20October%2029%202007.pdf](http://www.courts.gov.bc.ca/supreme_court/publication_bans/2007%20-%20Publication%20Ban%20Notification%20Project%20-%20October%2029%202007.pdf)>.
- North West Territories Supreme Court, Practice Direction, « Publication Bans », July 9, 2004, on line: <<https://www.nwtcourts.ca/directives/pd7.pdf>>.
- Alberta, E-File Notice of Application for Publication Ban, on line: Alberta Courts <<http://www.albertacourts.ab.ca/provincialcourt/criminalcourt/efilenoticeofapplicationforpublicationban/tabid/238/default.aspx>>.
- Saskatchewan, Discretionary Publication Ban Application, on line: Courts of Saskatchewan <<http://www.sasklawcourts.ca/index.php/home/resources/learn-about-the-courts-resources/court-watching/14-resources/249-media-ban-publication-tool>>.
- Nova Scotia, Notice of Applications for Publication bans service, on line: The Courts of Nova Scotia <[http://www.courts.ns.ca/pubban/how\\_to\\_pub\\_ban\\_notice.pdf](http://www.courts.ns.ca/pubban/how_to_pub_ban_notice.pdf)>.

- s. 648 – ban on publication of any proceedings in the absence of the jury – automatic.

- *Youth Criminal Justice Act:*

The YCJA automatically imposes a ban on the publication of, e.g., the identity of a young person (s. 110(1)), so neither the court nor Crown counsel need to do anything for the publication ban to be in place. There are provisions allowing for the youth court to lift such statutory publication bans. See, e.g., s. 110(4) which deals with a peace officer's application to allow publication of the identity of a young person who is accused of an indictable offence and who poses a danger to others, where publication of the young person's identity is necessary to assist in his or her apprehension. Section 110(6) allows a young person to apply for relief from the statutory ban on publication of his or her identity, if the youth court is satisfied publication would not be contrary to the interests of the young person or the public interest.

Section 75(2) requires a youth court, upon imposing a sentence on a young person for a violent offence, to consider lifting the ban on publication of the young person's identity, where this is necessary to protect the public from further violent offences by the young person.

As a matter of policy, when there is an automatic, mandatory publication ban (e.g. publication of proceedings in the absence of the jury, as in s. 648 of the Code, or publication of the identity of a young person as in s. 110 of the YCJA), Crown counsel need not take any steps since it is the operation of statute that automatically mandates the ban on publication. Where a publication ban only results from a positive order of the court, however, Crown counsel should be aware of those instances. Where a mandatory publication ban is triggered upon application of the defence (e.g. ban on publication of proceedings at show cause hearing or preliminary inquiry), Crown counsel need not take any steps if the accused is represented by counsel. In the case of a self-represented accused, however, it is appropriate for Crown counsel to remind the court that there is such a provision so that the court can discharge its duty to assist the self-represented accused in this regard. As well, Crown counsel should ensure in a prosecution for an offence listed in s. 486(1)(a) or (b) of the Code – basically, most sexual offences – that the court is aware of its obligation to inform any witness under the age of 18 years and any complainant of his or her right to apply for a publication ban, which ban is automatic upon application by the young witness or complainant, or by the prosecutor.

### **3.4. Discretionary publication bans**

There are also provisions for discretionary publication bans in many instances under the *Criminal Code*:

- s. 486.5(1) – ban on publication of the identity of any victim or witness, not already covered by the mandatory publication ban in s. 486.4, upon application of

the prosecutor, victim or witness, if the ban is “necessary for the proper administration of justice” – discretionary;

- s. 486.5(2) – ban on publication of the identity of any “justice system participant” as defined in s. 2, in any prosecution for an offence listed in s. 486.2(5), i.e. intimidation of a justice system participant, offences related to criminal organizations, terrorism offences, and offences related to the *Security of Information Act*,<sup>6</sup> upon application of the prosecutor or a justice system participant, if the ban is “necessary for the proper administration of justice” – discretionary;
- s. 631(6) – ban on publication of the identity of a juror, upon application of the prosecutor or on the court’s own motion, if the ban is “necessary for the proper administration of justice” – discretionary.

As a matter of policy, when a discretionary publication ban is in issue, Crown counsel should ensure that persons affected by the proposed ban have been given proper notice of the application. Concerning the media, see the discussion above about the need to ensure the media is notified as per *Dagenais*. Crown counsel also has an obligation to ensure that victims and witnesses are properly notified and advised of their right to make application for a publication ban, usually by informing the presiding judge of this right. If affected persons have been given proper notice, Crown counsel’s position on whether a discretionary publication ban should be imposed is governed by Crown counsel’s general duty to protect the public interest. Crown counsel will normally be initiating or supporting the application for a discretionary ban on publication, and should be able to address the public interest considerations in his or her submissions to the court.

### **3.5. Common law publication bans**

The superior courts have inherent jurisdiction to impose publication bans, and arguably the provincial courts have the same jurisdiction when exercising the authority to control their own process.<sup>7</sup> Such publication bans are discretionary. In *Mentuck*, the Supreme Court of Canada propounded the test for a common law publication ban as follows:

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right

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<sup>6</sup> RSC 1985, c O-5.

<sup>7</sup> *R v Cunningham*, 2010 SCC 10.

to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.<sup>8</sup>

With respect to the first branch of the test, the “serious risk” must be real, substantial, and well grounded in the evidence. As Iacobucci J put it: “it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained”.<sup>9</sup> The second branch of the test requires a balancing of interests, including constitutional protections for the accused and the press.

As a matter of policy, Crown counsel should ensure that affected parties (including the media) are notified of the proposed discretionary ban on publication, and be prepared to speak to the public interest considerations which are engaged. These include:

- the right of an accused to a fair and public hearing – s. 11(d) of the Charter;
- freedom of expression – s. 2(b) of the Charter;
- the privacy interests of witnesses and other third parties; and
- the integrity of the administration of justice, including the ability of the police to conduct an investigation without being compromised by publicity, with particular reference to the “serious risk” sought to be avoided by the proposed publication ban.

### **3.6. Appeal from a publication ban**

There is no statutory right to appeal from a publication ban. Any such appeal must therefore fall within s. 40(1) of the *Supreme Court Act*,<sup>10</sup> i.e., pursuant to an application for leave to appeal from the order directing a publication ban.<sup>11</sup>

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<sup>8</sup> *R v Mentuck*, 2001 SCC 76 at para 32, per Iacobucci J. See also *Toronto Star Newspapers v Ontario*, 2005 SCC 41.

<sup>9</sup> *Mentuck*, *ibid* at para 34.

<sup>10</sup> RSC 1985, c S-26.

<sup>11</sup> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *R v Adams*, [1995] 4 SCR 707; *Mentuck*, *supra* note 8.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.5 DELEGATED DECISION-MAKING**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(C) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline's purpose is to explain the delegation of powers under the *Director of Public Prosecutions Act*<sup>1</sup> (DPP Act).

The vast majority of prosecutorial decisions are made by federal prosecutors acting on behalf of the DPP, who in turn, acts under and on behalf of the Attorney General of Canada.<sup>2</sup> These include the decisions to prosecute, to seek an accused person's pre-trial detention, to stay proceedings and to seek particular sentences following convictions. However, certain decisions require specific higher level approval. Some offences in the *Criminal Code* (Code) and in other federal statutes can be prosecuted only with the prior consent of the Attorney General or the Deputy Attorney General. In addition, the Attorney General's or Deputy Attorney General's consent is a precondition to certain steps being taken in criminal proceedings. This includes, for example, preferring an indictment; recommencing proceedings where jurisdiction has been lost; and initiating dangerous offender and long-term offender applications.

Certain offences require the consent of the Attorney General or the Deputy Attorney General prior to the institution of prosecutions as a control mechanism. This ensures that there is pre-charge screening by a legal officer. The consent requirement is said to be aimed centrally at two potential harms, namely (a) the specific harm that may result from

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<sup>1</sup> *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

<sup>2</sup> Upon hiring, each Crown counsel receives a "section 9 authorization", authorizing them to undertake prosecutorial duties on behalf of the DPP.

the prosecution of an innocent person and (b) the general harm that results from the institution of proceedings that are not in the public interest. While, there is no clear unifying factor for the offences requiring consent to prosecute,<sup>3</sup> consent is typically required for offences that have an extraterritorial reach or that have the added dimension of interstate relations and competing jurisdictions, such as torture committed by a foreign citizen, sexual offences against children committed by a Canadian citizen in a foreign state, or war crimes and crimes against humanity.

## 2. THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

It is a general principle of administrative law that a statutory power should be exercised by the authority on whom it is conferred. In the absence of express statutory permission, it normally cannot be delegated to another person or body. Read with the *Criminal Code*, the DPP Act provides express statutory delegation for specific prosecutorial duties.

The DPP Act has not changed the Attorney General of Canada's historical role as chief law officer of the Crown. The Attorney General retains jurisdiction to prosecute all non-*Criminal Code* federal offences (except those under the *Canada Elections Act*<sup>4</sup>) and certain *Criminal Code* offences<sup>5</sup> in the provinces and authority to prosecute both *Criminal Code* and non-*Criminal Code* federal offences in the three territories. However, under s. 3(3) of the DPP Act, these powers have been delegated to the DPP, who exercises these general powers "under and on behalf of the Attorney General" independently, subject to directives issued by the Attorney General under s. 10.<sup>6</sup> The DPP's authority under s. 3(3) includes the authority to:

- (a) initiate and conduct federal prosecutions, subject to the Attorney General's power under s. 15 of the DPP Act;
- (b) intervene in proceedings that raise a question of public interest that may affect the conduct of prosecutions or related investigations, subject to the Attorney General's power under s. 14 of the DPP Act;
- (c) issue general guidelines to prosecutors;<sup>7</sup>

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<sup>3</sup> Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (Working Paper 62, 1990) at 67.

<sup>4</sup> See DDP Act, *supra* note 1, s 3(8).

<sup>5</sup> Section 2(b.1)-(g) of the *Criminal Code* give concurrent jurisdiction to the Attorney General of Canada to prosecute certain *Criminal Code* offences including terrorism offences, fraud, insider trading, stock market fraud. Section 467.2 of the *Criminal Code* gives concurrent jurisdiction to the Attorney General of Canada to prosecute organized crime offences.

<sup>6</sup> See the PPSC Deskbook directive "[1.1 Relationship between the Attorney General and the Director of Public Prosecutions](#)".

<sup>7</sup> Section 3(5) of the DPP Act, *supra* note 1 exempts from the requirements of the *Statutory Instruments Act* any guidelines the DPP issues under s 3(3)(c). Thus, these guidelines need not be approved by a Parliamentary committee.

- (d) advise law enforcement agencies on matters related to prosecutions generally and particular investigations that may lead to a prosecution;
- (e) communicate with the media and the public on prosecution matters;
- (f) exercise the Attorney General's authority in respect of private prosecutions; and
- (g) exercise any other duty that the Attorney General delegated to the DPP.

By virtue of s. 3(4) of the DPP Act, the DPP is the Deputy Attorney General for the purpose of exercising the powers and performing the duties and functions set out in s. 3(3). The principal significance of s. 3(4) is that it brings into play s. 2 of the Code which defines the Attorney General to include the Deputy Attorney General. The DPP's decisions to prosecute offences under federal statutes, stay proceedings or launch an appeal are binding and final unless otherwise instructed by the Attorney General under s. 10(1).

## **2.1. Delegated authority of Deputy Directors**

Section 6 of the DPP Act provides for the appointment of one or more Deputy Directors of Public Prosecutions (Deputy DPP's). Section 6(3) specifies that, under the DPP's supervision, the Deputy DPP may exercise any of the powers and perform any of the duties or functions set out in s. 3(3) of the DPP Act and for that purpose is a lawful deputy of the Attorney General. As such, a Deputy DPP is authorized to exercise any function or duty of the Attorney General that has been delegated to the DPP, under the DPP's supervision.<sup>8</sup>

## **2.2. Delegations for federal prosecutors, agents and non-prosecution staff**

The DPP is authorized to employ federal prosecutors (s. 7(1) of the DPP Act) and retain agents, also known as "non-employed federal prosecutors" (s. 7(2) of the DPP Act), as are necessary to enable the DPP to perform any of the duties or functions of the DPP.<sup>9</sup>

The DPP may also hire employees other than federal prosecutors to carry out the work of his or her office (s. 8(1) of the DPP Act). This includes, for example, in-house paralegals, finance and human resources personnel, and administrative support staff. Further, the DPP may retain other persons with special expertise or technical knowledge of any matter related to the DPP's work (s. 8(2) of the DPP Act). This includes, for example, retired judges, forensic accountants, computer experts, and management consultants.

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<sup>8</sup> Section 6(4) of the DPP Act, *supra* note 1 provides that the Deputy DPP may also act for and on behalf of the DPP, under the DPP's supervision, in the exercise of any other powers or the performance of any other duties or functions that the DPP has under the DPP Act or any other Act of Parliament.

<sup>9</sup> Section 7(1) of the DPP Act, *supra* note 1 enables the DPP to hire employees of the Office of Director of Public Prosecutions who are appointed under the *Public Service Employment Act*. Section 7(2) provides the DPP with authority to retain the services of private sector lawyers to act as federal prosecutors or "non-employed federal prosecutors" as distinct from staff prosecutors.



Section 9(1) of the DPP Act is quite specific about who the DPP may delegate to act on his or her behalf. It expressly authorizes the DPP to delegate any of his or her powers, duties or functions (with the exception of the actual power to delegate), to employed federal prosecutors, to agents retained under s. 7(2), and to employees appointed pursuant to s. 8(1). Individuals in the last group receive s. 9 delegations as “other employees of the ODPP”. As employees of the PSSC, articling students may be designated under s. 9 to act as federal prosecutors. However, s. 9 does not permit the DPP to delegate powers to students and paralegals working in agents’ law offices.<sup>10</sup> This delegated authority may be subject to restrictions or limitations.<sup>11</sup> As a general rule, all employees of the Public Prosecution Service of Canada (PPSC), with the exception of Deputy DPP’s, operate in accordance with written s. 9 delegations. These persons are identified as “delegated agents” of the DPP.<sup>12</sup>

### **2.3. Designations for the purposes of Part VI of the *Criminal Code***

Section 9(3) of the DPP Act permits the DPP, a Deputy DPP, any federal prosecutor or agent to be designated as an agent of the Minister of Public Safety and Emergency Preparedness under s. 185 of the Code. This enabling provision permits federal prosecutors and agents to be designated as agents of the Minister of Public Safety and Emergency Preparedness for the purpose of making applications for authorizations to intercept private communications under Part VI of the *Criminal Code*. Federal prosecutors and agents who receive s. 185 designations act in that capacity as agents of the Minister of Public Safety and Emergency Preparedness.

## **3. CONSENT OF THE ATTORNEY GENERAL**

Generally, individual Crown counsel make prosecutorial decisions.<sup>13</sup> As mentioned, s. 3(3)(a) of the DPP Act delegates to the DPP, the Attorney General’s power to initiate and conduct prosecutions. Under section 9(1) of the DPP Act, the DPP has authorized federal prosecutors to act on his behalf to fulfill this responsibility. The DPP retains the power to make personally any decision required to be made in his or her name.

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<sup>10</sup>Students and paralegals working in agents’ law offices are not employed as federal prosecutors (s 7(1) of the DPP Act, *supra* note 1), nor are they barristers or advocates of a provincial bar as required by s 7(3) of DPP Act (*ibid*).

<sup>11</sup> For example, the Director may restrict the authority of a private sector lawyer retained pursuant to s 7(2) of the DPP Act, *supra* note 1 to appear as the Director’s agent only in relation to prosecutions of certain offences and only in a particular part of the country. Likewise, the Director may restrict the authority of in-house federal prosecutors and other employees of his or her office, such as paralegals.

<sup>12</sup> Section 9(2) of the DPP Act, *supra* note 1 obviates the need for federal prosecutors, persons acting as federal prosecutors and other employees of the Office of Director of Public Prosecutions to prove that they have been authorized to act as an agent of the Director. It provides that anyone who is authorized to exercise powers or perform duties or functions under s 9(1) acts as an agent of the Director and is not required to prove such authorization.

<sup>13</sup> Upon appointment, the DPP gives Crown counsel a s 9 delegation setting out the scope of their authority.

As noted above, in some federal statutes, including the *Criminal Code*, the consent of the Attorney General is required either to initiate the prosecution of a particular offence or to take a particular step in a criminal proceeding. The statutes employ an array of phrases in describing actions to be taken by the Attorney General. Some demand his or her “personal consent in writing”.<sup>14</sup> Others require the Attorney General’s “consent in writing”<sup>15</sup> or simply “the consent of the Attorney General”.<sup>16</sup> Some of these go further and identify a need to obtain consent from a particular Attorney General, federal<sup>17</sup> or provincial.<sup>18</sup> Except where the statutory provision requires the decision to be taken personally in writing by the Attorney General only, the DPP, as the Deputy Attorney General, has the authority to provide the required consent.

Pursuant to section 9 of the DPPA Act, the DPP has authorized the Chief Federal Prosecutors, Deputy CFPs and General Counsel, Legal Operations (GCLOs) and Crown counsel to provide consent on his behalf under certain of these statutory provisions. Appendix A to this guideline lists the statutory consents covered by this authorization. The decision-maker remains accountable to the DPP and the DPP to the Attorney General for the decisions taken.

For statutory provisions requiring consent that are not listed in the authorization, and the Appendix, consent must be sought from:

- a) the Attorney General if the provision contemplates only the Attorney General’s personal consent in writing;
- b) the DPP if the provision contemplates the personal consent in writing of the Attorney General or of the Deputy Attorney General;
- c) the DPP or the Deputy DPP in all other cases.

Where an offence requires the consent of the Attorney General to “institute”, “commence” or “continue” a prosecution, the consent is an element of the offence which the Crown must be capable of proving beyond a reasonable doubt.<sup>19</sup> It is a necessary precondition to the jurisdiction of the court.<sup>20</sup> Failure to prove consent to the prosecution will result in charges being dismissed for lack of jurisdiction. Accordingly, consent should be obtained in writing from the appropriate decision-maker to provide evidence of the existence of the requisite consent. Decisions regarding whether or not to consent are

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<sup>14</sup> See e.g. *Criminal Code*, s 7 (3.75) and *Geneva Conventions Act*, s 3(4).

<sup>15</sup> See e.g. *Criminal Code*, s 119(2) and *Special Import Measures Act*, s 77.034(3).

<sup>16</sup> See e.g. *Criminal Code*, ss 7(7) and 172(4).

<sup>17</sup> See e.g. *Criminal Code*, s 251(3).

<sup>18</sup> See e.g. *Criminal Code*, s 342(2).

<sup>19</sup> *Re Quinn Contracting Ltd* (1983), 27 Alta LR (2d) 334 (QB); *R v Spicer and Blakely* (1992), 120 AR 139 (CA); *R v Chen* (2006) 209 CCC (3d) 534, 205 Man R (2d) 157 at para 10.

<sup>20</sup> *R v Linamar Holdings Inc.*, [2007] OJ No 4859 [*Linamar*]; *R v Alrifai*, 2008 ONCA 564.

reviewable only in cases involving exceptional circumstances such as dishonesty, flagrant impropriety or bad faith.<sup>21</sup>

### **3.1. Procedure for obtaining the personal consent of the Attorney General or the DPP**

It is important to identify, at the pre-charge or initial charge-review stage, cases that require consent to institute a prosecution or to undertake other measures. Consent should be obtained from the appropriate decision-maker at the earliest reasonable opportunity. The wording varies from one provision to the next; some requiring consent to “institute” a prosecution, others to “commence” a prosecution and still others to “continue” a prosecution that already has been commenced. A prosecution is instituted once a person lays an information before a justice. In contrast, a prosecution commences only once a justice of the peace issues process compelling attendance of the accused in court.<sup>22</sup> Thus, where the statutory language requires consent to “institute” proceedings, such consent must be obtained prior to laying the information.

The CFP must ensure preparation of the following:

2. a concise statement of facts sufficient to conclude that there is a reasonable prospect of conviction at trial and that the public interest is best served by a prosecution. The statement must include the name (and citizenship, if not Canadian) of the accused, the charges, the evidence and the date by which the consent is required. If multiple accused are to be charged, the statement must demonstrate that there is sufficient evidence to implicate each individually;
3. a statement indicating that the associated department (if there is one) has been consulted, and an outline of its views on the proposed prosecution;
4. two original consent documents in the following form.

### **3.2. Consent documentation**

Pursuant to (state section and statute requiring consent), I consent to the institution of proceedings against (accused's name, address and, if not Canadian, citizenship) for an offence contrary to (state offence section and statute).

This consent is given in relation to the following allegation(s):

(provide draft charges and a brief description of primary facts alleged including date and location)

This consent is given at Ottawa, Canada, this \_\_\_\_ day of \_\_\_\_ , \_\_\_\_.

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<sup>21</sup> See e.g. *R v Warren* (1981), 61 CCC (2d) 65 (Ont HCJ), *R v DPP, Ex Parte Kebeline*, [2000] 2 AC 326 (HL). See also *R v Balderstone* (1983), 8 CCC (3d) 532, [1983] 6 WWR 438 (Man CA), leave to appeal to SCC refused CCC *loc cit*; *R v Moore* (1986), 26 CCC (3d) 474, 50 CR (3d) 243 (Man CA).

<sup>22</sup> *Alrifai*, *supra* note 22 at para 22 citing *Linamar*, *supra* note 22.

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Attorney General of Canada

(or, as the case may be,

Director of Public Prosecutions of Canada and Deputy Attorney General of Canada  
or

Deputy Director of Public Prosecutions and lawful deputy of the Attorney General of Canada pursuant to section 6(3) of the *Director of Public Prosecutions Act* )

The CFP shall review each recommendation and, if satisfied that the case meets the criteria set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, send it to the Deputy DPP. For matters that require the consent of the Attorney General or the DPP, the Deputy DPP will review the request and prepare a recommendation and forward it to the Attorney General or DPP as appropriate for approval. If the Attorney General or DPP signs the consent documents, one signed document will be sent to the Regional Office. The second will be filed in the office of the Deputy DPP. Upon completion of the trial, the CFP must report the outcome to the Deputy DPP. If the Deputy DPP decides that proceedings should not be instituted, the request for consent goes no further. The CFP is then advised that no request for consent will be made.

For situations mentioned in Appendix “A”, except where Crown counsel has authority to consent, he or she should prepare the same documentation, and submit it to the CFP for approval.

### **3.3. Obligation to consult in consent-based prosecutions**

In respect of offences where consent to institute the prosecution was obtained, Crown counsel must consult the decision-maker (*i.e.*, the DPP, Deputy DPP, CFP, Deputy CFP or General Counsel Legal Operations) where it is proposed: (i) to discontinue the prosecution, (ii) to make major changes to the charges, or (iii) to accept pleas to lesser charges than those for which consent had originally been granted. Where the consent of the DPP or Deputy DPP was obtained, consultations should be routed via the CFP.

## **4. APPENDIX A**

### **DELEGATION TO FEDERAL PROSECUTORS AND PERSONS ACTING AS FEDERAL PROSECUTORS**

1. Pursuant to section 9(1) of the *Director of Public Prosecutions Act* (the Act), I hereby authorize federal prosecutors, as referred to in section 7(1) of the Act, holding the position of Chief Federal Prosecutor, to act for or on my behalf in the exercise of:

- (a) any of the powers or the performance of any of the duties or functions in relation to prosecutions that the Director of Public Prosecutions is authorized to exercise or perform under section 3(3)(a), (b), (d), (e), (f), and (g), (7), (8) and (9) of the Act or under any other Act of Parliament;
- (b) the power to consent on behalf of the Attorney General of Canada under the following statutory provisions:

***Criminal Code***

- s. 7(7)
- s. 136(3)
- s. 174(3)
- s. 342(2)
- s. 347(7)
- s. 385(2)
- s. 422(3)
- s. 478(3)
- s. 479
- s. 672.86(1)(b) & (2)
- s. 720(2)
- s. 733(1.1)
- s. 733.1(2)
- s. 742.5(1.1)
- s. 742.6(3.2)
- s. 753.3(2)
- s. 803(3)
- s. 810.01(1) Application for recognizance in relation to prevention of criminal organization offence only.
- s. 810.2(1)

***Immigration and Refugee Protection Act***

s. 117(4)

***Migratory Birds Convention Act***

s. 18.3(6)

***National Defence Act***

s. 226(3)(a) & (b)

***Youth Criminal Justice Act***

s. 58(3)

2. Pursuant to section 9(1) of the Act, I hereby authorize federal prosecutors, as referred to in section 7(1) of the Act, holding the position of Deputy Chief Federal Prosecutor or the position of General Counsel-Legal Operations, to act for or on my behalf in the exercise of:

- (a) any of the powers or the performance of any of the duties or functions in relation to prosecutions that the Director of Public Prosecutions is authorized to exercise or perform under section 3(3)(a), (b), (d), (e), (f), and (g), (8) and (9) of the Act or under any other Act of Parliament;
- (b) the power to consent on behalf of the Attorney General of Canada under the following statutory provisions:

***Criminal Code***

s. 479

s. 720(2)

s. 733(1.1)

s. 742.5(1.1)

3. Pursuant to section 9(1) of the Act, I hereby authorize federal prosecutors, as referred to in section 7(1) of the Act, and persons acting as federal prosecutors, as referred to in section 7(2) of the Act, to act for or on my behalf in the exercise of:

- (a) any of the powers or the performance of any of the duties or functions in relation to prosecutions that the Director of Public Prosecutions is

authorized to exercise or perform under section 3(3)(a), (b), (d), (e), (f), and (g), (8) and (9) of the Act or under any other Act of Parliament;

- (b) in the case of federal prosecutors, the power to consent on behalf of the Attorney General of Canada under sections 479 and 720(2) of the *Criminal Code*; and
- (c) in the case of persons acting as federal prosecutors, the power to consent on behalf of the Attorney General of Canada under section 720(2) of the *Criminal Code*.

4. Notwithstanding paragraphs 1 to 3 above, where a provision of the *Criminal Code* or of any other Act of Parliament requires the express consent or approval of the Attorney General of Canada or the Director of Public Prosecutions in order to initiate a prosecution or to take a specified step in a prosecution, as that term is defined in the Act:

- (a) only those federal prosecutors mentioned in paragraphs 1 to 3 above may act on their behalf and only in respect of the provisions specifically listed in those paragraphs; and
- (b) in respect of provisions that are not listed in paragraphs 1 to 3 above, only the Director of Public Prosecutions or a Deputy Director of Public Prosecutions can consent or approve.

5. In acting under this Delegation, federal prosecutors and persons acting as federal prosecutors are subject to the directives and guidelines contained in the *Public Prosecution Service of Canada Deskbook*.

6. This Delegation replaces the Delegations to Federal Prosecutors and Persons Acting as Federal Prosecutors issued by the Director of Public Prosecutions on September 2 and 4, 2014.

Signed in Ottawa, in the Province of Ontario, this 31<sup>st</sup> day of October 2014.

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Brian Saunders  
Director of Public Prosecutions and  
Deputy Attorney General of Canada







## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.6 DIRECT INDICTMENTS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Section 577 of the *Criminal Code* (Code) permits the Attorney General or the Deputy Attorney General to send a case directly to trial without a preliminary inquiry or after an accused has been discharged at a preliminary inquiry. The object of the section has been described by Southin J.A. of the British Columbia Court of Appeal in the following terms:

In my opinion, Parliament intended, by this section, to confer upon the Attorney General or his Deputy the power to override the preliminary inquiry process. It is a special power not to be exercised by Crown counsel generally but only on the personal consideration of the chief law officer of the Crown and his or her deputy.

Such a power is recognition of the ultimate constitutional responsibility of Attorneys General to ensure that those who ought to be brought to trial are brought to trial. There are many reasons why an Attorney General or a Deputy Attorney General might consider a direct indictment in the interests of the proper administration of criminal justice. Witnesses may have been threatened or may be in precarious health; there may have been some delay in carrying a prosecution forward and, thus, a risk of running afoul of s. 11(b) of the *Canadian Charter of Rights and Freedoms*; a preliminary inquiry, in, for instance, cases essentially founded on wire-tap evidence, may be considered by the Attorney General to be expensive and time consuming for no purpose. These are simply illustrations. It is neither wise nor possible to circumscribe the power of the Attorney General under this section.<sup>1</sup>

This guideline outlines the criteria applied by the Director of Public Prosecutions (DPP) in his or her capacity as Deputy Attorney General of Canada when determining whether to consent to the preferring of an indictment pursuant to this provision. It also describes

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<sup>1</sup> *R v Charlie* (1998), 126 CCC (3d) 513 at 521-522 (BCCA).

the procedure for Crown counsel and agents to follow when making a recommendation for a "direct indictment".

## 2. STATEMENT OF POLICY

The discretion vested in the Attorney General under s. 577 of the Code will be exercised only in circumstances involving serious violations of the law and where it is the public interest to do so.

Circumstances where it is in the public interest include the following:

1. where the accused is discharged at a preliminary inquiry because of an error of law, jurisdictional error, or palpable error on the facts of the case;<sup>2</sup>
2. where the accused is discharged at a preliminary inquiry and new evidence is later discovered which, if it had been tendered at the preliminary inquiry, would likely have resulted in an order to stand trial;
3. where the accused is ordered to stand trial on the offence charged and new evidence is later obtained that justifies trying the accused on a different or more serious offence for which no preliminary inquiry has been held;
4. where delay (actual or anticipated) in bringing the matter to trial, has led to the conclusion that the right to trial within a reasonable time guaranteed by s.11(b) of the *Canadian Charter of Rights and Freedoms* may not be met unless the case is brought to trial forthwith;
5. where there is a reasonable basis to believe that the lives, safety or security of witnesses or their families, informers, or justice system participants may be in peril, and the potential for interference with them can be reduced significantly by bringing the case directly to trial without preliminary inquiry;<sup>3</sup>
6. where proceedings against the accused ought to be expedited to ensure public confidence in the administration of justice;
7. where a direct indictment is necessary to avoid multiple proceedings, for example, where one accused has been ordered to stand trial following a preliminary inquiry, and a second accused charged with the same offence has just been arrested or extradited to Canada on the offence;<sup>4</sup>

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<sup>2</sup> For a discussion of "palpable error" as a basis for controverting findings of fact made in earlier proceedings, see *MacNeill and Shanahan v Briau*, [1977] 2 SCR 205; *Hoyt v Grand Lake Devl. Corp.*, [1977] 2 SCR 907 at 911-912, adopted in *R v Purves* (1979), 50 CCC (2d) 211 at 222-24 (Man CA); *R v Van Der Peet*, [1996] 2 SCR 507 at 565-566.

<sup>3</sup> Wherever reasonably practicable, Crown counsel should first ask the investigators, with the cooperation of the PPSC Security Officer, to prepare a confidential threat assessment where a direct indictment is being considered on this basis.

<sup>4</sup> See e.g. *R v Cross* (1996), 112 CCC (3d) 410 (QC CA).

8. where the age, health or other circumstances relating to witnesses<sup>5</sup> requires their evidence to be presented before the trial court as soon as possible, or presents difficulties in having witnesses testify more than once;
9. where the holding of a preliminary inquiry would unreasonably tax the resources of the prosecution, the investigative agency or the court; and
10. where a direct indictment is necessary to protect ongoing police investigations, operations and security where the requirement for such protection is of importance and can be significantly demonstrated.

### **3. PROCEDURE**

#### **3.1. Regional Offices**

The Chief Federal Prosecutor (CFP) shall give notice to the appropriate Deputy Director of Public Prosecutions (Deputy DPP) of the intention to seek a direct indictment and must ensure preparation of the following:

1. a legal memorandum containing a concise description and analysis of the available evidence, demonstrating how that evidence results in a reasonable prospect of conviction with respect to each accused on each count, and addressing why the public interest requires a prosecution. The memorandum must include the names of the accused, the charges, and the date, if any, for which the indictment is required. The memorandum should highlight the strengths and weaknesses of the case, as well as any significant legal issues expected to be encountered, and any issues of particular importance to the public interest. The memorandum should explain the reasons for requesting the direct indictment, address the considerations set out in this guideline, and include a reasoned and objective assessment of the factors weighing both for and against a direct indictment. The memorandum should also include a copy of the approved prosecution plan, if any;
2. an assessment of the state of disclosure already given to the accused, the extent of the disclosure yet to be made, an anticipated timeline for completion of the disclosure process, and an analysis of any disclosure problems or disputes anticipated; two original indictments containing all charges for which the indictment is requested. Both should be signed in the usual way by the person normally signing indictments in the Regional Office. Below that, the following should appear:

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<sup>5</sup> It would be appropriate to consider, for example, the particular circumstances relating to complainants in highly traumatic cases, such as sexual offences or war crimes. This may include consideration of whether requiring the witness to testify about the same matters a number of times will cause harm to that person, or will inhibit the presentation of candid and truthful evidence, or may cause the witness to change his or her evidence or refuse to testify.

I hereby consent to the preferring of this indictment pursuant to section 577 of the *Criminal Code*.<sup>6</sup> Dated at Ottawa, Ontario, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Director of Public Prosecutions and Deputy Attorney General of Canada

The CFP shall review the recommendation and, if satisfied that the case is appropriate for a direct indictment, send it to the appropriate Deputy DPP.

### 3.2. Headquarters

The Deputy DPP conducts an objective assessment of the request to determine whether a direct indictment will be recommended. In this role, the Deputy DPP exercises a challenge function. If the Deputy DPP recommends that a direct indictment be preferred, the recommendation will be forwarded to the DPP for consideration.<sup>7</sup> If the Deputy DPP concludes that a direct indictment is not appropriate in the circumstances, the Deputy DPP will advise the CFP that no recommendation will be made to the DPP.

In circumstances in which a s. 13 notice pursuant to the *Director of Public Prosecutions Act*<sup>8</sup> is appropriate,<sup>9</sup> the Attorney General may determine that a different course should be taken and issue a directive in writing and published in the Canada Gazette.

If the DPP accepts the recommendation, one of the original indictments, signed by the DPP, is sent to the Regional Office. The second signed original is filed in the DPP's office at Headquarters.

In cases where an indictment has been preferred and Crown counsel later concludes that the charges (or any of them) ought to be withdrawn, stayed or reduced, the appropriate Deputy DPP should first be consulted.

Once the trial has been completed, the CFP must report the outcome to the appropriate Deputy DPP.

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<sup>6</sup> A direct indictment should be endorsed to read that consent has been given "pursuant to s 577 of the *Criminal Code*". This is intended to avoid the erroneous conclusion that the preferment of the indictment by the Attorney General or the Deputy Attorney General was intended to *require* a jury trial under s 568. A requirement of that nature will, as outlined in the PPSC Deskbook guideline "[3.10 Elections and Re-elections](#)", be expressly endorsed on the indictment.

<sup>7</sup> In *R v Trang*, 2002 ABQB 744 at para 419 (August 15, 2002), it was held that the recommendation is subject to solicitor-client privilege; see also *R v Ahmad*, 2008 CanLii 27470 (ONSC).

<sup>8</sup> SC 2006, c 9.

<sup>9</sup> See the PPSC Deskbook directive "[1.2 Duty to Inform the Attorney General under Section 13 of the Director of Public Prosecutions Act](#)".

#### **4. RE-ELECTIONS**

Where an indictment has been preferred under s. 577, the accused is deemed under s. 565(2) to have elected to be tried by a court composed of a judge and jury. Under that same section, however, the accused may re-elect for trial by a judge without a jury, with the written consent of Crown counsel. The procedures necessary to give effect to the re-election are described in s. 565(3) and (4), and s. 561(6) and (7). Crown counsel should consider the criteria described in the PPSC Deskbook guideline “[3.10 Elections and Re-Elections](#)”, when assessing whether consent should be provided to a proposed re-election.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.7 RESOLUTION DISCUSSIONS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Discussions between Crown and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid litigation altogether, form an important and necessary part of the criminal justice system.<sup>1</sup> In fact, the vast majority of cases never go to trial; rather they are resolved by way of a guilty plea to the charges laid or a guilty plea to a lesser offence. In most cases, these outcomes flow from discussions between Crown and defence counsel regarding the evidence, possible defences, *Canadian Charter of Rights and Freedoms* issues, and other matters regarding the likelihood of a conviction. Discussions of this nature are often referred to as "resolution discussions." Though not defined in the *Criminal Code*, resolution discussions embrace a diversity of practices other than that just described: how the case may proceed, what an appropriate sentence might be, what the facts of the offence are for the purposes of a guilty plea, and, if the case is to proceed to trial, how the issues might be narrowed so as to expedite the trial. Early and meaningful resolution discussions can benefit all participants in the criminal

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<sup>1</sup> See e.g. Canada Law Reform Commission, *Plea Discussions and Agreements* (Working Paper 60), 1989 at 5-6 [Working Paper 60 of the Canada Law Reform Commission] for a discussion of the need for plea bargaining and the pros and cons of this practice; see also Department of Justice, Plea Bargaining by Milica Potrebic Piccinato, Department of Justice Canada, 2004, online: <<http://www.justice.gc.ca/eng/abt-apd/icg-gci/pb-rpc/pb-rpc.pdf>> at 5-6; *R v SK* (1995), 99 CCC (3d) 376 at 382 (ON CA); *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Justice G. Arthur Martin, Chair) 1993, pp 279-282 [The "Martin Committee Report"]; *R v Closs* (1998), 105 OAC 392.



justice system and advance the administration of justice. Crown counsel are encouraged to initiate resolution discussions, and in so doing they should agree to present a joint submission as to the exact length of sentence or amount of monetary fine only where satisfied that a joint submission is appropriate in the public interest and, in particular, will not bring that administration of justice into disrepute. Crown counsel should advise the court of the factors underlying the joint submission so that the basis of the decision to agree to a joint submission is readily understood by the court and members of the public.

Crown counsel are to make their best efforts to reach agreements on such issues as early as possible in the case. It must be emphasized, however, that any joint sentencing recommendations made to the court as part of a resolution discussion are subject to the overriding discretion of the court to accept or reject any submission by counsel.<sup>2</sup> When a sentencing judge indicates he or she is disinclined to follow a joint submission on sentence or is considering imposing a sentence outside the range proposed by counsel, Crown counsel should ensure the judge gives counsel an opportunity to make further submissions before pronouncing on sentence.<sup>3</sup>

Although resolution discussion practices may vary from jurisdiction to jurisdiction, the underlying guiding principles remain the same. This guideline is intended to give Crown counsel guidance on how to engage in meaningful discussions. The PPSC Deskbook guidelines covering specific types of prosecutions, and confidential legal memoranda must also be taken into account.<sup>4</sup> In addition, Crown counsel must be alert to the availability of such options as alternative measures programs and restorative or community justice processes.<sup>5</sup>

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<sup>2</sup> See s 606(1.1) of the *Criminal Code* which provides that the court is not bound by any agreement made between the accused and the prosecutor. Canadian appellate courts have articulated the standard for determining when trial judges may properly reject joint submissions on sentence accompanied by negotiated admissions of guilt. Generally, they have upheld the principle that sentencing judges should not depart from joint submissions unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest; See e.g., *R v Douglas*, [2002] CanLII 32492 (QCCA) at paras 40-43, 49 CR (5<sup>th</sup>) 188, where the court held that sentencing judges should not reject joint submissions unless they are “unreasonable”, “contrary to public interest”, “unfit” or would “bring the administration of justice into disrepute.” The court also held that submissions made by experienced counsel should be considered. See also *R v Benard* 2003 MBCA 92; *R v Sinclair*, [2004] MBCA 48; *R v GWC*, [2000] ABCA 333; *R v Cerasuolo*, (2001), 151 CCC (3d) 445 (ONCA), at pp 447-8; *R v Haufe*, [2007] ONCA 515; *R v Bezdan*, [2001] BCJ No 808 (QL) (BCCA) at para 15.

<sup>3</sup> *R v Abel*, 2011 NWTCA 04; *R v Hood*, 2011 ABCA 169.

<sup>4</sup> See for example, the PPSC Deskbook guidelines “[5.2 Competition Act](#)” and “[5.5 Domestic Violence](#)”; See also Memorandum of Understanding between the Canada Revenue Agency and the PPSC at para 24 states “Prosecutors will consult with the CRA before deciding to stay or withdraw charges, not to proceed with charges recommended by the CRA, or not to appeal a dismissal of charges. The CRA will be informed of decisions made.” See also the Competition Bureau’s Information Bulletin on Sentencing and Leniency in Cartel Cases, which sets out the factors that the Competition Bureau considers in making non-binding recommendations to the Director of Public Prosecutions (DPP) for lenient treatment of individuals or business organizations accused of criminal cartel offences under the *Competition Act*.

<sup>5</sup> See the PPSC Deskbook directive “[3.8 Alternative Measures](#).”

## 2. PRINCIPLES GUIDING RESOLUTION DISCUSSIONS

The unique role of Crown counsel as both advocate and minister of justice means that they must represent the interests of the Crown as knowledgeable and effective negotiators while ensuring that the accused is treated fairly and according to the law.<sup>6</sup> Resolution discussions must be based on the principles of openness and fairness, and must always be conducted in the public interest in the effective and consistent enforcement of the criminal law.

### 2.1. Openness

One of the more serious criticisms of plea bargaining in its early days pertained to the secrecy of the process and the related concern regarding “private deals” between counsel, subsequently ratified by the judiciary, engendering public suspicion and cynicism.<sup>7</sup> The principle of openness stems from the concept that “fair and rational decisions are more likely to be perceived as fair and rational if their origins and underpinnings have been fully disclosed”.<sup>8</sup> It involves at least two components: (i) canvassing, where appropriate, the views of certain interested parties regarding a proposed resolution and (ii) upholding the open court principle.

When reasonably possible, Crown counsel should solicit and weigh the views of those involved in the Crown's case - in particular, the victim (where there is one), the community where appropriate<sup>9</sup> and the investigating agency. In some cases, consultation may be warranted with the relevant provincial prosecuting service or with a Department of Justice legal service unit.<sup>10</sup> However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel.<sup>11</sup> If a plea agreement is reached, counsel should make reasonable efforts to ensure that victims and investigating agencies understand the substance of the agreement and the reasoning behind it. The scope of this discussion may, in certain circumstances, be limited by privacy or secrecy considerations, in the accused's interest or in the general public interest.<sup>12</sup>

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<sup>6</sup> See *e.g.*, *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7, 97 CCC (3d) 385, 38 CR (4th) 265: “Section 10(b) mandates the Crown or police, whenever offering a plea bargain, to tender that offer either to the accused's counsel or to the accused while in the presence of his or her counsel, unless the accused has expressly waived the right to counsel. It is a constitutional infringement to place such an offer directly to an accused, especially when the police coercively leave it open only for the short period of time during which they know defence counsel to be unavailable. Mere expediency or efficiency or the facilitating of the investigatory process was not enough to create urgency sufficient to permit a s 10(b) breach. To the extent that the plea bargain is an integral element of the Canadian criminal process, the Crown and its officers engaged in the plea bargaining process must act honourably and forthrightly.”

<sup>7</sup> Canada Law Reform Commission Working Paper 60, *supra* note 1 at 12.

<sup>8</sup> *Ibid.*, at 13.

<sup>9</sup> For example, in certain remote communities, community leaders and schools may have significant views on the impact of narcotics on the community.

<sup>10</sup> See the PPSC Deskbook directive “[1.3 Consultation within Government](#).”

<sup>11</sup> See the PPSC Deskbook guideline “[2.1 Independence and Accountability in Decision-Making](#).”

<sup>12</sup> See the PPSC Deskbook guideline “[5.1 National Security](#).”

Where a plea or sentence agreement has been reached, counsel should present the proposal to the trial judge in open court and on the record. In certain circumstances, it may be necessary to discuss some aspects of the agreement with the trial judge privately in the presence of defence counsel.<sup>13</sup> This should be done only in those rare situations involving facts which in the interest of the public or the accused ought not to be disclosed publicly. Examples include cases where the accused is terminally ill or is cooperating with investigators. It is not acceptable, however, to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it.<sup>14</sup>

Crown counsel should maintain a complete signed and dated written record on the file of all resolution issues discussed, offers made or agreements reached.<sup>15</sup> This will promote a consistent and informed practice, particularly where multiple Crown counsel successively handle a file.

## 2.2. Fairness

An effective resolution discussions system is premised upon the integrity with which the justice system participants operate.<sup>16</sup> Unfair plea bargaining practices lead to results that are contrary to the administration of justice.

Fairness means that the accused ideally should have received core disclosure prior to plea bargaining so that the parties are on equal footing. However, the practical realities of plea negotiations between Crown and defence counsel, in particular where defence counsel indicates his or client wishes to enter an early plea, are such that it may not be reasonably feasible to complete disclosure prior to entering a plea. In such cases, Crown counsel should ask that the accused, through defence counsel, indicate on the record that they waived their right to disclosure. Crown counsel should not conduct plea or sentence discussions with an unrepresented accused unless satisfied that the accused has been given full disclosure or is aware of the right to full disclosure and has clearly waived it.<sup>17</sup> Any such waivers should be indicated on the court record at the time of entering the plea.

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<sup>13</sup> Even then, depending on regional practices, it is preferable to have a court reporter present in chambers so that a complete and accurate record of the discussions can later be made available if necessary.

<sup>14</sup> Courts universally have condemned pre-plea participation by the trial judge in charge of sentence negotiations: *R v Wood* (1975), 26 CCC (2d) 100 at 108 (AB SC); *R v Dubien* (1982), 67 CCC (2d) 341 at 346 - 7 (ON CA); *R v White* (1982), 39 Nfld and PEIR 196 (NL CA). Generally, see: G.A. Ferguson, "The Role of the Judge in Plea Bargaining", (1972-3), 15 Crim L Q 26; Working Paper 60 of the Canada Law Reform Commission, *Plea Discussions and Agreements*, at 12-15, and Recommendation 4; Curran, "Discussions in the Judges Private Room", [1991] Crim L R 79.

<sup>15</sup> For an illustration of the difficulties that may arise where no proper record of discussions is kept, see *R v Rajaeefard* (1996), 104 CCC (3d) 225 (ON CA).

<sup>16</sup> Piccinato, *supra* note 1 at 13.

<sup>17</sup> See the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)" on providing disclosure to an unrepresented accused.

Crown counsel may not proceed with a resolution agreement where the charge approval standard set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”<sup>18</sup> cannot be met.<sup>19</sup> If the case does not meet this standard, charges are to be withdrawn or stayed.

Fairness also means that the Crown should honour all negotiated plea or sentence agreements unless fulfilling the agreement<sup>20</sup> would clearly be contrary to the public interest.<sup>21</sup> Additionally, while they should not disregard the position that another colleague previously communicated on the file, Crown counsel may be justified in repudiating an agreement if misled about material facts. The decision not to fulfill an agreement should be made only after consultation with, and approval of, the Chief Federal Prosecutor (CFP) and the appropriate Deputy Director of Public Prosecutions (Deputy DPP). As well, if counsel disagrees with an agreement reached earlier by a colleague, the matter should be referred to the CFP and then to the appropriate Deputy DPP, unless the disagreement stems from a material change in facts. In all cases where a plea resolution is repudiated, the reasons for repudiation must be well-documented on the file. Crown counsel should inform defence counsel in writing of the reasons for the repudiation.

If an accused enters a plea based on a negotiated plea or sentence agreement and the court disposes of the case on those terms, the Crown may not undertake an appeal unless exceptional circumstances exist<sup>22</sup> and a Deputy DPP authorizes the appeal in light of the recommendation of the CFP.

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<sup>18</sup> See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#).”

<sup>19</sup> There may be certain types of investigations, for example in the context of tax evasion and anti-competitive practices, where counsel for persons or corporations under investigation may initiate plea discussions even before charges are laid. In such cases, the appropriate threshold for entering into plea discussions would be where the charge approval standard can or could be met.

<sup>20</sup> The term “agreement” means a Crown offer that defence counsel has accepted. It is to be distinguished from “uncommunicated positions” on file and “communicated positions” or “communicated offers” that have been communicated to defence counsel or to the accused, but have not yet been accepted.

<sup>21</sup> Courts generally do not interfere with this discretion unless it has been exercised for an oblique motive, offends the right to a fair trial or otherwise amounts to an abuse of process. See *R v Nixon*, 2011 SCC 34 where the Supreme Court of Canada considered whether the exercise of prosecutorial discretion in the Crown’s repudiation of a plea agreement was an abuse of process contrary to s 7 of the *Canadian Charter of Rights and Freedoms*. Charron, J elaborated the appropriate standard for when Crown counsel may lawfully renege on a plea agreement: “in the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown’s alone to make.” The Court dismissed the appeal given that no prejudice to the accused could be shown (the accused could be restored without prejudice to the position she had been in prior to entering into the plea agreement), nor could any misconduct, improper motive or bad faith in the ADM and Crown’s decisions be shown. See also *R v RM* (2006) 83 OR (3d) 349, 213 CCC (3d) 107 (ONSC), *R c Camiré* 2010 QCCA 615. In *R v Tallon*, 181 CCC (3d) 261, 180 OAC 145, the appellate court accepted a change in the Crown’s position on sentence from the position stated at a pre-trial conference, prior to a guilty plea. In that case, there had been no agreement on sentence prior to the change in the Crown’s position, and the trial judge went to great lengths to ensure the accused was adequately informed of the consequences of a guilty plea.

<sup>22</sup> See *R v Wood*, *supra* note 14 where the court held that the Attorney General is not barred from appealing a sentence based on a position taken at trial by a Crown counsel; *R v Simoneau* (1978), 40 CCC (2d) 307 (MB CA) where the court held that the appellate court will not necessarily hold the Crown to the position it

### 3. TYPES OF RESOLUTION DISCUSSIONS

#### 3.1. Unrepresented accused

Plea or sentence negotiations with an unrepresented accused call for extreme care. Crown counsel may inform an unrepresented accused person of the Crown's initial position on sentence in the event of a guilty plea. However, Crown counsel may not advise the accused on whether or not to accept the Crown's offer. Any such discussions can proceed only where Crown counsel is satisfied that the accused is acting voluntarily.<sup>23</sup> Moreover, in entering into any plea discussions, Crown counsel, must not take advantage of the fact that the accused is unrepresented by counsel.

Crown counsel should first inform the accused of his or her right to retain counsel and, where appropriate, advise the accused of the availability of legal aid. If there are any concerns about the accused's understanding or ability to understand the extent of his or her jeopardy and the right to counsel, Crown counsel may need to take additional steps and encourage the accused to consult with counsel. If the accused declines to retain counsel, Crown counsel should generally arrange for a third person to be present as a witness during discussions because of the need to maintain an arms-length relationship with the accused. Crown counsel should follow the local practices in their region to mitigate the risks in respect of dealings with unrepresented accused. Depending on local practice, it may be advisable for Crown counsel to consult duty counsel regarding the unrepresented accused person's matter. It is especially crucial in these cases to keep on file a detailed written record of all discussions. In most instances, a written agreement or written evidence of an agreement<sup>24</sup> will be appropriate. When the case is disposed of in accordance with a negotiated plea or sentence agreement, Crown counsel should tell the judge about the existence of the agreement and that the accused was encouraged to retain counsel but declined to do so. Crown counsel should also recommend to the presiding judge holding a plea comprehension hearing.

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agreed to take at trial but would determine whether the Crown should be bound by that position depending on the circumstances of each case. Similarly in *Attorney General of Canada v Roy* (1972), 18 CRNS 89 (QC QB), followed in *R v Léger*, [1996] JQ no 522 (QC CA), the court held that the Crown, on appeal should not repudiate its position taken at trial except in the gravest of circumstances, including:

- (a) good faith Crown error that results in imposition of an illegal sentence;
- (b) misleading of Crown counsel at trial;
- (c) the gravity of crime and gross insufficiency of sentence outweighs the public interest in the orderly administration of justice.

<sup>23</sup> In this regard, see the Ontario Court of Appeal decision in *Rajaefard*, *supra* note 15, where undue pressure was brought to bear on the accused by a judge.

<sup>24</sup> Such as a memorandum to file or, minimally, a detailed endorsement on the file.

### 3.2. Charge discussions

Charge discussions may properly cover the following topics:

- reducing a charge to a lesser or included offence;<sup>25</sup>
- withdrawing or staying other charges;
- agreeing not to proceed on a charge or agreeing to stay or withdraw charges against others (for example, friends or family of the accused);
- agreeing to reduce multiple charges to one all-inclusive charge (where permitted by law); and
- in agreeing to stay certain counts and proceed on others, relying on the material facts that supported the stayed counts as aggravating factors for sentencing purposes.<sup>26</sup>

The following practices are not acceptable in the context of charge discussions:

- instructing or proceeding with unnecessary additional charges to secure a negotiated plea;
- agreeing to a plea of guilty to an offence not disclosed by the evidence;
- agreeing to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct unless, in exceptional circumstances, the plea is justifiable in terms of the benefit that will accrue to the administration of justice;
- agreeing to a plea of guilty to a charge to a lesser or included offence for the purpose of avoiding mandatory minimum penalties [MMPs]
- negotiating plea agreements that involve other government departments' administrative or enforcement processes (for example, Canada Revenue Agency) without their consultation with respect to the proposed resolution; or
- negotiating plea agreements with defence counsel representing multiple co-accused where there is reason to believe that he or she is in a conflict of interest.

### 3.3. Procedural discussions

Procedural discussions may properly include the following:

- agreeing to proceed summarily instead of by indictment;<sup>27</sup>

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<sup>25</sup> This includes an offence arising out of the same transaction: *Criminal Code*, s 606(4).

<sup>26</sup> Section 725 of the *Criminal Code* now regulates this practice.

<sup>27</sup> See PPSC Deskbook guideline “[3.10 Elections and Re-elections](#)” for guidelines regarding the Crown’s discretion to elect. Note in particular the discussion of the Crown’s ability to re-elect from indictable to summarily when the limitation period for proceeding summarily has passed. See also *R v Dudley* 2009 SCC 58.

- agreeing to dispose of the case at a specified future date if, on the record and in open court, the accused indicates that he or she is prepared to waive the right to a trial within a reasonable time; and
- agreeing to the waiver of charges to or from another province or territory, or to or from another judicial district within a province or territory.<sup>28</sup>

### 3.4. Sentence discussions

Crown counsel may engage in sentence negotiations where:

- the accused is willing to acknowledge guilt unequivocally; and
- the consent of the accused to plead guilty is both voluntary and informed.<sup>29</sup>

Each case must be resolved on its merits in a manner that is fit and just. An agreed-upon resolution should not adversely affect the investigation or prosecution of others. For example, an agreement as to sentence ought not to be so low that it makes what is an otherwise fit sentence for a co-accused a violation of the disparity principle.<sup>30</sup> Moreover, sentence agreements can never bind investigators in respect of future investigations.

Crown counsel shall also consider the sentencing principles set out in ss. 718-718.21 of the *Criminal Code*.

#### 3.4.1. Scope of sentence discussions

Sentence discussions may properly include the following:

- an undertaking by Crown counsel to recommend a certain range of sentence or a specific sentence;
- a joint recommendation for a range of sentence or for a specific sentence;

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<sup>28</sup> See PPSC Deskbook guideline “[3.9 Waiver of Charges](#)” for the policy and procedure on waivers.

<sup>29</sup> Section 606(1.1) of the *Criminal Code* provides: A court may accept a plea of guilty only if it is satisfied that the accused (a) is making the plea voluntarily; and (b) understands (i) that the plea is an admission of the essential elements of the offence, (ii) the nature and consequences of the plea, and (iii) that the court is not bound by any agreement made between the accused and the prosecutor. Section 606(1.2) stipulates that “the failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.” See also *R v Nevin* (2006) 245 NSR (2d) 52, 210 CCC (3d) 81 where the Nova Scotia Court of Appeal allowed an appeal of a conviction under s 686(1)(a)(iii) of the *Criminal Code* on the basis that the conviction resulted from an involuntary guilty plea which, in the court’s view, amounted to a miscarriage of justice. For a discussion of the risks of improper inducements to plead guilty, see Canada Law Reform Commission Working Paper 60, *supra* note 1 at 17-22.

<sup>30</sup> “Martin Committee Report”, *supra* note 1, at 301.



- an agreement by Crown counsel not to oppose a sentence recommendation by defence counsel which has been disclosed in advance;<sup>31</sup>
- an agreement by Crown counsel not to seek additional optional sentencing measures. However, Crown counsel cannot negotiate in this manner in respect of sentencing measures which apply by operation of law,<sup>32</sup> nor may they waive the right to seek forfeiture orders or prohibition orders in order to obtain a resolution agreement without prior approval of their CFP or Associate CFP;<sup>33</sup>
- an agreement regarding the filing of a notice of intention to seek greater punishment, that is made in accordance with the PPSC Deskbook guidelines on impaired driving cases and on other offences for which there are mandatory minimum penalties;<sup>34</sup>
- an agreement by Crown counsel not to oppose the imposition of an intermittent sentence rather than a continuous sentence;
- an agreement regarding the type of conditions to be imposed on a conditional sentence; and
- consideration of alternative resolutions, including community justice processes (for example, circle sentencing), in accordance with the PPSC Deskbook directive “[3.8 Alternative Measures](#)”.<sup>35</sup>

The following practice is not acceptable:

- a promise in advance not to appeal the sentence imposed at trial.

### **3.4.2. Conduct of sentence discussions**

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

- Because of the benefits that flow to the administration of justice from early guilty pleas, Crown counsel should make, as soon as practicable, a time-limited offer. This offer should reflect the fact that generally a plea of guilty is a mitigating factor on sentence, especially where the accused pleads guilty at the earliest

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<sup>31</sup> But see the specific policy on sentencing in certain types of offence: the PPSC Deskbook guideline “[5.5 Domestic Violence](#)”, *supra* note 4.

<sup>32</sup> See for example, s 109(1) of the *Criminal Code* which requires a prohibition order for firearms in certain cases, or s 487.051 of the *Criminal Code* which requires the judge, upon conviction for a “primary designated offence”, to order the taking of a DNA sample for forensic analysis.

<sup>33</sup> In some exceptional circumstances, however, Crown counsel may waive the right to seek forfeiture orders – for example in the case of relatively inexpensive items such as cell phones.

<sup>34</sup> See the PPSC Deskbook guideline “[5.7 Impaired Driving Cases: Notice to Seek Greater Punishment](#)” which sets out the policies on seeking greater punishment for this offence.

<sup>35</sup> See the PPSC Deskbook directive “[3.8 Alternative Measures](#)”, *supra* note 5.



opportunity.<sup>36</sup> Absent a significant change in circumstances, this offer should not be repeated at subsequent stages in the trial process (for example, after a preliminary hearing, on the day of trial);

- Crown counsel should initiate, as well as respond to, plea discussions with counsel;
- Where an accused changes counsel, Crown counsel should advise the new defence counsel of all previous offers and the Crown's present position in light of the known facts;
- Before recommending that a fine be imposed, Crown counsel should take reasonable steps to ensure that the fine is an appropriate disposition, including forming an opinion as to whether an offender is capable of paying the fine. Where possible, Crown counsel should, as part of the negotiations for resolving the case by way of a fine, arrange with the defence for the payment of the fine on the day of sentencing. If the money to pay is not immediately available, but will be in the near future, Crown counsel may wish to have the sentencing proceedings take place on that future date;
- Crown counsel should ensure that, prior to making an offer to defence counsel, they consult with their CFP or designate and/or headquarters counsel when required in accordance with the PPSC Deskbook guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)".<sup>37</sup> In addition, the PPSC Deskbook guidelines relating to particular criminal conduct (for example, impaired driving, domestic violence, mandatory minimum penalties for certain controlled substances and other offences) must be borne in mind when assessing whether a proposed disposition is appropriate; and
- Crown counsel must consult with the CFP or Deputy CFP before entering into a plea agreement that may deviate from the range of sentences generally imposed for a particular offence in a jurisdiction. Consultation with colleagues should also occur when Crown counsel are uncertain about the range of sentences for an offence in a jurisdiction. The more serious the crime, the more important it is to consult.

### 3.5. Agreements as to the facts of the offence

Where an accused decides to plead guilty, Crown counsel must put before the court those facts that could have been proved by admissible evidence if the matter had gone to trial. Discussions regarding the facts may properly include the following:

- whether to include in representations to the court embarrassing facts which are of little or no significance to the charge;

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<sup>36</sup> In *Competition Act* matters, because of the frequent involvement of counsel during the investigative stage, discussions may take place before charges are laid.

<sup>37</sup> See the PPSC Deskbook guideline "[2.6 Consultation within the Public Prosecution Service of Canada](#)".

- whether to rely on an agreed statement of facts; and
- whether to submit an agreed statement of the impact on public welfare in the context of regulatory offences.

The following practice is not acceptable:

- entering into an agreement respecting facts which results in, or gives the appearance of, misleading the court, such as:
  - (a) an agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;
  - (b) an agreement not to advise the court of the extent of the injury or damages suffered by a victim;
  - (c) an agreement to withhold from the court facts that are provable, relevant, and that aggravate the offence; or
  - (d) an agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.

### **3.6. Narrowing the trial issues**

For cases that are proceeding to trial, Crown counsel must attempt to narrow the issues to be litigated as much as possible. Towards this end, Crown counsel should:

- identify any legal issues that may arise and seek the defence's position on those issues; and
- more particularly, identify those issues and witnesses' anticipated evidence from which defence counsel might make admissions, such as *voir dires* on the admissibility of statements.<sup>38</sup>

## **4. JUDICIAL PRE-TRIAL CONFERENCES**

Resolution discussions may take place between counsel alone or in the presence of a judge during judicial pre-trials or pre-trial conferences. Judicially supervised pre-trial conferences are now an entrenched and important facet of our criminal justice system. A system of judicially-supervised pre-trials exists in most jurisdictions, although the form may differ from one jurisdiction to the next. They are effective not only in encouraging the fair disposition of cases without trial, but also in narrowing the issues in cases that do

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<sup>38</sup> It may be useful in this regard to draw up a list of potential admissions and provide it to defence counsel for his or her consideration and signature.

proceed to trial.<sup>39</sup> Crown counsel are encouraged to take initiative with court administrators to hold a pre-trial conference, where the court has not done so.

Crown counsel are encouraged to take whatever steps are reasonably possible to ensure that such conferences run smoothly which may include:

- ensuring that sufficient disclosure has been made to defence counsel prior to the pre-trial conference such that meaningful discussions regarding the facts and any possible issue or plea resolutions may take place;
- identifying before the pre-trial conference those areas in which agreements can be reached on issues which would shorten the proceedings;
- discussing the relevant issues with defence counsel prior to the pre-trial conference; and
- attempting to secure the attendance of an investigator on the case, where such attendance would be useful or necessary.

Counsel may conduct guilty plea and sentence proceedings before the judge who presides over the pre-trial conference where there is a joint position on sentence or where both defence and Crown counsel consent to the pre-trial judge conducting the sentencing hearing.

## 5. DELEGATED AUTHORITY TO PROSECUTE

At times, individuals are charged with offences under the *Criminal Code* and other federal statutes arising from the same incident. To avoid the need for both a provincial prosecution service and the PPSC to conduct separate trials and to avoid the potential for conflicting judicial outcomes on the same evidence, it is customary for the prosecuting service having jurisdiction over the less serious offence to delegate authority to prosecute that offence to the prosecution service having jurisdiction over the more serious offence. Thus, for example, the PPSC may authorize a provincial prosecution service to prosecute on behalf of the PPSC an offence under the *Controlled Drugs and Substances Act*<sup>40</sup> where the accused also faces a more serious charge under the *Criminal Code*. Conversely, a provincial prosecution service may authorize the PPSC to prosecute on its behalf an accused for an offence under the *Criminal Code* where the accused also faces a more serious drug charge.<sup>41</sup>

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<sup>39</sup> Pursuant to s 625.1(2) of the *Criminal Code*, pre-trial conferences are mandatory for cases in which a jury trial is to take place. Pre-trial conferences may also take place in trials to be conducted by a judge or justice alone, pursuant to s 625.1(1).

<sup>40</sup> SC 1996, c 19.

<sup>41</sup> The Director of Public Prosecutions may enter into agreements with his or her provincial or territorial counterpart respecting the delegation of authority to prosecute where an accused has been charged on the same information or indictment with federal and provincial/territorial offences. These are commonly referred to as “major-minor agreements”. Alternatively, CFPs may enter into similar agreements with their provincial or territorial counterparts at the local level. These may take the form of local major-minor agreements signed between the CFP and his or her counterpart that delegate standing authority to prosecute certain “minor” offences from the other jurisdiction, or ad hoc arrangements in individual cases.

When a delegation of authority to prosecute a charge takes place, the prosecution service which delegated the prosecution retains ultimate control over the prosecution and the prosecutor to whom that matter has been delegated remains ultimately accountable to the delegating prosecution service.<sup>42</sup> Thus, when the Director of Public Prosecutions (DPP) or a CFP (or Deputy CFP or General Counsel, Legal Operations) on the DPP's behalf, delegates authority to the province to prosecute a federal charge, the DPP retains the right to be informed of the matter, and to assume conduct of the delegated matter if there is disagreement on how the matter should be handled. It is usual practice for consultation between the prosecution services to continue as needed after the delegation. In practice, this ultimate accountability means that the delegating prosecution service should be consulted on resolution discussions on cases:

- that give rise to sustained, significant and/or anticipated media interest;
- where there is potential for a negative judicial ruling or comment against a prosecutor personally or the PPSC generally;
- where there is potential for a particular resolution agreement to generate significant public criticism;
- where an investigative agency's policies, practices or enforcement powers are challenged in the context of resolution discussions; and
- where a proposed resolution agreement would depart from this guideline.

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<sup>42</sup> See *R v Luz*, [1991] OJ No 1996 at paras 22-23, 5 OR (3d) 52, *R v DiGiuseppe*, [2003] OJ No 5630; *R v Lyndsay* (unreported, 6 October 2009, BC Prov Ct).



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.8 ALTERNATIVE MEASURES**

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014.

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### 1. INTRODUCTION

Not every person alleged to have committed an offence need be prosecuted. Alternative measures,<sup>1</sup> which were introduced in the *Criminal Code* in 1996 as part of significant reforms to the criminal law,<sup>2</sup> enable adults and organizations to take responsibility for offences in certain circumstances without going through judicial proceedings.

The fundamental principle underlying the use of alternative measures is that criminal proceedings should be used with restraint, and only when less intrusive measures have failed or would be inappropriate.<sup>3</sup> In some cases, because of the nature and circumstances

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<sup>1</sup> Alternative measures in s 716 of the *Criminal Code* are defined as measures other than judicial proceedings under the *Criminal Code* used to deal with a person who is at least 18 years of age and is alleged to have committed an offence. Based on a combined reading of the definition of organization in s 2 of the *Criminal Code* and the definition of person in s 35 of the *Interpretation Act*, the term person includes an organization. For Extrajudicial Measures under the *Youth Criminal Justice Act* (the equivalent to Alternative Measures for adults), see the PPSC Deskbook directive “[5.4 Youth Criminal Justice](#)”.

<sup>2</sup> Alternative measures were enshrined in legislation for young persons years earlier under the *Young Offenders Act* and re-introduced and expanded as Extrajudicial Measures when the *Youth Criminal Justice Act* came into force in 2003.

<sup>3</sup> See, for example, *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Justice G. Arthur Martin, Chair), 1993.

of the offence and the offender, the public interest may be better served by a resolution outside of the traditional criminal process.

### **1.1. Authorization by Attorney General of Canada**

Pursuant to s. 717(1)(a) of the *Criminal Code*, the Attorney General of Canada hereby authorizes the use by federal prosecutors of alternative measures consistent with the principles and criteria in this directive.<sup>4</sup>

For the purposes of s. 717(1)(a) of the *Criminal Code*, the range of acceptable measures that can form part of an alternative measures program authorized by the Attorney General of Canada can include community service, restitution or compensation in cash or services, mediation, referrals to specialized programs for counselling, treatment or education, (for example, life skills, drug or alcohol treatment, anger management), referrals to community, aboriginal or youth justice committees, victim-offender reconciliation programs and similar measures aimed at restorative justice, a letter of apology or essay, and other reasonable alternatives or measures that are consistent with the objectives and criteria in this directive. For greater certainty, a federal prosecutor can also refer an offender to an appropriate alternative measure that is part of a program authorized by a province or territory in accordance with s. 717(1)(a). There are also alternative measures expressly contained in some federal statutes, as discussed at note 7 and at section 6 of this directive on regulatory prosecutions.

### **1.2. Section 717 of the *Criminal Code***

Section 717 of the *Criminal Code* recognizes that where it is not inconsistent with the protection of society and certain conditions are met,<sup>5</sup> Crown counsel can exercise discretion to deal with persons who are alleged to have committed offences through the use of measures that are alternatives to judicial proceedings and conventional prosecutions. Addressing an offender's conduct through measures outside of the traditional court process is commonly known as "diversion". As noted above at section 1.1, a program of alternative measures can consist of a range of acceptable measures that can vary among communities.

Section 717 of the *Criminal Code* applies to all federal offences by operation of s. 34(2) of the *Interpretation Act*,<sup>6</sup> unless the federal statute expressly excludes it. In fact, some federal statutes have their own express and specific alternative measures regimes, as discussed below at section 6 of this directive.<sup>7</sup>

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<sup>4</sup> For similar authorization regarding the use of extrajudicial measures in relation to young persons, see the PPSC Deskbook directive "[5.4 Youth Criminal Justice](#)", *supra* note 1.

<sup>5</sup> These conditions are identified below at section 2.2 of this directive.

<sup>6</sup> RSC 1985, c I-21.

<sup>7</sup> For example, specific alternative measures regimes exist in the *Species at Risk Act*, SC 2002, c 29, s 108, and the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, ss 295, 296 and 309.

## **2. STATEMENT OF ALTERNATIVE MEASURES POLICY FOR ADULTS AND ORGANIZATIONS**

### **2.1. General principles**

Crown counsel should adopt a principled but flexible approach in determining whether alternative measures are appropriate in a given case. Alternative measures will generally be most suitable for offenders with no record, who have committed less serious offences and are unlikely to reoffend.<sup>8</sup>

The purpose of alternative measures is to promote a sense of responsibility in the offender and an acknowledgment of the harm done, and to satisfy the important objectives of public safety, deterrence, denunciation, rehabilitation, and reparation to victims and the community, without going through the formal court process. Crown counsel should consider alternative measures where the successful completion of the alternative measure can achieve the objectives of the prosecution.

Participation by an accused in alternative measures is voluntary and requires the accused's consent.<sup>9</sup> If the offender complies with the conditions of the alternative measure, the Crown can exercise its discretion not to prosecute the offender for the offence.

The use of alternative measures can occur before or after a charge is laid.<sup>10</sup> This directive generally applies after a charge has been laid and the file has been forwarded to Crown counsel, except in regions where pre-charge screening takes place, where it will apply both pre-charge and post-charge.

### **2.2. Statutory preconditions applicable to alternative measures**

When Crown counsel is considering exercising the discretion to use an alternative measure, Crown counsel must be satisfied that the following statutory pre-conditions have been satisfied:

- the measures are part of an authorized alternative measures program (s. 717(1)(a) of the *Criminal Code*;<sup>11</sup>

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<sup>8</sup> Factors to assist Crown counsel in identifying less serious offences are listed below at section 3.2 of this directive.

<sup>9</sup> *Criminal Code*, s 717(1)(c).

<sup>10</sup> Investigative bodies and enforcement agencies also "divert" alleged offenders by exercising their discretion not to lay charges and sometimes referring the offenders to programs instead.

<sup>11</sup> Under s 717 (1)(a), alternative measures programs can be authorized by the Attorney General, the Attorney General's delegate, or by a person or a person within a class of persons designated by the lieutenant governor in council of a province. (Note the definition of Attorney General in s 2 of the *Criminal Code*; also note that s 35 of the *Interpretation Act* defines province to include the territories).



- the particular alternative measure is considered appropriate, and consultation has been undertaken, where necessary, with victims, the enforcement agency or investigative body<sup>12</sup> or other interested parties, and an alternative measure is in the interests of society, the offender and the victim (s. 717(1)(b)) of the *Criminal Code*;
- the offender is willing to acknowledge responsibility for the alleged offence (s. 717(1)(e) of the *Criminal Code*);
- there is sufficient evidence to proceed with the prosecution, and the prosecution is not barred at law (ss. 717(1)(f) and (g) of the *Criminal Code*); and
- the offender has been advised that he or she does not have to consent to an alternative measures process and has, before consenting to participate, been advised of the right to be represented by counsel (ss. 717(1)(c) and (d) of the *Criminal Code*).

Where Crown counsel is considering alternative measures, and the federal act does not contain its own alternative measures regime (for example, the *Species at Risk Act*,<sup>13</sup> the *Canadian Environmental Protection Act, 1999*<sup>14</sup> and the *Youth Criminal Justice Act*,<sup>15</sup> all have specific regimes), Crown counsel must be satisfied that the above conditions in s. 717 of the *Criminal Code* have been met.

### **3. GUIDELINES FOR APPLICATION OF THE ALTERNATIVE MEASURES POLICY**

#### **3.1. The circumstances of the offender**

Crown counsel should consider the following factors in assessing an offender's suitability for alternative measures:

- whether the offender has previously committed an offence (including convictions, discharges or diversions) and if so, the date and nature of the violations;
- whether the enforcement agency or investigative body has used compliance measures, pre-charge diversion, or alternatives to charging against the offender in the past for similar or related conduct;

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<sup>12</sup> Some statutes set out complex regulatory regimes that are enforced by non-police personnel who have a particular expertise. Consultation with the regulatory agency and the relevant Departmental Legal Services Unit is important. (Federal government departments generally have legal services units, commonly referred to as LSUs, staffed by lawyers from the Department of Justice who provide legal services and advice to the department).

<sup>13</sup> SC 2002, c 29.

<sup>14</sup> SC 1999, c 33.

<sup>15</sup> SC 2002, c 1, in force April 1, 2003.

- the offender's remorse (including for example, whether the offender has agreed to fairly compensate any victim(s));
- whether the offender poses a risk to the community;
- whether the offender has undertaken rehabilitative measures to prevent a recurrence of the offence; and
- whether the offender is facing other charges.

### 3.2. The nature of the offence

As indicated above, this directive is directed at less serious offences. The following factors are relevant in determining the seriousness of an offence:

- whether the matter would proceed summarily;
- whether a minimum punishment is prescribed;
- whether the offence usually results in a sentence of imprisonment;
- whether a conditional sentence is available;
- the impact on the victim(s), including the potential or actual harm to the victims(s) or to society in general;
- the views of the enforcement agency or the investigative body;
- relevant aggravating factors set out in s. 718.2, and for organizations in s. 718.21 of the *Criminal Code*, as well as similar factors in other federal statutes.<sup>16</sup>

Crown counsel must also ascertain whether the offence is the subject of legislation, directives or guidelines that could affect the decision to address the conduct through an alternative measure. See for example the PPSC Deskbook guidelines on “[5.5 Domestic Violence](#)”, “[5.7 Impaired Driving Cases](#)”, “[6.3 Statutory Restrictions on the use of Conditional Sentences](#)”, “[6.2 Mandatory Minimum Penalties for Particular Drug Offences under the Controlled Drugs and Substances Act](#)”<sup>17</sup> and “[6.4 Mandatory Minimum Penalties under the Criminal Code](#)” and also the PPSC Deskbook directive “[5.6 Victims of Crime](#)”.

### 3.3. Circumstances that can preclude alternative measures

The presence of any of the following circumstances will usually preclude alternative measures:

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<sup>16</sup> For example, see the *Antarctic Environmental Protection Act*, SC 2003, c 20; *Canada National Marine Conservation Areas Act*, SC 2002, c 18; *Canada National Parks Act*, SC 2000, c 32; *Canadian Environmental Protection Act*, 1999, SC 1999, c 33; *International River Improvements Act*, RSC 1985, c I-20; *Saguenay-St Lawrence Marine Park Act*, SC 1997, c 37 and *Canada Consumer Product Safety Act*, SC 2010, c 21.

<sup>17</sup> SC 1996, c 19.

- the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than merely transient or trifling in nature;
- a weapon was used or threatened to be used in the commission of the offence;<sup>18</sup>
- the offence is a sexual offence;
- the offence had a serious impact upon the victim or victims (physical, psychological or financial);
- the conduct demonstrated sophisticated planning (for example, the offence was part of an ongoing criminal enterprise);
- a person trafficked, or possessed for the purpose of trafficking, Schedule I drugs such as cocaine, heroin, ecstasy or methamphetamine.
- a person trafficked in a controlled substance or possessed the substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any public place usually frequented by persons under the age of 18 years;
- a person trafficked in a controlled substance, or possessed the substance for the purpose of trafficking, to a person under the age of 18 years;
- a person used a person under the age of 18 years or involved such a person in committing a drug offence;<sup>19</sup>
- the degree to which the motivation for committing a drug offence was profit; or
- serious harm resulted or could potentially have resulted to human health, safety or security, the environment, a natural resource, a regulated industry, or to the public confidence.

After considering the circumstances above, if Crown counsel nevertheless concludes that exceptional circumstances exist that render the use of alternative measures in the public interest in a given case, or considers the case borderline, Crown counsel must consult the Chief Federal Prosecutor, or his or her designate, before making a decision.

#### **4. PREFERRED PROCEDURE AND SUCCESSFUL COMPLETION OF ALTERNATIVE MEASURES**

Crown counsel are encouraged to give early consideration to the appropriateness of alternative measures, in addition to responding to any overtures from defence counsel.

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<sup>18</sup> In relation to regulatory statutes, hunting offences involving the use of a gun or another hunting implement should not be presumed to be excluded from alternative measures.

<sup>19</sup> Crown counsel must keep in mind that trafficking and possession for the purpose of trafficking in Schedule I and Schedule II drugs (except for trafficking and possession for the purpose in three kilograms or less of Schedule II drugs, which are exempt from the MMP regime) are subject to MMPs when certain aggravating factors are present, some of which are identified on this list. Thus the drug offences where alternatives measures would even be an option for Schedule I and Schedule II drugs will generally be simple possession, trafficking in smaller amounts of Schedule II drugs, and trafficking where none of the aggravating factors listed in s 5(3) of the CDSA are present.

When Crown counsel has decided to use an alternative measure, court dates should be set for follow-up on the offender's progress and ultimate completion of the measure. The charges should be withdrawn following the completion of the alternative measure to the satisfaction of the Crown. Crown counsel should encourage the court to endorse the information to indicate that charges were withdrawn for alternative measures. The Crown file, including the electronic file, should be documented accordingly. If charges were not laid before the alternative measure was used, a prosecution should proceed if the alternative measure was not completed to the satisfaction of the Crown.

## **5. FAILURE TO COMPLETE ALTERNATIVE MEASURES**

If the offender fails to complete the alternative measure, criminal proceedings should ordinarily be continued. However, before doing so, Crown counsel should determine why the measure was not completed and determine whether it could be completed. Crown counsel should assess the appropriateness of proceeding with a prosecution in light of those facts, as exceptional circumstances may exist that would make proceeding against the offender unfair.

## **6. REGULATORY PROSECUTIONS**

The availability of alternative measures is not restricted to offences under the *Criminal Code* or the *Controlled Drugs and Substances Act*. As previously noted, other federal statutes, such as the *Canadian Environmental Protection Act, 1999* (CEPA) and the *Species at Risk Act*, contain express provisions for the use of alternative measures.<sup>20</sup> In addition, in cases where the regulatory statute does not expressly provide for alternative measures, s. 717 of the *Criminal Code* applies by virtue of the *Interpretation Act*, which provides for general application of the *Criminal Code* provisions to other federal statutes unless the statute provides otherwise.<sup>21</sup> In these latter circumstances, alternative measures can be used in accordance with s. 717 of the *Criminal Code* and this directive.

In highly regulated areas, including those related to human health and safety, food safety, occupational health and safety, the environment, and sustainable management of natural resources, Crown counsel must consult with the relevant agency to ensure that the agency's goals and relevant compliance policies are considered.

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<sup>20</sup> See full citations for these acts at note 7.

<sup>21</sup> RSC 1985, c I-21, s 34(2).



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.9 WAIVER OF CHARGES**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Offences are normally tried in the judicial district where they are alleged to have been committed.<sup>1</sup> This guideline sets out the policy on when the Director of Public Prosecutions (DPP) will consent to waivers of charges (i) from one judicial territorial jurisdiction to another in the same province ("intra-provincial" waivers of charges, s. 479 of the *Criminal Code* (Code)) and (ii) from one province to another ("inter-provincial" waivers, s. 478(3) of the Code).

### 2. STATEMENT OF POLICY

Both inter-provincial and intra-provincial waivers must meet the following requirements for consent from the DPP:

- the offence must not be a s. 469 of the Code offence;
- the proceedings must have been instituted at the instance of the Government of Canada and conducted by or on its behalf;

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<sup>1</sup> See *Criminal Code*, RSC 1985, c C-46, ss 470, 478(1).

- the DPP, or his or her delegate, must consent to the waiver;<sup>2</sup> and
- the accused must have agreed to plead guilty to the charge being waived.

Upon the request of the accused, together with a written undertaking to plead guilty, the DPP, or his or her delegate, generally will consent to a waiver of charges from one jurisdiction to another if the transfer of charges is in the public interest.<sup>3</sup> The following considerations, among others, are relevant in assessing public interest:

- a) Does the accused have substantial ties with the jurisdiction to which the charge would be waived (the "receiving" jurisdiction)?
- b) Are the offences of such a nature that we should expect that the victim (and/ or members of the victims family) may want to participate in or attend the sentencing hearing?
- c) Would the waiver create inconveniences for the victim (and/ or for members of the victims' family) to attend or participate in the sentencing hearing?
- d) Are the sentencing practices and precedents in the receiving jurisdiction reasonably consistent with those of the jurisdiction from which the charge is to be waived (the "originating" jurisdiction)?
- e) Is there a significant public interest in the case such that it ought to be disposed of in the community where the offence occurred?
- f) Is a waiver likely to result in undue delay, or has undue delay already occurred?
- g) Will splitting up proceedings cause undue complexity, for example where outstanding forfeiture hearings or other ancillary proceedings remain in the originating jurisdiction?
- h) Is there a reasonable basis to believe that once the charge is waived the accused may withdraw the undertaking to plead guilty to the offence, thereby requiring the charge to be returned to the originating jurisdiction?
- i) Despite the undertaking to plead guilty, are significant aggravating or mitigating facts likely to be in issue, thus requiring the Crown to call *viva voce* evidence from the originating jurisdiction under the rule in *R v Gardiner*?<sup>4</sup>

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<sup>2</sup> See the PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)" regarding the delegation of the decision to consent to inter-provincial waivers to Chief Federal Prosecutors and intra-provincial waivers to Crown counsel. Pursuant to s 9(1) of the *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act], the DPP may delegate this decision-making to Crown counsel. Sections 478 and 479 of the Code, *supra* note 1 specify that the "Attorney General" must consent to the transfer of charges. Section 2 of the Code, *supra* note 1 defines "Attorney General" as including his or her lawful deputy. Section 3(4) of the DPP Act specifies that the DPP is the Attorney General's lawful deputy for the purposes of exercising the prosecution functions set out in s 3 of the DPP Act including the conduct of prosecutions.

<sup>3</sup> *R v Fleming* (1992), 72 CCC (3d) 133 (Man QB): The Courts will not interfere with the Attorney General's refusal to consent to a transfer unless it is arbitrarily exercised.

<sup>4</sup> [1982] 2 SCR 368 at 413 ff; 68 CCC (2d) 477 at 513-16. See *Criminal Code*, *supra* note 1, s 724(3).

### 3. PROCEDURE<sup>5</sup>

An accused requesting a waiver must deliver a signed Application for Waiver,<sup>6</sup> to the appropriate Public Prosecution Service of Canada (PPSC) Regional Office,<sup>7</sup> along with a written undertaking to plead guilty in the receiving jurisdiction to the charge(s) for which waiver is sought. The Application for Waiver must state the following:

- (a) the full name of accused;
- (b) the current location of the accused;
- (c) a description of the offence and a copy of the relevant information(s), to make clear which charge(s) is the subject of the request;
- (d) the name of the originating and receiving judicial districts; and
- (e) the specific level of court to which the charge(s) is sought to be waived and the specific level of court from which the charge(s) is waived.<sup>8</sup>

If the waiver request is approved, Crown counsel must prepare a written Consent to the Transfer of Charges<sup>9</sup> which must include the following:

- (a) a description of the offence, including the name of the substance if an illegal substance is involved;
- (b) the date and place where the offence is alleged to have occurred;
- (c) a reference to the accused's undertaking to plead guilty;
- (d) the name and current location of the accused; and
- (e) the signature of the Chief Federal Prosecutor (CFP) (inter-provincial waivers) or Crown counsel (intra-provincial waivers) of the originating Regional Office.

In addition to the Consent to the Transfer, the Regional Office in the originating jurisdiction must transmit to the "receiving" court the following documents:

- (a) the original information/indictment sworn in respect of the offence(s);
- (b) a summary of the facts alleged in support of the charge(s);
- (c) a copy of the accused's criminal record (if any);

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<sup>5</sup> This procedure should be followed for both intra-provincial and extra-provincial waivers.

<sup>6</sup> A sample waiver application is attached as Appendix "A".

<sup>7</sup> Note that accused persons, who wish to transfer *Criminal Code* charges from a province to a territory, file their requests for waivers of the *Criminal Code* charges with the originating provincial Attorney General's office or provincial prosecution service, rather than with a regional PPSC office. Waiver requests in respect of CDSA or other federal charges are processed through the originating PPSC offices.

<sup>8</sup> Appendix "D" lists equivalent court levels for each province and territory.

<sup>9</sup> A sample consent form is attached as Appendix "B".



- (d) a copy of the accused's Application for Waiver;
- (e) a copy of the undertaking to plead guilty;
- (f) a copy of the Certificate of Analyst and the Notice of Intention, if the charge(s) is under the *Controlled Drugs and Substances Act* (CDSA) (if necessary); and
- (g) a copy of the Notice to Seek Greater Punishment (if applicable) and other documents associated with impaired driving offences, if the charge(s) is under s. 253 of the Code.

To ensure that the receiving court receives the above documents, the Regional Office in the originating jurisdiction must:

- (a) ask the clerk of the originating court to transfer the information/indictment to the receiving court;
- (b) provide Crown counsel appearing in the receiving court with a prosecution brief including sufficient particulars about the offence to support the Crown's case and to enable the court to accept a plea of guilty;
- (c) provide Crown counsel appearing in the receiving court with a copy of any correspondence or notes made by the counsel previously handling the file in respect of any agreement with defence counsel on sentencing submissions; and
- (d) inform the investigating agency in the originating jurisdiction of the transfer.

The CFP in the originating jurisdiction, or persons the DPP has specifically delegated for this purpose, may consent to the waiver of charges on behalf of the DPP.<sup>10</sup> Where the waiver request is refused, as a general rule, the Regional Office should provide written reasons to counsel for the accused, or to the accused personally if he or she has not retained counsel.

For an inter-provincial waiver of charges, the receiving Regional Office should advise the originating Regional Office of the date the accused pleaded guilty and the sentence imposed. Upon receiving this information, the originating office should advise the investigative agency.

In serious cases involving victims, Crown counsel should notify victims in advance of the pending transfer. While the decision whether to waive is ultimately that of the DPP or his or her delegate, the CFP or Crown counsel should take into consideration the interests of the victim in making the decision.

Where the waiver of charges involves a provincial prosecution service, the process must respect the protocol adopted by the Federal/Provincial/Territorial Heads of Prosecution on transfer of charges (Appendix "C").

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<sup>10</sup> PPSC Deskbook guideline "[3.5 Delegated Decision-Making](#)", *supra* note 2.

#### 4. OUTSTANDING CHARGES IN DIFFERENT LOCATIONS

It is in the public interest that justice be administered speedily and that all known charges against an accused be disposed of as early as possible. Whenever practicable, Crown counsel should ask the appropriate police authorities to verify whether an accused has any outstanding charges in other jurisdictions. Where Crown counsel knows that the accused is facing additional charges in another jurisdiction, he or she should advise defence counsel of the outstanding charges. In the case of interprovincial charges, the accused may wish to take advantage of s. 478(3) of the Code.<sup>11</sup> Where charges to which the accused has not submitted an Application for Waiver are identified, a remand may be necessary so that the accused can consider whether to amend the Application for Waiver to include consent to plead guilty to the additional charges.

Where the accused has outstanding charges in different locations within the same province, waiver may not be appropriate unless the accused agrees to waive all of the charges.<sup>12</sup>

Crown counsel and defence counsel in the originating jurisdiction are to settle any factual disagreements with respect to the allegations underpinning the offence(s) to which the accused will plead guilty prior to transferring the file. Transfers should not require formal hearings on the facts in the receiving jurisdiction.

#### 5. POST-WAIVER

Where the accused fails to appear in the receiving court or refuses to plead guilty, the Regional Office which authorized the waiver must arrange for the clerk of the receiving court to return the information to the originating court. The accused must then re-appear before the originating court. If the accused fails to appear before the originating court, a warrant should be requested.

In the case of an inter-provincial waiver of charges, the receiving Regional Office or prosecuting agent may not reduce the charge to a lesser included offence without first consulting the originating Regional Office. The originating office should advise the receiving office in writing of any discussions with respect to sentencing that took place

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<sup>11</sup> *R v Parisien* (1971), 3 CCC (2d) 433 (BCCA).

<sup>12</sup> A partial waiver will not be refused solely on this basis that an accused intends to contest some aspect of his or her outstanding charges. However, the accused should not be allowed to benefit from a partial waiver where he or she is in violation of a court appearance order in another jurisdiction.

prior to the waiver; however, the originating office should not dictate a sentence recommendation to the receiving office.<sup>13</sup>

Where an accused who has consented to the waiver of charge to another jurisdiction “refuses to admit the factual allegations” underlying the offence, the indictment should be returned to the province where the offence was committed.<sup>14</sup>

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<sup>13</sup> *R v Lister* 2003 BCCA CanLII 269, 175 CCC (3d) 528 at paras 11-13: The sentencing judge in the receiving jurisdiction cannot entirely ignore cases decided in similar circumstances in the originating jurisdiction. That sentencing judge should give substantial consideration to joint submissions made by counsel where a charge is being waived by consent for disposition from one province to another. However, the sentencing judge is not bound to accept a joint submission from the originating jurisdiction and ultimately must decide what is an appropriate sentence. See also *R v Shaw* 2005 BCCA 380 CanLII, 199 CCC (3d) 93 at paras 11-12. “...upholding a sentence that deviates significantly from the approach in British Columbia runs the risk of allowing the Crown to drive too hard a bargain for the waiver of jurisdiction.”

<sup>14</sup> *R v Hirt* (1997), 34 WCB (2d) 441 (BCSC).

## **APPENDIX A – APPLICATION FOR WAIVER OF CHARGES**

### **APPLICATION FOR WAIVER OF CHARGES**

UNDER SECTION 478(3) or SECTION 479 OF THE *CRIMINAL CODE*

DATE

I, [name of accused] hereby advise that I am in custody in [institution, city, province or territory] (or I presently reside at [street, city, province or territory]). I wish to avail myself of the provisions of section 478(3) [or section 479] of the *Criminal Code* in respect of the following outstanding charge(s) against me:

[list charge(s) with full particulars as to date, place, etc.]

I wish to have the above charges transferred to [level of court, name of the receiving judicial district] from [level of court, name of the originating judicial district] in order that I may plead guilty to the charge(s) in accordance with section 478(3) (or section 479) of the *Criminal Code*.

---

(Applicant's signature)

## APPENDIX B – CONSENT TO THE TRANSFER OF CHARGES

I have been informed by [name of defence counsel] that [name of accused] has the following charge(s) outstanding against her/him in the \_\_\_\_\_ [name of province or territory]

[list charge(s) with full particulars as to date, place, etc.]

I have further been informed that [name of accused] is incarcerated [resides] at [location] and desires, in accordance with section 478(3) (or section 479) of the *Criminal Code*, to transfer this charge(s) to [level of court, city, province or territory] from [level of court, city, province or territory] in order to plead guilty to the charge(s);

I consent to [name of accused] appearing before a Judge in [level of court, city, province] to signify her/his consent to plead guilty and to plead guilty to the charge(s).

DATED at the City of \_\_\_\_\_ in the Province of /or Territory of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
(Chief Federal Prosecutor's or Crown counsel's signature)

## **APPENDIX C – F/P/T PROTOCOL ON THE INTER-PROVINCIAL TRANSFER OF CRIMINAL CHARGES**

This protocol addresses the definition of responsibilities and accountability between transferring and recipient provinces, territories, and the PPSC under s. 478 of the *Criminal Code* (of the Code).

### **(a) Statement of Principle**

It is understood that an originating jurisdiction, in agreeing to transfer of a charge to another, is effectively waiving control over that charge, subject to the provisions of this protocol.

### **(b) Reduction/Withdrawal of Charges**

Reduction of charges or withdrawal of multiple counts (*i.e.*, ss. 334, 355, 253(a) and 253(b) of the Code) should be delineated by the originating jurisdiction prior to transfer. The receiving jurisdiction should consult with the originating jurisdiction regarding any proposed reduction or withdrawal of a transferred charge.

### **(c) Sentencing Representations to the Court**

While the receiving jurisdiction will take into consideration any recommendations as to sentence offered by the originating jurisdiction, the position to be taken on sentencing will be determined by the receiving jurisdiction [in accordance with the sentencing regime of the receiving jurisdiction]. The Crown in the originating jurisdiction should communicate to defence counsel and unrepresented applicants for transfers in the originating jurisdiction that any recommendation on sentence agreed to before transfer will not be binding in the receiving jurisdiction.

### **(d) The Decision to Appeal**

The decision to appeal a sentence rests with the receiving jurisdiction. That jurisdiction may seek input from the originating jurisdiction in this regard, but shall be guided by the principles and ranges, as established by that jurisdiction's appellate courts.

### **(e) Limitation on Transfer Requests**

Generally, only one request for the transfer of charges between jurisdictions will be considered, subject to any exceptional circumstances which may exist. This should be communicated to applicants for transfer by the originating jurisdiction.

**(f) Victims/Victim Impact Statements**

In considering whether to transfer a charge, the originating jurisdiction must consider the interests of the victim, as well as the offender. Should the Crown in the originating jurisdiction receive an indication from the victim that he/she wishes to participate in person in the sentencing proceeding, this position should be considered prior to transferring the criminal charge. Where a charge is transferred, Victim Impact Statements which have been prepared will be provided in separate sealed envelopes to the receiving jurisdiction along with the charges and other related documentation.

Where the matter is sensitive and has significant public interest and concern, the originating jurisdiction should advise victims that the matter is being waived and that the ultimate control over the filing of Victim Impact Statements will be subject to the policies and practices of Crown counsel in the receiving jurisdiction. Victims in these circumstances will be provided a telephone number or other contact means to reach the Crown in the receiving jurisdiction in order to express their concerns about the filing of victim impact information. Otherwise, the filing of victim impact information should be at the discretion of the receiving Crown, with the benefit of recommendations from the originating jurisdiction but based on the receiving jurisdiction's policies and practices.

**(g) Documentation**

All receiving jurisdictions will attempt to provide certified copies of sentencing documentation to the originating jurisdiction.

**(h) Determination of the Facts**

Crown counsel in the originating jurisdiction should ensure that a summary of the facts is included in the documentation transferred to the receiving jurisdiction. Save in exceptional circumstances, Crown counsel in the receiving jurisdiction, in making representations to a Court, should not vary from the facts as determined by the Crown in the originating jurisdiction. This protocol does not provide for witnesses to travel from the originating jurisdiction to the receiving jurisdiction to establish the facts. Where it is proposed to vary from the facts as submitted by the originating jurisdiction, Crown Counsel in the receiving jurisdiction is encouraged to contact the Crown in the originating jurisdiction. A dispute as to the facts which cannot be resolved by Crown counsel in the receiving jurisdiction will result in the return of the file to the original jurisdiction for its attention.

**(i) Charges under the Controlled Drugs and Substances Act (CDSA)**

Currently, the PPSC and the provincial prosecution agencies of New Brunswick, Quebec, and Alberta (with respect to proceedings respecting youth, only), undertake the prosecution of CDSA charges. These jurisdictions may refer such charges to either a

provincial prosecuting agency which undertakes such prosecutions, or to the PPSC for disposition.

Where these matters fall within the prosecutorial responsibility of the Director of Public Prosecutions, on behalf of the Attorney General of Canada, prosecutors or standing agents engaged by the PPSC will generally conduct such transferred proceedings in the receiving jurisdiction, unless the PPSC opts to request the involvement of a provincial prosecution service.

**(j) Administration**

All jurisdictions are encouraged to have one office to coordinate transfers to and from that jurisdiction. In any jurisdiction where this is not feasible, that jurisdiction will provide all jurisdictions with a list of those individuals within that prosecution service who are responsible for transfer of criminal charges.



## APPENDIX D – EQUIVALENT COURT OF EACH PROVINCE AND TERRITORY

### EQUIVALENT COURT OF EACH PROVINCE AND TERRITORY

<b>Province/ Territory</b>	<b>Provincial Court</b>	<b>Superior Court</b>	<b>Youth Court</b>
Alberta	Provincial Court (Criminal Division)	Court of Queen's Bench	Provincial Court (Family and Youth Division)
British Columbia	Provincial Court	Supreme Court	Youth Court
Manitoba	Provincial Court	Court of Queen's Bench	Provincial Court (Youth Court)
New Brunswick	Provincial Court	Court of Queen's Bench	Provincial Court (Youth Court)
Newfoundland and Labrador	Provincial Court	Supreme Court, Trial Division	Provincial Court (Youth Court)
Nova Scotia	Provincial Court	Supreme Court	Provincial Court (Family Division)
Ontario	Court of Justice	Superior Court of Justice	Youth Court
Prince Edward Island	Provincial Court	Supreme Court Trial Division	Youth Court
Quebec	Court of Quebec (Criminal and Penal Division)	Superior Court	Court of Quebec (Youth Division)
Saskatchewan	Provincial Court	Court of Queen's Bench	Youth Court
Yukon Territory	Territorial Court	Supreme Court	Youth Court
Northwest Territories	Territorial Court	Supreme Court	Youth Court
Nunavut	Court of Justice	Court of Justice	Court of Justice (Youth Court)





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.10 ELECTIONS AND RE-ELECTIONS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline is designed to direct Crown counsel in the following exercises of prosecutorial discretion:

- deciding whether to proceed summarily or by indictment in "hybrid" ("dual procedure ") offences;
- consenting to re-election by an accused; and
- requiring a trial by a judge and jury under s. 568 of the *Criminal Code* (Code).

Like any exercise of prosecutorial discretion, decisions regarding elections and re-elections must be made in accordance with Crown counsel's duty to be fair.<sup>1</sup> Such decisions must not be, and must not appear to be, an attempt by the prosecutor to achieve an unfair tactical advantage.

While the Crown is not legally required to give reasons for its elections or its refusal to consent to an accused's intended re-election, the need to maintain public confidence in the administration of justice may necessitate in some circumstances the giving of reasons. For example, Crown counsel should consider providing an explanation for a particular decision regarding elections and re-elections where the basis is not self-evident and it is reasonably foreseeable that the lack of an explanation would lead the court or members of the public to draw conclusions that attribute erroneous and improper motives to the Crown's exercise of

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<sup>1</sup> See the PPSC Deskbook guideline "[2.2 Duties and Responsibilities of Crown Counsel](#)". For example, Crown counsel's election decision should not be made for the sole purpose of prohibiting access to conditional sentences under s 742.1(f) of the Code. See also *R v De Zen*, [2010] OJ No 601 (SCJ).

prosecutorial discretion.<sup>2</sup> Prior to giving reasons in respect of these decisions, Crown counsel must consult with and seek prior approval of their Chief Federal Prosecutor (CFP) or the CFP's designate. Additionally, Crown counsel should note in the prosecution file the particular factor(s) which influenced their decision.

## 2. CROWN ELECTIONS IN HYBRID OFFENCES

In hybrid offences, Crown counsel has the discretion to proceed by summary conviction or indictment.<sup>3</sup> This discretion allows Crown counsel the flexibility of taking the specific circumstances of a case into account to ensure that the interests of justice, including the public's interest in the effective and efficient enforcement of the criminal law, are best served.

### 2.1. Statement of policy

Generally, Crown counsel should elect whether to proceed summarily or by indictment on a hybrid offence before the accused is asked to enter a plea on the charge(s).

When deciding whether to proceed summarily or by indictment,<sup>4</sup> Crown counsel shall examine the circumstances surrounding the offence and the background of the accused. The following factors are of particular importance:

- whether the facts alleged make the offence a relatively serious one, for example
  - (i) causation of death or serious bodily harm;
  - (ii) large number of victims or large financial loss;
  - (iii) an innocent third party suffered significant losses because of the actions of the accused or by innocently acting on the advice of the accused;
  - (iv) the accused, or someone on the accused's behalf, attempted to tamper with important evidence or witnesses; or
  - (v) the accused used intimidation to coerce others to assist in or acquiesce in the offence;

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<sup>2</sup> *Ibid* at paras 35-36. See also *R v Gill*, 2012 ONCA 607 at para 77.

<sup>3</sup> For a discussion of the nature of hybrid offences, see *R v Dudley* 2009 SCC 58, [2009] 3 SCR 570 [*Dudley*]; see generally *R v Smythe*, [1971] SCR 680, (1971), 3 CCC (2d) 366, which held that the discretion given by law to the Attorney General to prosecute by way of summary conviction or on indictment is not discriminatory or contrary to the principles of equality under the *Canadian Bill of Rights*; *R v Century 21 Ramos Realty* (1987), 32 CCC (3d) 353 (Ont CA), holding that the authority of Crown counsel to elect the mode of procedure in hybrid offences is not contrary to the *Charter of Rights and Freedoms*; *R v V.T.*, [1992] 1 SCR 749, (1992), 71 CCC (3d) 32 which confirmed *R v Smythe*.

<sup>4</sup> Before the Crown elects, a hybrid offence is treated as an indictable offence, pursuant to s 34(1)(a) of the *Interpretation Act*, RSC 1985, c I-21. See also *Dudley*, *supra* note 3 at paras 18, 20. Where the Crown fails to elect the mode of procedure for a hybrid offence and the case proceeds in summary conviction court, the Crown is deemed to have elected to proceed on a summary conviction basis: see E. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed, Aurora (Ontario: Canada Law Book, 2010) at s 7:2070.

- whether the accused has a lengthy criminal record or a record of criminal convictions for similar types of offences;
- whether, in the event of a conviction, the range of sentences at the summary conviction level could adequately address the purpose and principles of sentencing in respect of the particular offender and offence;<sup>5</sup>
- the effect that having to testify at both a preliminary inquiry and a trial may have on witnesses;<sup>6</sup>
- the prevalence of the offence in the community and the need for deterrence;
- whether the accused is alleged to be a member of a criminal organization as defined in s. 476.1(1) of the Code;
- whether the accused holds himself or herself out as a member or sympathizer of a criminal organization or of an organization that uses physical violence or intimidation, or wears symbols associated with a criminal organization; and,
- whether it is in the public interest to have a trial by jury.

Where an accused is charged with a number of offences arising out of the same transaction, Crown counsel also should consider making elections that avoid a multiplicity of proceedings. Such a course may benefit the accused, by reducing his or her court appearances, as well as serve the interests of the administration of justice. This approach will be beneficial not only at the trial level, but also in the event of an appeal.

## **2.2. Crown re-elections**

Where the Crown initially elects to proceed by indictment, Crown counsel normally may re-elect to proceed summarily without the accused's consent, unless the preliminary inquiry or trial has begun.<sup>7</sup> Crown re-elections may be used, for example, in respect of guilty plea agreements. The factors set out in the previous paragraph apply in respect of re-elections.

## **2.3. Proceeding summarily or by indictment beyond the six-month limitation period**

A summary conviction court has jurisdiction, with the consent of both the Crown and defence counsel, pursuant to s. 786(2) of the Code, over time-limited summary conviction

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<sup>5</sup> Note however that imposition of the maximum sentence for a summary conviction offence does not require the "the "worst offence" having been committed in the "worst circumstances". See *R v LM*, 2008 SCC 31, [2008] 2 SCR 163 at paras 18-22.

<sup>6</sup> If the procedure by indictment is chosen, this may lead to the preferral of a direct indictment or resort to s 540(7) of the Code where the complainant's evidence is considered credible and trustworthy. See the PPSC Deskbook guideline "[3.6 Direct Indictments](#)" and the PPSC Deskbook directive "[5.6 Victims of Crime](#)".

<sup>7</sup> *R v Sheehan*, 2010 NLTD 167 (CanLII) at paras 10-16, citing *Abarca v R*, (1980) 57 CCC (2d) 410, (Ont CA) at para 17, *R v Graetz*, 2007 QCCS 309 (Sup Ct) at paras 16-17, *R v Linton*, [1994], 90 CCC (3d) 528, 18 OR (3d) 647 (Gen Div).

proceedings.<sup>8</sup> Absent consent, it does not. Where the Crown elects to proceed summarily beyond the statutory limitation period, the prosecutor and the defendant must both declare expressly on the record — again, before plea — that they agree to proceed summarily.<sup>9</sup>

The failure of the accused to consent to the prosecution of a hybrid offence by way of summary conviction beyond the limitation period is fatal to the validity of the Crown's election and to the proceedings that ensued.<sup>10</sup> However, the information remains valid, and the Crown may still proceed by indictment, unless "the evidence discloses an abuse of process arising from improper Crown motive, or resulting prejudice to the accused sufficient to violate the community's sense of fair play and decency".<sup>11</sup> In some circumstances, the Crown's election may be impugned as an abuse of process if it appears that it was made solely to circumvent a limitation period.<sup>12</sup>

Where, having considered the factors set out in section 2.1 of this guideline, Crown counsel would normally elect to proceed summarily but the limitation period for a summary proceeding has expired and the accused has refused to give consent to have the matter proceed by summary conviction, Crown counsel generally should not elect to proceed by indictment unless:

- the particular circumstances of the offence did not come to light until shortly before or at some time after the limitation period expired;
- the accused contributed significantly to the delay;
- the investigative agency acted with due diligence but the investigation continued beyond the limitation period because of the complexity of the case; or
- not proceeding would bring the administration of justice into disrepute.

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<sup>8</sup> See s 786 of the Code. For a discussion of the governing principles where a hybrid offence is prosecuted by way of summary conviction beyond the six-month limitation period, see *Dudley*, *supra* note 3 at paras 2, 24, 29. For example, where an information contains both indictable and straight summary conviction offences, defence counsel may want to avoid an indictable trial and may thus consent to a Crown election to proceed summarily in respect of statute-barred offences.

<sup>9</sup> *Dudley*, *supra* note 3 at para 19.

<sup>10</sup> *Ibid* at paras 42-44. Prior to *Dudley*, there was a large and divided body of case law considering the Crown's right to "re-elect" on the original information to proceed by indictment after first electing to proceed summarily; See e.g. *Dudley*, *supra* note 3 citing *Re Abarca and The Queen*, (1980) 57 CCC (2d) 410 (Ont CA) at para 17; *R v Jans*, (1990), 59 CCC (3d) 398 (Alta CA) [*Jans*]; *R v Burke*, (1992), 78 CCC (3d) 163 (Nfld CA); *R v Kalkhorany*, (1994), 89 CCC (3d) 184 (Ont CA); *R v Boutilier*, (1995), 104 CCC (3d) 327 (NSCA) [*Boutilier*]; See also *R v Phelps*, (1993), 79 CCC (3d) 550 (Ont CA).

<sup>11</sup> *Dudley*, *supra* note 3 at para 44.

<sup>12</sup> There are a number of decisions in the area, with each turning on its particular facts; See e.g. *Dudley*, *supra* note 3 at para 5; *R v Smith*, 210 NSR (2d) 234; 170 CCC (3d) 315, *R v Quinn* (1989), 54 CCC (3d) 157 (Que CA); *Boutilier*, *supra* note 10 (the first information was laid within the six month limitation period, but charged the wrong offence. On those facts the court was satisfied the second information was an abuse of process and that a stay was the appropriate remedy); *R v Belair* (1988), 41 CCC (3d) 329 (Ont CA); *Jans*, *supra* note 10.

### 3. RE-ELECTIONS BY AN ACCUSED

Where the accused is charged with an indictable offence other than those listed in s. 469 or s. 553 of the Code, the accused is permitted to elect his or her mode of trial (*i.e.*, trial by a provincial or territorial court judge, trial by judge alone or trial by judge and jury). After the initial election, the accused may seek to change the mode of trial by re-electing in accordance with the provisions of s. 561 or s. 561.1 of the Code (for Nunavut).<sup>13</sup> In most cases, these re-elections are authorized only with the Crown's consent.

The *Criminal Code* provisions authorizing re-election by the accused require that written notice be given to the Crown. They also require the Crown's consent be given in writing. However, ss. 561 and 561.1 of the Code are otherwise silent about the criteria or manner in which Crown prosecutors exercise the discretion to consent or withhold consent to the intended re-election.

This guideline applies to the re-elections described in ss. 473, 561 and 561.1 of the Code that require the consent of Crown counsel or the Director of Public Prosecutions (DPP). More specifically, these include re-elections:

- from judge alone or judge and jury to provincial court judge (ss. 561(1)(a) and (c) of the Code);
- from provincial court judge to judge alone or judge and jury (s. 561(2) of the Code);
- from judge and jury to judge alone for offences listed in s. 469 (s. 473 of the Code);
- to another mode of trial in the Nunavut Court of Justice (ss. 561.1(1)-(3) of the Code).

#### 3.1. Statement of policy

While the decision to consent or to refuse to consent to a re-election must be made on a case-by-case basis, Crown counsel should generally consent to a timely request for re-election made by an accused or counsel for the accused. The following factors are important in deciding whether to consent. In some instances one of them may be decisive:

- the timing of the request for re-election;<sup>14</sup>
- the impact of a re-election on the orderly administration of justice;<sup>15</sup>

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<sup>13</sup> Section 473 of the Code is specific to the offences listed in s 469 (e.g. murder) and allows for a trial without a jury when both the accused and Attorney General consent.

<sup>14</sup> For example, Crown counsel should ask: How soon after the time limit was the request made? Was the request made before a particular trial judge was assigned?

<sup>15</sup> Tardy re-elections may be harmful to the administration of justice for various practical reasons including jury selection proceedings, summons of potential jurors, inconveniencing witnesses, and Crown counsel trial preparation.



- reasons for the re-election;<sup>16</sup>
- whether the proposed re-election will result in delay that could lead to a violation of s. 11(b) of the *Canadian Charter of Rights and Freedoms*;
- whether the accused has previously re-elected in the case;
- whether the court, including prospective jurors and witnesses, will be inconvenienced by a re-election;
- the complexity of the legal issues; and
- whether it is in the public interest to have a trial by jury.

It should be borne in mind that the interests of the accused and those of the Attorney General are not the same when considering re-election as to mode of trial. The accused is entitled to base his or her decision to re-elect on purely tactical considerations. Crown counsel's exercise of discretion cannot be for tactical reasons but must take into account a much broader range of interests. These include legal, practical and ethical interests.

Absent Crown misconduct amounting to an abuse of process (arbitrary, capricious or improper considerations), the court has no jurisdiction to override the Crown's exercise of discretion not to consent.<sup>17</sup>

#### **4. DECISION TO REQUIRE TRIAL BY JUDGE AND JURY**

##### **4.1. Statement of policy**

Under s. 568 of the Code,<sup>18</sup> the DPP<sup>19</sup> may require an accused to be tried by a court composed of a judge and jury, even if the accused has previously elected or re-elected

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<sup>16</sup> For example, the Supreme Court of Canada affirmed the impropriety in trying to influence the outcome of a proceeding by trying to "select" the judge (i.e. "judge-shopping") in *R v Regan*, 2002 1 SCR 297 at para 60. See also *R v Ng* (2003), 173 CCC (3d) 349, 12 CR (6<sup>th</sup>) 1, [2003] 11 WWR 429 (Alta CA): "...Within the constraints of the fair trial process, the defence is entitled to press its case, as is the Crown. However, when the defence re-election to judge alone is firmly tethered to knowing the identity of the trial judge, this belies the assertion that it is the mode of trial which is of primary concern. In these circumstances, it clearly is not. Instead, the choice of mode of trial is being used as a means to manoeuvre the criminal justice system. If the accused considers the particular assigned judge a better option than the jury, then, and only then, does the preferred mode of trial become judge alone. But a right to select mode of trial, where one exists, is not tied to knowing the name of the trial judge. Indeed, the statutory framework under the *Criminal Code* is designed to ensure that the final choice of mode of trial is made before the name of the trial judge is disclosed, failing which Crown consent is required...."

<sup>17</sup> See e.g. *R v Ng* (2003), 173 CCC (3d) 349, 12 CR (6<sup>th</sup>) 1, [2003] 11 WWR 429 (Alta CA) at para 33 "The basis for a court to probe into prosecutorial discretion, therefore, arises in the limited case of an abuse of the court's process where the prosecutor's misconduct threatens either the accused's Charter right to a fair trial or the public interest in a fair and just trial process."

<sup>18</sup> In *Re Hanneson v The Queen* (1987), 31 CCC (3d) 560 (Ont HC), it was held that this section is not contrary to the *Canadian Charter of Rights and Freedoms*.

otherwise. The alleged offence must be punishable by more than five years imprisonment.

A requirement to be tried by judge and jury under s. 568 of the Code will be directed only when it is in the public interest to do so. Requiring a trial by judge and jury may be warranted on the basis of factors including the following:

- a) where someone who is normally involved in the administration of justice, such as a police officer, lawyer, or judge, is charged with a serious offence. It is important in those cases to ensure that the public has, and continues to have, confidence in the criminal justice system;
- b) where community standards are in issue, or where the accused's guilt or innocence is of particular public importance; and
- c) where jointly charged accused select different modes of trial, and the provincial court judge chooses not to exercise the power in s. 567 of the Code to decline to record the non-jury elections.

In all instances the decision to proceed under s. 568 of the Code shall be made personally by the DPP, on the advice of a Deputy DPP and the CFP.

#### **4.2. Content of the request**

The CFP must ensure preparation of the following:

1. a legal memorandum that should:
  - a) set out the names of the accused, the charges, and the date, if any, for which the decision under s. 568 of the Code is required;
  - b) summarize the admissible evidence in support of the charges;
  - c) set out the historical and/or procedural record of the case;
  - d) highlight any significant legal issues that are anticipated, and any issues of particular importance to the public interest;
  - e) explain the reasons why it is in the public interest to require a jury trial;
  - f) include a list and a reasoned and objective assessment of the factors weighing both for and against requiring a trial by judge and jury, and the recommendation of the CFP; and
  - g) when Crown counsel has provided notice to defence counsel, the memorandum should also set out any representations made by defence counsel in response to the notice of the prospect of a requirement;
2. Two original indictments containing all charges on which the requirement is sought to be directed. Both should be signed in the usual way by the person normally signing indictments in the Regional Office. Below that, the following should appear:

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<sup>19</sup> The DPP makes the decision under and on behalf of the Attorney General of Canada.

3. I hereby require the above-named accused to be tried by a court composed of a judge and jury pursuant to s. 568 of the *Criminal Code*. Dated at Ottawa, Ontario, this \_\_\_\_ day of \_\_\_\_, \_\_\_\_.

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Director of Public Prosecutions and Deputy Attorney General of Canada

#### **4.3. Procedure**

In general, requests for a requirement should be presented to the DPP at the earliest possible stage of proceedings. Generally, notice should be given to the accused or counsel for the accused.

The CFP shall review each recommendation and, if satisfied that the case is appropriate to direct a requirement under s. 568 of the Code, send it to the appropriate Deputy DPP with a recommendation.

If the Deputy DPP concludes that the circumstances do justify proceeding under s. 568 of the Code, then advice on the case will be prepared for the DPP and the recommendation will be forwarded to the DPP for consent. If the Deputy DPP concludes that proceeding under s. 568 is not appropriate in the circumstances, the Deputy DPP will advise the CFP that no recommendation will be made to the DPP. The DPP ultimately decides whether or not to require a jury trial under s. 568 of the Code. If the DPP accepts the recommendation, one of the original indictments, signed by the DPP, will be sent to the Regional Office. The second signed original will be filed at Headquarters.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.11 INFORMER PRIVILEGE**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline sets out the policy on protecting the identity of informers in prosecutions (“informer privilege”).

### 2. THE IMPORTANCE OF THE PRIVILEGE

Informer privilege is one of longstanding existence. The modern statement of the privilege dates back to the 19<sup>th</sup> century English case of *Marks v Beyfus*.<sup>1</sup> In *R v Leipert*<sup>2</sup> the Supreme Court of Canada stressed the significance of the rule in the following terms:

A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same.<sup>3</sup>

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<sup>1</sup> *Marks v Beyfus* (1890), 25 QBD 494.

<sup>2</sup> [1997] 1 SCR 281 [*Leipert*]; see also *Bisaillon v Keable*, [1983] 2 SCR 60 [*Bisaillon*] and *R v Scott*, [1990] 3 SCR 979 [*Scott*].

<sup>3</sup> *Leipert*, *ibid* at para 9.

In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it.<sup>4</sup>

The policy reasons that underlie this broad and powerful privilege are two-fold: to protect persons who give information related to criminal matters in confidence to the police from possible retribution and to encourage future potential informers to do the same.

The common law imposes a duty on the police, the Crown and the courts to protect informer privilege.<sup>5</sup> By virtue of the rationale underlying the privilege, police officers, prosecutors and judges cannot weigh, on a case-by-case basis, either the maintenance or the scope of the privilege depending on what risks the informer might face.<sup>6</sup> While a judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply.<sup>7</sup> Once a judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applies.<sup>8</sup> The non-discretionary nature of the privilege explains why the rule is referred to as "absolute."<sup>9</sup>

### 3. THE NATURE OF THE PRIVILEGE

Informer privilege is a class privilege. In *R v National Post*, the Supreme Court of Canada explained the significant features of a class privilege as follows:<sup>10</sup>

"At common law, privilege is classified as either relating to a class (e.g. solicitor and client privilege) or established on a case-by-case basis. In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case. Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice."  
[underlining added]

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<sup>4</sup> *Ibid* at para 14.

<sup>5</sup> *R v Barros*, [2011] 3 SCR 368 at para 37 [*Barros*].

<sup>6</sup> *Named Person v Vancouver Sun*, [2007] 3 SCR 253 at para 22 [*Named Person*]; *R v Basi*, [2009] 3 SCR at 389 [*Basi*].

<sup>7</sup> *Named Person*, *ibid* at para 47; *Basi*, *ibid* at para 44.

<sup>8</sup> *Named Person*, *ibid* at para 30.

<sup>9</sup> *Ibid* at para 23.

<sup>10</sup> [2010] 1 SCR 477 at para 42.

#### 4. STATEMENT OF POLICY

Crown counsel has a duty to protect the identity of informers.<sup>11</sup> Where the privilege applies, unless there is some other evidentiary basis to make an objection, Crown counsel must object to disclosure of information tending to reveal an informer's identity or status as an informer.

Crown counsel should discuss with the investigative agency whether any informer privilege issues are anticipated to arise in a proceeding. Informer issues not only may arise during court proceedings, but also may affect pre-trial disclosure obligations.

Early discussions with investigators will also be beneficial in that counsel can learn the extent of any risk to the informer if disclosure is ordered by the court, determine whether it may be necessary to have a certificate prepared under s. 37 of the *Canada Evidence Act*,<sup>12</sup> or gather other evidence to support the Crown's objection.<sup>13</sup>

Informer privilege may be invoked under the common law or by relying on s. 37 of the *Canada Evidence Act*.<sup>14</sup> Generally, Crown counsel should advance their objection on the basis of the common law rule first. It is only where a judge has dismissed Crown counsel's common law objection and privileged information tending to reveal the identity of an informer is to be released to an accused that the Crown should invoke s. 37 of the *Canada Evidence Act*.<sup>15</sup> When s. 37 is used the strictness of the informer privilege rule is not relaxed.<sup>16</sup>

Sometimes courts may, contrary to the position taken by the Crown, order the informer's identity revealed or order the informer to appear. Crown counsel has a number of options which may vary depending on the facts of the case and the level of court at which the issue arises:

- a) Disclose the information in question in compliance with the judge's ruling but only after fully informed waiver has been provided by both the informer and the Crown, and counsel has determined that it is in the public interest to do so. Before disclosing, counsel must consult with the police to determine if the informer is likely to be subject to retribution if the judge's ruling is followed and, if so, whether the police can provide protection.

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<sup>11</sup> *Barros*, *supra* note 5; see also *Leipert*, *supra* note 2 at para 10; *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1 at 14 [*Stinchcombe*].

<sup>12</sup> RSC 1985, c C-5.

<sup>13</sup> See the PPSC Deskbook directive "[4.1 Protecting Confidential Information under Section 37 of the Canada Evidence Act](#)."

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Basi*, *supra* note 6 at para 23.



Where disclosure is not feasible, Crown counsel may elect one of the following options;

- b) invoke s. 37 of the *Canada Evidence Act*.<sup>17</sup> Crown counsel can assert this claim personally.<sup>18</sup> However, it is preferable for a senior police officer to do so, as occurred in *R v Archer*;<sup>19</sup>
- c) inform the court that counsel declines to comply with the ruling and offer no evidence, as in *R v Leipert*.<sup>20</sup> The resulting acquittal can be appealed;
- d) inform the court that counsel declines to comply with the ruling to disclose and invite the court to enter a judicial stay of proceedings, as in *R v Creswell*.<sup>21</sup> Also, counsel may stay the proceedings under s. 579 of the *Criminal Code* where none of the foregoing options is feasible; in exceptional circumstances, counsel may stay and re-commence proceedings, as in *R v Scott*.<sup>22</sup> The Supreme Court of Canada found that this procedure was justifiable in the unusual circumstances of the case, but it is clearly an extraordinary recourse and should be used only in compelling situations. Counsel considering this option must first consult with the Chief Federal Prosecutor (CFP), who, in turn, may wish to consult with the appropriate Headquarters officials.

## 5. OPERATION OF THE PRIVILEGE

Informer privilege is a non-discretionary rule which binds the police, Crown and members of the judiciary.

Crown counsel cannot waive the privilege without the consent of the informer. Once it is established that the privilege exists, the court is bound to apply the rule.<sup>23</sup> Even if Crown counsel does not assert the rule, the court must apply it of its own motion.<sup>24</sup>

## 6. SCOPE OF THE PRIVILEGE

Informer privilege is “extremely broad” in its application.<sup>25</sup> It applies to both documentary evidence and oral testimony; and in both criminal and civil proceedings.<sup>26</sup> It

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<sup>17</sup> *Supra* note 12.

<sup>18</sup> *R v Meuckon* (1990), 57 CCC (3d) 193 (BCCA).

<sup>19</sup> (1989), 47 CCC (3d) 567 (Alta CA); see also *supra* note 12.

<sup>20</sup> *Leipert*, *supra* note 2.

<sup>21</sup> (2000) BCCA 583.

<sup>22</sup> *Scott*, *supra* note 2.

<sup>23</sup> *Named Person*, *supra* note 6 at para 23.

<sup>24</sup> *Bisaillon*, *supra* note 2 at 93.

<sup>25</sup> *Named Person*, *supra* note 6 at para 26.

<sup>26</sup> *Ibid.*

is not limited to the courtroom.<sup>27</sup> it also protects against revelation of the informer's identity in public.<sup>28</sup>

The privilege protects not only the informer's name but also any information that might tend to reveal the identity of the informer.<sup>29</sup> Because the identification of informers can be revealed by seemingly innocuous pieces of information, scrupulous care must be taken in protecting from disclosure any information that may disclose their identity.<sup>30</sup> This includes information that tends to narrow the pool of people who have the same characteristics or identifiers as the informer.<sup>31</sup> Thus, Crown counsel must object to questions which narrow the field of possible informers in a way that may disclose indirectly the informer's identity.

## 7. INNOCENCE AT STAKE IS THE ONLY EXCEPTION

The only exception to informer privilege is innocence at stake: In *Leipert, Named Person* and *Basi*, the Supreme Court of Canada confirmed that the only real exception to informer privilege is "when the innocence of the accused is demonstrably at stake."<sup>32</sup> The Court also held that no exception exists for full answer and defence or for disclosure under *Stinchcombe*.<sup>33</sup> All other purported exceptions were held to be either applications of the innocence at stake exception or examples of situations where the privilege does not apply.<sup>34</sup>

When the innocence at stake is alleged, the procedure mandated by *R v McClure*<sup>35</sup> must be followed. *McClure* comprises a threshold test and a two-stage innocence at stake test. To satisfy the threshold test, the accused must establish that (1) the information is not available from any other source, and (2) he or she is otherwise unable to raise a reasonable doubt. In *R v Brown*<sup>36</sup> the Supreme Court stated that the second component of the threshold test was intended to carefully screen requests for access to information that may reveal the identity of an informer. Access is allowed only when (1) the accused has shown that he has no other defence, and (2) the requested information would make a positive difference in the strength of the defence case. If the threshold test is met, the judge must proceed to the following two stages:

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<sup>27</sup> *Barros*, *supra* note 5 at para 30.

<sup>28</sup> *Bisaillon*, *supra* note 2.

<sup>29</sup> *Ibid.*

<sup>30</sup> R W Hubbard, S Magotiaux, & S M Duncan, *The Law of Privilege in Canada*, (loose-leaf) at 2.4.

<sup>31</sup> *R v Omar*, 2007 ONCA 117 at para 40.

<sup>32</sup> *Basi*, *supra* note 6 at para 37.

<sup>33</sup> *Stinchcombe*, *supra* note 11.

<sup>34</sup> *Named Person*, *supra* note 6 at para 29.

<sup>35</sup> [2001] 1 SCR 445, 2001 SCC 14.

<sup>36</sup> [2002] 2 SCR 185, 2002 SCC 32 at para 55.

- Stage 1 – The accused must demonstrate an evidentiary basis to conclude that information exists that could raise a reasonable doubt as to his guilt; and
- Stage 2 – If the stage 1 test is met, the judge should examine the information to determine whether in fact it is likely to raise a reasonable doubt as to his guilt.

In each instance, an accused must show “some basis” to believe his or her innocence is at stake. If that basis is shown, the court should “only reveal as much information as is essential to allow proof of innocence.”<sup>37</sup>

## 8. SITUATIONS WHERE THE PRIVILEGE MIGHT NOT APPLY

There are situations where informer privilege does not apply, where the information-provider is a police agent or agent provocateur, when the privilege has been waived, or where a person provides information to the police in the absence of a promise or guarantee of confidentiality, either express or implied.<sup>38</sup> In these situations, the information-provider does not have (or, in the case of waiver, no longer has) informer status.

### a) Distinguishing Agents from Informers

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

A helpful explanation of the distinction between informers and agents is found in the Ontario Court of Appeal’s decision in *R v Babes*:<sup>39</sup>

In general terms, the distinction between an informer and an agent is that an informer merely furnishes information to the police and an agent acts on the direction of the police and goes “into the field” to participate in the illegal transaction in some way. The identity of an informer is protected by a strong privilege and, accordingly, is not disclosable, subject to the innocence at stake exception. The identity of an agent is disclosable.

Generally speaking, passive observers to criminal activities will be considered informers. In contrast, individuals who participate in the criminal activities under investigation as a result of being directed by the police will generally be considered police agents or *agents provocateurs*. A person may

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<sup>37</sup> *Leipert*, *supra* note 2 at para 33.

<sup>38</sup> *Barros* *supra* note 5 at para 31, *R v Named Person B*, 2013 SCC 9 at para 18.

<sup>39</sup> (2002), 146 CCC (3d) 465 at para 10.

have dual status as a confidential informer and police agent in relation to separate investigations or targets.<sup>40</sup>

b) Waiver of Informer Privilege

The privilege belongs jointly to the Crown and the informer. Neither can waive it without the consent of the other.<sup>41</sup> There is no basis for a deemed or implicit waiver of the privilege. To be operative, consent to waive must be clear, express and informed.<sup>42</sup> Inadvertent disclosure of an informer's identity does not result in waiver or loss of the privilege.<sup>43</sup>

c) Where Information is Provided in the Absence of a Promise or Guarantee of Confidentiality

Not everybody who provides information to the police thereby becomes a confidential informant. There must be a promise of protection and confidentiality. However, the promise need not be express and may be implicit in the circumstances: *Barros*, at para 31, *R v Named Person B*, 2013 SCC 9, at para 18. An implicit promise of informer privilege may arise even if the police did not intend to confer the status or consider the person an informer, so long as the police conduct in all the circumstances could have created reasonable expectations of confidentiality.

In *Basi*, Fish J. referred to the privilege arising in situations “where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information”.<sup>44</sup> This passage in *Basi* was relied on by the Ontario Court of Justice in *R v Kaboni*<sup>45</sup> where a 911 caller provided information to the police regarding a suspected impaired driver. Only later did she request anonymity. The judge held that the 911 caller did not have the status of an informer because she was never promised or guaranteed confidentiality by the police in

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<sup>40</sup> *Ibid* at paras 29-34. During the course of a wiretap investigation, a person who the Crown claimed to be an informer purchased contraband, using his own money, from individuals unrelated to the wiretap investigation. The police did not direct him to do so nor did they know that he was going to do what he did. The Court of Appeal agreed with the Crown that this activity in the field in respect to an unrelated investigation did not cause the informer to lose his status as such. An informer cannot, by his own actions, i.e., without any direction by the police, make himself a police agent.

<sup>41</sup> *Basi*, *supra* note 6 at para 40; *Leipert*, *supra* note 2 at para 15.

<sup>42</sup> *R v Schertzer*, 2008 CanLII 1952 (ON SC); *R v Sandham*, 2008 CanLII 84098 (ON SC).

<sup>43</sup> *R v Hazelwood*, [2000] OJ No 459 (SCJ) at paras 18-26; *R v Nicholson*, [2001] BCJ No 2239 (SC) at paras 15-16; *R v Hirschboltz*, 2004 SKQB 17 at paras 26-27; *R v Poncelet*, [2005] SJ No 756 (Sask QB) at para 16; *R v Santos*, [2007] OJ No 5235 (ONCJ) at para 16; *R v Beauchamp*, [2008] OJ No 2647 (SCJ) at para 24; A W Bryant, S N Lederman, M K Fuerst, *The Law of Evidence in Canada* (Markham: LexisNexis, 2009) at 1079.

<sup>44</sup> *Basi*, *supra* note 6 at para 36.

<sup>45</sup> 2010 ONCJ 91 (CanLII).

return for her information. See also *R v Chui*<sup>46</sup> where the court similarly rejected the notion that a person had the status of an informer where there was nothing in the facts to suggest that the information had been provided in confidence. *Kaboni* and *Chui* illustrate unsuccessful attempts by the police to retroactively confer informer status on persons lacking that status at the time they provided police with a statement or other information.

Since the relationship between the police and the informer/agent is crucial to the determination of the person's status, it is essential that Crown counsel obtain a full understanding of the nature of that relationship from the police. Counsel should discuss the matter with the CFP, or another experienced practitioner.

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<sup>46</sup> 2005 BCSC 353.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.12 JURY SELECTION**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. BACKGROUND

This guideline outlines the type of information that counsel may request from the police and other justice system participants with respect to prospective jurors and the ensuing disclosure obligations. These inquiries represent the maximum requests that counsel are permitted to make and should not be made, if such inquiries are conducted already by other justice system participants (e.g., sheriffs) or if it does not accord with the practices in counsel's jurisdiction.

### 2. SUGGESTED APPROACH

Counsel may request that the police conduct Canadian Police Information Centre (CPIC) and provincial/territorial data base system checks only for the purpose of confirming whether or not the juror has:

- 1) a conviction for which he/she was sentenced to a term of imprisonment exceeding 12 months<sup>1</sup> for which a pardon has not been received, as referred to in s. 638(1)(c) of the *Criminal Code*; or
- 2) a conviction that disqualifies them under the *Juror's Act* in the province or territory in which the trial will take place.

The request should be made in writing and should be specific.

Counsel will not seek out any additional information about the jurors unless so ordered or authorized by the court.

Counsel will not search or seek to have searched iCase for information about jurors.

All information sought and obtained will be disclosed to defence.

If by chance, other information does come to the knowledge of counsel, then this information must be disclosed to defence.

Any disclosure of information shall not include privileged information.

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<sup>1</sup>A sentence of imprisonment exceeding 12 months includes a conditional sentence.



This guideline applies in all cases except where specific jurisdictional Rules of Court, Court Orders or Court Practice Directives provide otherwise.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.13 RELEASE OF EXHIBITS FOR TESTING OR EXAMINATION**

**GUIDELINE OF THE DIRECTOR ISSUED UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline sets out the procedure for the release of exhibits<sup>1</sup> for testing or examination pursuant to s. 605 of the *Criminal Code*.<sup>2</sup> Crown counsel are also bound by the applicable criminal proceedings rules of the court in their particular jurisdiction.

Section 605 enables an accused to access original items seized for the purposes of testing or scientific analysis. The purpose of s. 605 is to enable the accused to properly prepare or present a defence.

The s. 605 power is discretionary. In order for a court to order release of an exhibit, an accused must provide a factual foundation demonstrating that there is an “air of reality”<sup>3</sup>

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<sup>1</sup> “Exhibits” refers to items seized that have been filed with a court and does not refer to exhibits that have been seized by the police but that are still in the possession of the investigators.

<sup>2</sup> Under s 605 of the *Criminal Code*, either Crown counsel or the accused may request the release of an exhibit for testing:

605 (1) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.

(2) Everyone who fails to comply with the terms of an order made under subsection (1) is guilty of contempt of court and may be dealt with summarily by the judge or provincial court judge who made the order or before whom the trial of the accused takes place.

to the examination sought. The examination sought must have a “meaningful capacity” to advance any available defence.<sup>4</sup> The request must be reasonable in the sense that it must be founded on something more than mere speculation.<sup>5</sup> It must relate to a live issue.<sup>6</sup> “Fishing expeditions” are not permitted.

## **2. CROWN CONSENT TO DEFENCE REQUESTS FOR RELEASE OF EXHIBITS**

Crown counsel may consent in writing to a defence application for the release of exhibits for testing except in the following situations:

- where the analysis by the government analyst is not yet completed;
- where the proposed analysis will unduly delay the trial;
- where the application is brought for an improper purpose;
- where the application clearly amounts to a “fishing expedition”; or
- where there is a reasonable basis to believe that the independent analyst proposed by the defence is not competent to conduct the analysis.

## **3. CONDITIONS FOR SECURITY, CUSTODY, AND CONTINUITY OF POSSESSION**

Crown counsel should request that the judge impose conditions pursuant to s. 605(1) that adequately safeguard the security, custody, and continuity of possession of the exhibit.<sup>7</sup> Accordingly, Crown counsel should seek to have the following terms included in the order:

- the name of the person who will have custody of the exhibit;
- the means by which the integrity of the exhibit will be safeguarded. This is especially important if the proposed testing is to take place outside of Canada;
- the time and place of the analysis or the length of notice to be given to Crown counsel regarding the time and place; and

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<sup>3</sup> See *R v Gauthier* 2013 SCC 32 at para 60 where the Court affirmed the test of “air of reality” in the context of putting a defence to the jury, previously stated in *R v Cinous*, 2002 SCC 29, [2002] 2 SCR 3. The Court reiterated that “it is not enough to simply identify “some evidence” or “any evidence”; the evidence must be “reasonably capable of supporting the inferences required for the defence to succeed”.

<sup>4</sup> *R v Rhab* (1985), 21 CCC (3d) 97, cited in *R v W.C.S.*, 2000 CanLII 28292 (NS SC), *R v Hodgson*, 1990 CanLII 2106 (BC CA); *R c Lawson* 2009 QCCQ 7738 at paras 23-25 [*Lawson*].

<sup>5</sup> *R v Eagles*, 1989 CanLII 205 (NS CA), (1989), 47 CCC (3d) 129 at 136.

<sup>6</sup> *Lawson*, *supra* note 4 at para 24.

<sup>7</sup> *Re Klassen and The Queen* (1976), 31 CCC (2d) 235 (Sask QB).

- the names of the persons entitled to be present during the analysis including the person designated by the Crown.

Additionally, Crown counsel may request that the judge permit analysis of only a portion of an exhibit such as a drug exhibit or a water sample.

#### **4. PROCESS FOR MAKING AN APPLICATION**

The application must be made to a judge of a superior court of criminal jurisdiction or to a judge of a court of criminal jurisdiction in accordance with the applicable court's criminal proceedings rules.<sup>8</sup> A justice presiding over a preliminary inquiry is not competent to make an order under s. 605.<sup>9</sup>

An application under s. 605 can be made in connection with *Criminal Code* charges or charges under any other act of Parliament, unless the other act contains a complete and exclusive procedure dealing with exhibits in criminal proceedings.<sup>10</sup>

#### **5. DRUG EXHIBITS**

An applicant may apply to re-analyze a drug exhibit in order to show that the intended analysis can be characterized as quantitatively or qualitatively different from the one initially carried out by the Crown. One example is where the second analysis is designed to assess the purity of the drug exhibit.

Given the nature of drug exhibits, Crown counsel should carefully review the background and professional qualifications of the independent analyst to ensure that the analyst is competent to re-analyze the exhibit.

Wherever possible, only a portion of a drug exhibit should be given to the independent analyst. A sufficient quantity of the drug should be retained in the event that further analysis is ordered by the court on application by the Crown or the accused. Crown counsel should therefore request that the order make provision for the analysis of a part of the drug exhibit only.

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<sup>8</sup> Note as well that s 683 of the *Criminal Code* governs the power of the appellate courts to permit the production of new evidence which could include a scientific analysis.

<sup>9</sup> *Doyle v The Queen*, [1977] 1 SCR 597, (1976), 29 CCC (2d) 177, *R v Walsh* (1981), 59 CCC (2d) 554 (Ont Prov Ct).

<sup>10</sup> For example, s 50 of the *Controlled Drugs and Substances Act*, SC 1996, c 19 does not set out a complete and exclusive procedure for drug exhibits in criminal proceedings. Accordingly, s 605 applies to drug exhibits. See *R v Bryers and Mueller* (1975), 28 CCC (2D) 466 at 468 (Ont Gen Sess Peace).

A court order authorizing an analyst named in the order to do an independent analysis should be regarded as authorizing the analyst to possess the drug lawfully for the analysis.<sup>11</sup>

The presence of an official designated by the Crown during the independent analysis may be warranted, where feasible, to ensure continuity of possession of the exhibit.

The result of the independent analysis may differ from the result of the analysis conducted by the government analyst. If the independent analyst testifies in court, a government analyst should be present in court to assist Crown counsel. This can be arranged through Health Canada.

## **6. EXHIBITS IN THE POSSESSION OF INVESTIGATORS THAT HAVE NOT BEEN FILED IN COURT**

Defence counsel may want to have independent tests done on items that are not deemed to be “exhibits” that have not been filed in court, but that are in the custody of a law enforcement agency (such as handwriting samples, tape recordings, bodily fluids, blood, and computer hardware).

These items may be released for testing in accordance with the *Stinchcombe* disclosure principles.<sup>12</sup>

## **7. REQUESTS BY CROWN COUNSEL FOR THE RELEASE OF EXHIBITS FOR TESTING**

Crown counsel should comply with the normal rules of criminal practice in the province or territory regarding application for release of exhibits for testing. Wherever possible, the initiating documents should be accompanied by a supporting affidavit setting out the basis for the application.

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<sup>11</sup> *Re R v Vales* (1979), 46 CCC (2d) 269 (Ont HC).

<sup>12</sup> See also the pre-*Stinchcombe* decision in *R v Savion and Mizrahi*, (1980) 52 CCC (2d) 276 (ON CA).







## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.14 TESTIMONY OF POLICE OFFICERS AND POLICE CIVILIAN AGENTS**

**GUIDELINE OF THE DIRECTOR ISSUED UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. BACKGROUND

In the prosecution setting, it is the role of the prosecutor to decide which witnesses to call and of the courts to assess the credibility and reliability of the witnesses and determine the weight to be given to their testimony. This guideline provides guidance on the steps prosecutors should take when they become aware that a police officer<sup>1</sup> or a civilian police agent (“police witness”) may give, or has given, sworn evidence, either in the form of an affidavit or as testimony before a court (collectively referred to as “testimony”) that is not credible or is unreliable.<sup>2</sup>

Credibility is a complex matter. Crown counsel must be mindful that all witnesses including police witnesses may have different opportunities to observe an incident and differing perspectives and may therefore honestly provide inconsistent testimony.

Reliability has to do with the accuracy of a witness’ testimony and may include consideration of a witness’ ability to observe, recall or recount the issue. A Court may reject a police witness’ testimony in whole or in part, or make a finding which is inconsistent with the witness’ testimony without necessarily finding that the witness was dishonest in his or her testimony.

Crown counsel must remain aware that they are not the trier of fact and must not by their decisions prevent the trier of fact from making determinations as to the credibility or reliability of witnesses without a compelling basis.

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<sup>1</sup> This guideline also applies to investigators who are not police officers.

<sup>2</sup> Crown counsel who have concerns regarding statements to be made or made under oath, but which do not rise to the level described in this guideline, should discuss them with their team leader.

These guidelines are based on the principles found in the jurisprudence respecting the role of Crown counsel, the rules of professional conduct governing counsel, and the policies contained in the PPSC Deskbook.

## **2. BEFORE TENDERING A STATEMENT UNDER OATH (AN AFFIDAVIT OR TESTIMONY)**

In determining which witnesses to call, Crown counsel must respect the obligations relating to the conduct of a prosecution. These obligations include ensuring that appropriate disclosure has been made to the accused of any information that relates to the credibility or reliability of a witness. In relation to police officers, these obligations were outlined by the Supreme Court of Canada in *R v McNeil*. Crown counsel must not call as a witness someone, including a police witness, who they reasonably believe, based on compelling information, will mislead the court with their testimony on matters that are material to the proof of the essential elements of the offence and without which the Crown could not satisfy the trier of fact beyond a reasonable doubt.

## **3. DURING TRIAL**

### **3.1. Misleading or false evidence inadvertently given under oath**

Where Crown counsel has a compelling basis for believing that misleading or inaccurate testimony has inadvertently been given by a police witness, Crown counsel must inform the defence counsel and the Court that the Crown does not rely upon the testimony to prove its case. This relates to cases of a serious error/mistake and cases of unacceptable negligence.

Crown counsel must bring the testimony to the attention of their supervisor or manager, in writing.<sup>3</sup> If the manager considers that the concern is well-founded, then the manager must bring it to the attention of the appropriate Officer in Charge (OIC) or the OIC's superior, to assess how such a situation can be avoided in the future.

### **3.2. Misleading or false testimony intentionally given under oath**

Where a court makes a finding or where it can be reasonably inferred from judicial comments that misleading or inaccurate evidence has been intentionally given by a police witness, Crown counsel must bring it to the attention of their supervisor or manager in writing<sup>4</sup> so that the matter will be referred to the police for possible investigation. If Crown counsel otherwise has a compelling basis for believing that inaccurate testimony has been intentionally given by a police witness, they must bring it to the attention of

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<sup>3</sup> Transcripts of the testimony must be ordered, but the notice to the Crown counsel's manager or supervisor should not await the transcript.

<sup>4</sup> *Ibid.*

their supervisor or manager, and they must notify defence and the court. For example, where a police officer had testified at trial that the voluntary statement evidence he was giving the court were the exact words of the defendant. In fact, the police officer later indicated that he had reconstructed his notes. In this situation, Crown counsel must inform the team leader, Deputy Chief Federal Prosecutor or Chief Federal Prosecutor and defence counsel and put the witness back on the stand to explain himself.

### **3.3. The assessment of whether the test for continuing a prosecution is met: reasonable prospect of conviction.**

In all instances of misleading or inaccurate statements made under oath, Crown counsel must assess the impact of the testimony upon the overall reliability or credibility of the police witness and whether the threshold test for prosecuting continues to exist.

## **4. AFTER TRIAL**

The same steps must be taken where Crown counsel is put on notice by the findings of a court that the court considers that a police witness has given misleading or inaccurate testimony or where the Crown counsel has a compelling basis for believing that it has occurred.

In cases where the findings of the court admit of ambiguity as to whether the testimony was intentionally misleading or inaccurate as opposed to the court simply determining that it will not accept the evidence of the police witness, Crown counsel should consult with their supervisor and manager.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.15 APPEALS AND INTERVENTIONS IN THE PROVINCIAL AND TERRITORIAL COURTS OF APPEAL**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline<sup>1</sup> sets out the factors that must be considered in deciding whether to appeal an acquittal or sentence. It also identifies who should make the decision to appeal on behalf of the Crown and the process for deciding.

### 2. THE DECISION TO APPEAL AGAINST ACQUITTAL

The authority to appeal in criminal proceedings comes entirely from statute. Common law appeals against conviction or acquittal do not exist.<sup>2</sup> In Canada, even accused persons had no effective right of appeal until 1923. In 1930, an amendment to the *Criminal Code* (Code) permitted Crown appeals against an acquittal, though only in cases raising a "question of law alone". While the basis for Crown appeals has since been further defined in the *Criminal Code*, essentially the Crown is still limited to raising legal, not factual, issues.

At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. This principle is reflected in s. 11(h) of the *Canadian Charter of Rights and Freedoms* (Charter). However, s. 11(h) does not preclude the Crown’s right of appeal as the words “finally acquitted” in s. 11(h) have been interpreted to mean after the appellate procedures provided in the *Criminal Code* have been completed.<sup>3</sup>

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<sup>1</sup> A separate guideline exists for appeals and interventions in the Supreme Court of Canada; see PPSC Deskbook guideline “[3.16 Supreme Court of Canada Litigation](#)”.

<sup>2</sup> *R v Meltzer*, [1989] 1 SCR 1764 [Meltzer]; *R v Robinson* (1990), 51 CCC (3d) 452 at 463 (AB CA) [Robinson].

<sup>3</sup> *R v Morgentaler Smoling and Scott*, [1988] SCR 30 at 155-156.

Over the past 60 years, the courts have signalled the need to show restraint in exercising the right to appeal. Only cases where the public interest is best served by pursuing should be appealed.

## **2.1. The Crown's right of appeal from acquittal is limited**

In indictable matters, the Crown's right of appeal against an acquittal is found in s. 676(1)(a), which provides:

676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

....

This is a much narrower right of appeal than that conferred upon a convicted person, who may appeal against conviction on any ground of appeal that involves a question of law alone or, with leave of the court of appeal, on any ground of appeal that involves a question of fact or mixed fact and law or that appears to the court of appeal to be a sufficient ground of appeal (s. 675(1)(a) of the Code). On an accused's appeal against conviction the court may allow the appeal if it concludes that the verdict of guilty was unreasonable, if the trial judge made an error of law (e.g. in an evidentiary ruling, or in the charge to the jury),<sup>4</sup> or that there was a miscarriage of justice (s. 686(1) of the Code).

By contrast, the restriction on the Crown's right of appeal to a question of law alone means that the Crown cannot just complain about the verdict, or argue that the trier of fact rendered an unreasonable acquittal.<sup>5</sup> Justice Lamer (as he then was) explained as follows in *Rousseau*:<sup>6</sup>

The trial judge considered that the accused's guilt was not established beyond a reasonable doubt. I have read the evidence and I believe that he did not, in so concluding, commit an error of law. Indeed, this is an appeal by the Crown from an acquittal, covered by s. 605(1)(a) of the *Criminal Code*, which limits the appeal to grounds "that involve [...] a question of law alone". For the doubt entertained by the judge to amount to an error of law it must be the result of conjecture and have no basis whatever in the evidence. [Underlining added]

In addition to satisfying the court of appeal that a pure error of law led to the wrong outcome, the Crown must also show that "the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal".<sup>7</sup>

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<sup>4</sup> Subject to the verdict-preserving "curative provisos" in *Criminal Code*, ss 676(1)(b)(iii) and (iv).

<sup>5</sup> *R v Schuldt*, [1985] 2 SCR 592.

<sup>6</sup> *Rousseau v The Queen*, [1985] 2 SCR 38 at 42, deletion in original.

<sup>7</sup> *R v Graveline*, 2006 SCC 16, [2006] 1 SCR 609 per Fish J at para 14.

## 2.2. No appeal from an interlocutory ruling

There is no right of appeal to a provincial or territorial court of appeal from an interlocutory order or pre-trial ruling.<sup>8</sup> Appeals are from verdicts. If there is no acquittal (or a judicially entered stay of proceedings, which for appeal purposes is the same as an acquittal),<sup>9</sup> the Crown has no right of appeal.

Where the trial judge has made a pre-trial ruling that for all practical purposes ends the prosecution, for example, a decision to exclude critical evidence under s. 24(2) of the Charter, or a disclosure order with which the Crown cannot comply because it would breach informer privilege, the prosecutor may simply invite an acquittal or a judicial stay, and consider an appeal on the basis of an error of law in the impugned ruling. However, where the impact of the ruling is not so decisive, the prosecutor should continue the prosecution and await the verdict, as otherwise the prosecutor's decision to invite an acquittal in order to trigger a right of appeal may be seen as an abuse of process.<sup>10</sup>

## 2.3. The public interest

Not every unfavourable ruling or error in law should be appealed. Neither the judiciary nor the Crown has the resources to review every judgment that might be wrong. Still, the public expects and is entitled to a criminal justice system that is applied consistently and is effective in the suppression of crime.

Where the dual thresholds for a Crown appeal against acquittal are met – (1) error of law, (2) that in the concrete reality of the case materially contributed to the acquittal – the Crown will consider whether the public interest is best served by appealing the acquittal.

Factors which may be considered when deciding whether the public interest is best served by an appeal include the following:

- a. Is the issue raised by the case of widespread importance for the effective enforcement of the criminal law, or is its impact confined largely to the immediate case?
- b. Does the seriousness of the offence or the circumstances of the offender demand a reconsideration of the case?
- c. Have courts differed in interpreting the issue raised?
- d. Could the trial decision impair the enforcement or administration of a significant government policy initiative (for instance, confiscating the proceeds of crime, reducing domestic violence) if left unchallenged?

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<sup>8</sup> *Meltzer*, *supra* note 2.

<sup>9</sup> *R v Jewitt*, [1985] 2 SCR 128. A judicial stay would result e.g. from the Crown's inability to comply with a disclosure order on grounds of protecting informer privilege.

<sup>10</sup> *R v Power*, [1994] 1 SCR 601; *United States v Fafalios*, 2012 ONCA 365.



- e. Will the resources required to prepare and present the appeal significantly outweigh the value of pursuing the case further?<sup>11</sup>

The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case.

A decision whether to appeal must not be influenced by any of the following:

- a. the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the case;
- b. Crown counsel's personal feelings about the accused, the victim, or the trier of fact;
- c. possible political advantage or disadvantage to the government, special interest group or political party; or
- d. the possible effect of the decision on the personal or professional circumstances of those responsible for making the decision to appeal.

### **3. THE DECISION TO APPEAL AGAINST SENTENCE**

An appeal against sentence<sup>12</sup> need not be grounded in an error of law (s. 687 of the Code). However, the standard of review – error in principle, or a sentence that is manifestly unfit – nonetheless invites a court of appeal to give considerable deference to the sentencing judge and the Crown should not lightly initiate an appeal against sentence.

It may be in the public interest to appeal where the trial judge erred in interpreting or applying a statutory provision or principle concerning sentence, or where the sentence is clearly below the accepted range of sentence, not merely at the low end of the range, or where the sentence may set a negative precedent.

The Crown must also consider how long it will take to appeal, and whether by then the offender will have served his or her sentence and deserves reincarceration.

### **4. INITIATING AN APPEAL: THE PROCEDURE**

In general, the decision to initiate an appeal is made by the Chief Federal Prosecutor (CFP), upon the written recommendation of Crown counsel with carriage of the prosecution at trial or, where the trial was conducted by an agent, of the agent supervisor. The CFP will consult with the

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<sup>11</sup> On the use of judicial resources, see *Borowski v Attorney General of Canada*, [1989] 1 SCR 342, (1989), 47 CCC (3d) 1 at 14-15; *Robinson*, *supra* note 2; but see the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

<sup>12</sup> A sentence may include a number of ancillary orders: *Criminal Code*, s 673.

applicable regional litigation committee or equivalent,<sup>13</sup> and where appropriate the National Litigation Committee, before deciding.

Crown counsel may sometimes need to file a “protective” notice of appeal before consultations are completed and a final decision is taken about proceeding with the appeal. Protective notices should be the exception, not the rule, since counsel are obliged to bring significant adverse decisions to the attention of their superiors so that appropriate and timely action can be taken. Counsel should ensure that a final decision is made as soon after filing the notice as is reasonably practicable.

Finally, Crown counsel, including a legal agent, must not announce that an appeal will or will not be initiated until the decision has been made by the appropriate authority.

#### **4.1. Conceding appeals**

The Crown is much more frequently the respondent than the appellant on criminal appeals. On rare occasions, appellate counsel may be placed in a situation in which an error of law committed by the trial court is so clear, or the findings of fact so patently unreasonable, that it may raise the possibility that the appeal ought to be conceded. This may arise, for example, in a case where a decision by the Supreme Court of Canada subsequent to the trial but prior to the appeal completely undermines the basis for conviction.

The decision to concede an appeal or to concede on a particular issue<sup>14</sup> within the appeal is never one that can be taken lightly. As a general rule, Crown counsel's duty is to advance all reasonable arguments that may be made to support the decision of the court below, and to leave it to the appellate court to decide whether to allow the appeal.<sup>15</sup>

Generally speaking, it is within the discretion of appellate counsel to concede on a particular issue in an appeal without conceding the appeal itself, where there is no reasonable argument to be made on that issue. Where that issue concerns the constitutional validity of federal legislation, however, instructions must be sought from the Office of the Director of Public Prosecutions (DPP), normally upon the advice of the National Litigation Committee. Where the issue concerns the constitutional validity of provincial legislation, consultation with the appropriate Attorney General's office is in order.

Appellate counsel may also be called upon to exercise a discretion with respect to the admission of fresh evidence on appeal. The admission of such evidence is governed by the well-known four

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<sup>13</sup> The Competition Law Section has its own national appeals committee.

<sup>14</sup> The Supreme Court has been highly critical of concessions by Crown counsel that it felt should not have been made: see *Schachter v The Queen*, [1992] 2 SCR 679, and *Miron v Trudel et al*, [1995] 2 SCR 418 at 485-486.

<sup>15</sup> Bearing in mind that many legal errors may be regarded as causing an accused no prejudice: *Criminal Code*, s 686(1)(b)(iv).

part test consistently used by the Supreme Court.<sup>16</sup> Counsel may well choose to consent to the admission of such evidence where it raises a substantial concern about an offender's innocence.<sup>17</sup>

Where counsel is of the view that an appeal ought to be conceded, further consultation is necessary. Before making such a recommendation to the CFP, appellate counsel will seek the views of the trial counsel and, where appropriate, the investigative agency. Where the concession is in a significant case,<sup>18</sup> consultation with the appropriate Litigation Committee will be necessary.

## 5. THE CROWN AS INTERVENER

Generally, only the parties to a criminal prosecution, Crown and accused, may participate in an appeal before a provincial or territorial court of appeal. Interveners, when allowed, are generally not permitted to add to the issues in dispute, or to enlarge the record.

In deciding whether to exercise its discretion to permit an intervener the court of appeal will consider whether this will delay the hearing or resolution of the appeal, prejudice the parties including increased costs, whether the intervener has additional submissions to offer not already advanced by the parties, and the prospect of the appeal between the parties being expanded by the intervener's interests.<sup>19</sup> A recognized consideration that is relevant to the Public Prosecution Service of Canada is whether it is desirable to have a national perspective on the issues brought in to the appeal.<sup>20</sup>

The decision to intervene in a provincial or territorial court of appeal is made by the DPP. The procedure for applying to intervene is the same as is explained in the PPSC Deskbook guideline "[3.16 Supreme Court of Canada Litigation](#)".

## 6. APPEALS FROM SUMMARY CONVICTION APPEALS

In summary conviction matters the accused may appeal from the adverse decision of a summary conviction appeal court (normally the superior court of justice) to the court of appeal on any ground of appeal that involves a question of law alone, with leave of the court of appeal or a judge of that court (s. 839 of the Code).

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<sup>16</sup> See e.g. *Palmer v The Queen*, [1980] 1 SCR 759, (1979), 50 CCC (2d) 193, *R v Stolar* [1988] 1 SCR 480, (1988), 40 CCC (3d) 1.

<sup>17</sup> In this regard, see *Report of the Commission on Proceedings Involving Guy Paul Morin*, Toronto: Queen's Printer, 1998, vol 2 at 1170-1171.

<sup>18</sup> As defined in the PPSC Deskbook directive "[1.3 Consultation within Government](#)".

<sup>19</sup> John Sopinka & Mark E. Gelowitz, *The Conduct of an Appeal*, 3rd ed (Canada: LexisNexis, 2012) at paras 8.9-8.18.

<sup>20</sup> *R v Regan* (1999), 174 NSR (2d) 1, 1999 CanLII 1855 (NS CA).

For many years in some jurisdictions the issue of leave to appeal was simply rolled into the main appeal, and was considered at the same time as the oral hearing of the appeal on its merits.<sup>21</sup> Leave to appeal to the court of appeal was routinely granted, whether or not the appeal on its merits was allowed or dismissed.

In the 2008 judgment in *R v R.R.*<sup>22</sup> the Ontario Court of Appeal significantly reinvigorated the requirement of leave to appeal contained in s. 839 of the Code. Doherty JA, writing for the court, reasoned that:

The requirement that the applicant obtain leave to appeal in s. 839 provides the mechanism whereby this court can control its summary conviction appeal docket. Access to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal.<sup>23</sup>

Justice Doherty went on to explain that leave to appeal to the court of appeal in a summary conviction matter may be granted: (1) where the merits of the proposed question of law are arguable, even if not strong, and the proposed question of law has significance to the administration of justice beyond the four corners of the case; and (2) where there appears to be a "clear" error even if it cannot be said that the error has significance to the administration of justice beyond the specific case.

The courts of appeal in some other provinces and territories have moved in a similar direction.<sup>24</sup>

Therefore, when Crown counsel is facing an appeal to the court of appeal in a summary conviction matter, counsel must consider whether to oppose leave to appeal by reference to the above considerations. In some cases, Crown counsel will want to press the court of appeal to determine the issue of leave in advance, thereby avoiding an investment of time and resources responding to a groundless appeal.<sup>25</sup> The application may be made to a single justice (s. 839 of the Code).

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<sup>21</sup> *R v R.R.*, 2008 ONCA 497 at para 2.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at para 27.

<sup>24</sup> See e.g. *R v Winfield*, 2009 YKCA 9; *Petrin v R*, 2013 NWTCA 1; *R v Harper*, 2008 ABCA 325; *R v Oliver*, 2011 MBCA 12; *Bouchard c R*, 2011 QCCA 30; *R v Pottie*, 2013 NSCA 68; *Dorgan and Gavin v R*, 2009 PECA 23; *R v Ralph*, 2008 NLCA 70.

<sup>25</sup> See e.g. *R v Metin*, 2013 ONCA 21.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **3.16 SUPREME COURT OF CANADA LITIGATION**

**GUIDELINE ISSUED BY THE DIRECTOR UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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## 1. INTRODUCTION

This guideline outlines the procedure applicable to litigation in the Supreme Court of Canada (the Court or SCC) involving the Director of Public Prosecutions (DPP) and addresses the role of the Supreme Court of Canada Litigation Coordination Section (the Section). It also covers the internal procedure for preparing documents to be filed with the Supreme Court of Canada, i.e. applications for leave to appeal, appeals, interventions and other motions.

Criminal appeals to the Court are primarily governed by the *Criminal Code*, the *Supreme Court Act*, the *Rules of the Supreme Court of Canada*, the *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada*,<sup>1</sup> the conventions and practices of the Court, as well as the Public Prosecution Service of Canada (PPSC) internal practices.

Pursuant to s. 34 of the *Interpretation Act*, the provisions of the *Criminal Code* apply to offences under other federal statutes, including appeals to the Supreme Court related to criminal prosecutions.<sup>2</sup> Other criminal appeals are subject to the *Supreme Court Act*.

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<sup>1</sup> Established by the Registrar of the Court pursuant to s 21 of the *Rules of the Supreme Court of Canada* [Rules].

<sup>2</sup> *Criminal Code*, ss 691-696.

## **2. SUPREME COURT OF CANADA LITIGATION COORDINATION SECTION**

### **2.1. Composition of the Section**

The Section is composed of the Supreme Court of Canada Litigation Coordinator and a paralegal. The Section is part of the Regulatory and Economic Prosecutions and Management Branch. Its offices are located at PPSC headquarters in Ottawa.

### **2.2. Role of the Section and the Coordinator**

#### ***2.2.1. Section***

As its name implies, the Section is responsible for coordinating all Supreme Court of Canada litigation conducted on the DPP's behalf – from the service of an originating document to any follow-up necessitated by a judgment of the Court in a case involving the PPSC.

#### ***2.2.2. Coordinator***

The Coordinator chairs the National Litigation Committee (NLC) whose primary role is to advise the DPP on Supreme Court of Canada litigation. The Committee makes recommendations to the DPP regarding applications for leave to appeal, positions to be advanced on appeal, approval of appeal and intervention factums in the Supreme Court of Canada, as well as motions for intervention made on the DPP's behalf before all levels of court.

Parties to appeals in the SCC are required to have an agent, defined as a lawyer practicing in the National Capital Region.<sup>3</sup> The Coordinator is the DPP's agent in the Court. In practice, communications about files or other matters generally take place between the Coordinator (or the paralegal) and the Court Registry personnel, although Registry personnel occasionally conduct business directly with regional Crown counsel.

Counsel are required to consult with the Section before communicating with the Court and to promptly report receipt or service of documents related to litigation in the Court – especially originating documents – so that follow-up can take place within prescribed time periods.

## **3. APPLICATIONS FOR LEAVE TO APPEAL**

The majority of criminal appeals before the Supreme Court are heard by leave. The federal Crown, like with any other litigant, can be an applicant or a respondent, although in practice it is more often than not the respondent.

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<sup>3</sup> Rules, *supra* note 1, ss 2, 16.



### 3.1. Crown as applicant

#### 3.1.1. *Decision-making authority: the DPP*

It is the decision of the DPP whether an application for leave to appeal will be filed, in light of the recommendation of counsel and the advice of the NLC.

#### 3.1.2. *Applicable test: “National Importance”*

As the highest court of law in the country, the Court is a “court of direction,” whose role is to rule on legal matters. It is not a “court of revision” the primary role of which is to rectify errors made by lower courts. That role is performed by intermediate appellate courts. This explains why leave to appeal is granted, under s. 40(1) of the *Supreme Court Act*, only when “the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.” This is the so-called “national importance” or “public importance” test, which also applies to leave applications made pursuant to s. 693(1)(b) of the *Criminal Code*, governing leave applications on indictable offence verdicts. The DPP applies a similar test in deciding whether to seek leave to appeal.

It is not sufficient for counsel recommending an appeal to show that the lower court’s judgment is ill-founded in law since this does not meet the “national importance” threshold. As the Court does not issue reasons in deciding leave applications, there are no judgments to look to for guidance in assessing whether a case meets the threshold. However, without being exhaustive, the following circumstances are generally recognized as justifying the granting of leave: where there are conflicting decisions in provincial or territorial appellate courts; where a case raises significant constitutional issues (particularly *Canadian Charter of Rights and Freedoms* (Charter) or division of powers questions), where the scope of police or Crown powers is at issue, or where the interpretation of new legislation raises an issue of significant importance.

In a 1997 speech, Justice Sopinka further explained some of the criteria used by the Court in deciding leave applications:

We are not a court of error and the fact that a court of appeal reached the wrong result is in itself insufficient. This is still the case if the court of appeal has misapplied or not followed a judgment of this Court. On the other hand, if a misinterpretation of one of our judgments becomes an epidemic in the courts below, then we may want to set the record straight. See, for example, *Askov* and *Morin*.

... if we have dealt with the issue recently and further issues arise out of our judgment in the application of the matter that we have decided, we don’t

immediately rush in to decide all subsidiary issues. We like to see what the courts below are doing with our decision, how they are applying it. Two good examples are *Stinchcombe* dealing with the issue of the obligation of the Crown to produce and *Martin v Gray*, conflict of interest. There are many subsidiary issues that arise out of those cases and we would like to see how the lower courts are applying our decisions before we get into the matter again.

... if the issue has been dealt with or is about to be dealt with by legislation, even if it doesn't apply to the case, we usually don't grant leave because that deprives the issue of its public importance.

In criminal cases, although we apply the public importance test, it is not applied as strictly. If an applicant has not had a fair trial or was possibly wrongly convicted, we may grant leave even in the absence of an "earth-shaking" issue of law.<sup>4</sup>

### **3.1.3. Internal procedure**

It is the responsibility of the regional office to decide in the first place whether it is desirable to seek the approval of the DPP to apply to the Supreme Court of Canada for leave to appeal. It is not necessary to refer the case to the DPP to make such a decision when it is clear that the case does not pass the national interest test. However, the regional office concerned can deem it necessary to obtain a decision from the DPP, even when the recommendation is not to apply for leave to appeal. This may arise, for example, when a case has attracted significant media interest or when counsel is of the opinion that the court of appeal's decision, although erroneous, falls just short of the national importance threshold. The Coordinator can be consulted in case of doubt as to what direction to take. When the decision is made at the regional level to submit the case to the DPP, the following process applies.

The decision-making process begins with the preparation by counsel in the regional office of a note for the approval of the DPP<sup>5</sup> explaining why the case should (or should not) be submitted to the Supreme Court for leave to appeal. Once approved at the regional level, the note<sup>6</sup> is sent to the Coordinator who submits it to the NLC for consideration. The NLC may endorse or reject the position set forth in the note or may make alternate recommendations to the DPP. The note must be submitted early enough within the time limit for an application for leave to permit a meeting of the NLC to take place on a week's notice and to allow time for the finalization of the documentation.

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<sup>4</sup> As cited in Henry S. Brown, *Supreme Court of Canada Practice* (Toronto: Carswell, 2013) at 20-21.

<sup>5</sup> A note template is available from the Section.

<sup>6</sup> The note should be accompanied by a copy of relevant decisions from the lower courts and of the factums filed with the lower court, if any.

The Coordinator reports to the DPP on the deliberations and recommendations of the NLC, forwarding the note, as amended at the Committee's direction or suggestion, as well as any relevant supporting documentation, such as the judgment below.

If the DPP accepts a recommendation that an application for leave to appeal be filed, Crown counsel assigned to the case prepares the supporting documentation and submits it to the Coordinator for review and final approval no later than ten days before the date of service and filing set out in the Rules.

In the rare event that the Court orders a hearing upon an application for leave to appeal, it is usually counsel who prepared the application who appears before the Court, either in person or by videoconference.<sup>7</sup>

#### **3.1.4. Time limits**

Applicants have 60 days from the date of the lower court's judgment to serve and file an application for leave to appeal.<sup>8</sup> The month of July is excluded in the computation of time.<sup>9</sup>

It is important to bear in mind the distinction between the judgment and the reasons for judgment as the time limits begin to run as soon as the lower court renders judgment, even if the reasons are released at a later date. Obviously, it may prove challenging to draft an application for leave without the written reasons for judgment. When delay in the release of reasons by the lower court makes it impossible to draft, serve and file more than simply a bare-bones application, it is appropriate to request from the Supreme Court an extension of time. The motion may be submitted at the same time as the application or, preferably, in advance and within the 60-day period in order to demonstrate the intention to file an application within the time limit.

A draft application must be sent to the Coordinator for approval prior to service and filing. Unless otherwise agreed, it must be received by the Coordinator no later than ten days before the filing date.

#### **3.1.5. Required documents**

Rule 25 of the *Rules of the Supreme Court of Canada* and the *Guidelines* issued by the Registrar set forth the nature and format of the documentation required in an application for leave to appeal. In a typical case, the following documents are submitted, bound in a single booklet and in the following order:<sup>10</sup>

- a notice of application for leave to appeal;

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<sup>7</sup> The appearance is coordinated with the Registry of the Court through the Section.

<sup>8</sup> *Supreme Court Act*, s 58(1)(a).

<sup>9</sup> *Ibid*, s 58(2).

<sup>10</sup> A precedent may be obtained from the Section.

- a certificate in Form 23A alerting the Court to any information that should not be publicly disclosed, along with a copy of supporting documentation, such as a court order or applicable legislation;
- a copy of any judgments, orders and relevant reasons issued by the lower courts;
- a memorandum of argument;
- documents to which the application refers, if any, including transcript excerpts, but only if those excerpts are necessary for the purposes of the application.

Although affidavits in support of the application may be submitted under Rule 25(1)(d), they are not usually required. The evidentiary basis for the application usually will have been established in the courts below; the public importance of the case does not generally require the filing of additional evidence.

Finally, the Court does not encourage the filing of authorities at the leave stage. Our practice has been not to include them unless they are not readily available in law reports or easily accessible websites. Where they are to be submitted, the authorities are placed at the end of the application booklet or are filed in a separate book.

### ***3.1.6. Memorandum of argument***

A memorandum of argument contains seven parts, in the following order:<sup>11</sup>

1. a concise overview of the party's position regarding the issues of public importance raised in the application and a concise statement of facts including judicial history, if required;
2. a statement of the questions in issue;
3. a statement of argument;
4. submissions as to costs which generally consist in making no submission;<sup>12</sup>
5. the order sought, which is usually that the application for leave to appeal be granted, without costs;
6. a table of authorities, arranged alphabetically and setting out the paragraph numbers in Part III of the memorandum where the authorities are cited;
7. copies of the statutory or regulatory provisions referred to in the factum, in both official languages where available.

Parts I to V of the memorandum must not exceed 20 pages. Note that this is the maximum, not the targeted, length.

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<sup>11</sup> Rules, *supra* note 1, s 25(1)(c).

<sup>12</sup> Unless there are exceptional circumstances, costs are not awarded in criminal matters: see, in particular, *R v M (CA)*, [1996] 1 SCR 500 at para 97.

### **3.2. Crown as respondent**

A regional office that is served with an application for leave to appeal (or any other originating document) must promptly inform the Section so that the appropriate response can be planned and coordinated.

#### ***3.2.1. Decision-making authority: the Coordinator***

The Coordinator, or his delegate, approves responses to leave applications. The Coordinator may choose to refer the draft response to the NLC for consideration and formulation of advice to the DPP who then exercises final decision-making authority. Such a referral is more likely to occur when it is envisaged to concede that leave be granted.

#### ***3.2.2. Applicable test: “National Importance”***

National importance, as explained above when the prosecution seeks leave to appeal, remains the applicable test.

Applicants often, incorrectly, base their applications on a demonstration of the errors allegedly made by the lower courts, rather than on showing the national importance of the issues they raise. A mere showing of error does not amount to national importance. A common example is the application of a legal standard to the facts of the case, which is a question of law for appeal purposes.<sup>13</sup> Even if the lower court erred in its conclusion, an issue of national importance is not necessarily raised thereby, insofar as the lower court applied the appropriate legal standard (as approved by the Supreme Court); the standard applicable to arrests<sup>14</sup> or detention<sup>15</sup> constitute common examples of such legal standards that are well settled.

In its response to a leave application, a respondent is not bound by the questions in issue as framed by the applicant, or by the structure adopted by the applicant. It may be useful, perhaps even necessary, to reformulate the issues and to adopt a structure that is different to that of the applicant. However, it is important to identify clearly the points raised in the application, while setting out how the application fails to raise an issue of public importance.

#### ***3.2.3. Internal procedure***

The internal process that applies to a response to an application for leave to appeal is generally simpler than the process for an application.

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<sup>13</sup> *R v Shepherd*, 2009 SCC 35, [2009] 2 SCR 527 at para 20.

<sup>14</sup> *R v Storrey*, [1990] 1 SCR 241.

<sup>15</sup> *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353.

As noted above, it is important to advise the Section as soon as an application for leave is received or served and to provide a copy. The Section maintains a log of all applications for leave involving the PPSC and ensures that the prescribed time limits are respected, including by providing the assigned counsel with a schedule. At this early stage, it is not necessary to prepare a briefing note (which is necessary for a leave application, as prescribed above).

When opposing a leave application, a final draft of the response, approved by the appropriate authorities of the regional office concerned, must be sent to the Section within the time limit set forth below.

When any type of response other than opposing leave is considered, the Coordinator must be advised promptly in order to allow sufficient time for a NLC meeting, if required, and for the approval of the DPP within the time limit. Insofar as the Coordinator chooses to refer the matter to the DPP for his approval, the procedure to follow is the same as that that governs applications for leave to appeal, with necessary modification. Once the DPP has agreed with the proposed position, the final approval of the response rests with the Coordinator.

#### **3.2.4. *Time limits***

The respondent has 30 days from the opening of a file by the Supreme Court to serve and file a response to an application for leave to appeal.<sup>16</sup> The operative date is that of the letter sent by the Court to the applicant, with a copy to the respondent, advising that a file has been opened and that a file number has been assigned. A copy of that letter must be provided to the Section.

Where the response opposes the leave application, unless otherwise agreed, a draft of the response must be sent to the Section one week before the filing date to allow for review and approval by the Coordinator prior to service and filing.

In other cases, a schedule should be established with the Section as soon as possible.

#### **3.2.5. *Required documents***

Rule 27 of the *Rules of the Supreme Court of Canada* and the *Guidelines* issued by the Registrar set forth the nature and format of the documentation required in a response to a leave application.<sup>17</sup> Usually, only the following documents are submitted, bound in a single booklet in the following order:

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<sup>16</sup> Rules, *supra* note 1, s 27(1). It should be noted that, prior to January 2014, the 30-day period began as soon as the application for leave was served, except for self-represented claimants, in which case the time period to respond began only when the Court created a file; the Court has finally extended that procedure to all applications for leave to appeal.

<sup>17</sup> Templates are available from the Section.

- a certificate in Form 23A alerting the Court to information that should not be publicly disclosed, along with a copy of supporting documentation, such as a court order or applicable legislation;
- a memorandum of argument similar in form to an applicant's memorandum with necessary modifications; ;
- documents to which the response refers, if any.

As in the case of applications, affidavits are generally not required nor are authorities unless they are not readily available, i.e. in law reports or easily accessible websites.

## 4. APPEALS

### 4.1. Appeals as of right

Pursuant to s. 693(1)(a) of the *Criminal Code*, the Crown may appeal as of right to the Supreme Court in an indictable case on any question of law on which a judge of the court of appeal dissents. Sentence and summary case appeals require leave of the Court under s. 40 of the *Supreme Court Act*, even where a judge dissents in the provincial or territorial court of appeal.

#### 4.1.1. *Decision-making authority: the DPP*

Although the national importance of appeals as of right is implicitly recognized by the *Criminal Code*, it is up to the DPP to decide whether, in a given case, an appeal will be pursued taking into consideration the recommendation of the NLC.

#### 4.1.2. *Applicable test: "Public Interest"*

The underlying assumption in the statutory provisions enabling an as-of-right Crown appeal is that there is a matter of national importance raised by the case. However, the DPP will authorize an as-of-right appeal only where it is in the public interest to proceed. Not every issue raised by the dissent in a court of appeal requires clarification by the Court. For instance, the application of a legal standard to a set of facts, such as whether particular circumstances constitute reasonable grounds for an arrest or search, is a question of law for the purposes of appeal and, although such issue may not require clarification, it may be in the public interest to take the matter to the Court; for example, where there is a need to re-establish a guilty verdict for particularly serious offences, or to avoid re-trying a mega-case, or to take into account a crime that has a substantial impact on the community in which it was committed.

### ***4.1.3. Internal procedure***

The procedure for applications for leave to appeal applies with necessary modifications to appeals as-of-right. A 30-day time limit applies to the filing of a notice of appeal as-of-right, rather than the 60-day period applicable to applications for leave.

## **4.2. Appeals with leave**

When the Court grants the Crown's application for leave to appeal, a notice of appeal must be filed within 30 days from the judgment granting the application. The notice of appeal is drafted by counsel assigned to the appeal and is served and filed after consultation with the Coordinator.

## **4.3. Notice of appeal**

### ***4.3.1. Time limits***

The time limit to file the notice to appeal is within 30 days from the Court's decision to grant leave to appeal.

For appeals as of right, the 30-day time limit begins on the date of the appellate court's judgment.<sup>18</sup>

As noted under section 3.1.4 of this guideline, the distinction between the judgment and the reasons for judgment must be borne in mind as deadlines begin to run from the time the lower court renders judgment, even if the reasons are released at a later date.

When delay in the release of reasons by the lower court makes it impossible to draft, serve and file more than simply a bare-bones Notice of Appeal, it is appropriate to request an extension of the deadline from the Court. The motion may be submitted at the same time as the application or, preferably, in advance and within the 30-day period in order to demonstrate within the time limit the intention to appeal.

### ***4.3.2. Required documents***<sup>19</sup>

For appeals by leave, it is sufficient for the notice of appeal to indicate that the appellant is appealing the lower court's judgment, without having to state the issues on appeal.

In the case of appeals as-of-right, the notice of appeal must specify the grounds of appeal and must be accompanied by a copy of the judgment and reasons being appealed from.<sup>20</sup> The grounds of appeal are limited to those questions of law on which there was a dissent

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<sup>18</sup> *Supreme Court Act*, *supra* note 8, s 58(1)(b).

<sup>19</sup> A notice of appeal template is available from the Section.

<sup>20</sup> Form 33 of the Rules, *supra* note 1.



in the court of appeal.<sup>21</sup> A party wishing to raise another issue must apply for leave of the Court to do so.

#### **4.4. Constitutional questions**

It is the prerogative of the Chief Justice of Canada, or of a designated puisne judge, to formulate constitutional questions. Such questions are required for all appeals that involve a challenge to the constitutional validity, applicability or inoperability of federal or provincial laws or regulations, or the challenge to the constitutional validity or applicability of common law rules.<sup>22</sup> Generally speaking, in addition to separation of powers cases, constitutional questions are appropriate when the remedy sought falls under s. 52 of the *Constitution Act, 1982*, as opposed to s. 24 of the Charter.

The purpose of formulating constitutional questions is to ensure that the Attorney General of Canada, the Attorneys General of the provinces, and the Ministers of Justice of the territories are alerted to constitutional challenges, in order that they may decide whether or not to intervene as of right; it also serves to advise the parties and other potential interveners of the constitutional issues before the Court.<sup>23</sup>

Proposals for constitutional questions are made by way of motion that must be filed within 30 days following the granting of a leave application (or the filing of an as of right notice of appeal). The parties, appellant or respondent, or any Attorney General or Minister of Justice, even if not a party to the appeal, can file a motion to state constitutional questions. Proposed constitutional questions must clearly identify the impugned legislative or regulatory provisions and the general nature of the alleged constitutional deficiencies. It is preferable, but not mandatory, to agree with the other parties on the formulation of the constitutional question. Depending on the circumstance, it may be necessary to object to the stating, or to wording proposed by another party, of a constitutional question.

The responsibility to prepare the motion to state a constitutional question, or to take a position on the questions proposed by other parties, rests with Crown counsel assigned to the case in consultation with the Coordinator.

#### **4.5. Factum on appeal**

##### ***4.5.1. Decision-making authority: the DPP***

All factums on appeal filed with the Supreme Court of Canada must have the prior approval of the DPP following a recommendation by the NLC.

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<sup>21</sup> *Criminal Code*, *supra* note 2, s 677 requires that the judgment of the court of appeal specify any grounds in law on which the dissent is based.

<sup>22</sup> Rules, *supra* note 1, s 60.

<sup>23</sup> *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 57.

#### 4.5.2. *Internal procedure*

Crown counsel assigned to the appeal are responsible for preparing a draft factum for the NLC's review and the DPP's approval.

Depending on the nature of the issues raised, it may be useful and in some cases required, to consult stakeholders outside the PPSC during the preparation and drafting of the factum. Typically, consultations take place with Justice Canada's Human Rights Law Section for Charter issues or the Criminal Law Policy Section with respect to provisions of federal criminal legislation, including the *Criminal Code*.<sup>24</sup>

The draft factum, along with supporting documentation,<sup>25</sup> is sent to the Coordinator within agreed-upon deadlines. The Coordinator then submits the draft to the NLC and convenes a meeting, usually by teleconference, to review it. In exceptional circumstances, for instance where there is insufficient time to hold a meeting, the Coordinator may obtain the views of NLC members by other means.

The Chair reports the NLC's recommendation to the DPP, forwarding the factum, as amended at the NLC's direction or suggestion, along with the supporting documentation.

Once approved by the DPP, counsel finalize the factum, as well as the record and the book of authorities. No major changes to the substantive arguments can be made after DPP approval without prior consultation with the Coordinator.

#### 4.5.3. *Time limits*

Unless otherwise ordered by the Court, the appellant has 12 weeks from the filing of the notice of appeal to serve and file their factum, record and book of authorities;<sup>26</sup> the respondent has 8 weeks from the service of the appellant's factum, record and book of authorities.<sup>27</sup> The month of July is included in the computation of the time limit,<sup>28</sup> but the period from December 21 to January 7 is not.<sup>29</sup>

Counsel are expected to respect the deadline for submission of the draft factum agreed upon with the Coordinator. It usually takes two weeks before the filing deadline to complete the internal procedure described above; that is, one week for the NLC members to prepare for the meeting, and one week for the NLC's suggested changes to be incorporated and for the DPP to review the record and approve the factum.

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<sup>24</sup> See the PPSC Deskbook directive "[1.3 Consultation within Government](#)".

<sup>25</sup> A copy of other parties' factum and of the lower court judgment, if any.

<sup>26</sup> Rules, *supra* note 1, s 35(1).

<sup>27</sup> *Ibid*, s 36(1).

<sup>28</sup> *Ibid*, s 5(3).

<sup>29</sup> *Ibid*, s 5.1.

#### **4.5.4. Form and content of factum**

The appeal factum, like the memorandum of argument on leave, is divided into seven parts:

1. the facts, divided into two parts: first, an overview that, in a few paragraphs, identifies and explains the issue(s) and summarizes the position adopted; second, a summary of the relevant facts, including judicial history, if required;
2. a statement of the questions in issue ; for the respondent, their position in response to the questions raised by the appellant;
3. a statement of argument;
4. submissions as to costs which generally consist in making no submission;<sup>30</sup>
5. the order sought;
6. a table of authorities, arranged alphabetically and setting out the paragraph numbers in Part III where the authorities are cited;
7. copies of the statutory or regulatory provisions referred to in the factum, in both official languages, where available.<sup>31</sup>

Parts I to V of the factum must not exceed 40 pages.<sup>32</sup> Note this is the maximum not the targeted length.

## **5. INTERVENTIONS**

### **5.1. General principles**

#### **5.1.1. Power of the DPP to intervene**

The DPP may intervene before any court in connection with any matter that raises issues of public interest that may affect the conduct of prosecutions or criminal investigations.<sup>33</sup> This power extends to interventions before the Supreme Court of Canada, which have become much more common in criminal appeals since the Charter was introduced in 1982.

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<sup>30</sup> Unless there are exceptional circumstances, costs are not awarded in criminal matters: see, in particular, *R v M (CA)*, [1996] 1 SCR 500 at para 97, *supra* note 12.

<sup>31</sup> Rules, *supra* note 1, s 42(2).

<sup>32</sup> *Ibid*, s 42(4). A template is available from the Section.

<sup>33</sup> *Director of Public Prosecutions Act*, SC 2006, c 9, s 3(3)(b) [DPP Act]. For a review of the general procedure that applies to interventions, see the PPSC Deskbook guideline on “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”.

### ***5.1.2. Authority of the Attorney General to intervene***

The Attorney General of Canada also has the authority to intervene in criminal cases.<sup>34</sup> Where the Attorney General has exercised the authority to intervene, the DPP is precluded from doing so.<sup>35</sup>

Under an informal agreement between the two organisations, interventions relating to extradition or the constitutional validity of a federal provision are undertaken by the Attorney General. Appeals pertaining to investigative powers, criminal procedure and evidence and offences are undertaken by the DPP. This division is not set in stone and may vary according to the specific circumstances of an appeal.

### ***5.1.3. Two types of intervention: as of right and with leave***

#### ***5.1.3.1. Intervention as of right for constitutional questions***

Federal and provincial attorneys general and territorial justice ministers have the power to intervene as of right when a constitutional question is stated by the Court.

Once the Chief Justice states the question, the applicant must serve on the Attorney General of Canada, the Attorneys General of each province and the Minister of Justice of each territory, the order stating the question, the notice of constitutional question and a copy of the judgment appealed from.<sup>36</sup> Attorneys General then have four weeks to serve on all other parties and file with the Registrar a notice of intervention without having to obtain leave to intervene from the Court.<sup>37</sup>

#### ***5.1.3.2. Intervention with leave***

All other interventions require leave of a judge of the Court the filing of a motion by the interested party. Interventions are possible not only in appeals and references, but also at the application for leave to appeal stage.<sup>38</sup> Motions at the leave stage are rare and the granting of leave rarer still.

## **5.2. Decision-making authority: DPP**

The DPP authorizes motions for intervention made to the Supreme Court of Canada, on the recommendation of the NLC.

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<sup>34</sup> DPP Act, *ibid*, s 14.

<sup>35</sup> *Ibid*, s 3(3)(b).

<sup>36</sup> Rules, *supra* note 1, s 61(2).

<sup>37</sup> *Ibid*, s 61(4).

<sup>38</sup> *Ibid*, s 55.

### 5.3. Criteria applicable: interest and usefulness

The Court assesses motions for intervention according to two criteria:

- the interest of the applicant in the questions raised;
- the usefulness to the Court of the proposed intervention.<sup>39</sup>

The DPP's interest in criminal investigations and prosecutions is usually easily demonstrated and poses little difficulty.

Satisfying the second criterion may, occasionally, prove more challenging as the Court strictly applies the usefulness criterion. In this regard, the applicant must set out the submissions to be advanced, their relevance and show that they differ from those of the other parties to the appeal, to avoid redundancy. This last requirement is normally the most difficult to satisfy. The following examples are circumstances in which an intervention may be warranted:

- when one of the parties fails to raise a question of law relevant to the issue or to deal with it adequately;
- when the intervener proposes a new interpretative approach to constitutional, statutory or regulatory provisions or common law rules;
- when the intervener introduces social science data that can shed light on the debate of the questions in issue;
- when the intervener proposes a comparative law approach that is useful to a consideration of the questions in issue.

Generally, however, the intervener cannot raise new questions, adduce further evidence or otherwise supplement the record of the parties; in other words, the intervener's submissions must respect the scope of the appeal as defined by the parties.

### 5.4. Internal procedure

#### 5.4.1. *Identification of potential cases for intervention*

The Section maintains a log of all Supreme Court of Canada appeals that are directly or indirectly related to criminal law or that may be of interest to the DPP in order to identify and track cases for possible intervention. Cases are monitored by the Section in order to ensure deadlines for intervention motions are respected. The Coordinator liaises with other attorneys general and directors of public prosecution when considering a possible intervention.

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<sup>39</sup> *Ibid*, s 57.

The Coordinator and the Justice Canada liaison officer identify potential cases for intervention and determine whether it is more appropriate for the DPP or the Attorney General of Canada to apply for leave to intervene.

The Coordinator considers suggestions made by Crown counsel with respect to a potential intervention.

#### ***5.4.2. Procedure for DPP authorization***

If the Coordinator considers an application for intervention should be made, the Coordinator, prepares a note seeking the approval of the DPP for the filing of a notice of intervention in an as of right constitutional question case or for the making of an application for leave in all other cases.<sup>40</sup>

The Coordinator or Committee Secretary calls a meeting of the NCL to consider the note and to formulate a recommendation to the DPP. The note and accompanying documents<sup>41</sup> must be sent to the Coordinator for distribution to NCL members enough in advance to allow NCL members sufficient time to consider the recommendation and for the DPP to review the case and make a decision. Generally, the NCL requires a week's notice prior to the meeting. In exceptional circumstances, for instance where time pressures do not permit the holding of a NCL meeting, the Coordinator may instead select another mode of consultation.

Once the NCL consultation is complete, the Coordinator reports the NCL's recommendation to the DPP, and forwards the note, as amended at the NCL's direction or suggestion, as well as the accompanying documentation.

If the DPP approves the filing of a motion for intervention, Crown counsel assigned to the case prepares the relevant documentation<sup>42</sup> and submits it to the Coordinator for review and approval before service and filing, within the prescribed delays.

### **5.5. Time limits**

#### ***5.5.1. Interventions as of right***

The Attorney General or the DPP has four weeks from the service of a notice of constitutional question to serve and file a notice of intervention. The month of July is included in the computation of time,<sup>43</sup> but the period from December 21 to January 7 is not.<sup>44</sup>

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<sup>40</sup> A note template is available from the Section.

<sup>41</sup> The note must be accompanied by a copy of the relevant judgments appealed from and the factums filed with the Supreme Court and the court appealed from, if applicable.

<sup>42</sup> See below for the counsel assignment procedure for the Supreme Court of Canada.

<sup>43</sup> Rules, *supra* note 1, s 5(3).

<sup>44</sup> *Ibid*, s 5.1.

### ***5.5.2. Intervention by leave***

The DPP has four weeks from the filing of the appellant's factum to serve and file a motion for intervention.<sup>45</sup> The month of July is included in the computation of time,<sup>46</sup> but the period from December 21 to January 7 is not.<sup>47</sup>

Owing to the short time limit, the process for NCL consultation and DPP approval must be expeditious. A schedule must be agreed upon with the Coordinator in order to meet the prescribed time limits.

### **5.6. Required documents**

A motion for intervention is comprised of a notice of motion and an affidavit.<sup>48</sup>

The notice of motion can simply refer to the affidavit which must contain all the information required to satisfy the two required criteria: the interest of the DPP in the case and the usefulness of the proposed intervention.

Although a factum in support of the motion may be filed, it is not necessary. Setting out the reasons for the intervention in an affidavit is permitted and is usually sufficient to provide the Court the information it needs to properly rule on the motion.

### **5.7. Intervener factums**

#### ***5.7.1. Decision-making authority: the DPP***

The intervener factum must be approved by the DPP, on the recommendation of the NLC, before filing at the Supreme Court.

#### ***5.7.2. Internal procedure***

Crown counsel assigned to the appeal are responsible for preparing a draft factum for review by the NCL and approval by the DPP. Counsel must provide the Coordinator with a draft factum, together with the relevant documentation,<sup>49</sup> by an agreed-upon deadline. The Coordinator distributes the factum and documentation to the NCL. The NCL usually conducts its review of the draft during a teleconference (or videoconference) meeting called by the Coordinator or the NCL Secretary. In exceptional cases, the Coordinator

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<sup>45</sup> The time limit is 30 days for a motion for intervention in the case of an application for leave to appeal.

<sup>46</sup> Rules, *supra* note 1, s 5(3).

<sup>47</sup> *Ibid*, s 5.1.

<sup>48</sup> Precedents are available from the Section.

<sup>49</sup> The factum must be accompanied by a copy of the factums of the other parties and the judgment appealed from, if applicable.

may use other methods of consultation if the circumstances warrant, including those where the time limits prevent a meeting from being held.

Once the NCL consultation is complete, the Chair reports the NCL's recommendation to the DPP, forwarding the factum, as amended at the NCL's direction or suggestion, as well as the accompanying documentation.

If the DPP approves the draft factum, Crown counsel assigned to the case finalizes the factum and the book of authorities. Once DPP approval has been obtained, no substantial changes can be made to the factum without prior consultation with the Coordinator.

### ***5.7.3. Time limits***

Unless otherwise ordered by the Court, the intervener has eight weeks from the order granting leave to intervene to serve and file a factum and book of authorities; in the case of an intervention for which leave is not required, the time limit is twenty weeks from the filing of the notice of intervention.<sup>50</sup> The month of July is included in the computation of time,<sup>51</sup> but the period from December 21 to January 7 is not.<sup>52</sup>

Counsel must submit a draft factum within the time limit agreed upon with the Coordinator. It usually takes two weeks before the filing deadline to complete the internal procedure described above, that is, one week for NCL members to prepare for the meeting and one week for the NCL's suggestions to be incorporated and for the DPP to review the record and approve the factum.

### ***5.7.4. Form and content of the intervener's factum***

The factum for intervention resembles the factum on appeal, with a few exceptions described below.

The factum cannot exceed 20 pages for interventions as-of-right and generally 10 pages for interventions by leave.

Given that the intervention should first and foremost address questions of law, it is generally not necessary to discuss the facts.

The intervener does not take a position on the outcome of the appeal. Instead, the intervener's contribution to the case is to enlighten the Court on the points of law relevant by the issues.

Part V of the factum is replaced by a request to make oral arguments.

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<sup>50</sup> Rules, *supra* note 1, s 37.

<sup>51</sup> *Ibid*, s 5(3).

<sup>52</sup> *Ibid*, s 5.



## 6. BRIEFING NOTE PURSUANT TO S. 13 OF THE DPP ACT

Under s. 13 of the *Director of Public Prosecutions Act*, the DPP must inform the Attorney General of Canada in a timely manner of any prosecution, or intervention that the DPP intends to make, that raises important questions of general interest.

All appeals and interventions involving PPSC, as well as leave applications filed by the PPSC in the Supreme Court of Canada are considered to be important and raise questions of general interest. Therefore, a s. 13 briefing note must be prepared by counsel sufficiently in advance to allow the Attorney General to consider exercising his or her power to give direction or take over a prosecution.<sup>53</sup>

Counsel must submit the draft briefing note to the Coordinator for review and approval, within the timeframe agreed upon with the Section.

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<sup>53</sup>DPP Act, *supra* note 33, s 15.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **4.1 PROTECTING CONFIDENTIAL INFORMATION UNDER SECTION 37 OF THE *CANADA EVIDENCE ACT***

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The public interest may require that sensitive or confidential information in the possession of government agencies be protected from disclosure, including disclosure in the litigation process. The need for confidentiality can arise in many ways and can involve information received or generated by government.<sup>1</sup> Public interest privilege protects certain confidential information from disclosure where such disclosure would be contrary to the public interest.<sup>2</sup> Public interest privilege can be invoked both under the common law and under certain statutory schemes. It typically involves a weighing of the competing public and private interests.

In criminal cases, an accused may seek disclosure of information that the government wishes to keep confidential.<sup>3</sup> Sections 37, 38 and 39 of the *Canada Evidence Act* (the CEA) establish a regime for objecting to the disclosure of information. This directive sets out the policy and procedures for objections raised under s. 37 during a prosecution.<sup>4</sup> Separate directives exist in respect of s. 38 and s. 39 of the CEA.<sup>5</sup>

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<sup>1</sup> For example, national security agencies sometimes receive information from foreign governments or other sources about terrorist groups in Canada. Similarly, law enforcement agencies receive information on criminal activity, and departments are often made privy to proprietary information concerning corporations.

<sup>2</sup> For a thorough discussion of law the law of privilege and in particular public interest privilege, see Robert W. Hubbard, Susan Magotiaux & Suzanna M. Duncan, “The Law of Privilege in Canada”, (Aurora: Canada Law Book, 2011) chapter 3 “Public Interest Privilege Under Section 37 of the *Canada Evidence Act* and Common Law”.

<sup>3</sup> *Bisaillon v Keable*, [1983] 2 SCR 60 at 97.

<sup>4</sup> Section 38 sets out the procedure for objecting to disclosure under s 37 on the grounds that the disclosure would be injurious to international relations, or national defence or security. The Federal Court is the forum for determining such objections. Section 39 sets out the right to object to the disclosure of confidences of the Queen's Privy Council for Canada.

<sup>5</sup> See PPSC Deskbook directives “[4.2 Protecting Confidential Information under Section 38 of the \*Canada Evidence Act\*](#)” and “[4.3 Protecting Cabinet Confidences under Section 39 of the \*Canada Evidence Act\*](#)”.

These objections are most commonly raised in situations where Crown counsel objects to an application for further disclosure from defence counsel, where a court might otherwise compel its production. Similarly, such objections may arise where defence counsel attempts to elicit confidential information while cross-examining a Crown witness. It is also possible that a federal official (e.g. RCMP, CSIS a government department) or a provincial or municipal official (e.g. a provincial Attorney General, municipal police force) may object to disclosure of confidential information.

## 2. STATEMENT OF POLICY

Section 37 of the CEA sets out when objections can be made to the disclosure of information on the basis of a specified public interest. Reliance on s. 37 to assert claims of privilege should be the exception, not the rule.<sup>6</sup> The CEA therefore should be a mechanism of last resort to protect evidence from disclosure. If disclosure of the information can be prevented on some other basis, such as lack of relevance or by asserting a common law privilege, those methods should be pursued first. For example, the common law rules preventing disclosure on grounds such as solicitor/client privilege, investigative privilege technique, location of surveillance post, or police informer privilege<sup>7</sup> first should be invoked rather than s. 37. Alternatively, steps may be taken to adduce the evidence without endangering the interest at risk (for example, vetted disclosure, delayed disclosure).

However, the assertion of a claim of privilege under the common law does not preclude subsequent resort to s. 37.<sup>8</sup> Where a trial judge rejects a common law claim of privilege and orders disclosure of confidential information over objections of the party claiming the privilege, the claimant may then invoke the broader s. 37 public interest privilege.

## 3. CONSULTATION

Where Crown counsel expects that an issue of this nature may arise, it is important to confer with investigators and interested departments or agencies before the proceedings begin. A plan must then be developed that takes into account the following matters, among others:

- the nature of the public interest to be protected;
- whether other objections have been or may be raised;

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<sup>6</sup> *R v Basi*, [2009] 3 SCR 389 at 398.

<sup>7</sup> See the PPSC Deskbook guideline “[3.11 Informer Privilege](#)”.

<sup>8</sup> *Basi*, *supra* note 6.

- the competing public interests in disclosure and non-disclosure for the purposes of the s. 37(5) balancing the court must undertake;<sup>9</sup>
- whether non-disclosure would compromise the prosecution;
- the effect the objection may have on the proceedings;<sup>10</sup>
- whether the claim of privilege grounding the objection is justified in the circumstances and not overreaching;<sup>11</sup> and
- who should advance the objection.<sup>12</sup>

#### **4. WHO MAKES THE OBJECTION**

Objections under s. 37 of the CEA involving a public interest will usually be made by a senior public official from the relevant investigating body or government department or agency which has responsibility in relation to the specified public interest. For example, the official may be a senior police officer concerned about the possible disclosure of police techniques and methods of investigation, such as the location of observation sites or the identity of police informers. The official may be either a federal or provincial government official.

#### **5. PROCEDURE FOR MAKING THE OBJECTION**

Objections under s. 37 may be made orally or in writing by certifying that information should not be disclosed on the grounds of a "specified public interest".<sup>13</sup> Under s. 37(5) of the CEA, the court is required to weigh the public interest in disclosure against the specified public interest. Crown counsel must identify the actual injury or harm that will result from disclosure. Crown counsel will have to offer a convincing rationale, explaining how the information came into existence, why non-disclosure is important, and the nature and gravity of the injury or harm that will occur if it is disclosed. However, when the "specified public interest" at stake is informer privilege, no balancing is required. Crown counsel can simply argue that the information is of a class which, by

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<sup>9</sup> Note that informer privilege is absolute and thus there is no balancing of the public interest in disclosure versus confidentiality in respect of informer privilege claims.

<sup>10</sup> For example, will the objection be determined by a court other than the trial court? Are there concerns regarding resulting delay?

<sup>11</sup> If unfounded or overly broad claims of privilege are made, courts may over time begin to accord less weight to certificates filed under s 37 when balancing the competing interests in disclosure and non-disclosure.

<sup>12</sup> Where the interested party is a federal department or agency, typically lawyers from the Department of Justice Civil Litigation Section advance the objection on behalf of that party. If the police advance the claim, typically PPSC counsel advance the objection in court on behalf of the police.

<sup>13</sup> *Canada Evidence Act*, s 37(1).

definition, merits non-disclosure. Informer privilege is not amenable to the public interest balancing contemplated in s. 37(5).<sup>14</sup>

The CEA does not define the nature of the public interest which may be protected. Where the public interest claim must be assessed on a case-by-case basis, Crown counsel should assess the validity of the claim of privilege by measuring it against, among other criteria, those established by Wigmore:<sup>15</sup>

1. the communications must originate in a confidence that they will not be disclosed;
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. the relation must be one which in the opinion of the community ought to be sedulously fostered;
4. the injury that would ensue to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

## 6. FORUM FOR THE OBJECTION

A s. 37 application constitutes a proceeding separate from the trial proper and from pre-trial proceedings.<sup>16</sup> Crown counsel may invoke common law privilege and make a claim under s. 37 of the CEA both in provincial and superior courts. However, whereas claims of common law privilege may be determined by both provincial and superior court judges, only superior court judges and the Federal Court have jurisdiction to determine s. 37 claims. By resorting first to the common law privilege in provincial courts, Crown counsel may avoid unnecessary fragmentation of, and delay in, the proceedings. Where the Crown invokes s. 37, the application must be heard before the Superior Court of the same province or territory.<sup>17</sup>

## 7. WHERE THE COURT ORDERS DISCLOSURE

On an objection under s. 37, courts must determine that the public interest in disclosure outweighs the importance of the specified public interest.<sup>18</sup> When the court decides in favour of disclosure, Crown counsel should again consult with the interested parties and determine which of the following options is most appropriate:

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<sup>14</sup> *Basi*, *supra* note 6 at paras 22-23. See also *R v Barros* 2011 SCC 51 where Binnie J states that the courts will enforce informer privilege without balancing of the competing interests that applies to other forms of privilege such as journalistic privilege.

<sup>15</sup> Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. 1961), vol 8 at 527; cited by the Supreme Court of Canada to assess privilege on a case-by-case basis in *R v National Post*, 2010 SCC 16 [2010] 1 SCR 477; *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41, [2010] 2 SCR 592.

<sup>16</sup> *Basi*, *supra* note 6 at para 19.

<sup>17</sup> CEA, s 37(3)(b). Alternatively, it can go before the Federal Court.

<sup>18</sup> CEA, s 37(5).

1. Simply comply with the court's ruling. Before doing so, counsel should ascertain from the client department or investigating agency the extent of the harm that will occur on disclosure and assess whether the harm can be minimized in a way that is still consistent with the court's ruling;
2. Appeal the court's ruling. This decision should be made in consultation with the Chief Federal Prosecutor and investigating agency;<sup>19</sup> or
3. Stay the proceedings. This option is to be used when there is no other way to protect the information and the importance of keeping it in confidence outweighs the public interest in pursuing the charges.<sup>20</sup>

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<sup>19</sup> In accordance with the PPSC Deskbook guideline “[3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal](#)”.

<sup>20</sup> In rare and compelling circumstances, it may be appropriate to stay proceedings and then re-commence them in accordance with s 579(2) of the *Criminal Code*. See for instance, *R v Scott*, [1990] 3 SCR 979, (1990), 61 CCC (3d) 300. Before taking this approach, however, the matter must be discussed with counsel’s supervisor, and in some instances may need to be raised with the Deputy Director of Public Prosecutions.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **4.2 PROTECTING CONFIDENTIAL INFORMATION UNDER SECTION 38 OF THE *CANADA EVIDENCE ACT***

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Section 38 of the *Canada Evidence Act*<sup>1</sup> (CEA) sets out a regime which prevents the disclosure of information or documents that contain what is defined as “sensitive” or “potentially injurious” information in a criminal proceeding without the consent of the Attorney General of Canada (Attorney General), or a court order.

### 2. OVERVIEW

Section 38.01 requires every participant in a proceeding to advise the Attorney General, as opposed to the Director of Public Prosecutions (DPP), in writing where there is a possibility of disclosure of sensitive or potentially injurious information. The disclosure of this information is prohibited unless authorized by the Attorney General or by a Federal Court judge. References in this directive to the Attorney General relate to the Department of Justice and not to the Office of the DPP.

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<sup>1</sup> RSC 1985, c C-5.

Upon receipt of the written notice, the Attorney General has ten days to provide written notice of his or her decision with respect to disclosure of the information.

If disclosure is not authorized within 10 days, disclosure of the information remains prohibited, pending a decision of the Federal Court.

### 3. APPLICATION

Section 38 applies to all criminal proceedings,<sup>2</sup> and whether the Public Prosecution Service of Canada (PPSC), a provincial Attorney General or even a private prosecutor has carriage of the prosecution.

### 4. TIMING

The obligation to notify the Attorney General arises both where disclosure is required to be made and where it may not be required but is nevertheless expected. Under the CEA, the obligation rests with the participant who expects to disclose. However, PPSC counsel must also ensure that the provisions are respected whether or not the Office of the DPP is the custodian of the information. Thus, counsel should raise the issue:

- with opposing counsel where PPSC is a party to the proceedings and it becomes apparent that the defence proposes to call or commences calling evidence that may engage s. 38;
- with the provincial Crown where it comes to counsel's attention that the Crown has disclosure materials in a provincial prosecution that may engage s. 38; and
- with the provincial Crown where it comes to counsel's attention that either the Crown or the defence in a provincial prosecution plan to call a witness or tender evidence that may engage s. 38.

Unless PPSC counsel is satisfied that provincial Crown counsel and/or opposing counsel, as appropriate, have provided notice to the Attorney General of Canada, PPSC counsel should consider appearing in court to raise the matter with the presiding justice.

Although likely to be a rare event in a criminal trial, counsel should also be aware that certain witnesses, who meet the definition of an "official" under s. 36.1 CEA,<sup>3</sup> may also

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<sup>2</sup> It also applies to any other proceedings under the *Criminal Code*, such as a sealing order under s 487.3 of the *Criminal Code* or an order for forfeiture under s 83.14 of the *Criminal Code*.

<sup>3</sup> Section 36.1 of the CEA adopts the definition in s 118 of the *Criminal Code* of "official", namely a person who (a) holds an office, or (b) is appointed or elected to discharge a public duty.

raise the matter with the court where the witness believes that information covered by the provision are at risk of being disclosed.<sup>4</sup>

## **5. RELATIONSHIP WITH SECTION 37 OF THE *CANADA EVIDENCE ACT***

Where Crown counsel determine that both s. 38 and s. 37 may apply, s. 38 takes primacy and Crown counsel should resort first to s. 38.

## **6. JURISDICTION**

Where the PPSC does not have carriage of the prosecution, s. 38.15 CEA allows for the serving of a fiat on the prosecution establishing the exclusive jurisdiction of the Attorney General of Canada to conduct the prosecution. In the alternative, the Attorney General of Canada may choose not to issue a fiat but instead come to an agreement with the provincial prosecutor respecting the manner and substance of disclosure of sensitive information.

Therefore, any counsel who becomes aware of the existence of any non-federal prosecution or potential prosecution, or any other court proceeding that may engage s. 38, must advise their Chief Federal Prosecutor (CFP), as well as the Regional Terrorism Prosecutions Co-ordinator, of the matter.

The Regional Terrorism Prosecutions Co-ordinator in turn will advise the National Terrorism Prosecutions Co-ordinator so he or she may confirm that the Attorney General has been advised of the possibility of disclosure and determine whether a fiat should be issued.

## **7. PROCEDURE IN PPSC PROSECUTIONS – DOCUMENTS IN THE INVESTIGATIVE FILE**

As a practical matter, s. 38 claims are most likely to arise in the context of national security prosecutions. Files that may be reasonably expected to contain documents engaging national security privilege include:

- terrorism offences,<sup>5</sup> including public bombings under s. 431.2 of the *Criminal Code*;

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<sup>4</sup> See CEA, s 38.01(2). The official may also raise it with the Attorney General, CEA, s 38.01(3). The provision is actually broader: the official need not be a witness to raise the matter but may actually not be directly involved in the proceeding at all.

<sup>5</sup> “Terrorism offences” are defined in s 2 of the *Criminal Code*.

- offences relating to internationally protected persons under s. 424 and s. 431 of the *Criminal Code* or against a member of the United Nations or associated personnel;
- war crimes;
- human smuggling;
- *Security of Information Act*<sup>6</sup> offences;
- passport or citizenship forgery offences under ss. 57 and 58 of the *Criminal Code*;
- files with classified information (generally Secret or above) or documents from CSIS, CSE or RCMP National Security Intelligence; and
- files with information from foreign law enforcement partners.

In many of these cases, the PPSC may be involved in providing legal advice prior to charges being laid.

The first stage in assessing a s. 38 claim is to identify whether or not the information is relevant under *R v Stinchcombe*.<sup>7</sup> Information that is not relevant is not subject to disclosure and there is no need to advise the Attorney General of Canada unless there is a risk of disclosure. If information would otherwise be subject to disclosure under *Stinchcombe*, but is properly the subject of a s. 38 claim, then the prosecutor should inform the National Security Group, and promptly prepare a Notice under s. 38.01 in accordance with this directive.

In complex prosecutions, PPSC counsel may seek and receive input from the investigative agency about both the likely relevance of the information as well as whether or not the information may cause harm to national security, national defence or international relations if disclosed.

Prior to sending a Notice, PPSC counsel shall notify the CFP and the National and Regional Terrorism Prosecutions Co-ordinators. Pursuant to s. 38.02(1)(b), the fact that Notice has been given shall not be disclosed.

## **8. TEST FOR POTENTIALLY INJURIOUS OR SENSITIVE INFORMATION**

“Potentially injurious information” is defined in s. 38 as information that could injure international relations, national defence or national security. It should be noted that:

- the information need not be in possession of the Crown nor generated by the Crown;

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<sup>6</sup> RSC 1985, c O-5.

<sup>7</sup> [1995] 1 SCR 754, 96 CCC (3d) 318.

- the focus is on the potential for harm rather than on any particular subject matter;
- the information need not be in a document, but may also include information known to a witness; and
- the reliability of the information is not relevant to the determination of its sensitivity.

“Sensitive information” is information in the possession of the Government of Canada of a type that Canada is taking measures to safeguard, and relates to international relations, national defence or national security. The information must:

- be in the possession of the Government of Canada; and
- relate to one of the three enumerated interests.

It may not be apparent to counsel whether or not the Government of Canada is taking means to protect the information. Crown counsel should err on the side of caution. If in doubt, counsel must consult the National Security Group (NSG) of the Department of Justice.

The NSG’s guide to s. 38 entitled “An Introduction to Section 38 of the *Canada Evidence Act*” has a non-exhaustive list of some practical examples of sensitive or potentially injurious information, such as:

- confidential diplomatic exchanges or other information about Canada’s relationships with foreign states;
- strategies of the government in foreign affairs;
- information received from third parties such as foreign intelligence services with a caveat against further disclosure;<sup>8</sup>
- capabilities and functions of Canadian forces, details of military operations
- intelligence operation, organizations and sources;
- telecommunications and cipher systems or cryptology, military equipment; and
- the identity of covert employees, confidential sources, or the targets of an ongoing or past investigation that have not been made public.

In assessing whether s. 38 applies, PPSC counsel may have recourse to the following resources:

- the NSG’s Guide is available from the Regional Terrorism Prosecution Co-ordinator through the Terrorism Toolkit;

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<sup>8</sup> In this case, some form of request for further disclosure should usually be made to the foreign source and an answer received prior to relying on the third party rule. However, the claim should be made in the interim until and unless a permissive answer is received.

- the regional Terrorism Prosecution Co-ordinator or the National Terrorism Prosecution Co-ordinator; and
- the NSG.

Where the information may fall within s. 38, counsel shall prepare a Notice, required by ss. 38.01(1) to (4) and send it to:

Director of the National Security Group  
The National Security Group  
Criminal Litigation Division  
Litigation Branch  
284 Wellington Street  
Ottawa, Ontario  
K1A 0H8

The Notice must contain:

- the name, address and phone number of PPSC counsel acting as the notifier;
- the nature, date and place of the proceeding in which the disclosure may occur;
- a brief procedural history and synopsis of the case;
- an assessment of the relevance of the information;
- a description of the information and, if possible, the information itself; and
- a brief description of the possible injury that disclosure should cause, i.e. the basis upon which it is believed that s. 38 may apply.

Counsel may contact NSG to obtain assistance with respect to the content of the Notice.

The NSG will formulate the Attorney General of Canada's position as to whether a privilege under s. 38 applies and whether to authorize disclosure of the information under s. 38.03 or enter into a disclosure agreement under s. 38.031 CEA.

Note also that the CEA prohibits disclosure of the fact that Notice has been given until authorized by the Attorney General. Counsel should confirm with NSG that permission to disclose the fact of the notice has been granted by the Director of the NSG.

## **9. APPLICATION TO THE FEDERAL COURT UNDER SECTION 38.04 OF THE *CANADA EVIDENCE ACT* FOR A DISCLOSURE ORDER UNDER SECTION 38.06 OF THE *CANADA EVIDENCE ACT***

The disclosure issue may be taken before the Federal Court on the initiative of the Attorney General, the Crown, the accused (if he or she has been made aware of it), or any other person who seeks the disclosure of the protected information (s. 38.04).

Applications before the Federal Court are conducted by Department of Justice counsel acting on behalf of the Attorney General and not by PPSC counsel. However, the trial judge in a criminal trial is to be given notice of the hearing, as are the accused and his or her counsel, and PPSC counsel should be vigilant in verifying that this has in fact taken place unless the Federal Court has declined to so order.

PPSC counsel with carriage of the prosecution should also seek to be served with Notice of a Hearing under ss. 38.04(i) or 38.04(5)(c)(i) CEA, and should ask counsel for the Attorney General to seek this order on the DPP's behalf. PPSC counsel must consider whether it is necessary to apply to make representations on the application.

The test for a disclosure order under s. 38.06 requires a Federal Court justice to assess whether or not the disclosure of the information would be injurious to international relations, national defence or national security. If this threshold is met, the justice then must consider whether the public interest in disclosure outweighs the public interest in non-disclosure.

Before undertaking this balancing test, the federal court judge must determine whether the information sought to be disclosed is relevant, with the onus on the party seeking disclosure.<sup>9</sup> In arguing this aspect of the test, Department of Justice counsel may well benefit from the input of PPSC counsel respecting the relevance of the information to an issue at trial.

The Federal Court justice has the option of crafting conditions on the form of disclosure as well as to order a summary of the information, a part or summary of the information or a written admission of facts relating to the information.

## **10. IMPACT OF CONFIRMATION OF PROHIBITION OR PROHIBITION CERTIFICATE**

Section 38.14 CEA authorizes the trial judge to make any order considered appropriate to protect the right of the accused to a fair trial, including staying the proceedings, dismissing specified counts or an order finding against the Crown on the issue relating to disclosure that has been prohibited.

Lack of disclosure in this context cannot necessarily be equated with the denial of the right to make full answer and defence resulting in an unfair trial. There will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised by the absence of full disclosure. However, the remedies have been defined very broadly and, according to the Supreme Court of Canada,

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<sup>9</sup> *R v Ribic*, 2005 1 FCR 33; *Canada (Attorney General) v Canada (Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar)*, 2008, 3 FCR 248.



“Parliament expected trial judges to be provided with a sufficient basis of relevant information on which to exercise their remedial powers judicially”.<sup>10</sup>

Of particular note, a stay of proceedings can be granted even where the “clearest of cases” threshold ordinarily required for a stay has not been met. The Supreme Court held in *Ahmad*,<sup>11</sup> that “...the legislative compromise made in s. 38 will require a stay in such circumstances if the trial judge is simply unable to conclude affirmatively that the right to a fair trial, including the right of the accused to a full and fair defence, has not been compromised.”

The Supreme Court has suggested a number of possible “arrangements” to satisfy the trial judge that non-disclosure has not materially affected trial fairness, including:

- “partial or conditional disclosure” to the trial judge alone;
- provision of a summary of the information to the trial judge alone, the trial judge and prosecutor, or all the parties;
- adapting certain facts sought to be established by an accused as proven and true for the purposes of the criminal proceeding;
- where the relevance of the withheld material is in issue, the appointment of a special advocate may be appropriate; and
- allowing defence counsel to access the withheld material on an undertaking not to disclose it to the accused. However, the Supreme Court of Canada urged caution in resorting to this practice.<sup>12</sup>

These arrangements require either the consent of the Attorney General, or a Federal Court order.

If, under the arrangements that are made, there is simply not enough information to decide whether or not trial fairness has been materially affected, the trial judge must presume that the non-disclosure order has adversely affected the fairness of the trial, including the right of the accused to make full answer and defence.

However, in such a case, rather than proceed directly to issuance of a stay, the Supreme Court placed an obligation on the trial judge to give the Crown “fair warning”. PPSC counsel will then have an opportunity to make further and better disclosure to address the trial judge’s concerns. This is an opportunity for PPSC counsel to approach the NSG to determine if there are any conditions that may be devised whereby the Attorney General may consent to release any additional information. If no (or inadequate) additional

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<sup>10</sup> *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110 [*Ahmad*].

<sup>11</sup> *Ibid* at para 35.

<sup>12</sup> *Ibid* at para 49.

information can be provided to the trial judge, a stay of proceedings will be the presumptively appropriate remedy.<sup>13</sup>

For this reason, PPSC counsel should explore any and all options, in consultation with counsel for the Attorney General, for providing as much material as possible (a) to all parties and (b) failing that, to the trial judge with counsel for the Attorney General acting on the s. 38 hearing.

Outside agencies from which the information originates may seek the prosecutor's views as to the impact that non-disclosure may have on the fairness of the trial. PPSC counsel may provide these views but must remain mindful of the fact that these agencies are not the investigative agency on the file and are third parties for the purposes of the prosecution with their own legal counsel.

If it becomes obvious to Crown counsel that non-disclosure under s. 38 will significantly and irreparably impact trial fairness, then Crown counsel itself ought normally to enter a stay of proceedings.<sup>14</sup> In assessing both the reasonable prospect of conviction and the public interest in a prosecution PPSC counsel will be assisted by the earliest possible identification of material which, the Attorney General is not prepared to disclose. This is another reason for advisory counsel to send early notifications to the NSG where sensitive or potentially injurious information is identified.

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<sup>13</sup> *Ibid* at para 51.

<sup>14</sup> *Ibid* at para 46.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **4.3 PROTECTING CABINET CONFIDENCES UNDER SECTION 39 OF THE *CANADA EVIDENCE ACT***

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Cabinet decision-making is founded on the principle of collective responsibility. In practice, this means that a decision of the Cabinet, or one of its committees, binds all members of the Government, regardless of their personal views on the issues being decided. Cabinet and its committees constitute the forum in which Ministers collectively make decisions on government policy and initiatives. The Cabinet meetings enable Ministers, within a confidential setting, to debate issues vigorously, reconcile different perspectives, participate in and influence deliberations, and collectively reach decisions.

Section 39 of the *Canada Evidence Act* (CEA) constitutes the statutory means for safeguarding that Cabinet confidentiality sets out a regime which prevents the disclosure of information or documents that consist of confidences of the Queen's Privy Council for Canada.

### 2. OVERVIEW

Although the “Queen’s Privy Council for Canada” referred to in s. 39 of the *Canada Evidence Act* (CEA) has quite an expansive membership, for the purposes of litigation the concern is usually with Cabinet documents. The purpose of “Cabinet Confidence” privilege is to protect from disclosure discussions and deliberations of federal Cabinet Ministers on matters that are, or have been, the subject of discussion at Cabinet meetings or between Cabinet Ministers. Cabinet Confidence privilege exists so that Ministers can have open and frank discussions and not be concerned with public perception of their deliberations. Cabinet Confidence privilege does not extend to the day-to-day administration of federal government departments. Section 39(4) limits Cabinet Confidence privilege to 20 years.

Section 39 of the CEA acts as an absolute bar to the disclosure of Cabinet Confidences as defined in s. 39(2). Whereas a judge assesses and makes the determination regarding disclosure or protection of information under ss. 37 and 38<sup>1</sup> of the CEA, the determination

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<sup>1</sup> With the exception of s 38.13 of the *Canada Evidence Act*.

of Cabinet Confidences under s. 39 is made by the Clerk of the Privy Council or a Cabinet Minister. Where a certificate is filed under s. 39 certifying that the information constitutes a Cabinet Confidence, a court must refuse disclosure of that information without examination or hearing of the information.<sup>2</sup> Objections under s. 39 must be made in writing, certifying that the information constitutes a Cabinet Confidence.

### 3. DOCUMENT REVIEW

Section 39(2) of the CEA, which defines “confidence of the Queen's Privy Council”, protects the following types of documents from disclosure:<sup>3</sup>

- a) Final and draft forms of Memoranda to Cabinet and information or preparatory documents that discuss subject matter or input into such Memoranda (s. 39(2)(a));
- b) In addition to actual agendas of Cabinet meetings, documents that discuss dates, locations, attendees and details of Cabinet meetings (s. 39(2)(c)); while Cabinet decision-making and recorded decisions are secret, the implementation of those decisions is not;
- c) Any record used for or reflecting communications or substantive discussions of any kind between Ministers regarding government policy and decisions (s. 39(2)(d));
- d) Final versions of briefings to a Minister on matters to be discussed with another Minister or at a Cabinet meeting (s. 39(2)(e)); drafts of these Memoranda, often called a “Briefing Note to the Minister” or “Memorandum to the Minister”, may be circulated widely for input. This wide circulation does not necessarily remove the document from s. 39 privilege; and,
- e) draft legislation (s. 39(2)(f)).

Determining whether a document is a Cabinet Confidence as described in s. 39(2)(a) to (f) and thereby protected from disclosure can be challenging in some cases. Documents may also be severed or have portions redacted instead of being entirely protected.

Crown counsel working on a file that may contain Cabinet Confidence documents must identify the relevant documents and the documents must be sent to the Privy Council Office (PCO) for review. It is wise to contact PCO as soon as reasonably practicable so that PCO officials can plan to review the documents and obtain the Clerk’s Certificate. Crown counsel shall notify the Chief Federal Prosecutor who will bring the matter to the attention of the appropriate Deputy Director of Public Prosecutions. The latter will consult with the Assistant Secretary to the Cabinet (Legislation and House Planning) to allow the

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<sup>2</sup> *Babcock v Canada (Attorney General)*, 2002 SCC 3, [2002] 3 SCR 3 at para 17.

<sup>3</sup> The discussion papers referred to at s 39(2)(b) CEA have not been in use since the 1980’s. Since the privilege for these documents expires after four years (s 39(4)(b)) CEA, no discussion papers are protected.

Minister<sup>4</sup> or the Clerk of the Privy Council to certify the documents and protect them from disclosure.

Once PCO officials have reviewed the documents and the Clerk has made a final determination of privilege, a Clerk's Certificate will be prepared.

#### **4. CHALLENGE TO A CERTIFICATE**

The consultation process described above also applies where an accused seeks disclosure of information which has been certified as a Cabinet Confidence.<sup>5</sup> The Clerk's Certificate produced in court simply describes the protected documents without revealing their contents. This Certificate is evidence that the listed documents are protected from disclosure. A court may not review the Cabinet documents listed in the Certificate. Although the court is not entitled to go behind a proper certificate filed under s. 39, the court can review the certificate to determine if, on its face, it complies with this section.<sup>6</sup>

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<sup>4</sup> The Minister may also certify the documents, however, this is a rare occurrence.

<sup>5</sup> In the past, Cabinet Confidences have been released in prosecutions only where a Minister of the Crown has been charged and that Minister had a conventional right of access as a Minister to the information at issue in the prosecution. An Order in Council releasing such information is required. Where, for the purposes of a prosecution, Crown counsel seeks to disclose information which may be a confidence of the Privy Council, permission to do so may be obtained in this manner as well.

<sup>6</sup> See *Babcock*, *supra* note 2 at para 28; *Canada (Privy Council) v Pelletier*, 2005 FCA 118 at paras 16-18.



# **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

## **5.1 NATIONAL SECURITY**

### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

February 14, 2014

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### 1. INTRODUCTION

In the Report on the Air India tragedy,<sup>1</sup> the Honourable John Major summed up succinctly the characteristics of terrorism that distinguish it from other crimes: “Terrorism is an existential threat to Canadian society in a way that murder, assault, robbery and other crimes are not. Terrorists reject and challenge the very foundations of Canadian society.”

Prosecutions with a national security component (e.g., terrorism or espionage) or relating to a war crime or a crime against humanity have both national and international significance. They regularly involve sensitive issues of international relations, national defence and national security, and other important broad-based public interests.

For these reasons, special considerations and policies apply to national security prosecutions.

### 2. DEFINITION

For the purposes of this guideline, the following are considered national security prosecutions:

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<sup>1</sup> See *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Air India Flight 182: A Canadian Tragedy*, vol 1 (Ottawa: Public Works and Government Services Canada, 2010) at 159.



- terrorism offences as defined in s. 2 of the *Criminal Code* and which include but are not limited to offences under Part II.1 of the *Criminal Code*, and any inchoate form of such an offence;
- public bombings under s. 431.2 of the *Criminal Code*;
- offences related to internationally protected persons<sup>2</sup> or against a member of the United Nations or associated personnel;<sup>3</sup>
- offences captured by s. 7(7) of the *Criminal Code* that involve foreign officials or heads of state;
- offences under the *United Nations Act*;<sup>4</sup>
- offences under the *Security of Information Act*;<sup>5</sup>
- the offence under s. 18 of the *Canadian Security Intelligence Service Act*;<sup>6</sup>
- offences under the *Crime Against Humanity and War Crimes Act*;<sup>7</sup> and
- offences involving the proliferation or the illegal import, export or sale of nuclear materials.

### 3. PRE-CHARGE LEGAL ADVICE

Where Public Prosecution Service of Canada (PPSC) counsel are approached for pre-charge legal advice on a matter falling within the subject matter of this guideline, counsel must advise their Chief Federal Prosecutor (CFP) and the National Terrorism Prosecutions Coordinator that they have been asked to provide legal advice, even if the investigation is in its infancy.

There is a protocol in place respecting whether or not a matter will be the responsibility of the Attorney General of Canada or the Attorney General of a province. The protocol provides for early communication between interested Attorneys General. Any questions about the application of the protocol should be raised with the National Terrorism Prosecutions Coordinator.

In order to commence terrorism proceedings, law enforcement authorities require the consent of the Attorney General.<sup>8</sup> That consent may be given by the Director of Public Prosecutions (DPP) or a Deputy Director of Public Prosecutions (Deputy DPP).<sup>9</sup>

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<sup>2</sup> *Criminal Code*, s 7(3).

<sup>3</sup> *Ibid*, s 7(3.71).

<sup>4</sup> RSC 1985, c U-2, s 3.

<sup>5</sup> RSC 1985, c O-5, ss 3-23.

<sup>6</sup> RSC 1985, c C-23, s 18.

<sup>7</sup> SC 2000, c 24.

## 4. PROCEDURE FOR COMMENCEMENT OF CHARGES

Charges for which a consent is sought must meet the charge approval standard in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”. Terrorism cases are inherently serious and where the evidentiary standard is met, the public interest will normally be best served by a prosecution. However, each case requires an individual analysis of the factors in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

### 4.1. Regional office

Requests to consent to the commencement of proceedings must be made by the appropriate Senior headquarters representative of the concerned law enforcement agency, and must be directed to the Deputy DPP, Drugs, National Security and Northern Prosecutions Branch. PPSC HQ will request a recommendation from the region in which the investigation originated. Crown counsel in the region must ensure that they are in possession of sufficient information, including documentation from the investigative file, to assess the request according to the applicable standard.

The CFP shall ensure the preparation of a legal memorandum addressing the following:

1. a concise description and analysis of the available evidence, demonstrating how that evidence results in a reasonable prospect of conviction with respect to each accused on each count, and addressing why the public interest is best served by a prosecution. The memorandum must include the names of the accused, the charges, and the date, if any, for which the consent is being requested by the police. The memorandum should highlight the strengths and weaknesses of the case, as well as any significant legal issues expected to be encountered, and any issues of particular importance to the assessment of the public interest;
2. the degree to which the prosecution may require the disclosure of information that could be injurious to national security, international relations or national defence;
3. the memorandum should recommend whether or not the request should be granted;
4. copies of witness statements or other key pieces of evidence essential to evaluating the strength of the prosecution’s case; and
5. two original informations or indictments containing all charges for which the indictment is requested. Both should be signed in the usual way by the person

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<sup>8</sup> *Criminal Code*, s 83.24. Section 2 defines the Attorney General as including his or her lawful deputy, being the Deputy Attorney General; *Director of Public Prosecutions Act*, SC 2006, c 9, s 3(4) [DPP Act] designates the DPP as the Deputy Attorney General of Canada for the purposes of exercising the powers and duties under the DPP Act. Section 6(3) of the DPP Act designates the Deputy DPPs, under the supervision of the DPP, as lawful deputies of the Attorney General.

<sup>9</sup> DPP Act, s 6(3).

normally signing indictments in the regional office. Below that, the following should appear:

I hereby consent to the commencement of proceedings pursuant to section 83.24 of the *Criminal Code*. Dated at Ottawa, Ontario, this \_\_\_\_\_ day of \_\_\_\_\_ , \_\_\_\_\_ .

Deputy Director of Public Prosecutions and pursuant to section 6(3) of the *Director of Public Prosecutions Act*, a lawful deputy of the Attorney General of Canada

The CFP shall review the memorandum and, if satisfied that it adequately considers the factors indicated above, send it to the Deputy DPP, Drug, National Security & Northern Prosecutions Branch, with his or her endorsement of the recommendation.

In circumstances where an arrest has been made or is imminent, and time does not permit a structured memorandum, less formal communications may be appropriate. However, this abbreviation is one of form and not of substance. In all cases the reviewing Crown and the CFP (or designate) must provide their informed assessments of the file.

#### **4.2. Headquarters**

The Deputy DPP conducts an objective assessment of the request to determine whether to consent to proceedings. If consent is granted, requesting counsel must prepare a briefing note to the Attorney General in compliance with s.13 of the DPP Act.<sup>10</sup>

### **5. PROCEDURAL CONSIDERATIONS AFTER CONSENT TO COMMENCEMENT OF PROCEEDINGS**

For the purposes of prosecution management, all prosecutions to which this section applies are deemed to be Major Cases and the policies contained in the PPSC Deskbook guideline “[3.1 Major Case Management](#)” apply to these cases.

Prosecuting counsel must keep the Deputy DPP, through the National Prosecutions Terrorism Co-ordinator, informed of the progress of the file. Once the trial has been completed, the CFP must also report the outcome to the Deputy DPP.

Where, after a full review of the evidence, Crown counsel concludes that all or some of the charges ought to be withdrawn, stayed or reduced, the Deputy DPP must first be consulted, and a s.13 briefing note prepared with as much time as is reasonably permitted to enable the Attorney General to exercise his or her powers under the DPP Act, should he or she so choose.

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<sup>10</sup> See the PPSC Deskbook directive “[1.2 Duty to Inform the Attorney General under section 13 of the Director of Public Prosecutions Act](#)”.

Section 13 briefing notes must also be prepared by trial counsel at the following stages of the prosecution:

- after a discharge on a preliminary inquiry or a stay of proceedings imposed by the court;
- upon acquittal or conviction;
- after the court imposes sentence; and
- in any other circumstances where important questions of general interest are raised, such as the receipt of an important constitutional ruling.

## **6. SENTENCING**

The terrorism provisions catch a wide variety of conduct, a feature recognized by the Supreme Court of Canada in *R v Khawaja*.<sup>11</sup> As in all criminal cases, sentencing is a highly individualized process depending on the particular facts at issue and the circumstances of the offender. Sentences in terrorism cases fall to be decided under the same set of sentencing principles as do other crimes.

However, the Supreme Court also affirmed that, given the seriousness of terrorism offences, denunciation and deterrence, both specific and general, will generally be paramount at the sentencing hearing.

Crown counsel should also be mindful, in assessing the individual factors of their case, that the courts so far have indicated that where offenders who knowingly engage in terrorist activity that is designed to or is likely to result in the indiscriminate killing of innocent human beings, life sentences or sentences exceeding 20 years will generally be appropriate.

As in all cases, there may be exceptional circumstances, such as the co-operation of the offender with the authorities in bringing other terrorists to justice that may warrant a departure from the ordinary sentencing range. Sentencing remains an individualized exercise that takes into account all of the circumstances of the offender and the offence.

### **6.1. Sentences are consecutive**

Section 83.26 provides that a sentence, other than a life sentence, imposed for an offence under any of ss. 83.02 to 83.04 and 83.18 to 83.23 shall be served consecutively to any other punishment imposed on the person, other than a sentence of life imprisonment, for an offence arising out of the same event or series of events.

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<sup>11</sup> *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555.

In *R v Khawaja*, the Supreme Court held that the requirement of s. 83.26 is not inconsistent with the totality principle. The fact that sentences of 20 years or more may be imposed more often in terrorism cases attests to the particular gravity of terrorist offences and the moral culpability of those who commit them.<sup>12</sup>

## **6.2. Delayed parole eligibility**

Offences covered by this guideline are generally offences for which the court has the power to delay parole eligibility under s. 743.6.

Terrorism offences, by operation of s.743.6 (1.2) of the *Criminal Code*, are presumptively offences to which a delayed parole order is appropriate. PPSC counsel who are of the view that the circumstances may be sufficiently exceptional that the presumption is capable of being rebutted must prepare a written recommendation for consideration by their CFP who, if satisfied that the recommendation is appropriate, will forward it for approval of the Deputy DPP, Drug, National Security & Northern Prosecutions Branch, prior to the matter being addressed in court.

Offences that are not presumptive, for example under ss. 4 through 7 of the *Crimes Against Humanity and War Crimes Act*, are still ordinarily appropriate for application for delayed parole eligibility.

PPSC counsel shall give serious consideration to an application under this section, especially where the offences are serious and exceptional mitigating circumstances are absent.

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<sup>12</sup> *Ibid* at para 126.





# **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

## ***5.2 COMPETITION ACT***

### **DIRECTOR'S GUIDELINE ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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## **1. INTRODUCTION**

The *Competition Act* (Act)<sup>1</sup> is a law of general application that establishes basic principles for the conduct of business in Canada. The Act is designed to, among other objectives, maintain and encourage competition in Canada and provide consumers with competitive prices and product choices.

## **2. POLICY OBJECTIVE**

This guideline sets out the main practices and policies of the Director of Public Prosecutions (DPP) with respect to competition law cases. A Memorandum of Understanding (MOU) has been established between the DPP and the Commissioner of Competition (Commissioner). The purpose of the MOU is to clarify the parties' roles and responsibilities at the investigative and prosecution stages of a case under the Act.<sup>2</sup>

## **3. COMPETITION LAW PROSECUTORS**

The National Capital Regional Office (NCRO) includes a group of Crown counsel (the Competition Law Section (CLS)) assigned to conduct prosecutions under the Act in the courts of all provinces and before the Federal Court.<sup>3</sup>

When the Commissioner of Competition requires the services of a prosecutor under s. 21 of the Act or refers evidence to the Attorney General under s. 23, the Chief Federal Prosecutor (CFP) of the NCRO determines whether the case should be assigned to counsel in the NCRO or whether assistance should be sought from Crown counsel in another regional office of the Public Prosecution Service of Canada (PPSC) or from an agent having the appropriate delegation from the DPP.

When a competition law case is assigned to Crown counsel outside the NCR, the counsel should consult with the CFP or the Deputy CFP of the NCRO on any legal decision or issue that may arise in the course of the prosecution.

## **4. ROLE AND RESPONSIBILITIES OF CROWN COUNSEL IN COMPETITION LAW MATTERS**

The responsibilities of the Commissioner<sup>4</sup> include the investigation of suspected offences under the Act and the referral of evidence to the PPSC. In addition, the Commissioner

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<sup>1</sup> RSC 1985, c C-34.

<sup>2</sup> A copy of the MOU is attached as Appendix A to this guideline and can also be found online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html>> [MOU].

<sup>3</sup> See *Competition Act*, *supra* note 1, s 73.

<sup>4</sup> The Commissioner discharges his responsibilities with assistance of members of the Competition Bureau.

makes recommendations to the PPSC on matters such as the granting of immunity and leniency, charges to be laid and the appropriate sanctions to be imposed following a conviction.

Crown counsel involved in competition law matters are responsible for providing prosecutorial advice, both general and specific, during an investigation. Under s. 23 of the Act, the Commissioner may remit evidence gathered in the course of an investigation to the PPSC with a request that a prosecution be commenced. The evidence is then assessed in accordance with the principles set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” for the purpose of determining whether a prosecution is warranted. When a prosecution is approved, Competition Bureau (Bureau) officers swear the information.

#### **4.1. Consultation**

In the regulatory prosecution context, “public interest” considerations include the objectives of the regulatory regime in question. Crown counsel should consult the Bureau in order to ascertain those objectives, especially as they relate to the matter being considered, and more particularly, with respect to charges to be laid and arguments to make before the court.<sup>5</sup> In this regard, see the PPSC Deskbook directive “[1.3 Consultation within Government](#)” in which the importance of consultation and communication is emphasized.

The goal of prosecutions under the Act is to promote compliance with the competition policy entrenched in the Act. Nevertheless, in light of the independence of the DPP, the Commissioner cannot dictate litigation positions to prosecutors or impose specific courses of action.<sup>6</sup>

#### **4.2. Role and responsibilities of Crown counsel prior to the laying of charges**

Crown counsel may be called upon from the outset of an investigation to provide legal advice to help ensure that the investigative strategy, techniques and procedures are consistent with the rules of evidence and with the *Canadian Charter of Rights and Freedoms*. Counsel may also advise Bureau officers on the nature of the evidence required, the use of investigative powers and the sufficiency of evidence.

While Crown counsel may work closely with the investigative team, they must not act as officers themselves by, for example, taking part in searches, participating in the surveillance of suspects or conducting interviews of witnesses. However, in certain circumstances, Crown counsel may interview important witnesses before charges are laid, for example, in the context of the Bureau’s Immunity and Leniency Programs.

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<sup>5</sup> See MOU, *supra* note 2 at para 2.31.

<sup>6</sup> See the PPSC Deskbook directive “[1.3 Consultation within Government](#)”.

Crown counsel may also provide legal advice on Bureau policies and programs in the criminal field (for example, the Immunity Program) and on practice and advisory notes (for example, search and seizure, disclosure, immunity and plea agreements).

#### **4.3. Role and responsibilities at the prosecution stage**

Crown counsel are responsible for the approval and prosecution of charges under the Act and for the conduct of all plea and resolution discussions.

Upon the referral of evidence by the Bureau to the PPSC in accordance with s. 23 of the Act, counsel must exercise his or her discretion independently of the Bureau in determining whether or not the recommended prosecution meets the standards set out in the PPSC Deskbook.<sup>7</sup>

#### **4.4. Plea and resolution discussions**

Crown counsel are responsible for conducting all plea and resolution discussions in accordance with the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”. Crown counsel will consult with Bureau officers regarding the terms of a proposed resolution<sup>8</sup> and will brief Bureau officers on the terms and supporting rationale of a plea agreement.

#### **4.5. Decision to appeal**

In general, decisions as to whether to commence an appeal are made by the CFP of the NCRO after consultation with the Team Leader of the CLS, a representative from the regional office in the province where the appeal is to be commenced and, in matters with significant public interest or national importance, the Deputy DPP, Regulatory and Economic Prosecutions. Crown counsel who has made a recommendation for an appeal must wait to receive instructions from the CFP before commencing an appeal.

### **5. IMMUNITY AGREEMENT**

In respect of serious criminal activity under the Act, it may be in the public interest to offer immunity from prosecution to persons willing to terminate their participation in the illegal conduct and fully cooperate with the Bureau and the PPSC.<sup>9</sup>

Pursuant to the Bureau’s Immunity Program, persons or organizations with information concerning anticompetitive business practices such as bid-rigging and price fixing are

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<sup>7</sup> For the guiding principles regarding independence and pre-charge involvement of Crown counsel in police investigations and the delineation of the respective roles of officers and prosecutors. See *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297.

<sup>8</sup> MOU, *supra* note 2 at para 2.33.

<sup>9</sup> See also the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”.

encouraged to make disclosure to the Bureau.<sup>10</sup> Both organizations and individuals may request immunity. When an organization is granted immunity, the organization may also apply for immunity for its directors and employees, past or present, provided these individuals meet the criteria and commit to the same disclosure and cooperation requirements as the organization.

The decision to grant immunity rests solely with the Crown and, like all exercises of prosecutorial discretion, is made in the name of the DPP.<sup>11</sup>

### **5.1. Process for granting immunity**

Bureau officers conducting an investigation and approached by an applicant for immunity will formulate a recommendation to Crown counsel. This recommendation must set out in as much detail as possible all relevant considerations to enable counsel to exercise his or her discretion independently. When counsel agrees that immunity should be granted, he or she must obtain approval from the Team Leader of the CLS to enter into an immunity agreement, which sets out the terms by which the parties to the agreement will be bound.

To that end, Crown counsel should follow immunity agreement templates. These can be found in Appendices B (organization immunity) and C (individual immunity) of this guideline. Individuals covered by organization immunity (Appendix B) must sign a standard letter setting out the independent conditions for continuing or revoking the individual immunity coverage. An example of such a letter is provided in Appendix D. Any proposed deviation from these standard forms must be approved by the Team Leader of the CLS. Because an immunity agreement typically includes issues of interest to the Bureau, the relevant Deputy Commissioner of the Bureau should also be notified of any such deviations.<sup>12</sup>

### **5.2. Cooperation and disclosure by the immunity applicant**

When Crown counsel, on behalf of the DPP, grants immunity and the parties enter into an agreement to that effect, the applicant for immunity must confirm in writing, as soon as possible, the content of the representations it has made within the application process and disclose all pertinent facts and documents of which it has knowledge and/or possession. Cooperation on the part of the immunity applicant is crucial and must be given completely and promptly.

As part of this process, Bureau officers will usually interview all involved parties, including an organization's senior executives or, if the immunity applicant is an

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<sup>10</sup> The Immunity Program sets out the practices of the Bureau, the respective roles of the Bureau and the PPSC with respect to the process of granting immunity, the conditions on which the Bureau will recommend that the PPSC grant immunity and the obligations of the applicant for immunity.

<sup>11</sup> See *Krieger v Law Society (Alberta)*, 2002 SCC 65, [2002] 3 SCR 372 at para 46; and *Director of Public Prosecutions Act*, SC 2006, c 9, s 9(1).

<sup>12</sup> See MOU, *supra* note 2 at para 3.11.

individual, that person. Bureau officers may have to interview witnesses before an immunity agreement can be implemented. In such cases, Crown counsel will provide an assurance in writing that the statements made by these witnesses and the information or documents they provide cannot be used directly against them. An example of a letter covering such a situation is included in Appendix E.

### **5.3. Revoking immunity**

Under the terms of an immunity agreement, immunity is contingent upon immunity applicants fulfilling their obligations. The agreement also provides that immunity may be revoked. Like the decision to grant immunity, the decision to revoke rests with the PPSC. However, Crown counsel should take into account any representations made by the Bureau in that regard.

In consultation with the Team Leader of the CLS, Crown counsel in such cases must evaluate whether it is advisable to revoke immunity by referring to the factors set out in section 9 of the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”. Factors identified as relevant to possible revocation include when an immunity applicant:

- withdraws promised co-operation with the Crown;
- fails to be truthful when testifying;<sup>13</sup>
- has wilfully or recklessly misled the investigating agency or Crown counsel about material facts concerning the case including factors relevant to that person's reliability and credibility as a witness; or
- has sought immunity by conduct amounting to a fraud or an obstruction of justice.

A final decision to revoke immunity must be approved by the CFP of the NCRO.

## **6. PLEA AGREEMENT FOLLOWING A RECOMMENDATION OF LENIENCY**

The Bureau's Leniency Program complements the Immunity Program and aims at encouraging other participants in an illegal cartel to acknowledge their actions and cooperate with the Bureau and the PPSC. In such cases, the Bureau recommends to the PPSC that the applicant receive lenient treatment in sentencing following a guilty plea. As with all plea negotiations, openness and fairness are crucial to the effective operation of the Leniency Program.

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<sup>13</sup> See e.g. *R v Ahluwalia* (2000), 149 CCC (3d) 193, 39 CR (5th) 356, 138 OAC 154 (ONCA), where the Crown was criticized for failing to fully investigate the lack of full disclosure of a witness's criminal record. See also the PPSC Deskbook guideline “[2.5 Principles of Disclosure](#)”, for Crown counsel's disclosure obligations.

### **6.1. Administration of the leniency program**

Organizations or individuals may apply for leniency provided that they meet the criteria set out in the Leniency Program.

The Bureau's recommendations of leniency to the PPSC must set out all relevant considerations to enable Crown counsel to exercise their discretion independently and with full knowledge of the facts. Only Crown counsel has the discretion to enter into and conduct discussions leading to a resolution of the case and sentencing.

### **6.2. Cooperation and disclosure by the leniency applicant**

Under the Leniency Program, a plea and sentencing agreement entered into between the DPP and a leniency applicant sets the conditions under which the applicant will benefit from leniency in sentencing. The agreement specifies the obligation upon the candidate for leniency to provide full, frank, timely and truthful disclosure and cooperation during any related investigation and resulting prosecution.

Failure by a leniency applicant to fulfill its obligations could lead to any leniency granted being revoked. In such circumstances, Crown counsel, in consultation with the Team Leader of the CLS, should evaluate whether to revoke leniency by having regard to the factors set out in section 9 of the PPSC Deskbook guideline "[3.3 Immunity Agreements](#)".

A final decision to revoke leniency must be approved by the CFP of the NCRO.

### **6.3. Plea and sentencing agreement**

Generally speaking, plea and sentencing resolutions<sup>14</sup> (including agreements pursuant to a leniency recommendation made by the Bureau under the Leniency Program) entered into with respect to an offence under the Act prior to charges being laid should be reduced to a written plea agreement in the form set out in Appendices F and G of this guideline.<sup>15</sup> The agreement must include a statement of facts admitted by the accused.

When charges have already been laid, Crown counsel may decide to proceed without a written plea agreement if no permanent obligation to cooperate will be imposed on the pleading party as part of the proposed resolution.

It is the responsibility of each Crown counsel to ensure that the standard plea agreement is used in every case where counsel proposes to enter into such an agreement, when a permanent obligation to cooperate as well as immunity arrangements will be provided for in the agreement. Any proposed deviation from the standard plea agreements must be approved by the Team Leader of the CLS.

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<sup>14</sup> See also the PPSC Deskbook guideline "[3.7 Resolution Discussions](#)".

<sup>15</sup> Appendices F and G, the plea agreement templates are currently being developed, and will be posted upon completion.

## **7. APPLICATIONS FOR PROHIBITION ORDERS UNDER S. 34(2) OF THE COMPETITION ACT**

Section 34(2) of the *Competition Act* permits a superior court of criminal jurisdiction to prohibit or prevent the commission of an offence under Part VI of that Act. The court may prohibit the “commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of the offence”. Before the prohibition order can be made proceedings must have been commenced.

### **7.1. Considerations**

The following factors, among others, are relevant when deciding whether a case should be the subject of a prohibition order, a prosecution or a more informal action:

1. any history of anti-competitive or other relevant behaviour by the respondent company, its principals or any associated company;
2. the seriousness of the conduct, including:
  - i. whether a prior order or undertaking has been contravened;
  - ii. the apparent effect of the conduct on consumers, competitors, etc.;
  - iii. whether the conduct violates corporate policy (and, if so, how effectively that policy is policed, and how quickly the conduct was terminated when senior officials became aware of it);
3. any remedial steps by the respondent; and
4. compliance policies of the Competition Bureau.

### **7.2. Procedure**

The decision to pursue a prohibition order under s. 34(2) requires the approval of the CFP of the NCRO. The CFP will sign the information in support of the prohibition order.

The Deputy DPP, Regulatory and Economic Prosecutions and Management Branch, must approve the decision to pursue a s. 34(2) prohibition order in cases of significant public interest. A request for the Deputy DPP’s approval must be accompanied by a memorandum outlining the background of the matter and the reasons for the recommendation. A draft order, information, notice of application, consent, and an agreed statement of facts or affidavit must also be included.

## **APPENDIX A – MEMORANDUM OF UNDERSTANDING BETWEEN THE COMMISSIONER OF COMPETITION AND THE DIRECTOR OF PUBLIC PROSECUTIONS**

May 13, 2010

With respect to the conduct of criminal investigations and prosecutions of offences under the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act.

### **PREAMBLE**

**Whereas** the Director of Public Prosecutions (DPP) and the Commissioner of Competition (Commissioner), the Parties to this Memorandum of Understanding (the Parties), have separate responsibilities within the criminal justice system of Canada, each Party recognizing the other's independence in performing their respective functions and duties;

**Whereas** the Office of the Director of Public Prosecutions, referred to as the Public Prosecution Service of Canada (PPSC), has a section composed of prosecutors (the Competition Law Section) specifically assigned to prosecutions of offences under the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act* (the Acts);

**Whereas** the Commissioner carries out her responsibilities with the support of the Competition Bureau (Bureau), which is composed of authorized representatives, including managers, competition law officers (officers), and support staff;

**Whereas** the Parties recognize that their roles are interdependent and they need to work together in close consultation in support of one another's mandates;

**Whereas** it is understood that effective collaboration can be based only on a clear understanding of one another's roles, mutual respect, and trust;

**Whereas** federal prosecutors are guided by the principles articulated in the *Federal Prosecution Service Deskbook (FPS Deskbook)*.

### **THEREFORE THE PARTIES AGREE AS FOLLOWS:**

#### **1. Purpose of the Memorandum of Understanding and Governing Principles**

1.1 The purpose of this Memorandum of Understanding (MOU) is:



1. to provide a clear understanding of the Parties' respective roles and responsibilities at the investigative and prosecution stages of a case under the Acts; and,
2. to improve the efficacy of prosecutions and to implement strategies to enhance the quality of investigations and of the cases presented at trial.

1.2 As a best practice, each Party undertakes to consult the other regarding any decision that is likely to have an impact on a prosecution emanating from a Bureau investigation.

1.3 The Parties undertake to disseminate this MOU throughout their respective organizations so that prosecutors, paralegals, managers, officers and support persons are aware of the principles it establishes and the resolve of the Parties to achieve its purpose.

## **2. Roles and Responsibilities**

2.1 In the exercise of their respective mandates the Parties respect one another's independence while recognizing the need to work together toward common goals.

2.2 The Bureau's responsibilities include the investigation of suspected offences under the Acts, the referral of evidence to the PPSC, and the making of recommendations on the charges to be laid, the appropriate sanction(s) to be imposed, and the granting of immunity and leniency.

2.3 The PPSC is responsible for: prosecutorial advice, both general and specific during the investigation; the decision, in accordance with *FPS Deskbook* principles, as to whether charges should proceed, the wording of charges, and the choice of persons to be charged; and the prosecution of charges laid.

### **Bureau: Roles and Responsibilities at the Investigative Stage**

2.4 The primary mandate of the Bureau is to enforce and administer the Acts. The Acts are designed to – among other objectives – maintain and encourage competition in Canada, and to provide consumers with competitive prices and product choices.

2.5 Officers commence and conduct investigations pertaining to the Acts. They are responsible for identifying the object and targets of an investigation. They also determine the structure, scope, and duration of those investigations, and the means to be used to carry them out. Under the direction of the Commissioner, officers exercise full discretion with respect to the conduct of investigations.

2.6 The Bureau will assign a lead officer at the opening of an investigation. The lead officer and assigned counsel will be one another's primary point of contact on the file and will keep one another updated as to developments. Officers assigned to the file will keep one another updated as to developments.

2.7 Officers gather evidence, and ensure its preservation. They organize the information and evidence collected over the course of an investigation, in anticipation of litigation and with a view to the Crown's disclosure obligation in accordance with the Briefing Note on Disclosure and with any other directive or guideline of the DPP.

2.8 As may be reasonable, officers will seek the advice of counsel in the PPSC Competition Law Section, assigned counsel from a PPSC regional office or, where appropriate, designated agents of the DPP as defined in paragraph 2.17 of this MOU (counsel) on any legal issue likely to impact an investigation or any subsequent prosecution. Officers will also refer to the relevant Practice Notes issued by the Competition Law Section (PPSC).

2.8.1 More specifically, officers will consult counsel in relation to the following:

- When seeking a search warrant under sections 15 and 16 of the *Competition Act*, or a search warrant, a general warrant, tracking warrant, or dialled-number recorded warrant under the *Criminal Code*;
- When seeking judicial authorization for electronic surveillance pursuant to Part VI of the *Criminal Code*;
- When seeking an order under section 11 of the *Competition Act*, or a production order under sections 487.012 and 487.013 of the *Criminal Code*;
- When seeking a special search warrant or a restraint order pursuant to sections 462.32 and 462.33 of the *Criminal Code*, dealing with suspected proceeds of crime;
- When seeking a sealing order pursuant to section 487.3 of the *Criminal Code*;
- On matters relating to the granting of immunity or leniency;
- On matters involving undercover or surveillance operations;
- Regarding the preparation of a disclosure package;
- When drafting a Report to Crown Counsel (RTCC) that summarizes the evidence gathered during the investigation, to ensure that it addresses all applicable PPSC legal and policy requirements;
- On claims of solicitor-client privilege; and,
- When retaining an expert.

2.9 In seeking any legal advice, managers and officers will inform counsel of the existence of legal advice they have already received on a given matter from another counsel, of requests for advice on the same or related issues of which they are aware, and of all relevant facts. The above information should be provided to counsel in writing to prevent any misunderstanding.

2.10 When the Bureau formally refers matters together with an RTCC pursuant to section 23 of the *Competition Act* for such action as warranted, it will endeavour to do so as expeditiously as possible, consistent with its enforcement priorities.

### **Bureau: Roles and Responsibilities at the Prosecution Stage**

2.11 Officers are responsible for providing ongoing, timely support and assistance to counsel during the course of post-referral proceedings until the prosecution is completed. More specifically, they will:

- Preserve evidence and all inculpatory and exculpatory information obtained, and maintain continuity and security of all evidence;
- Provide and identify to counsel all relevant information pursuant to disclosure obligations. The ultimate determination of relevance is up to counsel;
- Be available to review with counsel the facts of the case and disclosure issues;
- Take all necessary steps to ensure the availability of witnesses;
- Attend pre-trial interviews of prospective witnesses by counsel, and keep notes of such interviews for disclosure purposes;
- Attend court proceedings, when required;
- Carry out additional investigative tasks that are reasonably required by counsel.

2.12 Officers will continue to provide all relevant evidence, reports and briefs discovered or produced throughout the prosecution phase.

2.13 Officers, when called as witnesses, shall bring with them all notes and evidence in their possession relevant to their anticipated testimony.

2.14 The Bureau is responsible for making arrangements for the attendance of all Crown witnesses in court, expert reports, witness fees, and all litigation expenses, in accordance with applicable Treasury Board guidelines and Rules of Court.

#### **Plea and Resolution Discussions**

2.15 The Bureau is responsible for fully briefing counsel of the results of its investigation and identifying available evidence prior to the commencement of any plea and sentence negotiations. The briefing must provide a synopsis of the available evidence, both documentary and testimonial. The Bureau is responsible for making recommendations indicating what it believes to be an appropriate sentence, together with its rationale based on the Bureau's Information Bulletin on Sentencing and Leniency in Cartel Matters.

#### **Prosecutors: Roles and Responsibilities at the Investigative Stage**

2.16 Pursuant to subsection 3(3) of the *Director of Public Prosecutions Act*, the DPP is responsible for carrying out varied duties, which either involve or are related to the prosecution of offences. Broadly speaking, federal prosecutors carry out the criminal litigation responsibilities on behalf of the DPP, namely, the prosecution of infractions and all prosecution-related functions. The PPSC acts as prosecutor in all matters prosecuted by the DPP on behalf of the Crown. The PPSC ensures that a consistent national approach is taken to issues arising in prosecutions under the Acts.

2.17 The DPP may delegate his or her duties to private sector counsel or to counsel in the Department of Justice, Competition Bureau Legal Services (CBLS), and these counsel may act as an agent of the DPP only when they have been designated as such by the DPP for a specific case.

2.18 A prosecutor's role is to provide assistance and timely and strategic legal advice at the outset and during the course of an investigation, in accordance with the *FPS Deskbook*.

2.19 The PPSC, at the Bureau's request, will assign counsel to provide advice and assistance. The lead officer and assigned counsel will be one another's primary point of contact on the file and will keep one another updated as to developments. Where more than one counsel is assigned to the file, a lead counsel will be designated. Counsel assigned to the file will ensure that they update one another as to developments.

2.20 If requested, counsel may provide advice in the development of Bureau policies and programs in the criminal field (e.g., the Immunity Program) and on any related questions; draft and update practice and advisory notes (e.g., search and seizure, disclosure, immunity and plea agreements); and periodically provide information sessions and training programs to officers.

2.21 Counsel will help shape the investigation in the early stages by advising officers on the nature of the evidence required, and by providing input into the development of the case, the use of investigative powers, the adequacy of the evidence and the quality of the witnesses.

2.22 Counsel will assist the Bureau with any investigative procedure in a timely way. A refusal by a prosecutor to adopt a procedure, where approval by the PPSC is required, will be explained to the Bureau.

2.23 Counsel will provide assistance relating to:

- Any request of an officer on any legal issue likely to impact an investigation or any subsequent prosecution.
- Court applications made by officers. Counsel will review information to obtain search warrants, production orders, sealing orders and wiretap authorizations, among other applications. Counsel may also suggest modifications for the sake of clarity or accuracy, and assist in processing such applications.
- The preparation of the RTCC, at the earliest stage, to ensure that it meets all legal and policy requirements.
- The preparation of witness interviews. Counsel may attend witness interviews as needed.

2.24 Timely legal advice will be provided to officers or, alternatively, to their supervisors to ensure that investigation techniques and procedures are consistent with the rules of evidence and constitutional standards. Where such advice differs from that set out in the practice and advisory notes, counsel will explain any discrepancy, if requested.

2.25 When an officer seeks legal advice, counsel will consult with the officer to determine whether legal advice is necessary, the specific legal question to be answered, and the form that the advice should take. If the legal advice is to be provided in the form of a written legal opinion, counsel should consult with the officer before the opinion is finalized so as to ensure that all relevant facts have been set out and all relevant legal issues have been considered and answered.

2.26 Bearing in mind the independence of prosecutors and the need to assess cases on their own particular facts, counsel nevertheless recognizes the benefit of ensuring consistent advice and will strive to be consistent with that provided by other federal prosecutors.

### **Prosecutors: Roles and Responsibilities at the Prosecution Stage**

2.27 Counsel is responsible for the authorization and the prosecution of charges in court and for the conduct of all plea and resolution discussions. Counsel are agents of the DPP and prosecute offences on behalf of the Crown; they are bound by the Constitution, statute law, jurisprudence, and the rules of the relevant provincial or territorial law societies.

2.28 Upon the referral of evidence by the Bureau to the PPSC, counsel will review the evidence in the case in accordance with the "Decision to Prosecute" policy of the *FPS Deskbook*. This review is a crucial component of the exercise of independent prosecutorial discretion.

2.29 As far as reasonably possible, a decision to prosecute is to be taken by an arms-length counsel not originally assigned to the investigation who consult his or her colleagues assigned to the investigation before deciding independently whether or not to lay charges.

2.30 Counsel will, in a timely way, review all evidence referred, and in consultation with the officers, where applicable:

- Determine the charges to be sworn and the persons to be charged;
- Lay an information seeking a prohibition order pursuant to subsection 34(2) of the *Competition Act*;
- Make an application for the issuance of an interim injunction pursuant to section 33 of the *Competition Act*;
- Make a recommendation of further investigation;
- Estimate the resources needed and the cost of the prosecution; and,
- In all events, inform the Bureau of his or her decision as soon as possible and provide an explanation in the case of a refusal to lay charges.

2.31 The decision to prosecute is an ongoing process that continues throughout the prosecution. Counsel shall determine the sufficiency of evidence and evaluate whether a prosecution is in the public interest. In doing so, counsel shall exercise independent judgment and should consult with the Bureau to determine whether the prosecution is in the public interest.

2.32 The prosecutor's role is not to obtain a conviction but to lay before a trier of fact credible evidence relevant to an alleged offence. This must be done fairly, excluding any notion of winning or losing. However, if counsel elects to pursue a prosecution, it is done vigorously and to the best of his or her ability, with due regard to the law, legal ethics, his or her role as an officer of the court, and the overriding obligation to act objectively and fairly in the public interest. Further, when exercising his or her discretion, counsel must act independently, fairly, objectively and impartially.

2.33 Counsel is responsible for the conduct of all plea and resolution discussions. Counsel must ensure that the conduct meets the standards articulated by the *FPS Deskbook*. Counsel will consult the Bureau to elicit its views as to the appropriateness of any proposed plea and sentence or other resolution, and will consider the Bureau's

comments. This consultation should be ongoing so that the Bureau fully appreciates how the negotiations have been conducted in order that it can make a more informed recommendation. If a plea agreement is reached, counsel will convey to the officers the substance of the agreement and the reasoning behind it. Usually officers are present and provide assistance to prosecutors at plea and sentencing negotiations.

2.34 Counsel will consult with the Bureau on questions of staying or withdrawing charges, and on decisions to appeal. Counsel will provide an explanation of these decisions to the Bureau, if requested.

2.35 Counsel has an obligation to ensure that witnesses, including officers, are prepared adequately prior to testifying and that notices required pursuant to the rules of evidence have been served in a timely manner.

### **3. Immunity — Leniency**

3.1 To uncover and stop criminal activity pursuant to the *Competition Act*, the Bureau has put in place the Immunity Program that sets out the Bureau's practices, its role and the role of the PPSC in the immunity process, the conditions under which the Bureau will recommend that the PPSC grant immunity and the responsibilities of the immunity applicant. The Immunity Program is one of the Bureau's most effective tools for detecting and investigating criminal activities prohibited by the *Competition Act*.

3.2 The Bureau and the PPSC recognize that, in respect of serious criminal activity under the *Competition Act*, it is in the public interest to offer immunity from prosecution to a participant who is willing to terminate its participation in the illegal conduct and fully cooperate with the Bureau and PPSC.

3.3 The Bureau's Leniency Program complements the Immunity Program and aims at encouraging other participants in an illegal cartel to acknowledge their actions and cooperate with the Bureau and the PPSC.

3.4 The Bureau and the PPSC recognize that certainty, predictability of results and transparency are crucial to the effective operation of the Immunity and Leniency Programs.

3.5 The management of the Immunity and Leniency Programs, including such matters as acceptance of markers, taking of proffers, interviewing of witnesses and the collection of documentary evidence, is the responsibility of the Bureau.

3.6 A recommendation for immunity or leniency by the Bureau to the PPSC must fully set out the relevant considerations in order to permit counsel to exercise independent discretion while referencing as complete a record as possible.

3.7 The decision to grant immunity or leniency upon a recommendation by the Bureau, or otherwise, rests solely with counsel who exercises his or her independent discretion in accordance with the principles articulated in the *FPS Deskbook*. However, the Bureau's recommendation to the PPSC is given due consideration.

3.8 Officers and counsel shall consult one another as necessary throughout the immunity or leniency processes to ensure that all criteria are satisfied and that the public interest may be served by granting immunity and leniency in appropriate cases.

3.9 When counsel agrees with the recommendations of the Bureau, he or she must obtain approval from his or her manager to enter into an immunity agreement, or plea agreement, that sets out the terms by which the participants to the immunity or plea agreement will be bound. A standard immunity agreement form or plea agreement form must be used in this regard. This process will be guided by the principles set out in paragraph 3.4.

3.10 All plea and sentence resolutions concluded prior to charges being laid, and where appropriate after charges are laid, shall be reduced to a written plea agreement in the approved form, which shall include a statement of admitted facts.

3.11 Any deviation from the standard immunity agreement form or plea agreement form must be approved by the Director of the CLS, and notification given to the relevant Deputy Commissioner.

3.12 The Bureau is responsible for assessing whether the immunity or leniency applicant is in compliance with the terms of an immunity or plea agreement and to provide counsel with the evidence supporting a recommendation that immunity or leniency be revoked.

3.13 The decision to revoke immunity or leniency rests solely with counsel who will give due consideration to the Bureau's recommendation for revocation. Counsel shall exercise independent discretion when considering revocation or any other appropriate remedy, in accordance with paragraph 35.8 of the *FPS Deskbook*, after examining the terms of the agreement and the manner in which it was breached.

#### **4. Disclosure Protocol**

4.1 Prosecutors must act in accordance with the disclosure policies of the PPSC. In all prosecutions, the Bureau will be responsible for ensuring timely and complete disclosure in accordance with the Advisory Note on Disclosure.

4.2 A designated Bureau officer (the disclosure officer) will ensure that complete disclosure is available to each accused at the time of first appearance, in a form that is acceptable to PPSC counsel and in compliance with the Advisory Note on Disclosure.

4.3 The disclosure officer will provide supplementary disclosure to counsel as soon as reasonably practicable.

4.4 The disclosure officer will endeavour to bring to the attention of counsel any material that is subject to legal privilege, such as solicitor-client privilege or informer privilege. The final determination regarding whether a privilege applies with respect to disclosure is the responsibility of counsel.

4.5 Disclosure will generally be made electronically.

4.6 The Bureau is responsible for the costs of disclosure. However, counsel must consult the Bureau prior to making a determination that has an impact on the costs of disclosure.

(e.g., software to be used). Counsel will consider the best way to structure disclosure from the outset of an investigation so as to minimize cost and the duplication of effort.

4.7 Counsel has an ongoing role to give advice and consult with the officers with respect to the nature of the evidence and information that is required as part of disclosure. The final responsibility for reviewing disclosure and determining the information to be disclosed lies with counsel.

## **5. Designated Officials**

5.1 The following designated officials will have overall administrative responsibility for the implementation of this MOU.

### **For the Competition Bureau:**

Senior Deputy Commissioner of Competition, Criminal Matters Branch

Deputy Commissioner of Competition, Fair Business Practices Branch

### **For the PPSC:**

Director of the Competition Law Section, Public Prosecution Service of Canada

## **6. Confidentiality and Security of Information**

6.1 Subject to the provisions of this MOU, the *Competition Act*, the *Access to Information Act*, the *Privacy Act*, and any other applicable Act of Parliament, the information shared between the Parties under the terms of this MOU will be treated as confidential, and will be protected from further disclosure. The shared information can be used only for the specific purpose for which it is provided, and will not be passed on to any third party without the written consent of the Party from whom it originated. In the event of a request for disclosure of information under the *Access to Information Act* or the *Privacy Act*, the Party receiving the request agrees to consult with the other Party.

6.2 Each Party will ensure that its procedures for safeguarding information subject to this MOU comply with its operational standards and government security policy.

## **7. Dispute Resolution**

7.1 Any dispute arising from this MOU shall be referred to the designated officials noted in Part 5 of this MOU for resolution. If these officials are unable to resolve the dispute, it shall be referred to the Commissioner of Competition, and the Deputy Director for resolution.

## **8. Review**

8.1 The Parties agree to review this MOU as required.



## **9. Amendments**

9.1 This MOU may be amended at any time with the consent of the Parties. Such amendments may be effected by an exchange of letters between the Commissioner of Competition and the Deputy Director.

## **10. Effective Date and Termination**

10.1 This MOU shall come into effect on the date when it is last signed.

10.2 Either of the Parties may terminate this MOU upon six months written notice to the other Party. Such notice shall be given by either the Commissioner of Competition or the Deputy Director.

## **11. Nature of the MOU**

11.1 This MOU is an administrative understanding between the Parties. It is not intended to be legally binding or enforceable before the courts, nor is it designed to alter the pre-existing obligations, responsibilities, duties, or entitlements of either Party as may be defined by statute, regulation, or otherwise.

**In Witness Whereof**, this Memorandum was signed in duplicate, each copy being equally authentic

### **For the Competition Bureau**

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Melanie L. Aitken  
Commissioner of Competition  
Date

### **For The Public Prosecution Service Of Canada**

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Chantal Proulx  
Acting Deputy Director of Public Prosecutions

## APPENDIX B – ORGANIZATION IMMUNITY AGREEMENT TEMPLATE



Service des poursuites  
pénales du Canada

Public Prosecution  
Service of Canada

### ***[ORGANIZATION IMMUNITY AGREEMENT]***

THIS AGREEMENT IS BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
as represented by the  
DIRECTOR OF PUBLIC PROSECUTIONS

- and -

[X Ltd.]

This document sets out the terms and conditions of an agreement between Her Majesty the Queen in right of Canada, as represented by the Director of Public Prosecutions [“DPP”], and [X Ltd., as defined below] governing the grant of immunity from prosecution under the *Competition Act* [“Act”].

This grant of immunity follows an application by [X Ltd.] to the Commissioner of Competition [“Commissioner”] in accordance with the Competition Bureau’s information bulletin entitled *Immunity Program under the Competition Act* [“Immunity Bulletin”], attached to this agreement as Appendix 1.

This grant of immunity relates only to anticompetitive conduct as defined below.

This agreement is conditional and depends upon [X Ltd.] satisfying all of the terms and conditions set out below.

The parties to this agreement agree and undertake as follows:

1. **Definitions:** In this agreement,

“anticompetitive conduct” means that [X Ltd.] [entered into an agreement to fix prices, rig bids, made false and misleading representations, etc.] relating to [insert precise description of the product(s) and geographic market(s)] [insert specific time period]. Specifically [X Ltd.] represents that it [describe particular conduct: description of alleged offence, including nature of illegal behaviour and provision(s) of the Act violated];

“cooperation” means complete, timely and ongoing cooperation, at [X Ltd.’s] own expense throughout, with the DPP and the Commissioner in connection with the

investigation of the anticompetitive conduct and in any proceedings that may be instituted by the DPP in relation to the anticompetitive conduct, as more fully described in paragraphs 3 through 5 of this agreement;

“confidential information” means this agreement and any information that in any way relates to the investigation of the anticompetitive conduct;

“record” has the same meaning as found in section 2 of the *Competition Act*, RSC, 1985, c C-34;

“[X Ltd.]” means [*as agreed by the parties to this agreement; here specify what other affiliates, etc. may be included*].

2. **Representations:** [X Ltd.] represents that:

- a) it has reported to the Commissioner and the DPP that it has engaged in the anticompetitive conduct;
- b) it has taken effective steps to terminate its participation in the anticompetitive conduct;
- c) it has not coerced others to be a party to the anticompetitive conduct; and
- d) it has revealed to the DPP and the Commissioner any and all conduct of which it is aware that may constitute an offence under the Act.

3. **Cooperation and Disclosure:** [X Ltd.] shall provide cooperation and full, complete, frank and truthful disclosure to the DPP and the Commissioner, including, but not limited to:

- a) providing all non-privileged information, records and things in its possession, under its control or available to it, wherever located, whether or not requested by the DPP or the Commissioner, that in any manner relate to the anticompetitive conduct. Before providing the information, records and things, [X Ltd.] will consult with the Commissioner with respect to the relevance and scope of such information, records and things and the form in which such information, records and things will be provided to the Commissioner;
- b) using all measures, lawful where taken, to secure the cooperation of the current [*and former (if appropriate)*] directors, officers and employees [*agents (if appropriate)*] of [X Ltd.], and encouraging such persons to provide voluntarily to the DPP and the Commissioner all of their non-privileged information, records and things that in any manner relate to the anticompetitive conduct;

- c) facilitating, in accordance with the conditions set out in the Immunity Bulletin, the ability of current [*and former (if appropriate)*] directors, officers and employees [*agents (if appropriate)*] to appear for interviews and to provide testimony in connection with the anticompetitive conduct as the DPP or the Commissioner may require, at the times and places designated by the DPP or the Commissioner; and
  - d) revealing any and all conduct of which it becomes aware that may constitute an offence under the Act.
- 4. **Corporate Immunity:** Having considered the recommendation of the Commissioner and after an independent review by the DPP, the DPP grants [*X Ltd.*] immunity from prosecution under the Act in respect of the anticompetitive conduct defined above conditional upon:
  - a) the veracity of the representations contained in paragraph 2 above; and
  - b) the cooperation of and disclosure by [*X Ltd.*] as required pursuant to this agreement.
- 5. **Immunity of Individuals Covered by Corporate Immunity Agreement:** Subject to the veracity of the representations contained in paragraph 2 above, the DPP grants to the current [*and former (if appropriate)*] directors, officers and employees [*agent, if appropriate*] [*indicate "carve-outs" from agreement, eg, "other than individual Y"*] of [*X Ltd.*] immunity from prosecution under the Act in respect of the anticompetitive conduct, conditional on their admission of their knowledge of and participation in the anticompetitive conduct and on their continuing cooperation with and disclosure to the DPP and the Commissioner. Such cooperation and disclosure shall include, but not be limited to:
  - a) providing all non-privileged information, records and things (including personal records), in their possession, under their control or available to them, wherever located, whether or not requested by the DPP or the Commissioner, and that in any manner relate to the anticompetitive conduct, without falsely implicating any person or withholding any information known to them. Before providing the information, records and things, individuals covered by this agreement will consult with the Commissioner with respect to the relevance and scope of such information, records and things and the form in which such information, records and things will be provided to the Commissioner;
  - b) making themselves available in Canada for interviews and to testify in judicial proceedings at times and places designated by the DPP or the Commissioner; and

- c) revealing any and all conduct which may constitute an offence under the Act.
6. **Revocation of Corporate Immunity Does Not Affect Individual Immunity:** If at any time the Commissioner or the DPP should determine that [*X Ltd.*] does not satisfy the terms and conditions of this agreement and its immunity under this agreement is revoked, individual protection under this agreement will continue so long as no grounds exist to revoke, and the DPP has not revoked, the individual's immunity pursuant to paragraph 14 of this agreement.
7. **Confidentiality of Identity:** The DPP and the Commissioner shall not disclose to any third party the identity of [*X Ltd.*] or the individuals covered by this agreement ["individuals"], except where:
- a) disclosure is required by law, including:
    - i. in response to an order of a Canadian court of competent jurisdiction; or
    - ii. to a person charged with an offence in Canada;
  - b) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
  - c) disclosure is necessary for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
  - d) [*X Ltd.*] has agreed to disclosure;
  - e) there has been disclosure by [*X Ltd.*]; or
  - f) disclosure is necessary to prevent the commission of a serious criminal offence.
8. **Confidentiality of Information:** The DPP and the Commissioner shall not disclose to any third party information obtained from [*X Ltd.*] or the individuals, subject only to the exceptions listed above or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act.
9. **Disclosure to Foreign Law Enforcement Agency:** The DPP and the Commissioner shall not disclose the identity of [*X Ltd.*] or the individuals, nor the information obtained from [*X Ltd.*] or the individuals, to any foreign law enforcement agency without the consent of [*X Ltd.*].

10. **Disclosure to Third Parties:** Unless made public by the DPP or the Commissioner, or as required by law, [*X Ltd.*] and any individual shall not disclose confidential information to any third party, without the consent of the DPP, which consent will not be unreasonably withheld. Where disclosure is required by law, [*X Ltd.*] or any individual shall give notice to and consult with the DPP prior to making any required disclosure.
11. **Notice of Disclosure to Third Parties:** If any third party seeks to compel disclosure of confidential information from any party to this agreement, or any individual, that party or individual shall give prompt notice to the parties to this agreement, and shall take all reasonable steps to resist disclosure unless all parties to this agreement consent to such disclosure.
12. **Failure to Comply with the Immunity Agreement:** The parties agree that full compliance with all of the terms and conditions in this agreement by any person granted immunity by it is a condition of and fundamental to the agreement. The parties also agree that the accuracy and veracity of all representations required by this agreement by any person granted immunity by it is a condition of and fundamental to the agreement. Non-compliance with any of the terms and conditions of this agreement by any person granted immunity by it constitutes a breach of the agreement by that person, which may result in revocation of immunity for that person.
13. **Revocation of Corporate Immunity:** If the DPP determines that [*X Ltd.*] has made misrepresentations with respect to any of the matters referred to in paragraph 2, failed to provide the cooperation and disclosure required under paragraph 3, or failed to comply with any other terms and conditions of this agreement, the DPP may revoke the immunity granted to [*X Ltd.*] upon fourteen (14) days prior written notice to counsel for [*X Ltd.*]. The DPP will provide counsel for [*X Ltd.*] with an opportunity to meet with the DPP regarding the potential revocation of immunity.
14. **Revocation of Individual Immunity:** If the DPP determines that an individual granted immunity by this agreement has not provided the cooperation and disclosure required under paragraph 5 or complied with any other terms and conditions of this agreement, or that the individual has caused [*X Ltd.*] to be ineligible for immunity, continued to participate in the anticompetitive conduct after [*X Ltd.*] notified the individual to cease doing so, or obstructed or attempted to obstruct justice, the DPP may revoke the immunity granted to the individual upon fourteen (14) days prior written notice to counsel for the individual and to counsel for [*X Ltd.*]. Absent exigent circumstances, the DPP will provide counsel for the individual with an opportunity to meet with the DPP regarding the potential revocation of immunity.

15. **Impact of Revocation of Immunity:** Following revocation of immunity for a breach of this agreement, as described in paragraphs 12 through 14 above, the DPP may take such action against the person whose immunity has been revoked as the DPP considers appropriate, including prosecution under the Act. In any such action the DPP may use, in any way, any information, evidence, record, statement or testimony provided by any person at any time after the application for immunity and any evidence of any kind derived directly or indirectly from such information, evidence, record, statement or testimony provided. For greater certainty, any privilege that may apply in respect of any information, evidence, record, statement or testimony provided is deemed waived upon revocation of immunity.
16. **Use in Evidence:** No information, evidence, record, statement or testimony provided during an interview by any person granted immunity pursuant to this agreement will be used in evidence against that person in any proceedings undertaken by or on behalf of the DPP, except where the person granted immunity:
  - a) subsequently gives in any trial, hearing or judicial proceeding (including any proceeding in which the person is an accused) evidence that is materially different from the statement given in an interview;
  - b) is charged with perjury, giving contradictory evidence, fabricating evidence or obstructing justice; or
  - c) has had its immunity revoked after a breach of this agreement.
17. **Use of Information:** Nothing in this agreement affects the right of the DPP or the Commissioner to use any information, evidence, record, statement or testimony provided by any person under this agreement in order to discover or acquire other information, evidence or records from another source.
18. **Privilege and Jurisdiction:** Nothing in this agreement, or any action taken pursuant to it, shall constitute:
  - a) except for the waiver mentioned in paragraph 15, a waiver of any privilege by any party to this agreement; or
  - b) except for the purpose of this agreement and proceedings related to the enforcement of this agreement, a submission to the jurisdiction of the Canadian courts by any person granted immunity by this agreement who is not present in Canada.
19. **Applicable Law:** This agreement shall be construed in accordance with the laws of Canada.

20. **Entire Agreement:** This agreement constitutes the entire agreement between the DPP and [X Ltd.], including the individuals covered by this agreement, and supersedes all prior understandings or agreements, if any, whether oral or written, relating to the subject matter of this agreement.
21. **Notices:** Any notice required to be given under this agreement is deemed to be validly given if in writing and by pre-paid registered mail, courier delivery, facsimile transmission or electronic mail (e-mail) transmission to:
- a) The Director of Public Prosecutions  
  
*[Insert appropriate address and fax number]*  
  
Attention: Public Prosecution Service of Canada, Competition Law Section
  - b) The Commissioner of Competition  
  
Attention: Senior Deputy Commissioner  
  
Criminal Matters Branch  
20th Floor, Place du Portage, Phase I  
50 Victoria Street, Gatineau, QC, K1A 0C9  
Canada  
Fax: (819) 997-3835
  - c) [X Ltd.]  
  
*[Insert appropriate address and fax number]*  
  
Attention:  
  
With copy to:  
  
Counsel for [X Ltd.]  
  
*[Insert appropriate address and fax number]*  
  
Attention:
22. **Execution in Counterparts:** This agreement may be executed in counterparts.



23. **The Commissioner Joins in this Agreement:** The Commissioner joins in this agreement solely for the purposes of giving effect to the Commissioner's rights and obligations as set out in paragraphs 7 to 11 and paragraph 17 above.
24. **Authority and Capacity:** The DPP, [X Ltd.] and the Commissioner each represent and warrant to the others that their respective signatories to this agreement have all the authority and capacity necessary to execute this agreement and to bind them to it. [X Ltd.] represents that it has had an opportunity to consult Canadian legal counsel in respect of this agreement.

The signatories acknowledge the full and voluntary acceptance of the foregoing terms and conditions.

Dated at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.  
Prosecutions

Her Majesty the Queen in right of Canada as  
represented by the Director of Public

Per:

\_\_\_\_\_  
*[insert name and title of counsel for the  
Public Prosecution Service of Canada]*

Dated at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Commissioner of Competition

\_\_\_\_\_  
*[insert name of Commissioner of  
Competition]*

Dated at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

[X Ltd.]

Per:

\_\_\_\_\_  
*[insert name and title of signing officer]*

\_\_\_\_\_  
*[insert name of counsel to [X Ltd]]*

## APPENDIX C – INDIVIDUAL IMMUNITY AGREEMENT TEMPLATE



Service des poursuites  
pénales du Canada

Public Prosecution  
Service of Canada

### *[INDIVIDUAL IMMUNITY AGREEMENT]*

THIS AGREEMENT IS BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
as represented by the  
DIRECTOR OF PUBLIC PROSECUTIONS

- and -

*[INDIVIDUAL X]*

This document sets out the terms and conditions of an agreement between Her Majesty the Queen in right of Canada, as represented by the Director of Public Prosecutions of Canada (“the DPP”) and *[INDIVIDUAL X]* governing the grant of immunity from prosecution under the *Competition Act* (the “Act”).

This grant of immunity follows an application by *[INDIVIDUAL X]* to the Commissioner of Competition [“Commissioner”] in accordance with the Competition Bureau’s information bulletin entitled *Immunity Program under the Competition Act* [“*Immunity Bulletin*”], attached to this agreement as Appendix 1.

This grant of immunity relates to anticompetitive conduct as defined below.

This agreement is conditional and depends upon *[INDIVIDUAL X]* satisfying the terms and conditions set out below.

The parties agree and undertake as follows:

1. **Definitions:** In this agreement,

“anticompetitive conduct” means that *[INDIVIDUAL X.] [entered into an agreement to fix prices, rig bids etc., made false and misleading representations, etc.]* relating to *[insert precise description of the product(s) and geographic market(s)] [insert specific time period]*. Specifically *[INDIVIDUAL X]* represents that he/she *[describe particular conduct: description of alleged offence, including nature of illegal behaviour and provision(s) of the Act violated]*;

“cooperation” means complete, timely and ongoing cooperation, at *[INDIVIDUAL X’s]* own expense throughout, with the DPP and the Commissioner in connection

with the investigation of the anticompetitive conduct and in any proceedings that may be instituted by the DPP in relation to the anticompetitive conduct, as more fully described in paragraph 3 of this agreement;

“confidential information” means this agreement and any information that in any way relates to the investigation of the anticompetitive conduct;

“record” has the same meaning as found in section 2 of the *Competition Act*, RSC, 1985, c C-34;

2. **Representations:** [*INDIVIDUAL X*] represents that he/she:
  - e) has reported to the Commissioner and the DPP that he/she has engaged in the anticompetitive conduct;
  - f) has taken effective steps to terminate his/her participation in the anticompetitive conduct;
  - g) has not coerced others to be a party to the anticompetitive conduct; and
  - h) has revealed to the DPP and the Commissioner any and all conduct of which he/she is aware that may constitute an offence under the Act.
3. **Cooperation and disclosure:** [*INDIVIDUAL X*] shall provide cooperation and full, complete, frank and truthful disclosure to the DPP and the Commissioner, including, but not limited to:
  - e) providing all non-privileged information, records and things in his/her possession, under his/her control or available to him/her, wherever located, whether or not requested by the DPP or the Commissioner, that in any manner relate to the anticompetitive conduct. Before providing the information, records and things, [*INDIVIDUAL X*] will consult with the Commissioner with respect to the relevance and scope of such information, records and things and the form in which such information, records and things will be provided to the Commissioner;
  - f) making him/herself available in Canada for interviews and to testify in judicial proceedings at times and places designated by the DPP or the Commissioner; and
  - g) revealing any and all conduct of which he/she becomes aware which may constitute an offence under the Act.
4. **Immunity:** Having considered the recommendation of the Commissioner and after an independent review by the DPP, the DPP grants [*INDIVIDUAL X*] immunity from prosecution under the Act in respect of the anticompetitive conduct defined above conditional upon:

- c) the veracity of the representations contained in paragraph 2 above; and
  - d) the disclosure and cooperation of [INDIVIDUAL X] as required pursuant to this agreement.
5. **Confidentiality:** The DPP and the Commissioner shall not disclose to any third party the identity of [INDIVIDUAL X.] except where:
- g) disclosure is required by law, including:
    - i. in response to an order of a Canadian court of competent jurisdiction; or
    - ii. to a person charged with an offence in Canada;
  - h) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
  - i) disclosure is necessary for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
  - j) [INDIVIDUAL X.] has agreed to disclosure;
  - k) there has been disclosure by [INDIVIDUAL X.]; or
  - l) disclosure is necessary to prevent the commission of a serious criminal offence.
6. **Confidentiality of Information:** The DPP and the Commissioner shall not disclose to any third party information obtained from [INDIVIDUAL X.] subject only to the exceptions listed above or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act.
7. **Disclosure to Foreign Law Enforcement Agency:** The DPP and the Commissioner shall not disclose the identity of [INDIVIDUAL X.] nor the information obtained from [INDIVIDUAL X.] to any foreign law enforcement agency without the consent of [INDIVIDUAL X.].
8. **Disclosure to Third Parties:** Unless made public by the DPP or the Commissioner, or as required by law, [INDIVIDUAL X.] shall not disclose confidential information to any third party, without the consent of the DPP, which consent will not be unreasonably withheld. Where disclosure is required by law, [INDIVIDUAL X.] shall give notice to and consult with the DPP prior to making any required disclosure.

9. **Notice of Disclosure to Third Parties:** If any third party seeks to compel disclosure of confidential information from any party to this agreement that party shall give prompt notice to the parties to this agreement, and shall take all reasonable steps to resist disclosure unless all parties to this agreement consent to such disclosure.
10. **Failure to Comply with the Immunity Agreement:** The parties agree that full compliance with all of the terms and conditions in this agreement by [INDIVIDUAL X] is a condition of and fundamental to the agreement. The parties also agree that the accuracy and veracity of all representations required by this agreement by [INDIVIDUAL X] is a condition of and fundamental to the agreement. Non-compliance with any of the terms and conditions of this agreement by [INDIVIDUAL X] constitutes a breach of the agreement which may result in revocation of immunity.
11. **Revocation of Immunity:** If the DPP determines that [INDIVIDUAL X] has made misrepresentations with respect to any of the matters referred to in paragraph 2, failed to provide the cooperation and disclosure required under paragraph 3, or failed to comply with any other terms and conditions of this agreement, the DPP may revoke the immunity granted to [INDIVIDUAL X.] upon fourteen (14) days prior written notice to counsel for [INDIVIDUAL X.]. The DPP will provide counsel for [INDIVIDUAL X] with an opportunity to meet with the DPP regarding the potential revocation of immunity.
12. **Impact of Revocation of Immunity:** Following revocation of immunity for a breach of this agreement, as described in paragraphs 10 and 11 above, the DPP may take such action against [INDIVIDUAL X] as the DPP considers appropriate, including prosecution under the Act. In any such action the DPP may use, in any way, any information, evidence, record, statement or testimony provided by [INDIVIDUAL X] at any time after the application for immunity and any evidence of any kind derived directly or indirectly from such information, evidence, record, statement or testimony provided. For greater certainty, any privilege that may apply in respect of any information, evidence, record, statement or testimony provided is deemed waived upon revocation of immunity.
13. **Use of Statements:** No information, evidence, record, statement or testimony provided by [INDIVIDUAL X] during an interview will be used in evidence against him/her in any proceedings undertaken by or on behalf of the DPP except where [INDIVIDUAL X]:
  - d) subsequently gives in any trial, hearing, or judicial proceeding (including any proceeding in which [INDIVIDUAL X] is an accused) evidence that is materially different from the statement given in an interview;

- e) is charged with perjury, giving contradictory evidence, fabricating evidence or obstructing justice; or
  - f) has had his/her immunity revoked after a breach of this agreement.
14. **Use of Information:** Nothing in this agreement affects the right of the DPP or the Commissioner to use any information, evidence, record, statement or testimony provided by [INDIVIDUAL X] in order to discover or acquire other information, evidence or records from another source.
15. **Privilege and Jurisdiction:** Nothing in this agreement, or any action taken pursuant to it, shall constitute:
- c) except for the waiver mentioned in paragraph 12, a waiver of any privilege by any party to this agreement; or
  - d) except for the purpose of this agreement and proceedings related to the enforcement of this agreement, a submission to the jurisdiction of the Canadian courts by [INDIVIDUAL X], who is not present in Canada.
16. **Applicable Law:** This agreement shall be construed in accordance with the laws of Canada.
17. **Entire Agreement:** This agreement constitutes the entire agreement between the DPP and [INDIVIDUAL X] and supersedes all prior understandings or agreements, if any, whether oral or written, relating to the subject matter of this agreement.
18. **Notices:** Any notice required to be given under this agreement is deemed to be validly given if in writing and by pre-paid registered mail, courier delivery, facsimile transmission or electronic mail (e-mail) transmission to:
- b) The Director of Public Prosecutions  
  
*[Insert appropriate address & fax number]*  
  
Attention: Public Prosecution Service of Canada, Competition Law Section
  - c) The Commissioner of Competition  
  
Attention: Senior Deputy Commissioner  
  
Criminal Matters Branch  
20th Floor, Place du Portage, Phase I  
50 Victoria Street, Gatineau, QC, K1A 0C9

Canada  
Fax: (819) 997-3835

d) [INDIVIDUAL X]

[Insert appropriate address & fax number]

Attention:

e) With copy to:

Counsel for [INDIVIDUAL X]

[Insert appropriate address & fax number]

Attention:

19. **Execution in Counterparts:** This agreement may be executed in counterparts.
20. **The Commissioner Joins in this Agreement:** The Commissioner joins in this agreement solely for the purposes of giving effect to the Commissioner's rights and obligations as set out in paragraphs 7 to 11 and paragraph 17.
21. **Authority and Capacity:** The DPP, [INDIVIDUAL X.] and the Commissioner each represent and warrant to the others that their respective signatories to this agreement have all the authority and capacity necessary to execute this agreement and to bind them to it. [INDIVIDUAL X.] represents that he/she has had an opportunity to consult Canadian legal counsel in respect of this agreement.

The signatories hereto acknowledge the full and voluntary acceptance of the foregoing terms and conditions.

Dated at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.  
Prosecutions

Her Majesty the Queen in right of Canada as  
represented by the Director of Public

Per:

\_\_\_\_\_  
[insert name and title of counsel for the  
Public Prosecution Service of Canada]

Dated at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Commissioner of Competition

Per:

\_\_\_\_\_  
*[insert name of Commissioner of  
Competition]*

Dated at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

*[INDIVIDUAL X]*

Per:

\_\_\_\_\_  
*[insert name]*

Dated at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Signature of *[INDIVIDUAL X]* witnessed by  
counsel to *[INDIVIDUAL X]*

Per:

\_\_\_\_\_  
*[insert name of counsel to [INDIVIDUAL  
X]]*



## APPENDIX D – LETTER OF INDIVIDUAL COVERAGE ASSOCIATED WITH ORGANIZATION IMMUNITY



Public Prosecution  
Service of Canada

Service des poursuites  
pénales du Canada

Name of [X LTD.] director, officer or employee (company individual)  
Address

Dear *company individual*:

**Re: [X LTD.] – Immunity Agreement – Interview – Company Individual**

This is to confirm that pursuant to the Competition Bureau's information bulletin, entitled *Immunity Program under the Competition Act*, [X LTD.] has entered into an immunity agreement ["the agreement" – attached to this letter as an appendix] with the Director of Public Prosecutions and the Commissioner of Competition. The agreement, which governs the terms and conditions of your eligibility for immunity, covers you as a current director, officer or employee of [X LTD.] (as defined in the agreement) subject to your full disclosure and cooperation, as described in the agreement.

By signing this letter, you confirm that you have read and that you understand the agreement and that you have had an opportunity to consult with Canadian legal counsel in respect of the agreement.

By signing this letter you acknowledge your full and voluntary acceptance of the terms and conditions of the agreement pertaining to individuals and agree to be bound by them.

Dated at *city* this \_\_\_\_ day  
of *month, year*

Her Majesty the Queen in right of  
Canada as represented by the Director  
of Public Prosecutions

\_\_\_\_\_  
*Signature of PPSC counsel*

I understand the content of this letter and agree to the terms and conditions of the agreement pertaining to individuals.

\_\_\_\_\_  
*Company individual*

Dated: \_\_\_\_\_

**APPENDIX E – LETTER GUARANTEEING NO DIRECT USE IN EVIDENCE  
OF INFORMATION PROVIDED**

*Address*  
*Telephone:*  
*Facsimile:*  
\*.\*@ppsc-sppc.gc.ca

**PRIVILEGED and CONFIDENTIAL**

*[Date]*

*[Name/address]*

**Re: Inquiry Name**

Dear *[witness' name]*,

This letter sets forth the basis upon which you will make yourself available on *[date]*, for an interview in connection with the Commissioner of Competition's investigation into possible violations of the *Competition Act* in the *[Inquiry Name or Industry Name]*.

1. You have had an opportunity to consult with legal counsel.
2. At your request, *[counsel's name]* counsel, may be present at the interview.
3. The Director of Public Prosecutions (DPP) agrees that no statement made by you, or any record that you or *[X ltd.]* make available during the interview, will be used directly against you, in any legal proceeding brought by the DPP or the Commissioner of Competition, except that your statements or documents may be used in any such proceeding to impeach your testimony or to rebut evidence offered on your behalf. In addition, the DPP may use any statements made in the interview in a prosecution of you for perjury, obstruction of justice, or giving contradictory evidence.
4. Subject to paragraph 3 above, the Commissioner or DPP is free to use any information from the interview to pursue *[his/her]* investigation and any

information directly or indirectly derived from the interview in any subsequent prosecution of you or others.

This letter constitutes the entire understanding between the DPP and you. Please sign and date this letter to indicate your understanding of and agreement with the conditions for your interview.

\_\_\_\_\_  
Witness Name

Dated: \_\_\_\_\_

Yours truly,

X \_\_\_\_\_  
[PPSC counsel]





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.3 PROCEEDS OF CRIME**

**GUIDELINE ISSUED BY THE DIRECTOR UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline offers an overview of the practice and policies of the Director of Public Prosecutions relevant to proceeds of crime, money laundering and offence-related property cases. It also addresses the practice and policies regarding property associated with terrorist activities. In dealing with these matters, it is important for Crown counsel to consider the *Seized Property Management Act*<sup>1</sup> (SPMA), which is the statute governing seized, restrained and forfeited property.

### 2. INVOLVEMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA (PWGSC)

Under the SPMA, after being appointed by a Court Order to do so, the Minister of PWGSC is responsible for managing:

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<sup>1</sup> SC 1993, c 37.

- property restrained or seized under Part XII.2 of the *Criminal Code*;
- offence-related property restrained or seized under the CDSA or the *Criminal Code*;
- property restrained or seized under s. 83.13 of the *Criminal Code*; and,
- property seized under s. 487 of the *Criminal Code*.

provided that a management order has been issued for the property. In accordance with the provisions of the SPMA, PWGSC has established the Seized Property Management Directorate (SPMD) located in Gatineau, Quebec, to manage these types of property.

Since PWGSC is responsible for the payment of damages arising from all undertakings given by the Attorney General of Canada under the SPMA, SPMD personnel must be consulted prior to the signing of an undertaking, any seizure, restraint or forfeiture of property. Such consultation serves to notify the SPMD that a particular property will be put under its management, allows SPMD personnel to make comments on draft orders and to have input as to the feasibility or advisability of the seizure, restraint or forfeiture.

Where terrorism-related property is involved, Crown counsel may forego consulting with the SPMD prior to obtaining an order to seize or restrain property under s. 83.13 of the *Criminal Code* if he or she considers it appropriate in the circumstances. Once the order has been obtained, Crown counsel must immediately notify the SPMD, which can then take appropriate management measures if need be.

SPMD personnel must also be consulted before counsel agrees to the payment of legal costs out of seized or restrained property.

Consultation with the SPMD must continue after the seizure or restraint as circumstances require (e.g. prior to an amendment to the order) to ensure the implementation of the proposed amendment.

### **3. UNDERTAKINGS**

As a prerequisite for the issuance of a search warrant or restraint order under s. 83.13 (Terrorism) or Part XII.2 (Proceeds of Crime) of the *Criminal Code*, the Attorney General of Canada must undertake to pay any damages or costs that could arise from their issuance and execution. This undertaking must be filed with the application for the warrant or order under s. 83.13 or Part XII.2 of the *Criminal Code*.

### **3.1. Proceeds of crime and terrorism cases**

#### **3.1.1. Authority to sign the undertaking**

Where the property in question is neither a business nor a property or properties whose seizure or restraint might reasonably affect the operation of a business, Crown counsel must obtain the approval of the Chief Federal Prosecutor (CFP) before signing the undertaking. At the option of the CFP, the undertaking may be signed by the CFP or the Crown counsel.

Where the property in question is a business, or a property or properties whose seizure or restraint might reasonably affect the operation of a business, the approval levels for the undertaking are as follows:

- a. where the estimated aggregate value of the business, property or properties is \$1,000,000 or less, the CFP;
- b. where the estimated aggregate value of the business, property or properties exceeds \$1,000,000, a Deputy Director of Public Prosecutions.

The undertaking may be signed by the approval authority or at the option of the approval authority by counsel handling the file.

#### **3.1.2. Briefing note**

Where approval is required, a briefing note must be submitted.

The briefing note must contain the following information:

- **SUBJECT:** Provide an overview of what is being sought, e.g. approval of an undertaking;
- **BACKGROUND:** Attach a detailed summary of the facts established in the supporting affidavit. Describe any anticipated significant problems and how it is proposed to address them;
- **STATUS:** Describe the asset management considerations, including Seized Property Management Directorate consultations, the potential interim costs or damages in the particular seizure or restraint, and the harm, if any, to innocent third parties. Indicate when the police plan to lay charges and when a court order will be sought;
- **RECOMMENDATION:** Outline the asset management options, select the preferred option and indicate briefly why that option is the best one for the case. If other options are available, they must be submitted for consideration.

A copy of the affidavit in support of the proposed application as well as the proposed order must be attached to the briefing note.



#### **4. OFFENCE-RELATED PROPERTY**

Approval for the restraint of offence-related property under the CDSA or the *Criminal Code* must be obtained in all cases from the CFP, regardless of the estimated value and nature of the property involved.

As for a management order, its approval may be obtained from Crown counsel if the value of the property is below \$25,000.00. Otherwise, the approval must be obtained from the CFP.

Before obtaining a management order, Crown counsel must be satisfied that an order of forfeiture is feasible in respect of the property.<sup>2</sup>

#### **5. INTER-PROVINCIAL SPECIAL WARRANTS, RESTRAINT AND FORFEITURE ORDERS**

As set out in ss. 462.32(2.1) and (2.2), 462.33(3.01) and 462.371 of the *Criminal Code*, a special warrant, restraint order or forfeiture order can be obtained for execution in another province.

Before obtaining such a warrant or order, Crown counsel from the regional office where the property is located must be consulted to ensure that its terms are consistent with the relevant provincial legislation so as to avoid any execution problems. Crown counsel from the regional office must also oversee the execution of the warrant or order.

It is also essential to coordinate obtaining and executing the warrant, the restraint or forfeiture order with Crown counsel from the regional office where the property is located so as to limit the delay between issuance of the instrument and its execution in the other province.

Last, Crown counsel who obtained the warrant or order continues to be responsible for the process and must therefore ensure that the document has been duly registered or renewed under s. 462.35 of the *Criminal Code* as appropriate.

#### **6. MOTION BY THIRD PARTY BEFORE AND AFTER FORFEITURE AND ROLE OF DEPARTMENT OF JUSTICE**

One of the underlying principles of the offence-related property or proceeds of crime regime is protecting innocent third parties who have an interest in the property. Their rights may be recognized before or after forfeiture, depending on their nature.

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<sup>2</sup> Some judges have refused to order forfeiture of a property as offence-related property because its use was not determinative in the commission of the offence but incidental to it.

Given that the rights claimed by third parties are civil in nature, Department of Justice counsel may be required to address the issues that arise. It is therefore important to contact the Department in the Regional Office in your region as soon as possible to determine what steps to take to respond to these issues.

Crown counsel must not take a third party's claim into account in plea bargain. Only SPMD can decide whether to recognize a third party's claim after the forfeiture.

## **7. FORFEITURE ORDER**

Once property is forfeited, it belongs to the federal Crown, subject to the 30 day appeal period. Forfeited property is governed by the SPMA. The procedure for selling a forfeited property and using the proceeds of sale are set out in the Regulations adopted pursuant to the SPMA. It is important to consult the SPMD prior to obtaining a forfeiture order to ensure that it complies with the SPMA. If the order does not comply, Crown counsel will have to apply to the court, on behalf of SPMD, to amend the order so as to bring it into compliance.

### **7.1. Partial forfeiture**

In *R v Craig*,<sup>3</sup> the Supreme Court of Canada held that partial forfeiture of offence-related real property under the CDSA can be ordered. However, forfeiture of the equity or part of the equity, physical division of a property or partial forfeiture subject to conditions are not allowed.

It is important to point out that partial forfeiture is not a negotiation tool. If the facts justify an application for total forfeiture, Crown counsel may not, as part of negotiations, suggest partial forfeiture.

When certain conditions are met, alternatives to partial forfeiture are possible, in particular, the immediate payment of a sum of money equivalent to forfeiture. This amount is not a fine but should be considered offence-related property in lieu of partial forfeiture. Another option is selling the property by way of judicial sale prior to forfeiture and considering the proceeds of sale in lieu of the real property. The proportionality criterion would then apply to the sum of money, and Crown counsel could request a partial forfeiture.

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<sup>3</sup> 2009 SCC 23, [2009] 1 SCR 762.

## **8. RELATIONSHIPS BETWEEN PROCEEDS OF CRIME (POC) COUNSEL AND HEADQUARTERS COUNSEL GROUP (HCG)**

The HCG manages the Integrated Proceeds of Crime initiative. It decides on the strategic direction of the initiative within the Public Prosecution Service of Canada (PPSC), coordinates proceeds of crime matters and participates in the development of prosecution policies.

HCG counsel are also resource persons who provide advice on a range of proceeds of crime, money laundering and offence-related property issues.

Crown counsel should contact the HCG<sup>4</sup> on all matters pertaining to national policies, the current state of case law or legal issues with respect to proceeds of crime or money laundering. This will ensure that the PPSC's position on the matter is consistent across the country.

## **9. CIVIL FORFEITURE**

In recent years, almost all the provinces have enacted legislation on the civil forfeiture of criminal property. In *Chatterjee*,<sup>5</sup> the Supreme Court of Canada recognized the validity of such a forfeiture scheme in Ontario. In cases where it is decided that seized or restrained property will be transferred to the province for civil forfeiture, it is incumbent on Crown counsel first to ensure that all orders obtained by the PPSC affecting the property are set aside. Orders that have been registered on title must be removed. If the management orders are not set aside, the SPMD will continue to be responsible for the property, and it cannot be turned over to the province.

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<sup>4</sup> See the PPSC Deskbook guideline “[2.6 Consultation within the Public Prosecution Service of Canada](#)”.

<sup>5</sup> 2009 SCC 19, [2009] 1 SCR 624.





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.4 YOUTH CRIMINAL JUSTICE**

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

June 27, 2014

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## 1. INTRODUCTION

Young persons<sup>1</sup> who are charged with federal offences<sup>2</sup> generally must be prosecuted in accordance with the provisions of the *Youth Criminal Justice Act* (YCJA).<sup>3</sup> The YCJA provides the philosophical and procedural framework for a distinct and separate criminal justice regime for young persons, which recognizes that the youth criminal justice system must be based on the principle of the diminished moral culpability of young persons.<sup>4</sup>

Crown counsel who are prosecuting young persons must be familiar with the YCJA provisions, including the guiding principles, enhanced procedural protections, extrajudicial measures,<sup>5</sup> sentencing principles, available sentences, and the specific rules regarding the privacy of young persons as well as access to, and disclosure of, youth records. These rules differ, and often significantly, from those that apply to adults who are prosecuted in accordance with the *Criminal Code*. Young persons have not only all of the rights guaranteed to adults by virtue of the *Canadian Charter of Rights and Freedoms*, they have additional rights and protections under the YCJA.

## 2. GUIDING PRINCIPLES UNDER THE YCJA

The key guiding principles of the YCJA are found in both the Preamble and in s. 3 of the YCJA, and are intended to guide Crown counsel and other youth justice system participants in the interpretation and application of the YCJA. The Preamble includes as one of the overarching principles of the YCJA: The youth criminal justice system is

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<sup>1</sup> Young persons are defined in s 2 of the YCJA as persons who are at least 12 but under 18 at the time of the alleged commission of the offence. Thus an adult can be charged with having committed an offence as a young person.

<sup>2</sup> The definition of an offence in s 2 of the YCJA captures offences under Acts of Parliament and federal regulations.

<sup>3</sup> *Youth Criminal Justice Act*, SC 2002, c 1 (in force 1 April 2003). Crown counsel must be mindful of significant amendments to the YCJA, which came into force on October 23, 2012. This directive incorporates those amendments, however, a link to the precise wording of the amendments is included here because the annual annotated *Criminal Codes* do not always include the important transitional provisions contained at Clause 195 of the *Safe Streets and Communities Act*, SC 2012 c1. Some versions of the *Criminal Code* also contain mistakes regarding the amendments. For example, the 2014 version of Martin's Annual *Criminal Code* wrongly retains a reference in s 3(1)(a) of the YCJA to the long-term protection of the public when in fact this wording was removed in the new version of s 3(1)(a) of the YCJA. See online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5465759&File=4>>.

<sup>4</sup> YCJA, *ibid* at s 3(1)(b).

<sup>5</sup> Extrajudicial Measures are measures other than judicial proceedings used to deal with young persons alleged to have committed offences .

intended to reserve its most serious intervention for the most serious crimes and to reduce the over-reliance on incarceration for non-violent<sup>6</sup> young persons.

Section 3 of the YCJA provides detailed guiding principles regarding the youth criminal justice system, but does not prioritize those principles. Nevertheless, the first statement in s. 3 states that the youth criminal justice system is intended to protect the public by holding young persons accountable through proportionate measures, by promoting their rehabilitation and re-integration, and by referring them to community programs or agencies to address the circumstances underlying their offending behavior and thus help prevent crime. Crown counsel should also remain attuned to the fact that s. 3 states that measures against young persons are expected to respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and young persons with special requirements.<sup>7</sup>

### **3. EXTRAJUDICIAL MEASURES**

#### **3.1. Introduction**

Similar to alternative measures for adults, extrajudicial measures are measures other than formal judicial proceedings designed to hold young persons accountable for the offending conduct. Unlike alternative measures for adults, however, the extrajudicial measures regime for young persons is detailed and directive; it identifies specific types of extrajudicial measures, states their objectives, and provides principles to guide decisions regarding their use.

Crown counsel can use extrajudicial measures to address offending behaviour by young persons provided the Crown is satisfied that it would be appropriate in the circumstances. Generally such measures will be most suitable for young persons with no record, who have committed less serious offences and are not likely to re-offend. Such measures may often be the most effective, and quickest response (in relation to the time of the offending conduct), to hold the young person accountable, to repair the harm done to the victim and the community, and to reduce recidivism, and thus serve the important goal of public protection.

#### **3.2. Statutory guidelines for the use of extrajudicial measures**

The YCJA sets out specific principles in ss. 4 and 5 to guide police and Crown counsel in the use of extrajudicial measures.

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<sup>6</sup> A violent offence is defined in s 2 of the YCJA and includes an offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

<sup>7</sup> YCJA, *supra* note 3, s 3 (1)(c)(iv). This paragraph is not a complete encapsulation of the principles set out in s 3.



Extrajudicial measures are expected to be proportionate to the seriousness of the offence. They are also presumed adequate to hold a young person accountable for a non-violent offence if the young person has not previously been found guilty of an offence.<sup>8</sup> This presumption, albeit rebuttable, is a strong direction from Parliament that Crown counsel are expected to use extrajudicial measures rather than the court to deal with non-violent young persons who have not previously been found guilty of offences. However, Crown counsel may find that certain offences that have not generally been interpreted by the courts to fit the definition of a violent offence under the YCJA nevertheless require the Crown to conclude that extrajudicial measures may not be appropriate.<sup>9</sup>

Crown counsel should also be aware that extrajudicial measures can be used, even if the young person has previously been dealt with by extrajudicial measures, or has previously been found guilty of an offence, provided the use of the extrajudicial measure is consistent with the principles in s. 4 and is considered adequate to hold the young person accountable.<sup>10</sup>

### **3.3. Extrajudicial measures: options for Crown counsel**

If a pre-charge screening program<sup>11</sup> is in place in the jurisdiction, Crown counsel can advise the police that, under s. 6 of the YCJA, before laying a charge, police are obliged to consider whether any of the following options would be sufficient to address the offending conduct:

- take no further action;
- issue a warning;
- issue a police caution if a police cautioning program has been established in the jurisdiction; or
- with the consent of the young person, refer the young person to a community program or agency that may assist the young person not to commit offences.

Section 6 of the YCJA does not oblige the police to consider whether an extrajudicial sanction, which is the most severe type of extrajudicial measure, would be appropriate before proceeding with a formal charge. However, if the police advise the Crown prior to laying a charge that the police believe a sanction would be the best response in the

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<sup>8</sup> YCJA, *supra* note 3, at ss 5 (e) and 4 (c) respectively.

<sup>9</sup> One example may involve a situation where a young person trafficks in Schedule I drugs, such as cocaine, heroin, ecstasy or methamphetamine. Historically, the courts have generally not found trafficking in serious drugs to meet the definition of a violent offence in the YCJA, but this jurisprudence generally dates from the period before the definition of violent in the YCJA was expanded in 2012 to capture conduct that endangers the life or safety of others. The amended definition supports an argument that trafficking in serious drugs meets the definition of a violent offence and thus the presumption of an extrajudicial measure does not apply.

<sup>10</sup> YCJA, *supra* note 3, s 4(d).

<sup>11</sup> Pre-charge screening programs exist in British Columbia, Quebec and New Brunswick.

circumstances, Crown counsel must be satisfied that the conditions in s. 10 of the YCJA have been met.<sup>12</sup>

If a pre-charge screening program is not in place in the jurisdiction, and, as a result, Crown counsel is not consulted until after the police lay the charge, Crown counsel has the following options once a charge has been laid and the police have forwarded the file to the Crown:

### **3.3.1. Withdrawal of the charge**

Crown counsel may determine that, although there is sufficient evidence to proceed with the prosecution,<sup>13</sup> withdrawal of the charge is appropriate. It may be clear, for example, that after considering the principles and objectives in ss. 3, 4 and 5 of the YCJA, and the factors related to the seriousness of the offence, discussed below, that the process of apprehension, detention and charging has been a sufficient response from the youth criminal justice system, and no further action is required.

### **3.3.2. Referral to a community program or agency**

A referral to a community program or agency, with the consent of the young person, may be appropriate in cases where it is clear that the young person needs assistance with a problem that may have contributed to the commission of the offence. Rather than prosecuting the young person, Crown counsel may conclude that the matter can be addressed more appropriately outside of the criminal justice system by such a referral. For example, the young person may require help from a substance abuse program. While the YCJA does not expressly codify this referral power for prosecutors within the extrajudicial measures regime, as it does for the police, s. 3 of the YCJA states that the youth criminal justice system is intended to protect the public by supporting crime prevention through referrals of young persons to community programs or agencies to address the underlying causes of their criminality. It is within Crown counsel's discretion to make such referrals.

### **3.3.3. Crown cautions**

#### **3.3.3.1. Attorney General of Canada authorization for Crown cautions**

Pursuant to s. 8 of the YCJA, the Attorney General<sup>14</sup> may establish a program authorizing prosecutors to administer cautions to young persons instead of starting or continuing

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<sup>12</sup> The conditions required before an extrajudicial sanction can be imposed are similar to those that must be present in relation to Alternative Measures for adults under s 717 of the *Criminal Code*. Before an extrajudicial sanction can be imposed, for example, s 10(2)(f) requires that the Attorney General be satisfied that there is sufficient evidence to proceed with a prosecution.

<sup>13</sup> Crown counsel should also consider the factors listed in the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)".

<sup>14</sup> In s 2 of the YCJA, Attorney General means the Attorney General as defined in s 2 of the *Criminal Code* and includes an agent or delegate of the Attorney General.

judicial proceedings. The Attorney General of Canada hereby authorizes the use of Crown cautions by federal prosecutors in accordance with this directive.

### **3.3.3.2. Definition of Crown cautions and general procedures regarding their use**

A Crown caution<sup>15</sup> is a formal warning from the prosecutor that, although there are sufficient grounds to prosecute the offence, the prosecutor will not be proceeding with the charge. The caution advises the young person to avoid involvement in crime in the future.

A Crown caution letter must be provided to the young person. Crown counsel should meet with young persons to provide these cautions to emphasize the importance of the message. A police officer or another appropriate witness must be present for this meeting; the presence of this witness is particularly important when Crown counsel meets with a young person of the opposite gender. The young person should be encouraged to be accompanied by a parent or another suitable adult. See Appendix A for the format and substance of a Crown caution letter. A notice that the young person has been cautioned, as well as a copy of the caution letter, must also be provided to the parent or guardian of the young person wherever possible. See Appendix B for the format and substance of a Crown notice to a parent or guardian.

Once Crown counsel has confirmed that the young person has been cautioned, and has documented the file accordingly, the charge or charges should be withdrawn.

### **3.3.3.3. Crown cautions: specific considerations**

Crown cautions should be adequate to hold young persons accountable for less serious offences.

Crown counsel must not use Crown cautions in relation to matters in which the young person caused or attempted to cause bodily harm<sup>16</sup> or should have reasonably foreseen that bodily harm would be caused by the offence.

A Crown caution is also unlikely to be adequate to hold a young person accountable for the following drug offences:

- possession of more than 30 grams of marihuana or more than one gram of cannabis resin, or possession of Schedule I drugs, such as cocaine, ecstasy, heroin or methamphetamine;
- trafficking in a controlled substance, or possession of the controlled substance for the purpose of trafficking.

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<sup>15</sup> YCJA, *supra* note 3, s 8. See also Appendix A.

<sup>16</sup> Crown counsel must keep in mind that bodily harm includes psychological harm. See *R v McCraw* [1991] 3 SCR 72.

In some circumstances, Crown counsel may consider resolving the drug offences identified directly above by using an extrajudicial sanction, which is the most serious state response available within the range of extrajudicial measures, as discussed below.

The choice between using a Crown caution or an extrajudicial sanction depends on several factors, as discussed below.

### **3.3.4. Extrajudicial sanctions**

#### **3.3.4.1. Authorization of the Attorney General of Canada**

Pursuant to s. 10(2)(a) of the YCJA, the Attorney General of Canada hereby authorizes the use by federal prosecutors of extrajudicial sanctions consistent with the principles of the YCJA and criteria in this directive.

For the purposes of s. 10(2)(a) of the YCJA, the range of acceptable sanctions that can form part of an extrajudicial sanctions program authorized by the Attorney General of Canada can include community service, restitution or compensation in cash or services, mediation, referrals to specialized programs for counselling, treatment or education, (e.g. life skills, drug or alcohol treatment, anger management), referrals to community, aboriginal or youth justice committees (which can recommend sanctions), victim-offender reconciliation programs and similar measures aimed at restorative justice, a letter of apology or essay, and other reasonable sanctions or measures that are consistent with the objectives of the YCJA and criteria in this directive. For greater certainty, a federal prosecutor can also refer an offender to an individual, committee or agency in a community that can recommend a sanction or sanctions provided the extrajudicial sanction falls within a program of extrajudicial sanctions authorized by the province or territory in accordance with s. 10(2)(a).

#### **3.3.4.2. Statutory preconditions regarding extrajudicial sanctions**

Extrajudicial sanctions can be used to deal with a young person alleged to have committed an offence only if the young person cannot be dealt with by a warning, caution or referral in ss. 6, 7 or 8 because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances. Crown counsel should determine the seriousness of the offence by considering the factors discussed below at 3.3.4.4.

Unlike other types of extrajudicial measures, such as a police warning or a Crown caution, an extrajudicial sanction has specific conditions outlined in s. 10, such as requiring the young person to accept responsibility for the act that forms the basis of the offence. The young person must also consent to the terms and conditions of the sanction. Failure to comply can result in the prosecution of the offence.

#### **3.3.4.3. Extrajudicial sanctions: specific considerations**

There is no limit to the number of times that a young person may be dealt with through extrajudicial sanctions.

Even if the Crown determines that a less serious extrajudicial measure, such as a Crown caution, is inappropriate, Crown counsel should consider whether an extrajudicial sanction would be adequate to hold the young person accountable for the offending behaviour.

It is unlikely that an extrajudicial sanction will be appropriate for offences in which the young person caused or attempted to cause bodily harm, or should have reasonably foreseen that bodily harm would be caused by the offence.

Extrajudicial sanctions may be appropriate to deal with some drug offences that are too serious to be dealt with by a Crown caution. However, it will generally be inappropriate to resolve the following drug offences or offences committed in the following circumstances by imposing an extrajudicial sanction rather than proceeding with a prosecution:

- using another person more than two years younger than the young person alleged to have committed the offence to commit or assist in the commission of a drug offence;
- trafficking or possession for the purpose of trafficking in Schedule I drugs, such as cocaine, heroin, ecstasy or methamphetamine (an exception may arise where the young person shares a very small quantity of the substance with a peer for little or no consideration);
- the conduct demonstrated sophisticated planning (for example, the offence was part of an ongoing criminal enterprise); or
- where weapons were involved.

When Crown counsel imposes an extrajudicial sanction on a young person, the young person's file must be documented accordingly.

#### **3.3.4.4. Factors related to the seriousness of the offence, the history of previous offences or any other aggravating circumstances**

The following factors are relevant to determining the seriousness of the offence, the history of previous offences or any other aggravating circumstances, for purposes of deciding if an extrajudicial sanction is appropriate:

- whether the offence is summary or indictable;
- whether the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than transient or trifling in nature;

- whether a weapon was used or threatened to be used in the commission of the offence. As youth cases have demonstrated (water balloons and spit-balls have been found to be weapons), it is important to consider the actual danger represented by the weapon;
- the potential or actual harm or damage to the victim (physical, psychological or financial) and/or to society;
- whether it was a sexual offence; if the offence is a drug offence, the nature and deleterious consequences of the drugs involved should be considered;
- whether a mandatory minimum penalty could be imposed for the offence if the young person were found eligible for an adult sentence;
- whether the offence is a property offence. If so, did the young person intentionally cause or attempt to cause substantial property damage or loss? Should the young person have reasonably foreseen that substantial property damage would be caused by the offence?;
- whether the offence is an administration of justice offence, such as breach of probation. If so, would the non-compliance (e.g., failure to attend school, violation of curfew) have been an offence outside the context of a probation order? If not, it should be considered less serious and more likely to be dealt with appropriately through extrajudicial measures or through a review of the original sentence to determine whether the conditions should be changed;
- the role of the young person in the incident. For example, if the young person was the leader who planned and directed the offence, then his/her degree of responsibility is greater. However, this factor is secondary to the seriousness of the offence;
- whether the young person was a victim in the commission of the offence (e.g., a sexually exploited juvenile prostitute, a young person committing a drug offence who is being directed or exploited by an adult drug dealer). If so, it is more likely that an extrajudicial measure should be used;
- whether the young person has a history of committing offences. If so, what is the nature and number of previous offences? Although a history of offences may indicate that a more serious consequence is required to hold the young person accountable, this factor is secondary to the seriousness of the current offence;
- whether the young person has displayed remorse (e.g., through voluntary reparation to the victim or to the community, or has agreed to make such reparation); and
- if the young person were to proceed through the court system, what is the likelihood that the sentence would be more severe than what is available through extrajudicial measures?

## **4. BAIL**

Young persons can be detained in custody at the pre-trial stage only in the circumstances identified in s. 29 (2) of the YCJA. Crown counsel bears the onus of satisfying the youth justice court judge or the justice, on a balance of probabilities, that detention is required due to any of the grounds described in s. 29 (2)(b) and that no conditions of release would enable the risk to be managed in the community. Otherwise, the provisions in Part XVI of the *Criminal Code* regarding detention and release apply to young persons, unless these provisions are inconsistent with the specific provisions of the YCJA.<sup>17</sup>

### **4.1. When should the Crown consider opposing bail for a young person?**

Crown counsel should be most concerned about violent and repeat offenders who pose a public safety risk if released. This is consistent with the principles in the bail regime in s. 29 (2), as well as the Preamble, which clearly states that the youth criminal justice system should reduce the over-reliance on jail for non-violent young persons.

If the Crown wishes to show cause, Crown counsel should be satisfied that the concern (failure to appear, protection of the public, or exceptional circumstances and maintaining confidence in the administration of justice) cannot be addressed and managed by conditions of release.

## **5. RIGHT TO COUNSEL**

Crown counsel should be aware that, in certain situations, the youth justice court can direct that a young person be represented by counsel. When such direction is made, the Attorney General must appoint counsel, or cause counsel to be appointed.<sup>18</sup> In these circumstances, Crown counsel should notify the Chief Federal Prosecutor (CFP) or a person designated by the CFP in the territory or province to discuss procedures.

## **6. SENTENCING**

### **6.1. Sentencing principles**

A young person who is found guilty of an offence will receive a youth sentence in accordance with the general principles in s. 3, the purpose and principles of sentencing in s. 38, and the available sentences in the YCJA. However, if a young person is found guilty of an offence, and the youth justice court judge orders an adult sentence pursuant to s. 72 of the YCJA, as discussed below, the young person will be sentenced in accordance with the sentencing principles and sentences in the *Criminal Code*. In these

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<sup>17</sup> YCJA, *supra* note 3, s 28. In particular, Crown counsel should note s 29(1) (prohibition on detention as a social measure) and s 31 (availability of a responsible person rather than pre-trial detention).

<sup>18</sup> YCJA, *supra* note 3, s 25(5).

circumstances, mandatory minimum penalties available under the *Criminal Code* or the *Controlled Drugs and Substances Act* can be imposed on young persons provided the conditions for an MMP are satisfied in the particular case.<sup>19</sup>

## **6.2. When to seek a custodial youth sentence**

Crown counsel can seek a custodial youth sentence for a young person only in certain situations, which are identified in s. 39 of the YCJA. Under the YCJA, youth custodial sentences are designed so that a portion of the sentence is served in custody and a portion is served in the community. This approach is aimed at encouraging the rehabilitation and re-integration of the young person back into the community.

In considering whether to seek a custodial sentence, Crown counsel must consider the nature of the sentence that is required to hold the young person adequately accountable, that will have meaningful consequences for the young person, and that will also promote rehabilitation and re-integration into society, and thus contribute to the long-term protection of society.<sup>20</sup>

Specific sentencing principles apply to a young person who is to receive a youth sentence under the YCJA.<sup>21</sup> For example, the youth sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person.<sup>22</sup> The sentencing principles of rehabilitation and re-integration, specific deterrence and denunciation, are all subject to proportionality.

Crown counsel must also bear in mind that s. 38 directs the youth justice court to consider all available sanctions other than custody that are reasonable for all young persons, paying particular attention to the circumstances of aboriginal young persons.<sup>23</sup> Further, Crown counsel must remain alive to the fact that general deterrence is not a sentencing principle that applies to a young person who is receiving a youth sentence under the YCJA.<sup>24</sup>

## **6.3. Adult sentences**

Crown counsel can apply for an adult sentence for a young person in any case it considers appropriate, provided the young person meets the basic eligibility requirements: there must be a guilty finding against the young person in relation to an offence for which an

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<sup>19</sup> YCJA, *supra* note 3, ss 50 and 74 (1).

<sup>20</sup> YCJA, *supra* note 3, s 38 (1).

<sup>21</sup> YCJA, *supra* note 3, ss 3 and 38(2).

<sup>22</sup> YCJA, *supra* note 3, s 38(2)(c)

<sup>23</sup> YCJA, *supra* note 3, s 38(2)(d).

<sup>24</sup> As discussed in section 9 of this directive concerning transitional provisions, Crown counsel must remain mindful that the sentencing principles of specific deterrence and denunciation apply only to offences committed after October 23, 2012.



adult could receive more than two years in jail and the young person must have been at least 14 at the time of the offence.<sup>25</sup>

However, if the offence is a serious violent offence,<sup>26</sup> committed by a young person who was at least 14 at the time of the incident, Crown counsel must consider whether it would be appropriate to apply for an adult sentence.<sup>27</sup> In such cases, prior to deciding whether to apply for the adult sentence, Crown counsel with carriage of the file must consult the CFP, the Deputy CFP or the General Counsel Legal Operations. If the Crown ultimately decides not to apply in such a case, the Crown must advise the youth justice court before the young person enters a plea or, with leave of the court, before the trial.<sup>28</sup> Crown counsel must ensure that the file is appropriately documented so that it is clear that Crown counsel considered the appropriateness of an adult sentence in all cases where it is now obliged to do so.

Otherwise, when the Crown intends to apply for an adult sentence, the Crown must give notice of that intention to the young person and the youth justice court before the young person enters a plea or, with leave of the court, before the start of the trial.

### **6.3.1. Factors relevant to whether Crown counsel should apply for an adult sentence**

The YCJA does not explicitly identify the factors Crown counsel should consider in deciding whether to apply for an adult sentence.<sup>29</sup> However, given that Crown counsel is statutorily mandated to consider applying for an adult sentence any time a young person who was at least 14 at the time of the incident has committed a serious violent offence, the seriousness of the offence is obviously a factor to be considered.<sup>30</sup>

Other relevant factors Crown counsel should consider when deciding whether to apply for an adult sentence, include the following:

- the age, maturity, character, background and previous record of the young person;
- the level of intelligence, sophistication, and dependency (including the capacity for moral judgment) of the young person;
- the role of the young person in the commission of the crime;

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<sup>25</sup> YCJA, s 64.

<sup>26</sup> Under s 2 of the YCJA, a serious violent offence is defined as murder, attempt murder, manslaughter or aggravated sexual assault.

<sup>27</sup> YCJA, s 64 (1.1).

<sup>28</sup> *Ibid.*

<sup>29</sup> *R v DB*, 2008 SCC 25 [*R v DB*] at paras 41, 44, 47, 54, 62-65 and 76-77 provides some guidance as to the factors during the discussion of diminished moral blame worthiness.

<sup>30</sup> YCJA, s 64 (1.1).

- the harm done to victims, and whether it was intentional or reasonably foreseeable;
- the adequacy of a youth sentence to hold the young person accountable, to protect the public and to serve the goal of rehabilitation;
- the availability of treatment and resources in the youth system versus the adult system;
- the fact that the identity of the young person will automatically be made public when a young person receives an adult sentence;<sup>31</sup>
- the importance of general deterrence, which is a sentencing principle only when a young person receives an adult sentence; and
- any other factors that the Crown considers relevant in a particular case.

### **6.3.2. Test for an adult sentence**

Before imposing an adult sentence, the youth justice court must be satisfied that the presumption of the diminished moral blameworthiness of the young person has been rebutted.<sup>32</sup> The youth justice court must also be satisfied that a youth sentence would not be of sufficient length to hold the young person accountable. The Crown bears the onus of satisfying the youth justice court in this regard.<sup>33</sup>

## **7. PRIVACY, PUBLICATION AND RECORDS**

### **7.1. Introduction**

The privacy rights of young persons who are dealt with under the YCJA are set out in s. 3 and Part 6 of the YCJA;<sup>34</sup> the privacy of young persons is a theme throughout the YCJA.

### **7.2. Publication**

The YCJA generally protects the identities of young persons who are dealt with under the YCJA, as well as the identities of children and young persons who are witnesses or

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<sup>31</sup> YCJA, *supra* note 3, s 110 (2)(a).

<sup>32</sup> In *R v DB*, *supra* note 29, the Supreme Court of Canada found at paras 59 and 70 respectively that the presumption of the diminished moral culpability of young persons is not only a longstanding legal principle but a principle of fundamental justice. *R v DB* also provides some guidance regarding the factors and evidence Crown counsel can adduce to rebut this presumption in a given case, such as the age, maturity and capacity for moral judgment of the young person in question. The factors the Crown may wish to raise in seeking to rebut the presumption of diminished moral blameworthiness will often be the same factors referred to above under “Factors Relevant to Whether Crown counsel Should Apply for an Adult Sentence”.

<sup>33</sup> YCJA, *supra* note 3, s 72.

<sup>34</sup> YCJA, *supra* note 3, s 3(1)(b)(iii).

victims in relation to offences committed or alleged to have been committed by young persons. However, there are exceptions to these rules,<sup>35</sup> which include when a young person receives an adult sentence, or, in certain circumstances, when a young person receives a youth sentence for a violent offence.<sup>36</sup>

The identity of a young person can be published when the young person receives an adult sentence. Regarding the second exception (when the young person receives a youth sentence for a violent offence), the publication ban can be lifted only if Crown counsel satisfies the youth justice court judge that the publication ban should be lifted because the young person poses a significant risk of committing another violent offence and lifting the ban is necessary to protect the public.<sup>37</sup> Thus, in cases where the Crown takes the position that the ban must be lifted, Crown counsel must ensure that it has placed before the court an adequate evidentiary record.

### **7.3. Access to and disclosure of youth records**

The YCJA creates a regime for access to, and disclosure of, three types of youth records: court records, police records and records kept by government departments or agencies, which includes the Crown. It is an offence to disclose youth records, as defined in the YCJA, except in accordance with the YCJA.<sup>38</sup>

Crown counsel, as a record-keeper, has discretion under s. 119 of the YCJA as to whether to disclose a youth record in its possession to the parties identified in that section. When Crown counsel receives a request for a youth record, Crown counsel must be attuned to the fact that youth records generally remain accessible for only specified periods of time, which are spelled out in s. 119(2).

Crown counsel also has the discretion to disclose court or police records during proceedings under any federal act to a person who is a co-accused with the young person in relation to the offence for which the record is kept, and information to an accused in a proceeding that identifies a witness as a young person who has been dealt with under the YCJA.<sup>39</sup>

In the event that a requesting party disagrees with the Crown's decision not to disclose a youth record in a given case, the party can apply to a youth justice court judge for the record under s. 119(1)(s) if the access period to the record has not expired. If the access period has expired, an application can be made under s. 123.

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<sup>35</sup> YCJA, *supra* note 3, ss 110-111.

<sup>36</sup> YCJA, *supra* note 3, s 75.

<sup>37</sup> YCJA, *supra* note 3, ss 110(2)(b) and 75 (2) respectively (in terms of the examples cited).

<sup>38</sup> YCJA, *supra* note 3, ss 118 and 138.

<sup>39</sup> YCJA, *supra*, note 3, s 125(2).

Once a party is granted access to a record, the party cannot further disclose the information in the record unless there is authority for such further disclosure in the YCJA.<sup>40</sup>

When the Crown is preparing for sentencing in relation to a youth case, it is important for the Crown to be aware that the young person's youth record can be included in the pre-sentence report, provided access to the youth record is still open under s. 119(2).<sup>41</sup>

Crown counsel should also be aware that, unlike other types of extrajudicial measures, a young person's record of extrajudicial sanctions can be made available to various parties<sup>42</sup> upon request, and the history of a young person's involvement in extrajudicial sanctions can be included in a pre-sentence report and raised during the young person's sentencing hearing for a subsequent offence, provided the access period to the record is still open.<sup>43</sup>

It is also important for Crown counsel to be attuned to the fact that if a person is convicted of an offence committed after becoming an adult, while access to his or her youth record remains open, Part 6 of the YCJA no longer applies and that person's youth record loses the protections of the YCJA and is to be treated like an adult record.<sup>44</sup> In addition, in certain circumstances, a guilty finding received under the YCJA can be considered a previous conviction for purposes of imposing a greater punishment on an adult under other Acts of Parliament, such as the *Criminal Code* or the *Controlled Drugs and Substances Act*.<sup>45</sup>

Access to police and government records are more strictly controlled when the record concerns an extrajudicial measure other than an extrajudicial sanction. Only the police, the Crown, or a person participating in a conference, is allowed to have access to these records for certain purposes, including in order to decide whether to use another extrajudicial measure. By contrast, youth records involving extrajudicial sanctions are more widely accessible.<sup>46</sup>

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<sup>40</sup> YCJA, *supra* note 3, s 129.

<sup>41</sup> YCJA, *supra* note 3, at ss 40 (2)(iii) and (iv).

<sup>42</sup> YCJA, *supra*, note 3, s 119(2)(a)

<sup>43</sup> But by virtue of ss 119(4) and s 40 (2)(d)(iv), any extrajudicial measures used other than extrajudicial sanctions, such as a Crown caution, cannot be mentioned.

<sup>44</sup> YCJA, *supra* note 3, s 119(9)(b). See also s 120 (6) of the YCJA regarding a similar provision in relation to RCMP records concerning offences listed in the YCJA schedule (which include trafficking, importing and exporting, and production offences under the CDSA).

<sup>45</sup> While the Supreme Court of Canada has never ruled on this point, this is the combined effect of ss 119(9)(a) and 82(4) of the YCJA as discussed in *R v Able* 2013 OJ No 2675; 2013 ONCA. See also the 2013-06-27 PPSC Memo titled: Youth Records and MMPs under the CDSA.

<sup>46</sup> YCJA, *supra* note 3, ss 119(4) and 119(2)(a).

Nevertheless, police forces must keep records of all extrajudicial measures that they use to deal with young persons.<sup>47</sup> Crown counsel should ensure police forces are aware of this obligation and check with the relevant police force in appropriate cases to ensure the Crown has the complete record.

## 8. CROWN OBLIGATION TO PARENTS AND VICTIMS

The YCJA expressly recognizes the interests of victims as well as those of the parents of accused young persons.<sup>48</sup>

Thus, Crown counsel should:

- Verify that parents have been informed of measures or proceedings involving their children and encourage them to support their children in addressing their offending behaviour;<sup>49</sup>
- If a young person receives an extrajudicial sanction, attempt to ensure that the program administrator is aware of the obligation to inform the parent of the young person of the sanction;<sup>50</sup>
- Take into account the interests of victims,<sup>51</sup> treat victims with courtesy, compassion and respect, and provide them with information about the proceedings so that they have an opportunity to participate and be heard;<sup>52</sup>
- If a young person receives an extrajudicial sanction, inform the victim, upon request, of the identity of the young person and how the offence was dealt with.<sup>53</sup> In these circumstances, the Crown must also inform the victim that he or she is not permitted to further disclose that information unless provisions of the YCJA authorize it.<sup>54</sup>

## 9. TRANSITIONAL PROVISIONS

Crown counsel must remain mindful of the transitional provisions that are contained in the *Safe Streets and Communities Act* because they clarify when and how the 2012

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<sup>47</sup> YCJA, *supra* note 3, s 115 (1.1).

<sup>48</sup> See YCJA, *supra* note 3, Preamble and ss 3 (1)(d)(ii),(iii) and (iv), as well as ss 11-12.

<sup>49</sup> YCJA, *supra* note 3, s 3(1)(d)(iv).

<sup>50</sup> YCJA, *supra* note 3, s 11.

<sup>51</sup> See YCJA, *supra* note 3, Preamble, clause 5.

<sup>52</sup> YCJA, *supra* note 3, ss 3(1)(d) (ii) and (iii).

<sup>53</sup> YCJA, *supra* note 3, Preamble, clause 3, but more specifically s 12.

<sup>54</sup> YCJA, *supra* note 3, ss 118 and 129. Pursuant to s 138 of the YCJA, it is an offence to further disclose youth records or information provided under the YCJA unless the YCJA permits it.

amendments to the YCJA apply. As discussed at note 3, annual annotated *Criminal Codes* do not always include these transitional provisions. For example, Crowns must remain cognizant that some of the 2012 amendments to the YCJA apply only to offences committed after the October 23, 2012 coming into force date of the amendments, such as the amendments relating to the sentencing principles and to the eligibility criteria for custodial sentences under s. 39.<sup>55</sup> The other amendments, such as changes to the bail regime under s. 29 of the YCJA, apply to young persons who committed offences before the coming into force of the amendments if proceedings had not commenced before October 23, 2012.

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<sup>55</sup> As per clause 195 of the *Safe Streets and Communities Act*, the following provisions do not apply to young persons who committed the offence before the coming into force of these amendments on Oct. 23, 2012:

- The broader definition of a violent offence in s 2;
- The new s 3(1)(a) of the YCJA;
- The sentencing principles of denunciation and specific deterrence;
- The expanded eligibility for custody under s 39(1)c) of the YCJA; and
- The new wording of s 75 of the YCJA, which expands the circumstances where the identity of a young person who has received a youth sentence can be published.

## APPENDIX A

### CROWN CAUTION LETTERS

Consistent with the policy criteria set out in section 3.3.3 of this directive, federal prosecutors may administer Crown cautions under s. 8 of the *Youth Criminal Justice Act*, in the format below, modified as necessary to fit the circumstances.

#### ***Section 8 Youth Criminal Justice Act***

##### Crown Caution to a Young Person

To: (name of young person)

The Public Prosecution Service of Canada has received a report from {police agency}. In this report, police officers indicate that they have reasonable grounds to believe that you have broken the law by:

{set out offence(s)}.

While there is sufficient information to proceed with a prosecution, the Crown has decided, under s. 8 of the *Youth Criminal Justice Act*, to issue a formal caution to you rather than proceeding with charges for this offence.

If you break the law in the future, more serious consequences, including charges and prosecution with potentially serious penalties, may follow.

If a future matter proceeds to prosecution, a youth record could result. Meanwhile, a record of this Crown caution remains on file.

You are required to contact the Crown's office, or your probation officer or youth worker, to confirm receipt of this caution letter.

(date)

(place)

{name of person signing on behalf of the Director of Public Prosecutions and Deputy Attorney General of Canada}

Contact # for further information \_\_\_\_\_

## APPENDIX B

### NOTICE TO PARENT OR GUARDIAN

Crown counsel should notify a parent or guardian of the young person that a Crown caution has been administered in the following format, modified as necessary to fit the circumstances.

#### ***Section 8 Youth Criminal Justice Act***

Notice to the Parent or Guardian that a Young Person has been given a Crown Caution

To: {name of parent, guardian or adult with legal responsibility for young person}

This letter concerns {name of young person}.

The Public Prosecution Service of Canada has received a report from {police agency}. In this report, police officers indicate that they have reasonable grounds to believe that (name of young person) has broken the law by:

{set out offence(s)}

While there is sufficient information to proceed with a prosecution, the Crown has decided, under s. 8 of the *Youth Criminal Justice Act*, to issue a formal caution to (the young person) rather than proceeding with charges for this offence.

Please understand that if (the name of the young person) breaks the law in the future, there may be more serious consequences, including charges and prosecution with potentially serious penalties. If a future matter proceeds to prosecution, a youth record could result.

A record of this Crown caution remains on file.

{date}

{place}

{name of person signing on behalf of the Director of Public Prosecutions and Deputy Attorney General of Canada}

Contact # for further information \_\_\_\_\_





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.5 DOMESTIC VIOLENCE**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

This guideline is aimed at guiding Crown counsel in the exercise of their discretion in cases of domestic violence. The guideline highlights the importance of ensuring that the safety of complainants and their families is the paramount consideration at all stages of the prosecution.

For purposes of this guideline, a domestic violence case is one involving a physical or sexual assault, or threat of such violence, against a partner in a domestic relationship. A partner is a person with whom the accused has, or has previously had, an ongoing personal or intimate relationship, whether or not they are legally married or living together. The definition encompasses both opposite and same sex partnerships.

### 2. APPLICATION OF THE GUIDELINE

The Public Prosecution Service of Canada (PPSC) has jurisdiction to prosecute domestic violence cases only in Canada's three territories. It is therefore incumbent upon Crown counsel to take into account circumstances particular to the North. These circumstances include the fact that in many small northern communities, the options available to complainants of domestic violence may be limited because:

- a) complainants may not have access to the same types of support typically available in larger communities in southern Canada, such as emergency shelters or counselling services;
- b) absolute prohibitions on contact with the alleged abuser may be unrealistic in a small isolated community;

- c) in many circumstances, although complainants may wish the violence to cease, they may still be committed to the relationships;
- d) there are often financial or subsistence considerations that can impact a complainant and children in the family; and
- e) options for treatment of accused persons or couples may not be available.

### **3. THE COURT PROCESS**

#### **3.1. Evidentiary considerations and the decision to prosecute**

In circumstances where there is a reasonable prospect of conviction, the prior consent of the Chief Federal Prosecutor's (CFP) or his or her designate's is required if Crown counsel proposes to terminate a domestic violence prosecution on the basis that it is not in the public interest to proceed.

When considering whether a domestic violence prosecution best serves the public interest, Crown counsel must consider the criteria set out in the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)". Crown counsel should also consider the following factors:

- a) the views of the complainant;
- b) whether it appears that the complainant has been directly or indirectly threatened or intimidated by the accused or the accused's family or friends in connection with the present prosecution;
- c) whether it appears that the complainant will be unduly traumatized if required to testify;
- d) whether the complainant may commit perjury if called to testify;
- e) whether there is a likelihood of similar offences in the future particularly against the complainant or children in the home;
- f) whether the accused is addressing the abusive behaviour through counselling or some other treatment or program;
- g) whether the accused has prior convictions for domestic violence offences or other violent offences.

Where it is determined that the police investigation has not provided all the information or evidence that may be available, Crown counsel should advise the police, at the earliest possible stage, in writing that the evidence is incomplete.

In final analysis, Crown counsel is required to terminate a prosecution if it is determined that there is no reasonable prospect of conviction or that continuing with the prosecution no longer best serves the public interest.

A record explaining the reasons of any decision to terminate a domestic violence prosecution must be placed on file and copied to the CFP or his or her designate.

In all cases where a domestic violence prosecution is terminated, Crown counsel is responsible for ensuring that the decision is communicated, prior to it being made public or as soon as practicable thereafter, to the police and the complainant.

### **3.2. Judicial interim release**

In some circumstances victims of domestic violence may express wishes for reconciliation and to have the accused released from custody. In determining what position to take at the judicial interim release stage, Crown counsel must ensure, when considering such wishes, that these not outweigh serious objective concerns for the safety of the victim and members of the family.

Complainants in domestic violence cases may be reluctant to cooperate with the prosecution. While a complainant's views are relevant, the responsibility for the prosecution and decisions to be made at the stage of interim release rest with Crown counsel.

In assessing what position to take on the issue of interim release, Crown counsel must address the safety of the complainant(s) and children. When necessary, Crown counsel should not hesitate to request from police additional relevant information that may help in determining what terms of release may be appropriate or assistance in the preparation of submissions for a show cause hearing.

In circumstances where Crown counsel determines that releasing the accused would create an unreasonable risk to the complainant, the release should be opposed. Where the court is satisfied that the accused can be released, some restrictions will ordinarily be necessary both to ensure the safety of the complainant and to preserve the integrity of the prosecution. As circumstances may require, Crown counsel should consider recommending:

- a) non-communication with the complainant directly or indirectly;
- b) if the court is inclined to allow the accused to have contact with the children, conditions regarding access arrangements through a neutral third party;
- c) conditions prohibiting attendance at or near the residence or place of work of the complainant;
- d) a condition requiring the surrender of all firearms, ammunition, explosives and Firearms licence;
- e) a condition to abstain from the consumption of alcohol or drugs;
- f) in communities where access to domestic violence treatment programs is available, a condition requiring accused to attend all appointments required for treatment purposes and to comply with all related conditions.

Crown counsel should always seek to avoid situations which may have the effect of re-victimizing the complainant. Crown counsel should ensure that decisions or representations made at the interim release stage do not have the effect of forcing or pressuring the complainant and the children to leave the family home or community.

Where the accused is released from custody, a copy of the release terms should be provided to the complainant. In circumstances where the complainant has relocated to another community, Crown counsel or the Crown Witness Coordinator shall ensure that the police detachment nearest to the complainant is informed of the release terms. The police detachment in both the accused's and the complainant's communities should be provided with copies of the terms of release.

In some circumstances, the police may seek Crown counsel's advice on whether to release an accused person from custody before the formal laying of charges. In such situations, Crown counsel must ensure that police provide all the particulars of the case and relevant information before providing advice on the issue of interim release. If an accused has been arrested and then released by the police on a promise to appear or recognizance providing release terms, Crown counsel should review and determine if the conditions are adequate to protect the complainant and the children, as the case may be. If necessary, Crown counsel should request a warrant and an amendment of the conditions pursuant to ss. 499(4), 503(2.3) or 512 of the Code.

If an accused seeks changes to the terms specified by the police in the promise to appear or recognizance, Crown counsel should contact the police and obtain all documentation and information necessary to determine whether the changes being sought should be consented to or opposed.

It is not uncommon for a complainant to express a willingness to resume contact or even cohabitation with the accused or, when an accused is in custody, to ask that the accused be released. In general, it is the accused's responsibility to make an application to vary the interim release conditions or to have his custodial status reviewed. Any decisions made by Crown counsel at this stage should only be made on the basis of reliable and thorough information enabling effective safety planning. If there is a history of abuse or information suggesting that renewal of contact may expose the complainant's or other family members to unreasonable risk, Crown counsel should oppose such changes.

Where the court decides to release an accused in circumstances where Crown counsel considers that the complainant or other family members may be at risk, immediate consideration should be given to making an application for bail review, after consultation with the CFP or his or her designate.

Where a court orders that an accused remain in custody or when an accused is on remand, prior to his bail status being determined, Crown counsel should always consider recommending an order prohibiting the accused from having contact with the complainant or other persons that may be necessary, pursuant to ss. 516(2) or 515(12) of the Code.

Throughout the interim release process, Crown counsel or the Crown Witness Coordinator must keep the complainant informed of the proceedings and any outcomes relevant to the complainant's safety. The Crown Witness Coordinator must advise Crown counsel of any information provided by the complainant that could be relevant to the interim release process or that may have other evidentiary implications.

### **3.3. Preparation of witnesses and the role of Crown Witness Coordinators**

Witness preparation is an important function of Crown counsel prosecuting domestic violence cases. Crown counsel and Crown Witness Coordinators should work together to prepare complainants for the criminal court process. During this process Crown counsel or a Crown Witness Coordinator should ensure that the following steps are taken:

- a) where possible, meet with the complainant as soon as possible after charges are laid and prior to any proceeding where the complainant may be called to testify;
- b) explain the role of Crown counsel and defence counsel in criminal proceedings;
- c) explain the role of the Crown Witness Coordinator;
- d) explain the role of a witness in court;
- e) assess the complainant's reliability as a witness;
- f) tell the complainant or witness that they must testify truthfully;
- g) inform the complainant of any release conditions imposed on the accused, and determine if the complainant has any concerns with the accused's compliance with those conditions;
- h) confirm that the complainant has been made aware of available community services;
- i) attempt to answer any questions the complainant may have and discuss any continuing safety concerns; and,
- j) ensure that the complainant has been informed of the opportunity to file a Victim Impact Statement.

Crown counsel or the Crown Witness Coordinator must review with the complainant the statement given to the police. In circumstances where a Crown Witness Coordinator reviews a statement with the complainant, the Crown Witness Coordinator must document the particulars of that meeting and inform Crown counsel of any new or inconsistent information provided by the complainant.

Crown counsel must inform defence counsel immediately if new information or information inconsistent with the previous statement is provided by the complainant or any other witness.

### **3.4. Where the witness fails to attend**

Where a complainant fails to attend court, Crown counsel should make every reasonable effort to determine the reason(s) for the complainant's failure to appear.

Unless Crown counsel is in a position to proceed to trial without calling the complainant as a witness, Crown counsel should generally seek an adjournment.

In circumstances where Crown counsel considers seeking an arrest warrant against the complainant, Crown counsel must, where practicable, obtain the prior permission of the CFP or his or her designate. If such permission is granted, Crown counsel should contact and advise police regarding the circumstances of the issuance of the warrant. Ordinarily, Crown counsel will

advise police that they should seek information from the complainant on the reason for not attending court and that the complainant should be released as soon as possible on terms that he or she attend court as required. Where it is not feasible for Crown counsel to obtain the CFP's or his or her designate's prior consent, Crown counsel must provide the CFP or his or her designate with a written memorandum explaining this decision and ensure the memo is placed on file.

### **3.5. Where the witness recants or refuses to testify**

In domestic violence cases, it is quite common for complainants to demonstrate reluctance or unwillingness to participate in the criminal justice process. In order to maximize the prospect that the complainant will participate in the process, Crown counsel and Crown Witness Coordinators must work together and provide support and information to complainants throughout the process. It is particularly important to contact the complainant at the earliest possible opportunity.

In cases where there is concern that a complainant may recant or decide not to take part in the process, Crown counsel should consider:

- a) seeking the early intervention of a Crown Witness Coordinator or other support person to assess the complainant's willingness to participate in the process and any reasons for their reluctance to participate;
- b) reviewing the case to determine if police should be asked to obtain a sworn videotaped statement from the complainant;
- c) applying to the court, pursuant to s. 486, for an order:
  - i. prohibiting the publication or broadcast of complainant's identity in sexual offence cases: s. 486(3);
  - ii. allowing a support person inside the courtroom: s. 486.1(2.1);
  - iii. allowing the use of screen or closed circuit television: s. 486.2(2.1); or
  - iv. in rare cases, an order excluding the public from the courtroom while the complainant gives evidence: s. 486(1).

If the complainant refuses to testify, Crown counsel should consider whether other admissible evidence is sufficient to prove the domestic violence offence. Crown counsel may consider excusing the complainant from testifying without further consequence.

If the complainant does testify but cannot recall or the testimony differs from previous statements given, Crown counsel should consider the various options available that may enable the presentation of credible/reliable evidence of the complainant before the court, such as:

- a) seeking leave to show the complainant a prior statement, for the purpose of refreshing memory;

- b) seeking leave to cross-examine the complainant as an adverse witness, pursuant to s. 9(1) of the *Canada Evidence Act*;<sup>1</sup>
- c) seeking leave to cross-examine the complainant on the prior inconsistent statement, pursuant to s. 9(2) of the *Canada Evidence Act*;
- d) seeking to introduce evidence of a prior inconsistent statement for the truth of its contents, pursuant to the Supreme Court's judgment in *R v KGB*;<sup>2</sup>
- e) seeking to introduce evidence of prior out-of-court utterances of the complainant as *res gestae* evidence (e.g. police officer hearsay, 911 or police dispatch tapes).

#### 4. SENTENCE

Where an accused pleads guilty or is found guilty of a domestic violence offence, Crown counsel's submissions on sentencing should include ensuring the long-term safety of the complainant and other family members. Section 718.2(a)(ii) of the Code makes abuse of one's spouse, common law partner or child an aggravating feature on sentencing, and courts have found denunciation and deterrence to be important sentencing principles in cases of domestic violence.

In cases involving aboriginal offenders, particular attention must be paid to the principle of restraint in s. 718.2(e) as explained by the Supreme Court of Canada in *R v Gladue*<sup>3</sup> and *R v Ipeelee*<sup>4</sup>. The principle requires that all available sanctions other than imprisonment that are reasonable in the circumstances be considered given: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

Where available in the three territories, Crown counsel are also encouraged to seek the engagement of community and professional/therapeutic resources which may assist in treating the accused and prevents a reoccurrence of violence between partners who choose to continue in their relationships.

Crown counsel should also note the following considerations applicable to domestic violence cases:

- a) In most circumstances, domestic violence cases are not suitable for conditional or absolute discharges unless extraordinary and compelling circumstances are present as such dispositions do not adequately reflect public denunciation of domestic violence and

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<sup>1</sup> RSC 1985, c C-5.

<sup>2</sup> *R v KGB* [1993] 1 SCR 740.

<sup>3</sup> [1999] 1 SCR 688, (1999), 133 CCC (3d) 385.

<sup>4</sup> [2012] SCC 13.



the need to deter such offences.<sup>5</sup> Extraordinary and compelling circumstances for a discharge may arise where, for example, the accused has successfully completed the treatment process of a specialized therapeutic court program. The position to take in such circumstances must be done on a case by case basis, where Crown counsel must determine whether the conditions, provided by law, in support of a discharge have otherwise been met;

- b) Whether or not incarceration is sought, consideration should be given to seeking probation, with conditions obliging the accused to participate in a therapeutic violence prevention program. When necessary, conditions aimed at ensuring the safety of the complainant and other family members, including a no contact condition should be sought;
- c) Crown counsel must ensure that the complainant is given a reasonable opportunity to prepare and submit a Victim Impact Statement, pursuant to s. 722 of the Code;
- d) Crown counsel should consider recommending a prohibition to possess weapons/firearms when necessary, pursuant to ss. 109 (mandatory) and 110 (discretionary) of the Code;
- e) Crown counsel should seek orders pursuant to ss. 114 and 115 of the Code directing that any firearms licence be surrendered and forfeited where a prohibition order has been imposed;
- f) Crown counsel should consider seeking an order for forfeiture of any weapon or ammunition used in the commission of a domestic violence offence;
- g) Crown counsel should consider seeking a DNA order, pursuant to s. 487.051 of the Code;
- h) When a custodial sentence is sought, Crown counsel should consider seeking an order pursuant to s. 743.21 of the Code prohibiting the accused from communicating directly or indirectly with the complainant or witness during the period of custody;
- i) Crown counsel should generally not consider recommending a conditional sentence in circumstances where an accused has in the past received a conditional sentence for domestic violence related offence(s). Before seeking or agreeing to a conditional sentence for an accused who has received such a sentence in the past for a domestic violence related offence, Crown counsel first must seek the approval of the CFP or his or her delegate.

Crown counsel, with the assistance of a Crown Witness Coordinator, shall take reasonable steps to ensure that the complainant is informed of the sentence imposed and the status of any appeal proceedings undertaken.

## **5. ALTERNATIVES TO PROSECUTIONS**

Crown counsel may only resort to diversion, alternative measures or Extra-Judicial Sanctions in cases involving domestic violence with the prior consent of the CFP or his or her designate.

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<sup>5</sup> *R v Shortt* [2002] NWTJ 55.

Such alternatives to prosecutions should only be pursued in cases where there is a reasonable prospect of conviction and after consideration of sections 2 and 3 of the PPSC Deskbook directive “[3.8 Alternative Measures](#)”, and of the views of the complainant, of the police, and of other officials and treatment professionals who can assist in the assessment of the appropriateness of resolving by way of alternative measures. If the complainant expresses disagreement or reluctance to alternative measures, Crown counsel must inquire as to the reasons behind the complainant’s disagreement or concern. The reasons for such disagreement or concern are factors that Crown counsel must consider in determining whether it is in the public interest to terminate a prosecution in order to resolve a domestic violence case using alternative measures.

## **6. THE USE OF SECTION 810 RECOGNIZANCES**

Before resorting to s. 810 of the Code in domestic violence cases, Crown counsel must obtain the consent of the CFP or his or her designate.

Section 810 may be resorted to where there is no reasonable prospect of conviction on the evidence. In such circumstances Crown counsel must ensure that defence understands that the withdrawal or stay of the domestic violence charges is not done as a result of the accused willingness to agree to abide by a s. 810 recognizance, but rather on the basis that the complainant still reasonably fears for his or her safety, the safety of other family members or property

Section 810 may also be resorted to where on the evidence there is a reasonable prospect of conviction but in the circumstances, a prosecution does not best serve the public interest. These cases will be rare. Before seeking the consent of the CFP, Crown counsel must seek the views of the complainant, police and other administration of justice officials or treatment professionals. Generally, a peace bond will be appropriate only where:

- a) the complainant is agreeable to such a disposition;
- b) the violence involved was minimal;
- c) the accused has no history of violence with either this complainant or others;
- d) there is a realistic safety plan for ensuring that future violence is avoided,
- e) the available information about the accused’s treatment and rehabilitative steps is consistent with the prospect that future violence will be avoided; and
- f) there are resources in the community for the effective monitoring of compliance with the peace bond, for example by the police or probation services.

If the accused enters into a s. 810 recognizance, Crown counsel or a Crown Witness Coordinator must inform the complainant of the terms of the recognizance and the implications of non-compliance by the accused.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.6 VICTIMS OF CRIME**

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED UNDER  
SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The views, concerns and representations of victims are an important consideration in the criminal justice system. The *Criminal Code*<sup>1</sup> (the Code) contains numerous provisions intended to increase the opportunities for victims to be heard before the courts, and to provide protection to victims' physical integrity as well as to their privacy.

Although Crown counsel do not represent victims in criminal proceedings, they must ensure that victims are properly informed about matters that affect them. Where appropriate, they must be provided the opportunity to participate in the criminal justice process.

This directive provides guidance to Crown counsel and Crown Witness Coordinators<sup>2</sup> in their interactions with victims, including victims of crimes committed by young persons under the *Youth Criminal Justice Act* (YCJA).<sup>3</sup>

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<sup>1</sup> In relation to criminal prosecutions involving young persons, the YCJA contains similar provisions in the Preamble and ss 3(1)(d)(ii) and (iii).

<sup>2</sup> Crown Witness Coordinators provide court-based support to victims and witnesses in the three territories and are based in the PPSC regional offices in the Yukon, the Northwest Territories and Nunavut. Crown Witness Coordinators work with prosecutors in supporting victims and witnesses through the criminal justice process and providing information about the court process. Crown Witness Coordinators are required to travel to many small and remote communities, many of which are only accessible by air. The Crown Witness Coordinators locate and meet with victims and witnesses, and help them prepare for court appearances.

<sup>3</sup> Note that the YCJA contains specific provisions concerning victims.

## 2. DEFINITION OF VICTIM

The term “victim” is defined generally in s. 2 of the Code to “include[s] the victim of an alleged offence”. The term is given a more specific definition in s. 722(4) for the purpose of Victim Impact Statements where it is defined as “a person to whom harm was done or who suffered physical or emotional loss as result of the commission of the offence”.

## 3. STATEMENT OF POLICY

Crown counsel must be mindful of the principles contained in the *Canadian Statement of Basic Principles of Justice for Victims of Crime*.<sup>4</sup> The Basic Principles read as follows:

1. Victims of crime should be treated with courtesy, compassion, and respect.
2. The privacy of victims should be considered and respected to the greatest extent possible.
3. All reasonable measures should be taken to minimize inconvenience to victims.
4. The safety and security of victims should be considered at all stages of the criminal justice process and appropriate measures should be taken when necessary to protect victims from intimidation and retaliation.
5. Information should be provided to victims about the criminal justice system and the victim's role and opportunities to participate in criminal justice processes.
6. Victims should be given information, in accordance with prevailing law, policies, and procedures, about the status of the investigation; the scheduling, progress and final outcome of the proceedings; and the status of the offender in the correctional system.
7. Information should be provided to victims about available victim assistance services, other programs and assistance available to them, and means of obtaining financial reparation.
8. The views, concerns and representations of victims are an important consideration in criminal justice processes and should be considered in accordance with prevailing law, policies and procedures.
9. The needs, concerns and diversity of victims should be considered in the development and delivery of programs and services, and in related education and training.
10. Information should be provided to victims about available options to raise their concerns when they believe that these principles have not been followed.

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<sup>4</sup> A Crime Victim's Guide to the Criminal Justice System, *Canadian Statement of Basic Principles of Justice for Victims of Crime* (Ottawa: Government of Canada, 2008), online: Department of Justice <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/guide/secn.html>>. In 1988, the federal, provincial and territorial Ministers of Justice endorsed the *Canadian Statement of Basic Principles of Justice for Victims of Crime*. In 2003, a revised version of the *Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003* was endorsed by federal, provincial and territorial Ministers of Justice, reiterating their commitment that these principles should guide the treatment of victims, particularly during the criminal justice process.

In dealing with victims, Crown counsel must be careful to ensure that victims understand the role of a Crown prosecutor. They must therefore inform victims at the outset that they do not represent them in the proceedings and that as Crown counsel they must be scrupulously fair in presenting the case and may, as a result, present evidence that is favourable to the accused.

Crown counsel and Crown Witness Coordinators must bear in mind the disclosure obligations that may arise as a result of their dealings with witnesses, for example the need to disclose to defence all statements made by the victim, particularly where the victim has given inconsistent versions of the relevant events.

## **4. OPERATION OF THE POLICY**

### **4.1. The special needs of victims**

In their dealings with victims, Crown counsel and Crown Witness Coordinators must take into account the circumstances of the victims (including their age and gender), the nature of the crime(s) and the injuries (emotional and physical) that the victims sustained. Trauma may affect a victim's ability to process information about proceedings, particularly when that information concerns unknown or new terms or processes, which may require Crown counsel and Crown Witness Coordinators having to repeat information about the court process.

While the needs and circumstances of each victim will invariably be unique, Crown counsel should bear in mind certain considerations in specific types of cases.

Where the victim of a crime is a child, communication and protection take on special importance. Crown counsel must consider what measures are required to ensure the victim understands the information that is conveyed about the criminal justice system. Crown counsel should use language appropriate to the age, understanding and maturity of the child, and to the extent possible, should interview the child in a place and manner that is most likely to ensure the child's comfort and security.

Where the crime is one of domestic violence, Crown counsel should be aware of the dynamics commonly at play in respect of victims of such offences. To that end, Crown counsel must be familiar with the PPSC Deskbook guideline "[5.5 Domestic Violence](#)".<sup>5</sup>

Where the crime involved the violation of the victim's sexual integrity, the victim may find it difficult to participate in the proceedings. Crown counsel should attempt to ascertain the needs of the victim and respond accordingly.

In all crimes of violence, Crown counsel should be sensitive to a victim's sense of vulnerability and should consider appropriate measures to enhance security and comfort. Such measures should include steps to ensure that victims are kept informed about the progress of the case, and

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<sup>5</sup> See the PPSC Deskbook guideline "[5.5 Domestic Violence](#)".

about the types of issues that may arise: for example, applications to introduce evidence of prior sexual activity, or to obtain access to their personal, medical or other records.

In cases involving victims with special physical needs, Crown counsel must work to eliminate barriers that might impede the involvement of the victims in the proceedings. The same is true in cases where the first language of a victim is not the same as that of Crown counsel or the language in which proceedings are conducted.

Some victims may view court proceedings with suspicion; they may have concerns that people of their race, ethnic origin, gender, or sexual orientation are less likely to be treated fairly. Crown counsel should be aware of such concerns and seek to address them in an appropriate manner.

#### **4.2. Alternative measures**

Not all offences require criminal proceedings. In some cases, the interests of victims, offenders, and society may be properly addressed through the use of alternative measures programs.

In cases involving physical violence, the public interest normally requires that the offence be prosecuted. Crown counsel must consider the position of the victim and, where appropriate, seek input from the victim in deciding whether an alternative to prosecution is appropriate. Where an alternative to prosecution is appropriate, care must be taken to ensure that Crown counsel's decision is explained to the victim.

When considering an alternative measure for a criminal offence, Crown counsel must apply the PPSC Deskbook directive "[3.8 Alternative Measures](#)".

Crown counsel should also keep in mind that when such measures are being considered for a young person, they must consider relevant provisions under the YCJA.<sup>6</sup>

#### **4.3. Bail hearings**

On bail applications, Crown counsel must consider whether bail should be opposed in order to protect the victim. Even where bail is denied, Crown counsel must consider whether conditions of non-communication with the victim should be sought.

When considering the Crown position regarding interim release, Crown counsel must give particular attention to the provisions of the *Criminal Code* that allow the court to impose conditions aimed at protecting the victim: see ss. 515(4), 515(4.1), 515(12), 516(2), 522(2.1) of the Code.

Crown counsel or the Crown Witness Coordinator must communicate information related to bail proceedings and decisions made by the court to victims in a timely manner. In circumstances where the victim is difficult to contact, the assistance of police should be sought.

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<sup>6</sup> See YCJA, ss 4-12.

#### **4.4. Peace bonds**

Crown counsel should, in appropriate circumstances, consider other options for protecting victims. Sections 810, 810.1 and 810.2 of the Code are designed to assist potential victims by seeking to prevent contact with them and persons who may commit violent acts.

#### **4.5. Sentencing**

On sentencing, Crown counsel must consider seeking measures aimed at preventing future criminal offences, for example, conditions in probation orders or conditional sentences that prohibit an offender from being in certain places or having contact with people of a certain age or gender.

Crown counsel should also consider available sentencing approaches or processes available in their respective jurisdictions, including domestic violence treatment options, drug treatment, mental health treatment court processes. These may include other restorative sentencing approaches, such as sentencing circles, which may be available in certain aboriginal communities.

### **5. PROVIDING INFORMATION TO VICTIMS AND PARTICIPATION IN THE COURT PROCESS**

Crown counsel and Crown Witness Coordinators must work together to provide information to victims and to assist in their preparation as witnesses in the court process. Once a Crown Witness Coordinator becomes involved in a case, he or she must make every reasonable effort to contact the victim as soon as possible, explain the role of the Crown Witness Coordinator, provide appropriate information about the case and remain a point of contact for the victim during the process.

In providing the victim with information about the case, Crown Counsel and the Crown Witness Coordinator must be careful not to disclose other evidence in the case so as not to taint the victim's testimony. Crown Witness Coordinators should also provide the victim as early in the process as possible with information about victims' services available within the territory, either through the police, the community or territorial government services.

Once charges are laid, Crown counsel, in collaboration with the Crown Witness Coordinators, should:

- make every reasonable effort to ensure the victims are made aware of the release of the accused from custody if this occurs before the completion of proceedings, the terms of release, and any subsequent amendment to the terms of release;
- make sure the victims know what to do if they have concerns about the accused's compliance with the terms of release, and who to call if there is a breach;
- ensure that the victims are informed of any conditions prohibiting contact with the victims while the accused is in custody;



- explain to the victims the roles of Crown counsel, defence counsel, the judge, and the jury and their role as witness and tell the victims to testify truthfully in the proceedings;
- assess the victims' reliability as witnesses and ensure that the victims have been given the opportunity to review their statement, if any, before testifying;
- consider the need for and type of testimonial aid that may be helpful in helping victims to testify in the proceedings, and apply for these testimonial aids from the Court;
- ensure, to the extent feasible, that the victims are informed beforehand when proposing to make a significant amendment to the charges, or to terminate a prosecution;
- consider steps to prevent inappropriate use or dissemination of the disclosure materials where they contain information of a sensitive nature pertaining to the victim. In particular, Crown counsel must follow, as required, the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)";<sup>7</sup>
- apply, where appropriate, for an adjournment where an application is made by the accused for the production of records pertaining to a victim and the victim requests the opportunity to retain a lawyer;
- provide timely information regarding developments in the proceedings as well as information pertaining to plea and sentence negotiations;
- seek restitution orders where appropriate;
- inform the victims about options to participate in the sentencing process by means of testimony, or a Victim Impact Statement pursuant to s. 722 of the Code (and inform the victims that this can be read aloud if they so wish or presented by other means, for example by videotape);
- inform the victims of the right to notice and participation in various post-conviction processes, such as parole hearings, *Criminal Code* Review Board hearings and parole eligibility hearings; and
- inform the victims of any appeals made either by the Crown in case of an acquittal or by defence against a conviction or against the sentence, and ensure that the victims are informed of any decisions related to bail.

### **5.1. Aids to trial testimony**

The *Criminal Code* provides a number of measures that can be invoked to increase the comfort and security of victims obliged to testify in criminal proceedings. It is the responsibility of Crown counsel to consider if any of these measures are available and appropriate in a given case, and to apply to the court accordingly:

- Section 486 - the exclusion of the public from the courtroom;
- Section 486.1 - the presence of a support person;
- Section 486.2 - the use of a screen or closed circuit television;

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<sup>7</sup> See the PPSC Deskbook guideline "[2.5 Principles of Disclosure](#)".

- Section 486.3 - preventing cross-examination by self-represented accused;
- Sections 486.4 and 486.5 - orders restricting publication of identity of victims;
- Section 715.1 - the use of pre-recorded video evidence;
- Section 657.1 - the use of affidavit evidence;
- Section 278.2 - opposing production to the accused of a victim's personal records;
- Section 276 - opposing the admissibility of evidence of the victim's prior sexual conduct.

Crown counsel are to assess the needs of witnesses and victims with regards to the various testimonial aids available, in order to determine which aid or support to apply for, where appropriate. Crown counsel, with the assistance of a Crown Witness Coordinator when necessary, may need to seek additional information from witnesses and victims (for example, from the victim about their ability to testify or from the Court about the availability of testimonial aids) prior to the hearing in order to support an application for a testimonial aid.

## **6. VICTIM SURCHARGES**

Section 737 of the Code requires the court to impose a victim fine surcharge in relation to all *Criminal Code* and *Controlled Drugs and Substances Act* offences to which an accused pleads guilty, is convicted or is discharged. Crown counsel must remind the court of the requirement to impose a victim fine surcharge. Following *Criminal Code* amendments in 2013, imposing the victim fine surcharge is now mandatory and therefore, the Court has no discretion whether or not to impose this measure.<sup>8</sup>

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<sup>8</sup> The provisions of Bill C-37 that relate to the amendment of the victim fine surcharge came into force on October 24 2013.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.7 IMPAIRED DRIVING CASES: NOTICE TO SEEK GREATER PUNISHMENT**

**GUIDELINE OF THE DIRECTOR ISSUED UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

The *Criminal Code* prescribes minimum sentences for second and subsequent “impaired driving” offences.<sup>1</sup> Mandatory minimum penalties for subsequent offences may be imposed only if Crown counsel proves that the accused was notified before plea that greater punishment would be sought because of previous convictions.<sup>2</sup>

This guideline sets out the policy for seeking greater punishment for second and subsequent impaired driving offences.

The relevant sections of the *Criminal Code* are:

255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
- a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
    - i. for a first offence, to a fine of not less than \$1000,
    - ii. for a second offence, to imprisonment for not less than 30 days, and
    - iii. for each subsequent offence, to imprisonment for not less than 120 days;

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<sup>1</sup> Offences described in *Criminal Code*, ss 253-254.

<sup>2</sup> *Criminal Code*, s 727(1).

727. (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

## **2. YOUNG OFFENDERS**

As a general rule, this guideline does not apply to the sentencing of young persons pursuant to the *Youth Criminal Justice Act* (YCJA).<sup>3</sup>

Section 82(4) of the YCJA precludes the use of a guilty finding imposed under the YCJA as a previous ‘conviction’ for the purpose of imposing a mandatory minimum sentence because of a previous conviction.

However, where the circumstances in s. 119(9)(a) of the YCJA are satisfied, the guilty finding of a young person under the YCJA for a prior offence can be considered a previous conviction for purposes of imposing a mandatory minimum penalty on that person, as an adult, under s. 255 of the *Criminal Code*.<sup>4</sup>

## **3. SERVICE OF NOTICE OF INTENTION TO SEEK GREATER PUNISHMENT**

Crown counsel should request that the police ensure that the accused has been served with a Notice of Intention to Seek Greater Punishment (“Notice”) prior to plea in all cases where the accused has previous conviction(s) within the meaning of s. 255(4) of the *Criminal Code*.<sup>5</sup> Where the Notice has not been served and the accused is before the Court intending to enter his/her plea, Crown counsel should provide oral notice of Crown counsel’s intention to seek greater punishment to the accused in court and on the record.

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<sup>3</sup> SC 2002, c 1.

<sup>4</sup> *R v Able* 2013 OJ No 2675; 2013ONCA 385.

<sup>5</sup> 255(4): Where a person is convicted of an offence committed under paragraph 253(a) or (b) or subsection 254(5), that person shall, for the purposes of this Act, be deemed to be convicted for a second or subsequent offence, as the case may be, if the person has previously been convicted of:

- a) an offence committed under any of those provisions;
- b) an offence under subsection 255(2) or (3); or
- c) an offence under section 250, 251, 252, 253, 259, or 260, or subsection 258(4) of this Act as this Act read immediately before the coming into force of this subsection.

#### **4. PROVING SERVICE OF NOTICE OF INTENTION TO SEEK GREATER PUNISHMENT**

Absent exceptional or compelling circumstances described below, Crown counsel shall prove service of the Notice.

Crown counsel may exercise discretion to not prove service of the Notice, subject to the guidelines for exercising that discretion set out in section 7 of this guideline, where the offender has one prior conviction which occurred more than five years before the commission of the current offence.

In all other circumstances Crown counsel must seek the consent of the Chief Federal Prosecutor (CFP) to not prove service of the Notice. The CFP may exercise discretion to not prove service of the Notice in accordance with the guidelines set out in section 7 of this guideline.

In all matters where the CFP's consent is granted to not prove service of the Notice, a memo outlining the reasons for the decision must be placed on the file.

#### **5. PROVING THE OFFENDER'S CRIMINAL RECORD**

In every case for an offence committed under s. 253 or s. 254 of the *Criminal Code*, regardless of whether service of the Notice was proven, Crown counsel shall prove the criminal record.

Depending on the circumstances, Crown counsel should consider submitting that, according to the principles of sentencing in the *Criminal Code*:

- the court is entitled to take into account the previous record of the offender in imposing a fit sentence, whether service of a Notice is proved or not;<sup>6</sup>
- the relevant sentencing cases indicate that the minimum sentence is inadequate;
- evidence that the concentration of alcohol in the blood of the offender at the time when the offence was committed exceeded one hundred and sixty milligrams of alcohol in one hundred millilitres of blood is an aggravating factor, by operation of s. 255.1 of the *Criminal Code*;
- the offender should not be treated less severely than others in similar circumstances; and
- it would be inappropriate to treat the offender as a first time offender.

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<sup>6</sup> *R v Norris* (1988), 41 CCC (3d) 441 (NWTCA).

## 6. PROHIBITED PRACTICE

The following practices are not acceptable:

- proving service of the Notice and the criminal record, then advising the court that Crown counsel is only relying on part of the record;<sup>7</sup>
- proving service of the Notice and only part of the criminal record;<sup>8</sup>
- proving service of the Notice solely to preclude the court from considering the conditional sentence provisions of the *Criminal Code*. The availability of a conditional sentence is not a factor to be considered in determining if Crown counsel shall prove service of the Notice.

## 7. EXERCISE OF DISCRETION

In situations involving the discretion described in section 4 of this guideline, proving service should be determined in all cases by giving consideration to all the circumstances of the offence and the background and circumstances of the offender and globally, the interests of the administration of justice.

Proving service of the Notice will generally be expected in any of the following circumstances:

- the current offence involves a fatality, significant accident or personal injury caused by the offender indicating a need for specific and general deterrence purposes of a sentence for at least the minimum period which would ordinarily follow proof of serving the Notice;
- the degree of intoxication and the nature of operation of the motor vehicle, vessel, aircraft or railway equipment demonstrated a significantly enhanced risk of injury or property damage;
- the offender has previously been incarcerated for a related offence;
- the concentration of alcohol in the blood of the offender at the time when the offence was committed exceeded one hundred and sixty milligrams of alcohol in one hundred millilitres of blood (an aggravating factor on sentence under s. 255.1 of the *Criminal Code*); or
- during or after the commission of the current offence, the offender attempted to flee from the police.

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<sup>7</sup> *Kotchea v R*, [1987] NWTR 289 (NWTSC).

<sup>8</sup> The Attorney General of Canada takes the position that Crown counsel should in all cases place the entire relevant criminal record before the sentencing judge.

Crown counsel, and the CFP where necessary, may decide to not prove service of the Notice where there are exceptional or compelling considerations. In determining whether there are “exceptional or compelling considerations” that may warrant not proving service of the notice in Court, Crown counsel and the CFP may consider such factors as:

- a victim who will be particularly traumatized and potentially re-victimized by testifying in court;
- the historical nature of the previous convictions and any intervening periods of sobriety;
- the total number of previous convictions for related offences;
- past sentences and their effect on the offender;
- the offender’s personal circumstances as they relate to the public interest in prosecuting based on the notice, including:
  - employment;
  - age;
  - the physical health, mental health or infirmity of the offender;
  - number of dependents and the consequences of the sentence on them;
  - attitude of the offender towards the offence;
  - alcohol treatment programming taken by the offender since the offence;
- the offender’s acceptance of responsibility for the offence;
- the degree of risk that the accused will pose based upon the criminal record and, in particular, the alcohol-related driving record of the offender;
- the aboriginal status of the offender, s. 718.2(e) of the *Criminal Code* and the *Gladue* factors; and
- the availability and appropriateness of a curative discharge to the offender.

## 8. CURATIVE DISCHARGE

Section 255(5) of the *Criminal Code*<sup>9</sup> allows the court to, instead of convicting an offender of an offence committed under s. 253, discharge an offender under s. 730 in circumstances where:

- the person is in need of curative treatment in relation to his consumption of alcohol; and
- it would not be contrary to the public interest.

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<sup>9</sup> *Criminal Code*, s 255(5) has been proclaimed in force in the Yukon and the Northwest Territories.



A curative discharge may be granted in the narrow circumstances where the evidence demonstrates that the offender is in need of curative treatment and that his rehabilitation is probable. In considering whether a curative discharge is in the public interest, Crown counsel should consider factors such as:<sup>10</sup>

- the circumstances of the offence and whether the offender was involved in an accident which caused death or serious bodily injury;
- the motivation of the offender as an indication of probable benefit from treatment;
- the availability and caliber of the proposed facilities for treatment and the ability of the participant to complete the program;
- a probability that the course of treatment will be successful and that the offender will never again drive a motor vehicle while under the influence of alcohol; and
- the criminal record and, in particular, the alcohol-related driving record of the offender as an indication of ability to reform.

The offender will be required to tender “medical or other evidence” at the sentencing hearing which has been interpreted to require an “expert qualified to give opinion evidence regarding the offender’s illness, motivation and responsiveness to curative treatment”.<sup>11</sup>

When a curative discharge is being pursued by an offender, Crown counsel shall prove service of the Notice where applicable. If the court declines to grant the curative discharge then the mandatory minimum sentence provision will apply.

In circumstances where the offence caused death or serious bodily injury, Crown counsel may only make submissions in support of a curative discharge with the approval of the CFP.

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<sup>10</sup> *Ashberry Regina v Mills*, (1989) 47 CCC (3d) 138.

<sup>11</sup> *R v Soosay*, [2001] AJ No 1445 (AB CA).





## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.8 CORRUPTION OF FOREIGN PUBLIC OFFICIALS**

**GUIDELINE OF THE DIRECTOR ISSUED UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

On December 17, 1997, Canada signed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the *Convention*), an initiative arising primarily from work done by the Organization for Economic Co-operation and Development (OECD). Canada ratified the *Convention* on December 17, 1998.

To implement the terms of the *Convention*, Parliament passed the *Corruption of Foreign Public Officials Act* (CFPOA)<sup>1</sup> which came into force on February 14, 1999. The CFPOA essentially prohibits giving, offering or agreeing to give or offer any benefit, directly or indirectly, to a foreign public official for the purpose of obtaining or retaining an advantage in the course of business. For a detailed description of the CFPOA please refer to the document published by the Department of Justice entitled *The Corruption of Foreign Public Officials Act: A Guide, 1999*<sup>2</sup>.

Significant amendments to the CFPOA were made in June of 2013,<sup>3</sup> including:

- an increase in the maximum penalty for an individual convicted of a foreign bribery offence from 5 to 14 years imprisonment in addition to unlimited fines;
- creation of a new offence in relation to books and records kept to further or hide foreign bribery,
- expanded jurisdiction based on nationality<sup>4</sup>,
- removal of the concept of “for profit” from the definition of business; and

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<sup>1</sup> SC 1998, c 34.

<sup>2</sup> Available on the Government of Canada Publications internet site, on line: <<http://publications.gc.ca/collections/Collection/J2-161-1999E.pdf>>. Note that this document has not been updated to reflect the 2001 amendments and should be read with this in mind.

<sup>3</sup> *Fighting Foreign Corruption Act*, SC 2013, c 26.

<sup>4</sup>The Act deems acts of Canadian citizens, permanent residents, corporations, societies, firms or partnerships on a worldwide basis to be acts within Canada for the purposes of the CFPOA. This provision essentially subjects all Canadian citizens and companies to global regulation by Canadian authorities under the CFPOA.

- the future removal of the facilitation payment<sup>5</sup> exception under the Act.

Additionally, the RCMP will now have the exclusive authority to lay charges under the CFPOA.

## **2. PURPOSE OF THE GUIDELINE**

The purpose of the guideline is to ensure the effective coordination of prosecutions under the CFPOA and to call attention to unique aspects of the Act and the *Convention*.

## **3. APPLICATION OF THE GUIDELINE**

### **3.1. Coordination**

Given the inherent international dimension of prosecutions under the CFPOA and the potential impact on Canada's relationship with other states, it is essential to coordinate prosecutions under the Act at a national level. Accordingly, Chief Federal Prosecutors (CFP) shall notify the Deputy Director of Public Prosecutions (Deputy DPP) of the Regulatory and Economic Prosecution and Management Branch of all requests for advice in relation to investigations, any prosecutions initiated and all developments in relation to cases involving the CFPOA.

Headquarters counsel are available to provide support to Regional Offices in the form of subject matter expertise in relation to the interpretation of the CFPOA, sentencing considerations, comparable foreign statutes and consultation with other government departments as required.

### **3.2. The decision to initiate a prosecution or refuse to prosecute**

Like any decision regarding whether or not to prosecute, prosecutions under the CFPOA must be instituted or refused on a principled basis and must be made in accordance with the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)". In particular, Crown counsel should be mindful of s. 5 of the *Convention* which states:

5. Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

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<sup>5</sup> Facilitation payments are those made to foreign public officials to secure or expedite the performance of acts of a routine nature that are within the scope of the official's duties. The exception will be removed from the Act by way of an Order in Council at a date that is yet to be determined.

Crown counsel should record in writing the reasons for deciding or declining to institute proceedings. Such reasons may be highly relevant in dispelling any suggestion of improper political concerns influencing prosecutorial decision-making.

Where there is disagreement between the police and prosecutors over the merits of a particular prosecution based on the assessment of sufficiency or the evidence or the public interest criteria, Crown counsel should notify the Deputy DPP at the earliest opportunity in order to resolve the matter.

### **3.3. Annual report**

A unique aspect of the CFPOA is the reporting requirement imposed by s. 12 of the Act, which states:

12. Within four months of the end of each fiscal year, the Minister of Foreign Affairs, the Minister for International Trade and the Minister of Justice and Attorney General of Canada shall jointly prepare a report on the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and on the enforcement of this Act, and the Minister of Foreign Affairs shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is completed.

Public Prosecution Service of Canada (PPSC) counsel must maintain information in prosecution files sufficient to enable the Minister of Justice and Attorney General to make such a report. To that end, on or before January 31<sup>st</sup> of each year, the CFP in each region, shall forward to the Deputy DPP a report on activities with respect to the provisions of the CFPOA covering the previous year. The report shall detail:

1. the nature and status of any prosecutions undertaken by the PPSC pursuant to the provisions of the CFPOA or the *Criminal Code*;
2. the nature and status of any other proceedings taken pursuant to the CFPOA or the *Criminal Code* to which the Attorney General is a party, such as seizure of assets.

The Deputy DPP shall collate the information and provide it to the Senior General Counsel (Criminal Law Policy Section) in the Department of Justice to assist that section in preparing the Minister of Justice and Attorney General's contribution to the report.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.9 PRIVATE PROSECUTIONS**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

A private prosecution is a prosecution started by a private individual who is not acting on behalf of a law enforcement agency or prosecution service.

The right of a citizen to institute a prosecution for a breach of the law has been called "a valuable constitutional safeguard against inertia or partiality on the part of authority".<sup>1</sup> The private citizen, as prosecutor, and the Attorney General, who has exclusive authority to represent the public in court and to supervise criminal prosecutions, are both fundamental parts of our criminal justice system.<sup>2</sup> As a result, where the two roles conflict, the role of the Attorney General is paramount as the Attorney General may intervene and take over a private prosecution where in his or her opinion the interests of justice so require.

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<sup>1</sup> *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 477 (HL) [*Gouriet*]. For commentary on the inherent value of private prosecutions, see also Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 28. Except where the Attorney General's consent is required, s. 504 of the *Code* permits anyone to lay an information. The definitions of "prosecutor" in ss. 2 and 785 make it clear that someone other than the Attorney General may institute proceedings. The 2002 addition to the *Code* of s. 507.1 providing for a "pre-enquete" is the most explicit recognition of the ability of persons not involved in law enforcement to commence criminal proceedings.

<sup>2</sup> *Gouriet*, *supra* note 1 at 481; *Re Dowson and The Queen* (1981), 62 CCC (2d) 286 (Ont CA), approved unanimously by the Supreme Court of Canada: [1983] 2 SCR 144, (1983), 7 CCC (3d) 527 at 535-6.



This guideline explains when the Director of Public Prosecutions (DPP) should intervene either to stay a private prosecution or to take over conduct of such a prosecution.

## **2. AUTHORITY OF THE ATTORNEY GENERAL OF CANADA TO INTERVENE IN PRIVATE PROSECUTIONS**

The DPP exercises the authority of the Attorney General of Canada respecting private prosecutions, including the authority to intervene and assume the conduct of – or direct the stay of – such prosecutions by virtue of s. 3(3)(f) of the *Director of Public Prosecutions Act*.<sup>3</sup>

The DPP has full authority to intervene, throughout the country, in private prosecutions of *Controlled Drugs and Substances Act* drug matters.<sup>4</sup>

Section 2 of the *Criminal Code* (Code) provides that the Attorney General of Canada and the Attorneys General of the provinces share responsibility for conducting prosecutions.<sup>5</sup> More particularly, provincial Attorneys General, and their lawful deputies have jurisdiction to prosecute *Criminal Code* offences in the provinces.<sup>6</sup> The Attorney General of Canada is the Attorney General in respect of proceedings taken in the Yukon, the Northwest Territories and Nunavut. The Attorney General of Canada will also have authority to prosecute federally-enacted, non-*Criminal Code* offences in the provinces where the proceedings were commenced at the instance of the federal government.

Accordingly, the DPP has full authority to intervene in private prosecutions of *Criminal Code* offences brought in the Northwest Territories, the Yukon Territory, and Nunavut.

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<sup>3</sup> *Director of Public Prosecutions Act*, SC 2006, c 9.

<sup>4</sup> SC 1996, c 19. See definition of Attorney General in s 2 of the *Controlled Drugs and Substances Act*.

<sup>5</sup> Section 2 of the *Criminal Code* assigns prosecutorial roles as follows:

“Attorney General”

with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy, and

with respect to

the Yukon Territory, the Northwest Territories and Nunavut, or

proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of a conspiracy or attempt to contravene or counselling the contravention of any Act of Parliament other than this Act or any regulation made under any such Act, means the Attorney General of Canada and includes his lawful deputy.

<sup>6</sup> See also *Constitution Act, 1867*, s 92(14) which assigns to provinces the following power: "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

Equally, the DPP has concurrent jurisdiction with provincial prosecuting authorities to prosecute the offences set out in ss. 2(b.1) to (g) of the Code:<sup>7</sup>

- extraterritorial offences in relation to cultural property (s. 2(b.1) and s. 7(2.01) of the Code;
- certain terrorism and national security offences as enumerated in s. 2(c) of the Code;
- frauds under ss. 380, 382, 382.1 and 400 of the Code.

As already noted, the s. 2 definition limits the Attorney General of Canada's authority to prosecute offences under non-*Criminal Code* federal statutes to proceedings that are commenced at the instance of the federal government. This does not cover private prosecutions in the provinces because such proceedings are not "commenced at the instance of the Government of Canada". Nonetheless, the DPP has full authority to intervene in private prosecutions commenced under federal statutes other than the *Criminal Code* – either for the purpose of conducting or staying the proceedings – where the relevant provincial Attorney General has not intervened.<sup>8</sup>

### 3. THE PRE-ENQUETE – SECTION 507.1

Section 507.1 governs pre-inquiry hearings in the case of private prosecutions.<sup>9</sup> It requires that a justice receiving an information sworn by a private informant refer that information to a provincial court judge or, in Quebec, to a judge of the Court of Quebec or to a designated justice to consider whether to compel the appearance of the accused. The justice or judge conducts a pre-enquete to determine whether process should issue to compel the attendance of the person named in the information to answer to the charge, thus to determine whether a criminal prosecution will be commenced. These provisions were designed to provide a judicial screening process to avoid burdening the justice system with vexatious litigation, misuse of the criminal process in order to advance a civil dispute, and to protect innocent persons from the stigma of having to appear in court on such matters.<sup>10</sup>

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<sup>7</sup> Sections 2(b.1) to (g) of the Code provide concurrent jurisdiction for the Attorney General of Canada and the Attorneys or Solicitors General of the provinces to prosecute the offences set out in those sections.

<sup>8</sup> *Criminal Code*, s 579.1 was added in 1994 to give the Attorney General of Canada authority to intervene in private prosecutions commenced under federal statutes other than *Criminal Code*, where the provincial Attorney General has not intervened.

<sup>9</sup> By virtue of *Criminal Code*, s 507.1 (9), this process does not apply to s 810 and s 810.1 peace bonds.

<sup>10</sup> *R v Friesen* (2008), 229 CCC (3d) 97 (Ont SC) at paras 9-11 [*Friesen*], cited in *Ambrosi v British Columbia (Attorney General)*, 2012 BCSC 1261 at paras 54-57 [*Ambrosi*].

This “pre-enquete” or process hearing<sup>11</sup> places the onus on the private informant to establish that a summons or warrant should issue to compel an accused to attend before the court to answer a criminal charge. The information must establish a *prima facie* case, requiring some evidence on all of the essential elements of the offence.<sup>12</sup>

The judge or designated justice may issue process compelling the appearance of the accused only after considering the allegations and evidence of the informant and being satisfied that the relevant Attorney General has received a copy of the information, has been given reasonable notice of the hearing and has had an opportunity to cross-examine, call witnesses and present evidence.

A criminal proceeding commences with the swearing of an information. A criminal prosecution commences with the issuance of process to compel the appearance of the accused. Crown counsel may intervene to take over the prosecution or withdraw a charge only *after* the court makes an order issuing process.<sup>13</sup> Crown counsel may, however, enter a stay at any time after an information is sworn.

Sections 507(2) to (8) regarding compelling appearance in public prosecutions applies to the hearing under s. 507.1. Unless expressly prohibited in a particular statute, the *Criminal Code* provisions permitting private prosecutions apply to other federal statutes.<sup>14</sup> Thus, s. 507.1 applies to proceedings under the *Criminal Code* and all other federal acts.

If the pre-enquete justice does not issue process to compel the appearance of the accused, and the private prosecutor has not commenced proceedings to compel process within six months, the Information is deemed never to have been laid.<sup>15</sup>

#### 4. CONDUCT OF THE PRE-ENQUETE

A s. 507.1 hearing is to be held *ex parte* and Crown counsel should request that it be held in camera.<sup>16</sup> Crown counsel may appear at the pre-enquete without being deemed to

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<sup>11</sup> The s 507.1 hearing may be referred to as a pre-enquete, a pre-inquiry, a referral hearing, or as a process hearing because it relates to the issuing of process.

<sup>12</sup> *Ambrosi*, *supra* note 10 at 56.

<sup>13</sup> *R v McHale* 2010 ONCA 361 at paras 59-62 and 71-77.

<sup>14</sup> *Lynk v Ratchford et al* (1995), 142 NSR (2d) 399 (CA), by virtue of s 34(2) of the *Interpretation Act*, RSC 1993 c I-21 provides:

All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

<sup>15</sup> *Criminal Code*, s 507.1(5).

<sup>16</sup> *R v Whitmore*, (1987), 41 CCC (3d) 555 (Ont H CJ) (aff’d 51 CCC (3d) 294 (Ont CA); *McHale*, *supra* note 13 at para 48.

intervene in the proceeding.<sup>17</sup> At the process hearing, Crown counsel, as an officer of the Court, are permitted (but not required) to assist the court in determining whether or not a case for issuing process is made out (i.e. whether there is a *prima facie* case) by cross-examining the informant or the informant's witnesses, calling witnesses, presenting any relevant evidence or making submissions.

Upon receiving notice of the pre-enquete, Crown counsel should contact the informant, ask for copies of the evidence in support of the charge(s) and attend the pre-enquete. At the same time, Crown counsel should contact the relevant investigative agency to ascertain whether or not they have been investigating the matter giving rise to the private prosecution. If it appears that Crown counsel's active participation at the pre-enquete, for example by cross-examining the informant's witnesses or by presenting evidence, will assist the presiding judicial officer in determining whether a *prima facie* case has been made out, Crown counsel should assume that role.

Even when a private investigation precedes a private prosecution, it may be difficult to assess whether there is sufficient evidence to justify continuing the proceedings. Thus, in most instances where no investigative agency investigation preceded the process hearing, Crown counsel may need to conduct follow-up steps after their initial charge assessment. If additional time is needed, Crown counsel may request an adjournment, and ask the appropriate investigative agency to review the evidence and to investigate further as needed. Crown counsel should request the views of the relevant investigative agency on the sufficiency of the evidence. It may be necessary to stay proceedings while the investigation is conducted. Once the investigation is complete, the assigned Crown counsel should assess whether to commence proceedings in accordance with the two-pronged test set out in the PPSC Deskbook guideline "[2.3 Decision to Prosecute](#)".

Where the pre-enquete has resulted in an issuance of process, Crown counsel should obtain a transcript of the process hearing.

## **5. THE DECISION WHETHER OR NOT TO INTERVENE IN A PROSECUTION**

If process issues,<sup>18</sup> Crown counsel assigned to review the case must assess (1) whether to assume conduct of the prosecution and terminate the proceedings by withdrawal or a stay; (2) whether to assume conduct of the prosecution and continue it or (3) whether to allow the private prosecution to run its course. In all cases, Crown counsel must consult with their Chief Federal Prosecutor (CFP) who, in cases of particular public interest or complexity, should confer with the Deputy Director of Public Prosecutions (Deputy DPP) before making a decision.

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<sup>17</sup> *Friesen*, *supra* note 10 at para 11.

<sup>18</sup> *R v McHale* 2010 ONCA 361: A criminal proceeding commences with the swearing of an information. A criminal prosecution commences with the issuance of process to compel the appearance of the accused. The Attorney General may withdraw a charge only after process is issued but may issue a stay at any time after an information is sworn.

## **6. INTERVENTION IN A PRIVATE PROSECUTION IN ORDER TO STOP IT**

Crown counsel shall apply the evidentiary standard and the public interest test that is applicable to all prosecutions as set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, namely, whether there is a reasonable likelihood of conviction and, if so, whether the prosecution best serves the public interest. A private prosecution should be taken over and stayed if, upon review of the evidence, either the evidential sufficiency test or the public interest test, as set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” is not met.

Where the evidentiary standard set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)” is met, it nonetheless may be necessary to take over and stop the prosecution on behalf of the public where there is a particular “public interest” need to do so. Apart from the factors set out in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, examples of factors likely to damage the interests of justice that specifically may arise in the private prosecution context include cases where:

- the prosecution interferes with the investigation of another criminal offence;
- the prosecution interferes with the prosecution of another criminal charge;
- Crown counsel is satisfied that the private prosecution is vexatious or being undertaken on malicious grounds; and
- the prosecuting authorities have given the defendant a promise of immunity from prosecution.<sup>19</sup> This does not include cases where the prosecuting authorities have merely informed the defendant that they will not be bringing or continuing proceedings.

Where Crown counsel decides that taking over a private prosecution in order to stop it is the appropriate course of action, unless there are exceptional circumstances, Crown counsel should write to the private prosecutor explaining the reasons for the decision.

## **7. INTERVENTION IN AND CONDUCT OF A PRIVATE PROSECUTION**

If it is determined that the charge is well founded, Crown counsel must then decide whether to assume conduct of the prosecution. The issue must be decided on a case-by-case basis. Normally, there is nothing wrong in allowing a private prosecution to run its course through to a verdict. There is no requirement for the DPP to take charge of the prosecution.

The following considerations will help to inform Crown counsel’s decision whether or not to take charge of the prosecution:

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<sup>19</sup> See the PPSC Deskbook guideline “[3.3 Immunity Agreements](#)”.

1. the need to strike an appropriate balance between the right of the private citizen to initiate and conduct a prosecution as a safeguard in the justice system, and the responsibility of the Attorney General of Canada for the proper administration of justice;
2. the relative seriousness of the offence – generally, the more serious, the more likely it is that the DPP should intervene;
3. there are detailed or complex disclosure issues to resolve;
4. the prosecution requires the disclosure of highly sensitive material or the conduct of the prosecution involves applications for special measures or for witness anonymity;
5. there is a reasonable basis to believe that the private prosecutor lacks the capacity or the funding to effectively carry the case forward to its completion;
6. there is a reasonable basis to believe that the decision to prosecute was made for improper personal or oblique motives, or that it otherwise may constitute an abuse of the court's process such that, even if the prosecution were to proceed, it would not be appropriate to permit it to remain in the hands of a private prosecutor;
7. given the nature of the alleged offence or the issues to be determined at trial, it is in the interests of the proper administration of justice for the prosecution to remain in private hands.

If the reviewing Crown counsel recommends allowing the matter to proceed privately, he or she should advise the CFP in writing of the circumstances and, in cases of particular public interest or complexity, if the CFP agrees with the recommendation, the CFP must seek approval of the appropriate Deputy DPP. Similarly, Crown counsel must seek written approval of their CFP prior to intervening in a private prosecution to stop it or stay it.

Where new information or a change in circumstances comes to light that could reasonably impact the DPP's decision not to intervene in a private prosecution such that the DPP may want to take charge of and stop or conduct the prosecution, Crown counsel should be prepared to revisit the decision regarding intervention.

## **8. SCOPE OF PRIVATE PROSECUTOR'S AUTHORITY**

In summary conviction proceedings, the private prosecutor controls the proceedings from start to finish unless the Attorney General intervenes. In indictable matters, a private prosecutor may conduct the preliminary inquiry and the trial. However, the private prosecutor requires a judge's written consent under s. 574(3) of the Code to prefer an indictment.

## **9. PROCEDURAL MATTERS**

When drafting a written pleading in a private prosecution matter, Crown counsel should refer to the informant as “[Name of Informant] as Private Prosecutor”.

Challenges to the exercise of Crown discretion to take charge of or stay a private prosecution may be brought as a judicial review of DPP decision-making in the Federal Court. Such matters should be referred to the Department of Justice.







## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **5.10 PARENTAL CHILD ABDUCTION**

**DIRECTIVE OF THE ATTORNEY GENERAL ISSUED  
UNDER SECTION 10(2) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. INTRODUCTION

Parental child abduction occurs when one parent, without either legal authority or the permission of the other parent, takes a child from the parent who has lawful custody. There may be both international and domestic aspects to child abduction. Although children may not be in physical danger, their lives are nevertheless greatly disrupted. They are deprived by the abducting parent of security, stability and continuity in their lives. The purposes of ss. 282 and 283(1) of the *Criminal Code* are to prevent such outcomes and to encourage parents to settle child custody and access issues in court and to abide by any court orders that are made.<sup>1</sup>

Section 282 of the *Criminal Code* prohibits parental child abductions in situations where there is a custody order made by a Canadian court. Section 283 applies to situations where parents continue to have joint custody of their child by operation of law, where there is a written agreement, where there is a foreign custody order, or where the abducting parent did not believe or know there was a valid custody order.

The Ontario Court of Appeal in *R v McDougall* (1990) 62 CCC (3d) 174 at 189 cautioned that:

The offence created by s. 282 is a grave one and is intended to strike at conduct in the nature of child abduction. Care must be taken before a prosecution is launched under s. 282 to ensure that the events complained of truly amount

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<sup>1</sup> Only the PPSC's Northern offices handle parental child abduction prosecutions under ss 282 and 283 of the *Criminal Code*.

to criminal conduct. This care is evidenced by the requirement in s. 283 (a companion section to s. 282) that the Attorney General or counsel instructed by him consent to proceedings under that section. It is very common in custody and access disputes that each parent feels terribly wronged and makes the most serious allegation against the other ....Criminal prosecutions cannot become a weapon in the arsenal of parties to acrimonious family disputes.

In October of 1998, the Federal/Provincial/Territorial Ministers responsible for Justice adopted model charging guidelines for use by police and Crown counsel to assist in the uniform application of the *Criminal Code* provisions and in particular in deciding when and how charges may be laid. The guidelines remain advisory only, since the decision on charging rests with investigative agencies and ultimately with Crown counsel. This directive reflects the principles set out in the model guidelines.

## 2. STATEMENT OF POLICY

The *Criminal Code* provisions send a clear message that unilateral actions by one parent that affect lawful care and control rights of the other parent respecting the child will not be tolerated. Such actions have a detrimental effect on the well-being of the children involved. Parents are to be discouraged from using “self-help” remedies to deal with custody disputes. Parents are to be encouraged to comply with existing orders or agreements and to resolve disputes with the other parent through civil processes.

Not all cases of parental child abduction will warrant criminal charges. As with any decision to prosecute, in addition to assessing the reasonable prospect of conviction, Crown counsel must consider whether a prosecution best serves the public interest.<sup>2</sup> Civil enforcement is another route that can be used as an alternative to the criminal response when criminal charges are not appropriate.

The federal *Family Orders and Agreements Enforcement Assistance Act* establishes procedures to ascertain the addresses of parents and children residing in Canada from federal information banks to facilitate the enforcement of custody orders.

The *Hague Convention on the Civil Aspects of International Child Abduction* (the *Hague Convention*), which has been adopted by all Canadian jurisdictions, is the main international treaty that can assist parents whose children have been abducted to another country.

Article 3 of the *Hague Convention* states in part:

The removal or the retention of a child is to be considered wrongful where:

1. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the

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<sup>2</sup> See the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”.

child was habitually resident immediately before the removal or retention; and

2. at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Article 5 of the *Hague Convention* states in part:

For the purposes of this Convention

- a. “rights of custody” shall include rights relating to the care of the child and, in particular, the right to determine the child's place of residence;

In addition, each jurisdiction should ensure the police, Crown counsel and others dealing with s. 282 and s. 283 of the *Criminal Code* are provided with information on the role of, and how to contact, the Central Authority for the *Hague Convention* in their jurisdiction.<sup>3</sup> There may be civil proceedings for the return of the child underway or available under the *Hague Convention*. Crown counsel should consult with the Central Authority in their province/territory as international cooperation may be facilitated by understanding the relationship between civil and criminal actions.

### 3. WHERE CHARGES WARRANTED

Given the significance of charging a parent with abducting his or her child, Crown counsel must consult with their Chief Federal Prosecutor before proceeding. Additionally, consent of the Attorney General is a statutory prerequisite to commencing a prosecution under s. 283(1). This consent power may be exercised by the Director of Public Prosecutions (DPP) and a Deputy DPP<sup>4</sup> as lawful deputies of the Attorney General.

The offence under s. 282 and s. 283 apply only where children under the age of 14 are involved.

#### 3.1. Abduction in contravention of a custody order (s. 282 of the *Criminal Code*)

Charges under s. 282(1) of the *Criminal Code* may be warranted where:

1. A child under the age of 14 is involved; and
2. There is a court order establishing “custody rights” granted in Canada which is not being complied with.

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<sup>3</sup> The current contact information for the federal government Central Authority, as well as the provincial and territorial Central Authorities, can be found on the Hague Conference on Private International Law website, online: <[http://www.hcch.net/index\\_en.php?act=authorities.details&aid=75](http://www.hcch.net/index_en.php?act=authorities.details&aid=75)>.

<sup>4</sup> See Annex B of the PPSC Deskbook guideline “[3.5 Delegated Decision-Making](#)” which specifies that these decisions regarding consent can be made by the DPP or a Deputy DPP.

To establish an offence under s. 282, the evidence must demonstrate that:

- a) the alleged abductor
  - i. is a parent, guardian (as defined in s. 280(2)) or other person having the lawful right to care for or charge of a child;
  - ii. takes, entices away, conceals, detains, receives or harbours the child;
  - iii. is in contravention of the custody provisions of a Canadian custody order; and
  - iv. intended to deprive the parent, guardian or person having lawful care or charge of the child of possession of the child contrary to a court order.
- b) The parent, guardian or other person whom the alleged abductor intended to deprive of possession of the child did not consent to the taking, of the child by the alleged abductor (see s. 284); and
- c) There is no reason to believe that the alleged abductor did not know of the existence or terms of the custody order.

In considering whether charges are warranted, Crown counsel must keep the following in mind:

- 1) Persons can have different types of “custody rights” under custody orders. For example, an order may grant a person sole custody, joint custody, periods of care and control (with custody remaining joint between the parents by virtue of provincial legislation) or guardianship. These are all types of “custody rights.”
- 2) There may be no reasonable prospect of conviction: (a) where the order is not clear on its face as to the terms of custody allegedly breached and the available evidence does not clarify the nature of the breach; or (b) where there are competing interim or final orders issued by different courts dealing with the custody of a child, which are both valid on their face.
- 3) It is not necessary to register an order of custody granted in one province before criminal charges can be laid in another. The investigating agency must be advised to ascertain whether the custody order relied upon is the most current order and is still in effect. The agency must obtain a copy of the order. This can be done by asking the complainant, calling the registrar/court staff where the order was issued, or otherwise.

### **3.2. Abduction in absence of a Canadian custody order (s. 283 of the *Criminal Code*)**

No proceedings may be commenced under s. 283(1) of the *Criminal Code* without the consent of the Attorney General or counsel instructed by him or her for that purpose is obtained. Under the *Director of Public Prosecutions Act*, the DPP and Deputy DPP’s are

lawful deputies and may consent on behalf of the Attorney General.<sup>5</sup> The fact that consent has been given may be added to Informations under s. 283(1), as follows: “The Consent of the Director of Public Prosecutions and Deputy Attorney General of Canada (or Deputy Director of Public Prosecutions) has been obtained to lay this charge.”

Charges under s. 283(1) may be warranted where:

1. A child under 14 is involved; and
2. One of the following scenarios exists:
  - a) A Canadian custody order exists but the alleged abductor was unaware or did not believe that there was a valid order (see s. 282(2));
  - b) No Canadian custody order exists, but parental rights of custody under statute or common law exist (e.g. provincial family law legislation may indicate that parents have joint custody of their children unless the court orders otherwise);
  - c) No Canadian custody order exists, but custody rights under a separation agreement or a foreign order have been violated. Where the rights of the access parent are not so extensive, resort should be made to civil remedies;
  - d) There has been a permanent or indefinite denial of a right or access pursuant to an agreement that provides the access parent with a significant degree of care and control over a child with or without a provision permitting the child’s removal from the jurisdiction. Where the rights of the access parent are not so extensive, resort should be made to civil remedies; or
  - e) There has been a permanent or indefinite denial of right of access pursuant to a court order, which provides the access parent with a significant degree of care and control over a child. Where the rights of the access parent are not so extensive, resort should be made to civil remedies, which exist in the jurisdiction.

To establish an offence under s. 283, the evidence must demonstrate that:

1. The alleged abductor
  - a. is a parent, guardian (as defined in s. 280(2)) or other person having the lawful right to care for or charge of a child;
  - b. takes, entices away, conceals, detains, receives or harbours the child;
  - c. intended to deprive the parent, guardian or person having lawful care or charge of the child of possession of the child; and
  - d. the parent, guardian or other person whom the alleged abductor intended to deprive of possession of the child did not consent to the taking of the child by the alleged abductor (see s. 284 below).

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<sup>5</sup> *Ibid.*

#### **4. THE PUBLIC INTEREST**

On charge assessment for alleged offences under s. 282(1) or s. 283(1), the factors to be considered in deciding whether a prosecution best serves the public interest are described in the PPSC Deskbook guideline “[2.3 Decision to Prosecute](#)”, but also include the following factors that are specific to this type of a prosecution.

##### **4.1. Factors or circumstances favouring prosecution**

1. A child has been taken from a situation where there has been some degree of permanency, contrary to a settled (written or otherwise) or ongoing arrangement.
2. Custody proceedings have been initiated or are anticipated, and the alleged abductor, in taking the child, is frustrating the proceedings. This may include, but is not restricted to, situations in which the court has stated that, pending a determination, the child is not to be removed from the jurisdiction.
3. There are reasonable grounds to believe that one parent has a foreign custody order and the alleged abductor is in breach of that order.
4. The child has been taken by the alleged abductor contrary to existing custody rights and a criminal charge is necessary to ensure protection of the child.
5. The alleged abductor takes the child surreptitiously and disappears with the child.
6. The alleged abductor takes the child where there is a provision in an order or agreement restricting the ability of a parent to remove the child from the jurisdiction.
7. The alleged abductor takes the child and in so doing has permanently or indefinitely frustrated the other parent’s rights, where such rights by their nature involve a significant degree of care and control over the child.
8. The offending party has previously breached ss. 282(1) or 283(1).
9. There are reasonable grounds to believe that the offending party is incapable of looking after the child (e.g. due to substance abuse or diminished capacity).

##### **4.2. Factors or circumstances weighing against prosecution**

1. A less onerous civil remedy is available and would be more appropriate in the circumstances.
2. The offending parent is merely late in returning a child from an access visit.
3. Although technically possible, a charge would not likely be laid in circumstances in which one party moves out of the home with the child while in the course of separating from the other party, if it appears that the parties are attempting to resolve custody either through the courts or by agreement.

## **5. DEFENCES**

1. It is a defence if the alleged abductor establishes that the taking of the child was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of the child (s. 284). However, the alleged abductor's consent is not sufficient for this defence.
2. It is a defence:
  - a. if the child was taken to protect the child from danger of imminent harm; or
  - b. if the alleged abductor was fleeing from imminent harm and taking the child as well. For example, protecting a child from child abuse would be a defence as would a parent escaping from a situation of spousal assault and removing the child at the same time (s. 285).
3. It is not a defence to any charge under ss. 282 and 283 that the young person consented to or suggested any conduct of the accused (s. 286).





# **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

## **6.1 DRUG TREATMENT COURTS**

### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. PURPOSE

The purpose of this guideline is to advise federal Crown counsel of the procedure to follow when dealing with federal charges against an accused whose sentencing is being delayed to allow for participation in a drug treatment court (DTC) program.

The new ss. 10(4) and 10(5) of the *Controlled Drugs and Substances Act* (CDSA), which came into force on November 6, 2012, allow a court to delay sentencing while an addicted offender either participates in a drug treatment court program approved by the Attorney General, or attends a treatment program approved by the province under the supervision of the court as outlined in s. 720(2) of the *Criminal Code*.<sup>1</sup> If the person successfully completes the treatment program, the court is not required to impose the mandatory minimum penalty (MMP) for the offence.

### 2. BACKGROUND

#### 2.1. Drug treatment court defined

DTCs focus on facilitating treatment for drug-motivated offenders who meet specified criteria. They provide an alternative to incarceration by offering an opportunity to complete a drug treatment program. DTCs take a comprehensive approach intended to reduce the number of crimes committed to support drug dependence through judicial supervision, comprehensive substance abuse treatment, random and frequent drug testing, incentives and sanctions, clinical case management, and social services support. They are aimed at reducing the harm people cause to themselves and to others through their drug use, as well as reducing the risk that these individuals will continue to use drugs and thereby come into conflict with the law.

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<sup>1</sup> See the amendment to s 10(2) and the new ss 10(4) and 10(5) of the CDSA.

The following is a list of internationally recognized Drug Treatment Court principles that have been adopted by the Canadian Association of Drug Treatment Court Professionals.<sup>2</sup>

- Integrated justice system case processing and addiction treatment services;
- A non-adversarial approach to case problem solving by the judge, prosecutor and defence counsel;
- Eligible participants are identified early and placed in the Drug Treatment Court program as promptly as possible;
- Drug Treatment Courts provide access to a broad continuum of treatment and rehabilitative services;
- Objective monitoring of participants' compliance by frequent substance abuse testing;
- Coordinated strategic response to program compliance and non-compliance by all disciplines involved (including police, probation, prosecutor, treatment, social workers and court);
- Swift, certain and consistent sanctions or rewards for non-compliance or compliance;
- Ongoing direct judicial interaction with participants;
- Monitoring and evaluation processes for the achievement of program goals and to gauge effectiveness;
- Continuing interdisciplinary education of the entire DTC team;
- Forge partnerships among courts, treatment and rehabilitation programs, public agencies and community based organizations to increase program effectiveness and generate local support for the program;
- Ongoing case management including social re-integration support; and
- Adjustable program content, including incentives and sanctions, for groups with special needs, e.g. women, minority ethnic groups and persons with mental disorders.

## **2.2. Approval of a drug treatment court program**

Under s. 10(4)(a) of the CDSA, a drug treatment court program must be approved by the Attorney General. In order to be approved by the Attorney General, the program should comply with the above internationally recognized principles. Provided the DTC program complies with the above principles, the Chief Federal Prosecutor (CFP) in the appropriate

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<sup>2</sup> Canadian Association of Drug Treatment Court Professionals, online: <<http://www.cadtc.org/DTCProgram.aspx4>>.

province, territory or region can approve the DTC program in that region on behalf of the Attorney General. The attached form must be signed by the CFP to signify that the program has been approved by the Attorney General.

### **2.3. Eligibility for drug treatment court**

Accused persons charged with offences that were motivated by addiction are encouraged to apply for admission to a DTC program. The DTCs will generally accept adult offenders who are actively addicted to a hard drug such as cocaine, crack cocaine, heroin and other opiates, and methamphetamines. The accused and defence counsel must also have received sufficient disclosure to determine that the accused is able to plead guilty to the charges set out in the applicable Information(s).

The inter-disciplinary teams associated with each DTC establish the eligibility criteria for that particular DTC. These criteria may vary among DTCs; however federal Crown counsel is a member of the DTC team, and thus the eligibility criteria must be acceptable to the federal Crown counsel.

Ordinary rules of sentencing recognize the pre-eminent role of general deterrence, as well as specific deterrence and rehabilitation, in the imposition of a fit sentence. The DTC model is an exception based upon such factors as an assessment of the risk posed by an offender and the ability of the DTC program to address the criminal conduct caused by drug addiction. As it is an exception, the offender must address concerns that ordinarily would militate against consideration for the DTC program.

Certain criminality is of such a severity that the risk assessment will not generally favour the DTC program approach over ordinary sentencing principles. These include factors that commonly put public safety at risk, such as the following:

- The person has been charged with a significant crime of violence;
- The drug offence was committed in circumstances that raise concerns about drug-impaired driving;
- The person has a recent and/or significant history of violence; or
- The person used or threatened to use a weapon during the commission of the offence.

Persons who commit offences in circumstances which strongly suggest that the offence was not directly connected to an addiction, but rather to other causes not ordinarily amenable to a DTC program, will generally not be admissible to a DTC unless there is reliable support for their assertion that (a) the offence was predominantly motivated by the person's drug addiction, and (b) that addressing that addiction will also address the other causes underlying or motivating the criminal activity. While the following factors would generally render an accused ineligible for admission into the DTC program, the assessment should reflect consideration of the criteria indicated above in (a) and (b):

- The person has been charged with trafficking for commercial gain;

- The drug offence involved risk to a young person; or,
- The person is an associate or member of a gang or criminal organization.

Finally, the DTC program relies upon the willingness and ability of the candidate to overcome an addiction that has contributed to the commission of the offence. Persons whose past conduct indicates an inability to comply with or maintain a previous court order, or to benefit from admission into a DTC program, will not generally be admissible. Persons who are currently serving a conditional or intermittent sentence at the time of their application to the DTC program will generally not be admissible as these sentences are generally incompatible with an intensive DTC program. Persons who have previously participated in a DTC program and either been expelled or withdrawn, as well as those who have graduated from a DTC program in the previous year,<sup>3</sup> are generally not admissible to the DTC program. In such cases, the onus is on the applicant to persuade the DTC team that they should be given another opportunity. A candidate should generally be considered only in light of convincing evidence of changed circumstances and a willingness and ability to commit to treatment.

An indication that the resort to the DTC program is being used solely to avoid punishment rather than to address an addiction that contributed to the criminality in question should militate against admission to the DTC program.

#### **2.4. Successful completion of drug treatment court program**

The standard for what it means to have successfully completed a DTC program is to be determined by the individual DTCs. The successful completion criteria should take into account the fact that the individual has met the general completion requirements of the individual DTC. Some suggested criteria include: a substantial period of abstinence from hard drugs such as cocaine, opiates and methamphetamine; a substantial period of time having passed without further criminal convictions; and social stability indicators such as having obtained stable housing, ongoing attendance at community support programs, and being employed, attending school or participating in significant community volunteer work.

A person who meets the individual DTC program's successful completion criteria, and consequently graduates from a DTC program, is eligible to receive, upon sentencing, a reduced sentence, such as a suspended sentence along with a period of probation to be recommended by the DTC team.

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<sup>3</sup> Previous year means within the previous 365 days.

### **3. CONCLUSION**

Crown counsel must be mindful of the procedures to follow when an accused seeks to have his/her sentencing delayed in order to participate in a DTC program. Crown counsel must be diligent to ensure that only qualified individuals are referred to the DTC.

## APPENDIX A - ATTORNEY GENERAL'S APPROVAL

Section 10 of the *Controlled Drugs and Substances Act* provides, in part, as follows:

10(4) A court sentencing a person who is convicted of an offence under this Part may delay sentencing to enable the offender:

- (a) to participate in a drug treatment court program approved by the Attorney General;
- (b) to attend a treatment program under subsection 720(2) of the *Criminal Code*.

10(5) If the offender successfully completes a program under subsection (4), the court is not required to impose the minimum punishment for the offence for which the person was convicted.

I, \_\_\_\_\_, on behalf of the Attorney General of Canada, pursuant to s. 10(4)(a) of the *Controlled Drugs and Substances Act*, do hereby approve of \_\_\_\_\_ drug treatment court program which operates in a manner consistent with the policy criteria contained in the Drug Treatment Court Guideline No. \_\_\_\_\_ issued by the Director of Public Prosecutions pursuant to s. 3(3)(g) of the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121.

Dated at the City of \_\_\_\_\_, \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Chief Federal Prosecutor for the Region of \_\_\_\_\_







## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **6.2 MANDATORY MINIMUM PENALTIES FOR CERTAIN DRUG OFFENCES UNDER THE *CONTROLLED DRUGS AND SUBSTANCES ACT***

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. PURPOSE

The purpose of this guideline is to provide direction to Crown counsel regarding the 2012 amendments to the *Controlled Drugs and Substances Act* (CDSA) that add mandatory minimum penalties (MMPs) for particular drug offences in certain circumstances.<sup>1</sup> The amendments are contained in the *Safe Streets and Communities Act* (Act). These amendments apply only to offences committed after the coming into force of this legislation.

### 2. IMPACT ON PROSECUTIONS

As noted below, there is a requirement that the Crown provide notice of the intention to seek the MMP and the intention to prove the aggravating factors. There is no time limit provided for the giving of notice, except that it be before the accused enters a plea; therefore it is recommended that Crown counsel review their files early-on in order to ensure that notice has been provided to the accused, and if not, provide one as soon as possible. Each regional office should coordinate with their local police forces the specific procedure to be followed for providing this notice to the accused, including the possibility of the police providing this notice as a matter of course at the time of arrest.

With the implementation of this MMP regime, Crown counsel may be under increased pressure from defence counsel to negotiate a plea agreement that would not require that an MMP be imposed in a particular prosecution. Crown counsel are reminded that they are obliged to present all available provable facts to the court, in a firm but fair manner,

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<sup>1</sup>*Safe Streets and Communities Act*, SC 2012, c 1.

in order to ensure the integrity of the prosecution throughout the litigation process.<sup>2</sup> Crown counsel must also conduct plea and sentence negotiations in a manner consistent with the policies set out in the PPSC Deskbook. In particular, the Deskbook states that an agreement to withhold from the court facts that are provable and relevant, and that aggravate the offence is not acceptable.<sup>3</sup>

In keeping with the will of Parliament, it will generally be inappropriate to take a plea to a lesser offence, or to stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP where the evidence supports the original charge. In situations where the facts supporting the MMP are present and provable, counsel should generally prosecute that offence and the court will impose the MMP. Also, where there are two possible charges in a prosecution and one has an MMP and one does not, or both have an MMP but one is higher than the other, the one with the MMP or the one with the highest MMP should proceed.<sup>4</sup>

### **2.1. Stay, withdrawal or accepting plea to lesser offence**

If counsel wishes to stay or withdraw a charge with an MMP, or to take a plea to a lesser offence, the prior consent of the Chief Federal Prosecutor (CFP) or his/her delegate is required. Counsel must provide the CFP with a written memorandum setting out the basis for the stay, withdrawal or plea and explaining why the proposed course of action is in the public interest. If the reason for the stay, withdrawal or plea to a lesser offence is due to the evidentiary threshold for prosecution not being met (i.e. no reasonable prospect of conviction), consent is not required.

### **2.2. Non-reliance upon notice**

In situations in which Crown counsel intends to proceed with the prosecution of an offence with an MMP but considers that the imposition of an MMP would likely result in an unduly harsh consequence under the circumstances of a particular case, counsel may exercise discretion not to rely on the notice of intention to seek the MMP. For example, Crown counsel might consider exercising their discretion in proving the notice of intent in situations where the imposition of an MMP would be an unduly harsh consequence for someone who has special needs, such as a medical condition that would make jail

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<sup>2</sup> See *Boucher v The Queen*, [1955] SCR 16 at 23-24 : “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly.”

<sup>3</sup> See the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)” at para 3.5 c).

<sup>4</sup> Examples include: (A) Accused charged with ss 7(1) and 5(2) for a 300 plant grow operation, no criminal record, and plants grown in his or her own home. Section 7(1) has an MMP of 12 months and the s 5(2) has no MMP. Crown counsel shall not withdraw or stay the s 7(1) charge. (B) Accused charged with ss 7(1) and 5(2) of methamphetamine with the aggravating factors of the lab being in a rental home and using a 16 year old to operate it. The s 7(1) charge has a 3-year MMP while the s 5(2) charge has a 2-year MMP. The Crown shall not withdraw or stay the s 7(1) charge.

particularly onerous. In such cases, counsel may do so only with the prior consent of their CFP or his/her delegate. Counsel shall nonetheless still present the aggravating factor(s) to the court if they are relevant and provable.

### **2.3. Obtaining prior consent not feasible**

In exceptional circumstances, where it is not feasible for counsel to obtain the CFP's consent beforehand, Crown counsel may stay, withdraw, or agree to a plea to a lesser offence on a charge with an MMP. In such circumstances, counsel must provide to the CFP, as soon as practicable after doing so, a written memorandum demonstrating how the proposed course of action was in the public interest and why it was not feasible to seek consent beforehand.<sup>5</sup> Counsel must also ensure that the memorandum is placed on the file.

## **3. BACKGROUND**

The Act amends the CDSA to provide for MMPs when an accused is convicted of certain serious drug offences including trafficking, possession for the purpose of trafficking, importing and exporting, and production. This is the case only when the charges involve drugs listed in Schedule I and Schedule II of the CDSA. It should be noted that GHB and Flunitrazepam (Rohypnol), most commonly known as the “date-rape drugs,” as well as all of the amphetamine drugs have been moved from Schedule III to Schedule I as a result of the Act. Also, the maximum penalty for production of Schedule II drugs has been increased from 7 to 14 years.

In general, the MMP will apply where there is an aggravating factor present, including where the production of the drug constituted a potential security, health or safety hazard. MMPs are also triggered by trafficking, exporting, importing or producing certain quantities of either Schedule I or Schedule II substances. For the production of between 6 and 200 marijuana plants, the Crown must prove by way of expert evidence that the production was for the purpose of trafficking.

The chart attached as Appendix A to this note sets out in detail, by quantity and other aggravating factors, the penalties mandated for both Schedule I and Schedule II drugs. In particular, the aggravating factors involve offences committed:

Aggravating Factors List A:

- for the benefit of, at the direction of, or in association with a criminal organization;

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<sup>5</sup> Such circumstances must be understood as exceptional. Crown counsel are expected to make efforts to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may only stay, withdraw or agree to a plea on a charge with an MMP in circumstances where, after making reasonable attempts to contact the CFP or his/her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

- involving use or threat of violence;
- involving use or threat of use of weapons;
  - by someone who has been previously convicted of a designated substance offence,<sup>6</sup> or has served a term of imprisonment for a designated substance offence,<sup>7</sup> within the previous 10 years;<sup>8</sup> and
- through the abuse of authority or position, or by abusing access to restricted area, to commit the offence of importation/exportation and possession to export.

Aggravating Factors List B:

- in or near a school, on or near school grounds, or in or near an area normally frequented by persons under the age of 18;
- in a prison;
- using the services of, or involving, a person under 18;
- in relation to a youth (e.g., selling to a youth).

In relation to the production offences, MMPs may be imposed where the following security, health and safety factors are:

- the accused used real property that belongs to a third party to commit the offence;
- the production constituted a potential security, health or safety hazard to children who were in the location where the offence was committed or in the immediate area;
- the production constituted a potential public safety hazard in a residential area; or
- the accused placed or set a trap.

It should be noted that a court is not required to impose an MMP unless it is satisfied that the offender, before entering a plea, was notified of the possible imposition of an MMP for the offence in question and of the Attorney General's intention to prove any factors in relation to the offence that would lead to the imposition of an MMP.<sup>9</sup>

The Act also allows a court to delay sentencing while an addicted offender either participates in a drug treatment court program approved by the Attorney General, or attends a treatment program approved by the province under the supervision of the court

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<sup>6</sup> Refers to a "designated substance offence" as defined in part 2 of the CDSA.

<sup>7</sup> This is interpreted to mean the warrant expiry date.

<sup>8</sup> This is to be interpreted as 10 years preceding the commission of the offence.

<sup>9</sup> See Bill C-10, s 42 which adds a new s 8 to the CDSA.

as outlined in s. 720(2) of the *Criminal Code*. If the person successfully completes the treatment program, the court is not required to impose the MMP for the offence.<sup>10</sup>

#### **4. CONCLUSION**

Crown counsel must be aware of the facts in a given case that may give rise to the imposition of an MMP, ensure that notice has been given before the matter proceeds, and be prepared to prove the aggravating factors present in the case. Throughout this process, Crown counsel are duty bound to present to the court all provable aggravating facts that are relevant to the prosecution.

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<sup>10</sup> See Bill C-10, s 43(2) which provided the amendment to s 10(2) and the new ss 10(4) and (5) of the CDSA.

## APPENDIX A - MANDATORY MINIMUM PENALTIES FOR SERIOUS DRUG OFFENCES

SCHEDULE I - DRUGS (COCAINE, HEROIN, METHAMPHETAMINE, ETC., AND DRUGS BEING MOVED FROM SCHEDULE III INCLUDING ECSTASY, GHB AND ROHYPNOL)					
OFFENCE	MANDATORY MINIMUM PENALTY				NOTES
		w/ <i>Aggravating Factor List A<sup>1</sup></i>	w/ <i>Aggravating Factor List B<sup>2</sup></i>	w/ <i>Health and Safety Factors<sup>3</sup></i>	
7(1) Production	2 YEARS	n/a	n/a	3 YEARS	
5(1) Trafficking		1 YEAR	2 YEARS	n/a	
5(2) Possession for the Purpose of Trafficking		1 YEAR	2 YEARS	n/a	
6(1) Importing Exporting	1 YEAR	n/a	n/a	n/a	1 year for Schedule I <u>under</u> 1 kg if (i) the offence is committed for the purpose of trafficking, (ii) the person abused a position of trust or authority, or (iii) the person had access to an area that is restricted to authorized persons and used that access.
	2 YEARS (if more than 1 kg)				
6(2) Possession For the	1 YEAR	n/a	n/a	n/a	1 year for Schedule I <u>under</u> 1 kg if (i) the offence is

<b>Purpose of Exporting</b>	<b>2 YEARS</b> <i>(if more than 1 kg)</i>				<i>committed for the purpose of trafficking, (ii )the person abused a position of trust or authority, or (iii) the person had access to an area that is restricted to authorized persons and used that access.</i>
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SCHEDULE II DRUGS (CANNABIS MARIHUANA)					
OFFENCE	MANDATORY MINIMUM PENALTY				NOTES
		w/ <i>Aggravating Factors- List A<sup>1</sup></i>	w/ <i>Aggravating Factor - List B<sup>2</sup></i>	w/ <i>Health and Safety Factors<sup>3</sup></i>	
<b>5(1) Trafficking</b>		<b>1 YEAR</b>	<b>2 YEARS</b>	n/a	<i>Offence would have to involve more than 3 kg of cannabis marijuana or cannabis resin</i>
<b>5(2) Possession for the Purpose of Trafficking</b>		<b>1 YEAR</b>	<b>2 YEARS</b>	n/a	<i>Offence would have to involve more than 3 kg of cannabis marijuana or cannabis resin</i>
<b>6(1) Importing Exporting</b>	<b>1 YEAR</b>	n/a	n/a	n/a	<i>One year for Schedule II if (i) the offence is committed for the purpose of trafficking, (ii )the person abused a position of trust or authority, <b>or</b> (iii) the person had access to an area that is restricted to authorized persons and used that access.</i>
<b>6(2) Possession for the Purpose of Exporting</b>	<b>1 YEAR</b>	n/a	n/a	n/a	<i>One year for Schedule II if (i) the offence is committed for the purpose of trafficking, (ii )the person abused a position of trust or authority, <b>or</b> (iii) the person had access to an area that is restricted to authorized persons and used that access.</i>
<b>7(1) Production of</b>	<b>6 MOS</b>	n/a	n/a	<b>9 MOS</b>	<i>Offence is committed <b>for the purpose of trafficking.</b></i>

<b>6 - 200 plants</b>					<i>Maximum penalty will be increased to 14 years imprisonment</i>
<b>7(1) Production of 201 – 500 plants</b>	<b>1 YEAR</b>	n/a	n/a	<b>18 MOS</b>	<i>Maximum penalty will be increased to 14 years imprisonment</i>
<b>7(1) Production of over 500 plants</b>	<b>2 YEARS</b>	n/a	n/a	<b>3 YEARS</b>	<i>Maximum penalty will be increased to 14 years imprisonment</i>
<b>*7(1) Production of substances in schedule II other than marihuana (i.e. resin/oil)</b>	<b>1 YEAR</b>	n/a	n/a	<b>18 MOS</b>	<i>If offence is committed for the purpose of trafficking.</i>

<sup>1</sup> **Aggravating Factors List A**

**The aggravating factors include offences committed:**

- for the benefit of, at the direction of, or in association with a criminal organization;
- involving use or threat of violence;
- involving use or threat of use of weapons;
- by someone who was previously convicted of a designated drug offence or had served a term of imprisonment for a designated substance offence within the previous 10 years; and,
- through the abuse of authority or position or by abusing access to restricted area to commit the offence of importation/exportation and possession to export.

<sup>2</sup> **Aggravating Factors List B**

**The aggravating factors include offences committed:**

- in or near a school, on or near school grounds, or in or near an area normally frequented by persons under the age of 18;
- in a prison;
- using the services of, or involving, a person under 18;
- in relation to a youth (e.g. selling to a youth)

<sup>3</sup> **Health and Safety Factors**

- the accused used real property that belongs to a third party to commit the offence;
- the production constituted a potential security, health or safety hazard to persons under the age of 18 who were in the location where the offence was committed or in the immediate area;
- the production constituted a potential public safety hazard in a residential area;
- the accused placed or set a trap, device or other thing that is likely to cause death or bodily harm to another person in the location where the offence was committed or in the immediate area, or permitted such a trap, device or other thing to remain or be placed in that location or area.



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **6.3 STATUTORY RESTRICTIONS ON THE USE OF CONDITIONAL SENTENCES**

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. PURPOSE

The purpose of this guideline is to provide direction to Crown counsel regarding the key changes to the conditional sentence regime pursuant to s. 742.1 of the *Criminal Code* (Code), as a result of the coming into force in 2012 of certain aspects of the *Safe Streets and Communities Act* (the Act). The effect of the amendments is to restrict the availability of conditional sentences. These amendments apply only to offences committed after the coming into force of the provisions, which are contained in Part 2 of the Act.

Under the new regime, conditional sentences remain unavailable if the offence is punishable by a minimum term of imprisonment,<sup>1</sup> or if the offence is a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more.

The new s. 742.1 of the Code no longer states that conditional sentences are unavailable in relation to serious personal injury offences as defined in s. 752 of the Code. Under the new regime, conditional sentences are now unavailable in the following circumstances:

- In the case of all offences prosecuted by way of indictment for which the maximum term of imprisonment is either 14 years or life;<sup>2</sup>

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<sup>1</sup> Existing mandatory minimum penalties (MMP) in the *Criminal Code* can be found in the Offence Grid, which appears at the back of the *Criminal Code*, before the Index. It is also important to read this guideline in conjunction with other PPSC guidelines concerning the Act, which concern new or increased MMP in relation to certain *Criminal Code* offences and particular drug offences committed in certain circumstances.

<sup>2</sup> The list of offences in the *Criminal Code* that fall in these categories can be found in the Offence Grid, located in the *Criminal Code*, as explained in note 1. See also the attached Appendices A and B of this guideline for examples of offences in other federal acts that fall into these categories.

- Offences prosecuted by indictment for which the maximum term of imprisonment is 10 years, that:
  - (i) resulted in bodily harm;
  - (ii) involved the import, export, trafficking or production of drugs, or
  - (iii) involved the use of a weapon.

In addition, a list of eleven offences, when prosecuted by indictment, are expressly excluded from eligibility for conditional sentences. This list includes prison breach (s. 144 of the Code), criminal harassment (s. 264 of the Code), sexual assault (s. 271 of the Code), kidnapping (s. 279 of the Code), trafficking in persons-material benefit (s. 279.02 of the Code) and abduction of person under 14 (s. 281 of the Code), but also includes a number of property offences:

- motor vehicle theft (s. 333.1 of the Code);
- theft over 5,000 (s. 334 (a) of the Code);
- breaking and entering a place other than a dwelling house (s. 348 (1)(e) of the Code);
- being unlawfully in a dwelling-house (s. 349 of the Code); and
- arson for fraudulent purpose (s. 435 of the Code).

Thus, fewer offences are eligible for conditional sentences as a result of these changes to the CSO regime, and because of related amendments to the *Controlled Drugs and Substances Act* (CDSA) in the Act that include an increase in the maximum penalty for marihuana production from seven to 14 years and the introduction of mandatory minimum penalties (MMP) for certain CDSA offences committed in certain circumstances in relation to Schedule I and II drugs.<sup>3</sup>

As a practical matter, as far as CDSA offences are concerned, conditional sentences will remain available for s. 4 offences. However, conditional sentences will no longer be available for any other Schedule I or Schedule II drug offence, except for s. 5 offences of trafficking or possession for the purpose of trafficking in three kilograms or less of a Schedule II drug (marihuana).

## 2. IMPACT ON PROSECUTIONS

These amendments mandate no change in the general Crown approach and rationale regarding Crown elections, plea resolution and sentencing discussions. That said, Crown

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<sup>3</sup> See the PPSC Deskbook guidelines “[6.4 Mandatory Minimum Penalties under the Criminal Code](#)” and “[6.2 Mandatory Minimum Penalties for Certain Drug Offences under the Controlled Drugs and Substances Act](#)”.

counsel must follow the guidelines described below that relate to the exercise of discretion.

Regarding the Crown election, the same considerations should arise when the Crown is deciding whether to proceed summarily or by indictment. In other words, if the Crown would normally choose to proceed by indictment, due to the seriousness of the case, the criminal record of the accused or because of other relevant factors, the Crown should not elect to proceed summarily so that a conditional sentence would remain available to the accused.<sup>4</sup>

Likewise, concerning plea resolution and sentencing discussions, in keeping with the will of Parliament, it will generally be inappropriate to either agree to a plea to a lesser offence, or stay or withdraw a charge, where the evidence supports the original charge, so that the accused will remain eligible for a conditional sentence. For example, if the accused is charged with an offence that is punishable by an MMP, or that is an indictable offence punishable by 14 years or life, Crown counsel should not generally agree to a plea to a lesser offence so that a conditional sentence will be available to the accused.

### **2.1. Stay, withdrawal or accepting plea to a lesser offence**

If Crown counsel wishes to stay or withdraw a charge, or take a plea to a lesser offence, so that a conditional sentence will remain available to the accused, the prior consent of the Chief Federal Prosecutor (CFP) or his or delegate is required. Counsel must provide the CFP with a written memorandum setting out the basis for the stay, withdrawal or plea and explaining why the proposed course of action is in the public interest. For example, there may be situations where the lack of availability of a conditional sentence would likely result in an unduly harsh consequence under the circumstances of a particular case, such as where the unavailability of a conditional sentence would result in young children being left with no caretaker. In such situations, Crown counsel might exercise discretion to reach a resolution that would permit a conditional sentence. However, if the reason for the stay, withdrawal or plea to a lesser offence, is due to the threshold for prosecution not being met (a reasonable prospect of conviction), the above-mentioned consent is not required.

### **2.2. Obtaining prior consent not feasible**

In exceptional circumstances, where it is not feasible for Crown counsel to obtain the CFP's consent beforehand, Crown counsel may stay, withdraw, or agree to a plea to a lesser offence, which would enable the accused to remain eligible for a conditional sentence. In such circumstances, Crown counsel must provide to the CFP, as soon as practicable after doing so, a written memorandum demonstrating how the proposed

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<sup>4</sup> See the PPSC Deskbook guideline "[3.10 Elections and Re-Elections](#)" for the PPSC policy regarding Crown elections in relation to dual procedure offences.

course of action was in the public interest and why it was not feasible to seek consent beforehand.<sup>5</sup> Crown counsel must also ensure that the memorandum is placed on the file.

During sentencing submissions, it will also be important for Crown counsel to remind the judiciary that the principles of sentencing for adults in the *Criminal Code* have not changed. Judges must continue to sentence in accordance with the sentencing principles and the jurisprudence, to the extent that the jurisprudence has established the applicable sentencing principles, sentence range, and overall sentence fitness in certain types of cases. Crown counsel can reasonably argue that Parliament has not altered the sentencing principles but merely restricted sentencing options in relation to certain kinds of offences. For example, probation will not be appropriate as a result of these amendments in situations where it was not appropriate before.

Finally, Crown counsel should never hesitate to consult senior colleagues of the Public Prosecution Service of Canada (PPSC) and their manager when engaged in resolution discussions and the preparation of sentencing submissions. Crown counsel should also remain mindful of their obligation to consult managers in appropriate circumstances as outlined in the PPSC Deskbook and in relevant guidelines.

### 3. CONCLUSION

Crown counsel continue to be bound by relevant PPSC Deskbook policies concerning Crown elections, plea resolution and sentencing discussions involving offences for which a conditional sentence will no longer be available.

It will generally be inappropriate for Crown counsel to take a plea to a lesser offence, or stay or withdraw a charge, when it is done with the intent of ensuring that a conditional sentence remains available to the accused, where the evidence supports the original charge. In exceptional circumstances deviating may be acceptable and must be done in accordance with the present guideline.

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<sup>5</sup> Such circumstances must be understood as exceptional. Crown counsel are expected to make every effort to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may stay, withdraw a charge, or agree to a plea, which would result in a conditional sentence being available to the accused only where it otherwise would not be, if reasonable attempts were made to contact the CFP or his or her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

## **APPENDIX A – NON-CRIMINAL CODE OFFENCES PUNISHABLE BY A MAXIMUM SENTENCE OF 14 YEARS IMPRISONMENT**

### **1. CONTROLLED DRUGS AND SUBSTANCES ACT OFFENCES**

No offences punishable by a maximum sentence of 14 years imprisonment.<sup>6</sup>

### **2. CRIMES AGAINST HUMANITY AND WAR CRIMES ACT**

#	SECTION	OFFENCE
1	s. 18	Bribery of judges and officials
2	s. 19(3)	Perjury
3	s. 20	Witness giving contradictory evidence
4	s. 21	Fabricating evidence

### **3. IMMIGRATION AND REFUGEE PROTECTION ACT**

#	SECTION	OFFENCE
1	s. 117(2)(a)(ii)	Human smuggling and trafficking: Organizing entry into Canada (under 10 persons)
2	ss. 122 and 123(b)	Offences Related to Documents
3	ss. 119 and 120	Human trafficking

### **4. COMPETITION ACT**

#	SECTION	OFFENCE
1	s. 45(2)	Conspiracies, agreements or arrangements between competitors
2	s. 47(2)	Bid rigging
3	s. 52(5)(a)	False representations
4	s. 52.1(9)(a)	Telemarketing
5	s. 53(6)(a)	Deceptive notice of winning a prize

<sup>6</sup> As of the coming into force on November 6, 2012 of the changes to the CDSA by virtue of the Act, the maximum sentence for the production of marihuana has increased to 14 years.



**5. SECURITY OF INFORMATION ACT**

#	SECTION	OFFENCE
1	s. 3(1)	Prejudice to the safety or interest of the State
2	s. 4(1)	Wrongful communication, etc., of information
3	s. 4(2)	Communication of sketch, plan, model, etc.
4	s. 4(3)	Receiving code word, sketch, etc.
5	s. 4(4)	Retaining or allowing possession of document, etc.
6	s. 5(1)	Unauthorized use of uniforms; falsification of reports, forgery, personation and false documents
7	s. 5(2)	Unlawful dealing with dies, seals, etc.
8	s. 6	Approaching, entering, etc., a prohibited place
9	s. 7	Interference
10	s. 14(2)	Unauthorized communication of special operational information
11	s. 23	Conspiracy, attempts, etc.

**APPENDIX B – NON-CRIMINAL CODE OFFENCES PUNISHABLE BY A  
MAXIMUM SENTENCE OF LIFE IMPRISONMENT**

**1. CONTROLLED DRUGS AND SUBSTANCES ACT OFFENCES**

#	SECTION	OFFENCE
1	s. 5(3)(a) CDSA	Trafficking – Schedule I or II
2	s. 6(3)(a) CDSA	Import/export – Schedule I or II
3	s. 7(2)(a) CDSA	Production – Schedule I or II

**2. CRIMES AGAINST HUMANITY AND WAR CRIMES ACT**

#	SECTION	OFFENCE
1	s. 4(2)(a) and (b)	Genocide committed in Canada
2	s. 5(3)	Breach of responsibility by military commander or superior
3	s. 6(2)(a) and (b)	Genocide, etc., committed outside of Canada
4	s. 7(4)	Breach of responsibility by a superior

**3. IMMIGRATION AND REFUGEE PROTECTION ACT**

#	SECTION	OFFENCE
1	s. 117(3)	Human smuggling and trafficking: Organizing entry into Canada
2	ss. 118 and 120	Disembarking persons at sea
3	ss. 119 and 120	Human trafficking
4	s. 131	Counseling

**4. SECURITY OF INFORMATION ACT**

#	SECTION	OFFENCE
1	s. 16(3)	Communicating safeguarded information
2	s. 17(2)	Communicating special operational information
3	s. 20(3)	Foreign-influenced or Terrorist-influenced Threats or Violence



## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **6.4 MANDATORY MINIMUM PENALTIES UNDER THE *CRIMINAL CODE***

#### **GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT***

March 1, 2014

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### 1. PURPOSE

The purpose of this guideline is to provide direction to Crown counsel regarding the certain amendments to the *Criminal Code* (Code) in 2012 that add mandatory minimum penalties (MMPs) for particular offences involving the sexual exploitation of children. The amendments are contained in the *Safe Streets and Communities Act* (Act), formerly Bill C-10. These amendments apply only to offences committed after the coming into force date of these provisions.<sup>1</sup>

The Act also creates two new hybrid offences (ss. 171.1 and 172.2 of the Code). Section 171.1 makes it an offence to provide sexually explicit material to a child. Section 172.2 creates an offence to agree or make arrangements with another person by means of telecommunications to commit a sexual offence against a child.

### 2. IMPACT ON PROSECUTIONS

Crown counsel are reminded that they are obliged to present all available provable facts to the court, in a firm but fair manner, in order to ensure the integrity of the prosecution throughout the litigation process.<sup>2</sup> Crown counsel must also conduct plea and sentence negotiations in a manner consistent with the policies set out in the PPSC Deskbook. In particular, the Deskbook states that an agreement to withhold from the court facts that are provable and relevant, and that aggravate the offence is not acceptable.<sup>3</sup>

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<sup>1</sup> These provisions are contained in Part 2 of the Bill and came into force on August 9, 2012.

<sup>2</sup> See *Boucher v The Queen*, [1955] SCR 16 at 23-24: “It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly”.

<sup>3</sup> See the PPSC Deskbook guideline “[3.7 Resolution Discussions](#)”, in particular para 3.5c).

In keeping with the will of Parliament, it will generally be inappropriate to either agree to a plea to a lesser offence, or to stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. Also, where there are two possible charges in a prosecution and one has an MMP and one does not, or both have an MMP but one is higher than the other, the one with the MMP or the one with the highest MMP should proceed.

If an offence with an MMP has a reasonable prospect of conviction, such an offence may be stayed or withdrawn under a plea agreement only with the consent of the Chief Federal Prosecutor (CFP) or his/her delegate. The consent of the CFP shall only be given where the basis for the plea is set out in a written memorandum that demonstrates, to the satisfaction of the CFP, how the proposed course of action is in the public interest.

If the reason for the stay, withdrawal or agreement to a plea to a lesser offence is due to the threshold for prosecution not being met (a reasonable prospect of conviction), such consent is not required. In such circumstances Crown counsel must provide a written memorandum to the CFP or his/her delegate that explains the decision and ensure that the memo is filed.

In exceptional circumstances, where it is not feasible to get consent, Crown counsel may stay, withdraw, or agree to a plea to a lesser offence on a charge with an MMP. In such circumstances Crown counsel must provide to the CFP, as soon as practicable after doing so, a written memorandum explaining the decision and why it was not feasible to get the consent.<sup>4</sup> Crown counsel must also ensure the memo is filed.

### **3. CONCLUSION**

It is important for Crown counsel to refer to the tables in Appendices A and B below, in order to know whether an MMP attaches to offences involving the sexual exploitation of children.

Under the new MMP regime it will generally be inappropriate for Crown counsel to take a plea to a lesser offence, stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. In exceptional circumstances deviating may be acceptable and must be done in accordance with the present guideline.

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<sup>4</sup> Such circumstances must be understood as exceptional. Crown counsel are expected to make efforts to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may stay, withdraw or agree to a plea on a charge with an MMP in circumstances only where, after making reasonable attempts to contact the CFP or his/her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

## APPENDIX A

<b>NEW OFFENCES AND NEW MANDATORY MINIMUM PENALTIES FOR SEXUAL EXPLOITATION OF CHILDREN</b>				
<b>Offence</b>		<b><i>Criminal Code</i> Section</b>	<b>New mandatory minimum penalties</b>	
			<b>On Summary Conviction</b>	<b>On Indictment</b>
1.	Incest, against a person under 16 years of age (indictable offence)	<b>155</b>	<b>n/a</b>	<b>5 years</b>
2.	Bestiality	<b>160 (3)</b>	<b>6 months</b>	<b>1 year</b>
3.	<b>New:</b> Providing sexually explicit material to a child (hybrid offence)	<b>171.1</b>	<b>30 days</b>	<b>90 days</b>
4.	Internet luring (hybrid offence)	<b>172.1</b>	<b>90 days</b>	<b>1 year</b>
5.	<b>New:</b> Agreeing/making arrangements with another person, via telecommunication, to commit sexual offence against a child (hybrid offence)	<b>172.2</b>	<b>90 days</b>	<b>1 year</b>
6.	Exposure	<b>173(2)</b>	<b>30 days</b>	<b>90 days</b>
7.	Sexual assault, against a young person under 16 years of age (hybrid offence)	<b>271</b>	<b>90 days</b>	<b>1 year</b>
8.	Sexual assault with a weapon, <sup>1</sup> against a young person under 16 years of age (indictable offence)	<b>272</b>	<b>n/a</b>	<b>5 years</b>
9.	Aggravated sexual assault, <sup>2</sup> against a young person under 16 years of age (indictable offence)	<b>273</b>	<b>n/a</b>	<b>5 years</b>

<sup>1</sup> There is a mandatory minimum penalty for this offence if a restricted or prohibited firearm is used in connection with organized crime (5 years for first offence; 7 years for second or subsequent offence).

<sup>2</sup> There is a mandatory minimum penalty for this offence if a firearm is used (4 years).

## APPENDIX B

<b>INCREASED MANDATORY MINIMUM PENALTIES FOR EXISTING SEXUAL EXPLOITATION OF CHILDREN OFFENCES</b>				
<b>Offence</b>		<b><i>Criminal Code</i> Section</b>	<b>On summary conviction</b>	<b>On indictment</b>
			<b>Increased Mandatory Minimum Penalty</b>	<b>Increased Mandatory Minimum Penalty</b>
1.	Sexual interference (hybrid offence)	<b>151</b>	<b>90 days</b>	<b>1 year</b>
2.	Sexual touching (hybrid offence)	<b>152</b>	<b>90 days</b>	<b>1 year</b>
3.	Sexual exploitation (hybrid offence)	<b>153</b>	<b>90 days</b>	<b>1 year</b>
4.	Bestiality in the presence of or by a child	<b>160(3)</b>	<b>6 months</b>	<b>1 year</b>
5.	Making child pornography	<b>163.1(2)</b>	<b>6 months</b>	<b>(No change)</b>
6.	Distributing child pornography	<b>163.1(3)</b>	<b>6 months</b>	<b>(No change)</b>
7.	Possession of child pornography (hybrid offence)	<b>163.1(4)</b>	<b>90 days</b>	<b>6 months</b>
8.	Accessing child pornography (hybrid offence)	<b>163.1(4.1)</b>	<b>90 days</b>	<b>6 months</b>
9.	Parent/guardian procuring sexual activity where victim is under 16 (indictable offence)	<b>170(a)</b>	n/a	<b>1 year</b>
	Parent/guardian procuring sexual activity where victim is 16-17 (indictable offence)	<b>170(b)</b>	n/a	<b>6 months</b>
10.	Householder permitting sexual activity where victim is 16-17 (indictable offence)	<b>171(b)</b>	n/a	<b>90 days</b>







## **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

### **6.5 PROCESS FOR PRESUMPTIVELY ELIGIBLE STATUS FOR A DANGEROUS OFFENDER OR LONG TERM OFFENDER DESIGNATION**

**GUIDELINE OF THE DIRECTOR ISSUED UNDER  
SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC  
PROSECUTIONS ACT***

March 1, 2014

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### 1. BACKGROUND

During initial file review, counsel should always be prepared to assess the feasibility of whether or not an offender could be declared a dangerous offender (DO) or long term offender (LTO), paying particular attention to the criteria needed by the court to make such a designation pursuant to s. 752 of the *Criminal Code* (Code).

On July 2, 2008, Bill C-2 came into force imposing a new duty on prosecutors in some circumstances to advise the court as soon as feasible after the finding of guilt and before sentence whether the prosecutor intends to make an application under s. 752.1 of the Code to have the offender remanded for an assessment for use as evidence in a DO or LTO application.

Section 752.01 of the Code states:

“If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).”

### 2. SUGGESTED APPROACH

Crown counsel are required to identify all prospective files for a possible DO or LTO designation at the bail hearing or charge screening stage as considerable time is needed for adequate preparation and information gathering.

All files identified through the National Flagging System or identified through normal file review that meet the appropriate criteria for consideration must be brought to the attention of a member of the regional management team, or designate, as soon as practicable.

A member of the regional management team or designate will review the file in accordance with applicable PPSC policies or guidelines.

Management will then assign the file to designated counsel who will be responsible for gathering and reviewing all the relevant information and documentation needed.

The designated counsel then has an ongoing obligation to keep the Chief Federal Prosecutor (CFP) fully informed as to the progress with respect to the file and the decision whether to proceed or not must be made in consultation with the CFP.

If the decision is made to proceed, the designated counsel will make an assessment application under s. 752.1 of the Code at the appropriate time after there has been a finding of guilt and before sentencing.

Once the Assessment Report has been received and reviewed, designated counsel will prepare a written memo to the CFP setting out the reasons for requesting a dangerous offender or long term offender designation.

The CFP will review the memo, sign off on it if appropriate and provide a copy of it, together with the completed Assessment Report to the appropriate Deputy Director of Public Prosecutions for his or her consideration pursuant to the PPSC Deskbook guideline “Delegated Decision-Making”.