

Report



FEDERAL
PROSECUTION
SERVICE
REVIEW

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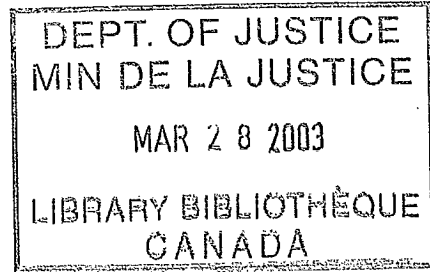
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Bureau régional de l'Ontario
la tour Exchange
130 rue King ouest
Pièce 3400, CP 36
Toronto (Ontario)
M5X 1K6

Tel: 416 973-3596
Fax: 416 973-3004
Internet: Thea.Herman@justice.gc.ca

May 30, 2001

Mr. Morris Rosenberg
Deputy Minister of Justice and
Deputy Attorney General of Canada
Department of Justice
284 Wellington Street, Room 4121
Ottawa, Ontario
K1A 0H8



Dear Deputy Minister:

In June 1999, the Justice and Legal Affairs Committee of Deputy Ministers approved the Terms of Reference for a review of the Federal Prosecution Service. The purpose of the review was to examine how the demand for the services of the FPS could be managed as well as to consider whether there were ways in which those services could be delivered more effectively and efficiently.

The report of the review is now completed and we wish to submit our findings and recommendations to you. Many committed and talented individuals both within the FPS and, more broadly, within the Department and across government have participated in this review and we want to acknowledge their important contributions.

While the challenges facing the FPS are daunting, we are convinced that the FPS is up to the task. We hope that this review will be of some assistance.

Sincerely,

Thea Herman

David Gates

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PART ONE: INTRODUCTION

I. Reason for a Review

The Federal Prosecution Service (FPS) of the Department of Justice is facing considerable challenges in meeting the current demand for its services. Demand has increased over the past few years and it is anticipated that this increase will only continue. More significant than the increase in the quantity of cases is the increase in their complexity due to a rapidly changing criminal law environment both nationally and internationally.

Information gathered during Phases I and II of Reference Level Review conducted in the Spring of 1999 by the Treasury Board Secretariat suggests that the gap between available resources and demand will continue to grow unless something is done. However, demand is largely beyond the control of the FPS. The Department of Justice must either find new resources for its prosecution services or address the issue of what services it will supply and how those services are to be provided.

Phases I and II of the Reference Level Review looked primarily at the gap between current demand for services and the resources available. Our Review looks more fundamentally at the mandate and operations of the FPS. It examines steps that can be taken to reduce or contain the growing demand for services and how those services could be provided more efficiently and effectively. It considers how the FPS should position itself to meet the priorities of the government and the challenges of a new century.

II. Organization of the Review

The terms of reference for the Review were approved by the Justice and Legal Affairs Committee, a committee of Deputy Ministers (see Annex A). A steering committee consisting of representatives from the Department of the Solicitor General, the Royal Canadian Mounted Police (RCMP), Health Canada, the Treasury Board Secretariat and Privy Council Office, as well as senior officials from the Department of Justice, was selected to oversee the Review (see Annex B for a list of members). The Review team was instructed to be bold and to place all options on the table.

The subject matter of the Review was divided into 15 areas and one or more topic champions were assigned to each area. The topic champions were responsible for developing a preliminary paper, leading discussions and consultations, and then revising their topic papers. The content of these papers has been incorporated into this report.

A number of major themes emerged during the Review that have led to the principal recommendations of this report. (The full set of recommendations can be found in Annex E). These principal recommendations are grouped into major areas: **Managing Demand for FPS Services; New Working Arrangements; and Better Management Practices and Systems.**



PART TWO: STRATEGIC CONSIDERATIONS

I. Current Role of the FPS

The FPS has responsibility for prosecutions under some 50 statutes while conducting a range of other operations including management of the drug prosecution fund and serving as an important policy centre for criminal law, national security and federal law enforcement.

The FPS is the federal prosecutorial arm. As such, it prosecutes offences under federal statutes, except for the *Criminal Code* which are prosecuted by the provinces. Most FPS cases fall within two categories: criminal drug prosecutions or regulatory prosecutions for a host of client departments and agencies. The regulatory prosecutions comprise a much smaller proportion of overall FPS work.

There are some variations in practice across the country. In addition to the above duties, the FPS prosecutes offences under the *Criminal Code* in the three territories. In the province of Québec, the FPS prosecutes only those criminal cases where the RCMP has laid charges.

The services provided by the FPS are central to the maintenance of public confidence in the administration of justice and to the safety and stability of Canada. The demand for services is externally driven. Cases which the FPS prosecute are initiated elsewhere, i.e. by police (the RCMP, provincial and municipal police) or regulatory enforcement agencies and officials.

The fact that one person holds the dual roles of the Minister of Justice and Attorney General is also a consideration. As Attorney General, the Minister is responsible for providing legal advice to the federal government and for prosecuting offences under its statutes. As Minister of Justice, she is responsible for amendments to the *Criminal Code*. As noted, however, except in the territories,

it is the provinces that have authority for prosecutions under the Code, pursuant to provincial jurisdiction for the administration of justice.

Canada's international obligations are also of increasing significance to the FPS. Under the *Extradition Act*, the Minister is responsible for making extradition requests of other countries. Where a request is made of Canada, the Minister must decide whether or not to surrender the fugitive after a judicial determination. The Department also takes part in negotiating extradition and mutual legal assistance treaties on behalf of the Minister and, pursuant to those treaties, is required to provide counsel to assist foreign states appearing before Canadian courts.

II. Role of the Prosecutor

The absolute independence of the Attorney General in deciding whether to prosecute is well established in Canadian law and practice. This means that the Attorney General must not take directions from the Prime Minister, Cabinet or anyone else with respect to these decisions. However, it is quite appropriate and, in some cases, desirable for the Attorney General to consult with others in arriving at those decisions.

The responsibility of the Attorney General in these decisions also means that she is accountable to Parliament. Decisions relating to prosecutions are to be made on the basis of the evidence, the law and the public interest, and are not to be influenced by improper considerations, such as partisan politics.

In practice, the Attorney General cannot and does not get involved in day-to-day decisions affecting individual cases. In the vast majority of cases, her role as prosecutor is delegated through the lines of authority in the Department to the individual prosecutors in the field. However, the delegation of day-to-day decisions does not mean that the individual prosecutor is completely

independent. All counsel for the Attorney General are accountable to their superiors for the decisions taken. They act under the direction of prosecution group heads and Regional Directors, who are in turn responsible to the Assistant Deputy Attorney General (Criminal Law), the Deputy Minister and, ultimately the Attorney General herself.

Just as the Attorney General may consult, so too individual prosecutors may, and in many cases, should consult. As long as the Minister's core responsibilities as Attorney General are protected, there can be significant benefits to consultation, for example, with policy officers in the Department and in client departments. The role of the prosecutor, thus, requires a balance between the principles of independence and accountability and the practice of consultation.

Also of relevance in discussing the role of the prosecutor is the relationship and distinction between prosecutors and the police. Prosecutors and the police have separate, but interdependent roles in the criminal justice system. Police investigate criminal offences and arrange for accused persons to appear in court, while the Attorney General, through Crown counsel, is responsible for presenting the Crown's case in court. Of necessity, prosecutors need to work closely with the RCMP and provincial and municipal police. The RCMP has federal policing responsibilities and in eight of the provinces also provides police services under contract with the provinces and municipalities.

III. Current Structure of the FPS

The FPS currently consists of a head office, the Criminal Law Branch, located in the Department of Justice in Ottawa, as well as prosecutors in 13 offices in various locations across the country.

At the time of this Review, the FPS employed 316 in-house counsel, 29 paralegals and 116 administrative staff. In addition, the Minister of Justice and Attorney General also appoints members of the private bar to act as agents in assisting the Department in its role as federal

prosecutor. There were 233 legal firms and approximately 763 counsel appointed as standing agents of the FPS. These agents are employed mostly in areas where there is no regional office.

All counsel, whether in-house or agents, work under the direction of group heads and regional directors. They are in turn responsible to the Assistant Deputy Attorney General (Criminal Law).

IV. Operating Environment

The environment in which the FPS operates is a complex one. Indeed, the FPS operates within many separate but related contexts: the federal government; provincial and territorial governments; the Canadian criminal justice system, involving police, courts, corrections, and provincial prosecutors; the defence bar; victims; the public; and an evolving international criminal justice system. The legal context is complex as well, including the *Controlled Drugs and Substances Act*, the *Criminal Code*, the *Canadian Charter of Rights and Freedoms*, about 50 federal statutes under which it prosecutes, and a growing number of international treaties and obligations.

At present, the FPS is unable to meet the current level of demand for its services and yet an analysis of the environment suggests that the challenges it faces will only increase in the future. The FPS is affected by a number of factors:

i. Nature and level of demand

The FPS is, by and large, a responsive service. It responds to demands for prosecution services from police and other enforcement agencies. Thus, its caseload is principally determined by the caseload and enforcement policies of external agencies. It has little ability to limit or reduce demand and, therefore, has a limited ability to control the size of its caseload. Its principle challenge, therefore, is to better understand what the demand will be and how to manage it.

The demands on the FPS are not only increasing in number but, more significantly, in complexity. While the majority of cases continue to be of low



or medium complexity, the cases at the high end of the complexity spectrum are becoming even more demanding (see Section x below).

ii. Unstable funding

There are presently four sources of funding for the FPS (A-Base, Special Initiatives, Drug Prosecution Fund, client funding). FPS has had, for many years, an accrued deficit. Temporary and emergency resources have become increasingly significant in enabling the FPS to meet the demands on a year-to-year basis. The absence of a secure financial foundation has not only inhibited planning relative to the use of resources, but also placed significant stress and strain on staff.

iii. Accountability requirements

There are high expectations from the FPS for accountability for the use of resources and for the services it provides. This is consistent with a more transparent and rationalized approach to government services generally. Prosecutors are increasingly being asked to account for their actions to the public and to the media.

iv. Variations in delivery

There are variations across the country in the way in which federal prosecution services are delivered. In some provinces, formal pre-charge screening by prosecutors is mandatory. In Québec, the FPS prosecutes only those cases that are initiated by the RCMP. In the North, the FPS prosecutes all criminal offences. There is also a variety of formal and informal arrangements across the country for co-operation with provincial prosecution services. In the current federal/provincial/territorial context, a unitary approach to prosecution would be extremely difficult to achieve.

v. Technology

Advances in technology and the widespread use of Internet communications are having a major effect on the work of the FPS. The prospects for

“cybercrime” have increased dramatically. It is anticipated that crimes committed through technological means will attract more regulatory and enforcement attention in the future and will require adaptability and nimbleness on the part of prosecutors.

In addition, technology is changing the day-to-day practice of law. In the office, prosecutors are expected to use technology to record their time and manage their files. Technology allows information and expertise to be shared across the FPS, with agents and with provincial prosecutors. There is movement towards the creation of an integrated criminal justice system, in which enforcement agencies, prosecutors, courts and various jurisdictions will be technologically linked. The FPS will need both the resources and the expertise to function within this technological environment.

vi. Increased Focus on Organized Crime

The federal Solicitor General, the RCMP, policing agencies, and several provincial governments have all indicated that organized crime is a law enforcement priority. There is also an increasing international focus on law enforcement and organized crime which will undoubtedly result in more prosecutions in the future and a need for even closer working relationships with investigative agencies, including the RCMP.

vii. Victims of Crime

Victims have gained an enlarged role in Canada's criminal justice system. In some cases, that role has been translated into legal requirements, such as amendments to the *Criminal Code* giving victims a greater role in the sentencing process.

There has been an increase in the number and activities of victims groups and broader provision of victims services. The role of victims is particularly pertinent to prosecutors in the North, where the bulk of the caseload is made up of crimes of violence or property offences.

viii. Disclosure

Disclosure is a non-discretionary requirement mandated by the *Charter*. In 1991, the Supreme Court of Canada released a landmark ruling in *R. v. Stinchcombe* which has substantially increased the scope of disclosure. The Crown is required to ensure that all relevant information has been received by the accused, as the law deems the information in the possession of the police to be in the Crown's possession for disclosure purposes. In addition, Crown counsel are obliged to carefully review the information in the disclosure package in order to assert claims of privilege.

The Court articulated the following general principles that govern the law of disclosure in Canada:

- Crown counsel is under both a legal and ethical obligation to provide disclosure;
- the obligation is triggered by a request by or on behalf of an accused person; (If an accused person does not have a lawyer, Crown counsel has a duty to advise him or her of the right to disclosure);
- generally speaking, disclosure must be made before the accused elects a mode of trial or enters a plea.;
- the duty to disclose is a continuing obligation (any additional relevant information that comes to light after initial disclosure has been made must be disclosed promptly after it has come to the attention of Crown counsel);
- the Crown's decisions to withhold or delay disclosure are subject to review by the trial judge.
- the Crown must justify any exceptions to the principle of full disclosure.

The consequences to the state for failing to provide full disclosure and thereby breaching *Charter* rights can be substantial, including the awarding of costs against the Crown or the termination of proceedings through a judicial stay of proceedings. Some provincial law societies

have determined that they have the power to review disclosure decisions made by Crown counsel. Further, the Department of Justice is also at risk of being sued in a civil action for disclosing information revealing the identity of a police informer.

Vast quantities of material can fall under disclosure rules even in the most routine cases. The Supreme Court has taken a very generous view of the meaning of "relevance" for disclosure purposes and has stated that the relevance threshold is "quite low" and encompasses a "broad range of material", some of which may "have only marginal value to the ultimate issues at trial".¹

ix. Pre-Charge Role of the Prosecutor

It is important to recognize that the disclosure challenges facing the FPS and its law enforcement partners are symptomatic of a broader issue. The complexities of effective law enforcement have changed dramatically in the past decade (and perhaps beyond that). The refinement and application of *Charter*-based challenges to investigative practices and techniques have increased many-fold the complexity of police investigations. The way that police action is now being scrutinized by the courts is such that the role of the prosecutor as legal advisor to the police at the investigative stage has taken on new significance and new meaning. The FPS and its law enforcement partners must fully understand this dynamic and take appropriate and aggressive steps to meet this new challenge.

x. Complex Cases

Complex cases constitute 7% of the numerical caseload of the FPS, but occupy 60% of the time of prosecutors. A typical complex case involving organized crime can easily involve ten to twenty accused and an equal number of defence lawyers armed with an arsenal of *Charter*-related points of attack. Further, the investigations are on average one to two years in length, involve affidavits for wiretap authorizations that can be over five hundred pages long, capture as many as ten thousand intercepted conversations, require thousands of pages of documentary evidence

¹See *R. v. Dixon* (1998), 122 C.C.C. (3d) 1.



such as financial records, and involve hundreds of pages of notes from surveillance teams.

Complex cases require FPS intervention at the investigative stage because of the legal issues associated with the collection, organization and admissibility of evidence. The involvement in pre-charge investigative activities has not been a traditional role for the Canadian prosecutor. Historically, the investigative arena was the exclusive preserve of the police, just as the prosecutorial arena belonged to agents of the Attorney General. While there seems to be general agreement that these watertight compartments are no longer appropriate, particularly given the overlay of the *Charter* on all investigative action, there is some discomfort among investigators and prosecutors about how a new relationship is to be defined. Accordingly, a clear, shared understanding of respective roles and responsibilities of the FPS and the police or another investigative agency is an essential requirement for a successful result in a complex case.

xi. Dealing with Change

The environment in which the FPS currently operates is in a constant state of change. Criminal enterprises are developing more sophisticated and complex ways to avoid detection and prosecution. Technology is altering the ways in which crimes are committed and investigated, and changing the practice of law itself. The criminal law environment is becoming more global, while changing political priorities may lead to shifting emphases in the criminal justice field.

All of this suggests that hidebound practices, rigid territorial approaches to jurisdiction and static management procedures are antithetical to the FPS's ability to respond to 21st century challenges. Success in meeting these challenges will depend on imaginative strategies devised with openness and willingness to change.

PART THREE: MANAGING DEMAND FOR FPS SERVICES

While the demand for prosecution services is largely beyond the control of the FPS, there are measures that can be adopted and choices made to manage that demand. We explored three major areas in this regard:

- **Role and mandate** – What should be the business of the FPS and what kinds of cases should it handle?
- **Alternatives to prosecution** – Are there certain types of cases currently being prosecuted that would be better suited to alternative approaches?
- **International Activities** – How can the FPS respond to the escalation in the volume and complexity of international cases?

I. Role and Mandate

A review of options for managing the demand for prosecution services begins with establishing a vision for the future role and mandate of the FPS. In charting a new course, we were cognizant of the need to ensure that the vision for the FPS served the national interest and the public, consistent with the overall mandate and strategic directions of both the Department of Justice and the Government of Canada in general.

At the current time, the FPS, either through its in-house prosecutors or through agents, is primarily responsible for drug prosecutions and regulatory prosecutions for the federal government (with the exception of the Territories, where the FPS prosecutes all Criminal Code offences and Québec, where only charges laid by the RCMP are prosecuted by the FPS). This means that the bulk of Criminal Code offences are prosecuted by provincial prosecution services.

Review of Possible Options

We examined a number of possible options with respect to the role and mandate of the FPS.

- (i) **The Status Quo** – The FPS would continue to prosecute in response to the demands of its various partners. However, responding to increasing demands without a strategy which enables forward planning and choices is not sustainable in the long run.
- (ii) **Devolve all Prosecution Functions to the Provinces and Territories** – Do we need an FPS? Could all prosecution functions be devolved to the provinces and territories? This would mean that the federal government would effectively lose all control of the prosecution function. This would be particularly problematic in regulatory prosecutions where, it is suggested, the provinces would have a minimal interest in prosecuting, in international and trans-national prosecutions, and in major criminal prosecutions. The Department would lose its operational arm and its linkages with the RCMP and other enforcement agencies, and retain only its criminal law policy function. The linkage between prosecutions (both drug prosecutions and regulatory prosecutions) and policy (both the drug strategy and client departments' policy objectives) would be severed. As well, the FPS's particular expertise in areas such as wiretaps and international matters would be lost. In the area of drug prosecutions, it is arguable that the federal role in prosecutions provides an important lever to the federal government in taking a national approach to the drug problem. It enables the government to provide leadership and support innovative pilot projects, facilitates the international reporting of drug offense data, and provides consistency across the country in the prosecution of these cases. On a historical note, the Attorney General has, in the past, jealously guarded her ability to both legislate and prosecute in the area of narcotic drugs.



- (iii) Outsource all Prosecution Work to Agents –** Many prosecution agencies around the world, including the FPS, use a form of operational outsourcing (i.e. agents) to conduct part of the prosecution work. Should this be expanded so that the entire function is assumed by agents? The difficulties with devolving prosecutions to the provinces apply here as well as added concerns about the ability to ensure quality. Concerns that exist with respect to the current agents' program would be magnified in an approach which would see a significant expansion of the role of agents.
- (iv) Client Specialization in Regulatory Prosecutions –** Personnel within departments and within DLSUs (the Legal Service Units within each department) could become more involved in compliance activities. For example, at the Competition Bureau, there is a more expansive approach to alternatives to prosecution as well as a specialized unit which handles those cases which go the prosecution route. Critics of this approach argue that it could lead to variations in standards for prosecution and ultimately a reduction in quality. It would also deny prosecutors the opportunity to become involved in challenging regulatory work. On the other hand, some client departments have complained that the regulatory work currently takes a back seat to the drug prosecution work of the FPS, and this would enable them to ensure that these cases receive the appropriate level of attention.
- (v) National Interest Mandate –** As an institution of the federal government, it is arguable that the role of the FPS should be restricted to or focussed on matters that are within the "national interest". The "national interest" would include matters that had national or international implications. All other matters would be handled by provincial and territorial prosecutors who, one could argue, are in a better position to prosecute matters that are of a more purely local character.

Three basic approaches could be taken to operationalizing this concept.

- i. Define "national interest" and reallocate the prosecution responsibilities between the federal government and provincial government on this basis. The result of this approach would likely be that the provinces would prosecute drug cases of a more local nature and that the FPS would retain responsibility for prosecuting regulatory prosecutions and drug cases that had national implications (e.g. organized crime). The FPS would also assume responsibility for cases that the provinces are now prosecuting which have international or national implications, such as cases arising under Mutual Legal Assistance Treaties and cases involving terrorism.
- ii. Align the mandate of the FPS with the federal policing mandate of the RCMP. This is basically the model currently in place in the Québec regional office.
- iii. FPS would have "right of first refusal" over the prosecution of cases and would decide, on a case-by-case basis, whether it had an interest in prosecuting the case and, if it did not, the case would be turned over to a province or territory for prosecution. This is the model used in the U.S.

The benefits of a national interest approach are many. It aligns the FPS with the overall objectives of the government and specifically with those of the RCMP. It could facilitate compliance with Canada's international obligations. It builds on the strengths of the FPS in national and international areas. It permits the FPS to focus its efforts on the more complex cases (although, "national" does not always equate with "complex"). It could enhance the ability of the FPS to attract "the best and the brightest" by giving them opportunities to work at the highest level of prosecution. It permits the

FPS to focus its operations in a manner consistent with the key core values of the criminal law. Arguably, a province or territory would be in a better position to prosecute cases of a local nature.

The challenges, however, are not insignificant. As noted earlier, it is not easy to define the "national interest". A broad definition could lead to more responsibilities, not less. To the extent that a change in mandate requires a reallocation of prosecution responsibilities between the federal and provincial governments, difficult negotiations would be required and might not be successful. Beyond concerns about resources, provinces might not be eager to assume what might be perceived as the FPS's low-level work and hand over the more complex, high-profile cases. A devolution of the current responsibilities could result in the loss of an opportunity to promote national policies. A focus on more complex cases presents a challenge in terms of finding training opportunities for junior prosecutors. More complex cases can also be accompanied by high levels of stress and burnout. A change in focus could also result in a reallocation of resources across the country which could, in turn, have an impact on employees. There would likely be concerns from client departments and agencies that their priorities were being downgraded, unless all regulatory prosecutions were included within the national interest mandate of the FPS.

- (vi) **Collective and Collaborative Management with the Provinces and Territories** – This option would have the FPS work with the provinces and territories to address the overall management of prosecutions in Canada in order to ensure that the interests of the federal government were being served and that Canadians had an effective, accessible and fair justice system. This approach could take various forms such as: joint management of prosecutions; a team approach to the prosecution of complex cases; devolution of some cases to the provinces (e.g. cases in outlying areas); operational efficiencies; protocols concerning the prosecution of certain cases.

Some initiatives already in place suggest that cooperative arrangements can be found to ensure vigorous and effective prosecution of federal offences by provincial authorities. Most of the jurisdictions have formal or informal arrangements where provincial or territorial prosecutors deal with some matters on behalf of federal prosecutors, such as setting dates and adjournments. They also have agreements in place to deal with situations where a person is charged with both a provincially-prosecuted offence and a federally-prosecuted offence. In Alberta, for example, there is an agreement between the two orders of government that the province will prosecute all Youth Court matters. Similarly, in British Columbia, the province does most of the Youth Court prosecutions. This is not to suggest that the discussions would be easy. There would likely be varying interest across the country in addressing the overall prosecution function in the country and in formalizing collaborative approaches. It is unlikely that the same arrangement could be put into place in every jurisdiction.

New Role and Mandate

Recommendation #1 – The FPS should meet with the provinces and territories, both multilaterally and bilaterally, to examine how the prosecution function and prosecution resources in the country could be collectively managed and rationalized, consistent with the goals of achieving a justice system that is fair, equitable and accessible, and which would provide high quality services more efficiently and effectively. These discussions should include the consideration of a variety of approaches including: joint management of prosecutions; joint prosecution of cases; maximizing efficiencies through increased collaboration; and devolution of responsibility for certain types of cases and/or bodies of work.

II. Alternatives to Prosecution

An important strategy for managing the increased demand for FPS services would be to utilize alternatives to prosecution when and where appropriate. Within the broader spectrum of policy options, prosecution is a rather blunt and expen-



sive instrument that should be reserved for those situations where it is clearly the most effective measure given the circumstances.

We wish to strongly emphasize the importance of this strategy. The greatest potential for alleviating the workload of the FPS can be found in alternatives to prosecution. The increased demand for FPS services is a result in large part of an under-utilization of these kinds of measures. Strong participation of FPS agents across the country in the utilization of alternatives to prosecution would be necessary to manage the increasing future workload of the FPS.

Generally, the broad objective of a regulatory scheme should be to obtain compliance, to ensure that actions and behaviours are in conformity with prescribed norms and standards. But, in the criminal law context, compliance with prescribed standards of behaviour is only one aspect of the objective. Other aspects include the protection of society, the denunciation of certain types of behaviour, deterrence, and societal sanction or punishment. These different objectives require different strategies for approaching criminal and non-criminal offences.

From a practical standpoint, the utilization of alternatives works in concert with the existing Criminal Litigation Policy established by the FPS. This Policy, which deals with cases already destined for prosecution, creates the framework within which prosecutorial discretion is to be exercised. It is based on the following three principles:

- the criminal justice system needs to be more efficient in its use of available resources. (new practices must be adopted to achieve that end);
- resources are invested at the front-end of the process in the expectation that this will minimize the subsequent consumption of resources;

- better and earlier co-operation with investigative agencies, including joint planning, is an essential component of this policy.²

This Policy has been implemented with varying success across the country. It is suggested that this Policy should be applied more aggressively and that there be a greater emphasis on a strategy that emphasizes alternatives to prosecution.

Criminal Litigation Strategy

Recommendation #2 – The FPS should utilize the Criminal Litigation Strategy as a key mechanism for managing demand by:

- assigning very senior and experienced prosecutors to its development and on-going management;
- considering the creation of senior practitioner positions across the FPS to underscore its importance;
- extending the Strategy to Nunavut; and
- developing performance measures to identify and track the impacts and results of the Strategy.

i. Prohibited Drugs

Canada's approach to prohibited drugs is a combination of enforcement, prevention and treatment. The *Controlled Drugs and Substances Act* (CDSA) sets out the substantive framework that defines the scope of the prohibited activities. The CDSA also provides the statutory basis for the fulfilment of Canada's obligations under the international drug conventions which have a significant impact on what Canada can and cannot do in this area.

Health Canada has the overall responsibility for drug policy. Canada's first Drug Strategy was launched in 1987 and renewed in 1992. On its expiration in 1997, funding for prevention, harm reduction and enforcement activities was reduced. A new public document, entitled

² Federal Prosecution Service Deskbook, June, 2000.

"Canada's Drug Strategy" was issued in 1998. The long-term goal of the strategy is to reduce the harm associated with alcohol and drugs to individuals, families, and communities. It recognizes that substance abuse is primarily a health problem. Its objectives include reducing the demand for drugs, restricting the supply of illicit drugs and reducing the profitability of illicit drug trafficking.

With respect to enforcement, the RCMP generally focuses on large-scale trafficking cases and cases with national or international dimensions. Provincial and municipal police are responsible for the enforcement of most of the less serious cases, except where the RCMP carries out provincial policing activities under contract with the provinces.

Recent statistics on police charging practices demonstrate that there continues to be a strong emphasis on enforcement. Between 1998 and 1999, drug offences increased significantly, with the number of drug incidents reported by the police increasing by 13%. The overall increase was mostly the result of an increase in cannabis offences, where the number of actual incidents increased by 17%.³ Aggregate police data also show that about 43% of narcotic possession charges are accompanied by one or more other charges. However, the data is not broken down by the kind of drug, so that the number of charges for possession of cannabis that are accompanied by other charges is not known. An increase in reported drug offences may not necessarily reflect an increase in drug use, but could indicate a change in the level of enforcement.

There is considerable support for decriminalizing the possession of cannabis, removing the negative consequences of a criminal record, although support is not unanimous. The supporting view sees the consequences of a breach of the law with respect to possession of cannabis as disproportionate to the offence, primarily because of the resulting criminal record. It is also argued that limited resources (police, courts, legal aid and prosecution) could

be better spent elsewhere and that the law is currently being applied unfairly and unevenly.

Prosecution is only one instrument to achieve policy goals. It needs to be seen in a larger context and as one of a number of alternatives, ranging from education to criminal prosecution. Alternatives to prosecution are well suited to some drug offences, where the problems may be considered to be more a matter of health than criminal law. Prosecutions of minor drug offences, particularly those handled by agents make up a large proportion of FPS cases in the courts. The decriminalization of the possession of cannabis in small amounts, for example, would result in a reduction in demand for FPS services.

Alternatives to prosecution should be part of a comprehensive and integrated drug strategy. There are a number of alternatives to prosecution that could be used more effectively in dealing with drug offences, such as diversion into addiction treatment programs, the use of community service orders and the remedies utilized by drug treatment courts. There is currently one Drug Treatment Court in Canada, located in Toronto, but it is hoped that this model will be applied elsewhere in the country. It is an excellent example of the justice system working together with other players: the police, treatment facilities, legal aid, social services and communities. With the effective use of a full range of social responses, prosecution would be reserved for the most serious offences.

The implementation of a national drug strategy would require partnerships with all orders of government, prosecutors, enforcement agencies, health and social service agencies as well as local community organizations. As a first step, the Department of Justice should work with Health Canada to initiate the development of a comprehensive strategy.

Alternatives to Drug Prosecutions

Recommendation #3 – The Department of Justice should work with Health Canada to develop a range of measures to deal with

³ Aggregate Uniform Crime Reporting (UCRI), Canadian Centre for Justice Statistics, 1998/99



prohibited drugs in addition to prosecution as part of a comprehensive and integrated health strategy.

ii. Regulatory Prosecutions

The Department of Justice is responsible for providing legal advice to regulatory authorities concerning regulatory solutions, harmonization of regulatory requirements, compliance and enforcement techniques, and the use of performance and international standards. The FPS is responsible for the conduct of all regulatory prosecutions on behalf of the government of Canada. Cases are handled both by FPS counsel and agents.

There has been concern that courts do not take regulatory prosecutions as seriously as criminal prosecutions or fully appreciate the regulatory context. Consideration should be given to using other mechanisms to adjudicate or resolve regulatory disputes and to create non-criminal sanctions which might be equally or more effective.

An instrument of choice approach should be adopted, in which a range of tools is available to achieve policy compliance, with prosecution as but one option. Prosecution may be too blunt an instrument and it is not always effective in achieving long-term compliance. Clients must understand the implications and costs of choosing the prosecution route. This represents a fundamental change in thinking for both the FPS and its clients.

Excellent models for an instrument of choice approach already exist. The Competition Bureau, for example, has developed a "Conformity Continuum". That Continuum provides a comprehensive, integrated approach to achieving the ultimate goal of compliance with the legislation. It enables the Bureau to choose the appropriate instrument or combination of instruments to address the issues raised by a specific situation. A range of instruments is

provided, from proactive efforts such as education and monitoring to responses to specific instances of non-compliance. Information on the Continuum is provided to the business and legal communities and to the general public so that they are aware of the instruments available.

The ultimate goal of regulatory prosecutions should be compliance with the policy objectives of federal legislation. An emphasis on positive strategies to achieve compliance in many situations may be a more effective means than prosecution. The Department of Justice should work with its client departments to review their respective legislation, practices and policies and provide for the increased use of other instruments such as alternative dispute resolution, civil remedies and other instruments of choice, reserving prosecution for the most serious violations.

Alternatives to Regulatory Prosecutions

Recommendation #4 – The FPS should work in collaboration with client departments and departmental legal service units to develop a range of measures to achieve regulatory compliance, with prosecution as only one of many strategies.

III. International Activities

The International Assistance Group (IAG) of the FPS carries out the responsibilities of the Minister of Justice as the central authority for Canada in extradition and mutual legal assistance matters. IAG reviews and coordinates all requests for extradition or mutual assistance made to or by Canada in criminal matters, negotiates treaties, and assists in the development of extradition and mutual legal assistance policies and legislation.

The legal framework for extradition is set out in the *Extradition Act*. Most of Canada's extradition treaties provide for a request to Canada in urgent

circumstances for the provisional arrest of a person pending an extradition hearing.

The Mutual Legal Assistance in Criminal Matters Act, enacted in 1988, implements requests made by a foreign state pursuant to a treaty or special arrangement. The treaties provide that Canada can receive and provide assistance in gathering evidence in criminal cases. The Minister of Justice is responsible for the administration of the Act and for receiving and presenting requests for mutual legal assistance. Since 1988, Canada has entered into 20 Mutual Legal Assistance Treaties (MLATs).

In the last decade, international assistance work has increased exponentially. However, the work of the IAG and the corresponding work undertaken by the regions have never been examined or approached in a planned or strategic way. As a result, the IAG has evolved in an ad hoc manner. The IAG was initially formed to deal with casework and bilateral treaty negotiations, but international developments have resulted in an expansion of the group's mandate well beyond these matters, to participation in multi-lateral policy work, international training and multilateral negotiations.

While its mandate expanded, the level of funding and resourcing did not. In fact, the international assistance function has never been "A-based". Instead, resources have been taken from elsewhere to support it. At the same time, there have been only limited attempts to set priorities. While the IAG itself has been under-resourced, so too have the regions, where funds have not been specifically allocated for this type of work. The work has not been adequately integrated with the Department's other international activities, although some positive steps have been taken recently towards improved co-operation and communication.

A further difficulty has arisen with respect to co-operation from the provinces. The province of British Columbia, for example, has advised the FPS that due to staffing problems, BC Crown Counsel are unable to handle any mutual legal assistance requests made by other countries.

They will refer all requests to the federal Department of Justice. This will place further workload pressures on the regions and the IAG. It is also evident that in some other jurisdictions, provincial attorneys general attach very low priority to cases arising out of MLATs.

It is critical that the importance of the international assistance function be recognized and that resources be allocated accordingly. Further, it is essential that both strategic and operational planning exercises be carried out so that the mandate is clarified and priorities set. These exercises should include a clarification of the respective roles of the IAG and counsel in the regions and the method for coordinating work between headquarters and the regions to optimize both efficiency and effectiveness. Discussions should also be undertaken with the provinces with respect to MLAT work and the possibility of the FPS assuming responsibility for this function should be explored. Finally, the work of the IAG should be examined within the larger context of the international work that the Department undertakes to ensure that the necessary coordination and communications occur.

Review of the International Assistance Function

Recommendation #5 – The FPS should review the international assistance function within the context of the Department's international functions and the role of the FPS in international assistance. In particular, the review should consider: the role and responsibilities of the International Assistance Group; the role and responsibilities of the regions; how this work should be organized and performed; resource allocation; opportunities for efficiencies; and the involvement of the provinces. Following this review, strategic and operational planning should be undertaken on a regular basis. This planning should include the identification of priorities and resources.



PART FOUR: NEW WORKING ARRANGEMENTS

The FPS does not function in a vacuum. It is a vital unit of a major government department that includes other important divisions as well. In addition, it has many external associations in carrying out its functions. Improved working arrangements and greater integration are required by the FPS with a number of areas. The FPS must strengthen its relationships with other sectors and branches of the Department of Justice, particularly in the area of policy development. Stronger partnerships are also required in the FPS's relations with external partners. Finally, there is a need for greater integration within the FPS itself, particularly in the way human resources are utilized and managed.

I. Integration of Policy and Prosecutions

To be successful, the FPS needs to be fully connected to the policy and program objectives of the Department and to the broader agenda of the Government of Canada. It is important both that the development of policy be informed by the experience of prosecutors and that the policy dimensions of prosecutions be recognized.

The Department has been called "a loosely connected group of independent practices".⁴ There is, in particular, a perceived sense of isolation of the FPS both within the Service and more broadly in the Department. Its role is not well understood either in the Department or by other federal departments and agencies. While it is important not to impinge on the independence of the Attorney General in the prosecutorial function, it is also important that this role not be misunderstood in a way that prevents the establishment of important linkages.

The policy dimension of prosecutions becomes even more critical with the evolving role of

prosecutors and the move to position the role of prosecutions within a larger policy context. Indeed, if one is to arrive at a coherent approach to drug prosecutions or regulatory prosecutions which includes the exploration and implementation of alternatives to prosecutions, it is essential to integrate policy and prosecutions.

On the other side – the impact of prosecutions on policy development – there is a sense that the Department has significant resources and expertise at its disposal that are not currently being maximized. Prosecutors have indicated that they are occasionally consulted and that the requests for input often involve very short time-lines that they are unable to meet. For their part, policy staff often feel frustrated in their attempts to receive feedback from prosecutors. Requests for input may have a low priority given the other demands on a prosecutor's time.

Prosecutors also complain that when they do provide input to the policy sector on amendments that need to be made, these changes are often not reflected in the subsequent Bills. This concern may relate, in part, to a lack of understanding or feedback on why the proposals could not be included.

The prosecutors in the territories should be a key resource within the Department for policy formulation since they prosecute all Criminal Code offences and work in a part of the country with a predominantly aboriginal population. While they are sometimes asked to provide input, in reality, given their workload, they are generally unable to be of much assistance.

The relationship between policy and prosecutions is particularly evident in the area of criminal procedure reform. The purpose of criminal procedure reform is to streamline the administration of criminal justice and to reduce the burdens on victims and witnesses while, at the same time, ensuring that the system is fair,

⁴ CAC, "Reference Level Review of Operational Services, the Department of Justice", December, 1999.

equitable and accessible. While the responsibility for criminal procedure reform rests with the policy function in the Department, it is the prosecutors who have the day-to-day experience and whose input into the process would therefore be valuable. There is a sense that the Department currently has significant expertise at its disposal which is not being optimized.

The process for criminal procedure reform is a particularly complex one, since a reform package is generally developed in partnership with provincial and territorial officials. It has sometimes proven difficult to develop and then maintain a sufficient level of consensus for reform. A federal/provincial/territorial process needs to be devised that can develop and maintain a sufficient level of consensus to carry the reform proposals through to their implementation. In the development of such a process, the important contribution that prosecutors could make should not be forgotten. In fact, it needs to be enhanced.

There are many good ideas from a variety of sources. These include reforms to:

- preliminary inquiry process
- reclassification of offences
- limitation periods
- incorporating technological advances
- disclosure
- appeal rights
- use of the *Contraventions Act*
- caseload management
- pre-hearing conferences
- creation of Unified Criminal Courts and specialized courts
- increased use of written material
- adjournments on consent without court appearances
- adequate funding for prosecutions and Legal Aid

As key players in the justice system, prosecutors need to be involved in addressing these issues.

The Department has determined that "Capitalize on our Strengths" is one of its five strategic directions for the years 2000-2005. Included within this is the following commitment: "We will integrate the law and policy dimensions of our work to better meet the needs of government." To succeed as a national prosecution service in collaboration with the provinces and territories, FPS activities will have to be more fully integrated with the policy and program objectives of the Department of Justice, with the broader agenda of the Government of Canada, and with the objectives of other orders of government.

Integration of Policy and Prosecution

Functions

Recommendation #6 – The FPS and the Department of Justice must take steps to achieve greater integration within the Department of Justice while still respecting the principle of prosecutorial independence, so that policy and prosecution initiatives inform each other in an on-going and substantive way. In particular, the expertise of prosecutors should be used in criminal procedure reform and the expertise of Northern prosecutors should be used in the development of criminal law and Aboriginal justice policy.

Independence of Prosecutors

Recommendation #7 – The FPS should undertake a dialogue involving all staff in all regions concerning the evolving role of prosecutors and in particular the concept of prosecutorial independence.

II. Relationships with Client Departments and Departmental Legal Service Units (DLSUs)

There is no formal protocol between the FPS and government departments that establishes a consistent national approach to regulatory prosecutions. There is consultation and communication, but what exists is an ad hoc approach



that relates largely to the initiative taken by specific Departmental Legal Service Units (DLSUs) and government departments to track prosecutions on a national basis and share the information with prosecutors. There is a greater need for financial accountability and for progress reporting by both clients and the department.

There is a need to clarify the respective roles of DLSU counsel, client department officials and members of the FPS specifically in relation to the conduct of regulatory prosecutions. Considerable confusion exists concerning the appropriate level of input of the client in the decision-making processes associated with a prosecution. This confusion in the definition of roles lies at the heart of the difficulties that confront the relationship amongst the FPS, departmental colleagues in DLSUs, and officials in client departments.

There is no inconsistency between the concept of prosecutorial independence and a strong client orientation, in the regulatory prosecution context. Close linkages to the DLSU and client department are entirely appropriate. While the ultimate decisions relating to the initiation and termination of a prosecution rest with the Attorney General and her agents, prosecutors can and do consult DLSU counsel and client officials at important decision points in the life of a prosecution. The department responsible for the regulatory regime is accountable to its Minister, and thereby to Parliament, for the regulatory program. As such, the department has a clear and substantial interest in the enforcement of its legislation. DLSU counsel have a special understanding of the realities of the client department and of the regulatory regimes that are in place.

Many client departments also make significant financial contributions to the prosecution effort. As such, they are accountable for the expenditure of these public funds. It is difficult to

determine with certainty the total costs incurred to conduct regulatory prosecutions, since no dedicated tracking system exists within the Department of Justice to quantify and cost regulatory prosecutions. The Department of Justice dedicates approximately \$710,000 per year to the FPS across the country for the regulatory prosecution activity in 2000-2001. In addition, a total of \$8.4 M annually was spent on agents over the past 3-4 years.

The Justice A-base was allocated on a client department and portfolio basis in 1995-96. Anomalies that existed at that time in terms of the relative share of client departments in this limited funding source have been perpetuated in the process. Moreover, shifts in regulatory activity that have taken place since 1995-96 have tended to exacerbate the situation. As a result, some departments such as Fisheries & Oceans Canada receive only a very small percentage of their funding for regulatory prosecutions via the Justice A-base. The balance is funded through a separate Client Driven Services (CDS) agreement with the Department of Justice.

There has been a great deal of debate over the years about the shifting of responsibility for the costs of prosecution activity from the Department of Justice to client departments. Some argue that this activity should be funded entirely by Treasury Board. Others suggest that the combined costs of prosecutions, the Justice A-base and client funding should be transferred to Justice to reduce the administrative burden associated with cost recovery transactions and the administration of annual client service agreements.

Additional attention must be devoted to the inequities that exist between client departments in terms of their proportionate share of the total cost of regulatory prosecutions. However, shared financial responsibility does tend to create shared responsibility for the overall management of regulatory regimes. The policy development

process within departments in terms of choice of instrument to secure compliance should be guided to some extent by the cost implications of resorting to prosecution. This is a healthy tension that may require adjustment, but is otherwise fundamentally sound.

During this Review, certain DLSUs expressed real concern that client resources are being diverted from regulatory work to other work undertaken by the FPS. There is a clear need for increased transparency and accountability on the use of the Justice A-base for prosecution work.

Finally, there is a need for all departments and agencies to address the resource implications for the FPS of new policy and legislative schemes when creating additional enforcement provisions. The time lag between the enactment of legislation and regulations and actual cases arising for prosecution should allow the appropriate government departments and DLSU and the FPS sufficient time to undertake some planning for anticipated resource requirements.

Departmental Role in Regulatory Prosecutions

Recommendation #8 – The FPS should establish a working group in collaboration with departmental officials to examine the respective roles of FPS and departmental counsel and agents in the conduct of regulatory prosecutions.

Regulatory Prosecutions Group

Recommendation #9 – A Regulatory Prosecutions Group should be established to:

- develop a system for workload projections and forecasting;
- examine best practices in communications between the FPS and DLSUs;
- work with the Training Coordinator to develop and deliver a training program for prosecutors on regulator prosecutions and for client investigators and inspectors on basic legal principles and practices;

- develop a “lessons learned” protocol for significant regulatory prosecutions;
- reinstitute the Prosecution Guides for regulatory prosecutions

Review of Shared Responsibility/ Client-Driven Service Process

Recommendation #10 – Corporate Management in the Department, in conjunction with the FPS and client Departments, should examine improvements to the system of shared financial responsibility for regulatory prosecutions as well as review the administrative procedures associated with the Client-Driven Services (CDS) process in order to streamline the procedures.

III. Relationships with the RCMP and other Agencies

The RCMP is a key partner of the FPS in the delivery of prosecution services across the country. The RCMP is not only the national police force responsible for federal policing, but also the provincial police force in all provinces and territories except for Ontario and Québec. In addition, they fulfill municipal policing responsibilities under contract to a large number of communities, particularly in Western Canada.

From the outset of our Review, the linkage between the FPS and the RCMP was identified as a key relationship that warranted particular examination. Consultations were held during the spring of 2000 with the Council of CROPS – Criminal Operations Officers – in each of the four RCMP regions. FPS Group Heads participated in each of the meetings. The sessions were highly productive and many valuable comments and suggestions were received. Similar meetings should take place between FPS Group Heads and other enforcement agencies across the country on a regular basis.

The RCMP is generally very supportive of examining new service delivery models for federal prosecution services. For example, they would encourage initiatives to integrate



federal/provincial prosecution teams to address borderless crime. They also have concerns about the capacity of standing agents to handle complex cases and support the idea of using provincial prosecutors to handle work currently in the hands of agents in locations where there is no FPS presence.

There is a widespread sense of frustration over a number of issues relating to disclosure. There is clearly a need for dialogue between the two organizations at every level to try and address this issue. The FPS needs to better explain the broad implications of the *Stinchcombe* decision to RCMP colleagues and the practical limitations placed on the Crown to effectively resisting requests for material of even marginal relevance. There is, in addition, a serious issue around the funding of disclosure.

There is a very clear recognition on the part of the RCMP of the need to engage FPS colleagues, both at the national and regional levels, in strategic planning to ensure that FPS resources are ready and available to respond to the fruits of RCMP investigative activity. Generally, there is a readiness to formally link the FPS at key points into the well-defined RCMP planning cycle.

An agreement was reached during the consultations associated with the Review to formally meet with FPS Group Heads on an annual basis to discuss RCMP regional priorities for the coming year. From the FPS perspective, this type of formal consultation will undoubtedly be of assistance in terms of the planning process. However, this must be supplemented by a commitment on the part of both the RCMP and the FPS to on-going dialogue during the life of an investigation to refine workload projections. Moreover, no single source of information should be relied upon to provide FPS managers with workload projection data. Rather, information provided by the RCMP should be supplemented through effective linkages to Integrated Proceeds of Crime (IPOC) counsel,

agent supervisors, and counsel actively engaged in the preparation of wiretap applications. These are important planning tools that need to be fully utilized to properly inform FPS management in the planning process.

As noted earlier, the respective roles of the police and the prosecutor are evolving in response to the changing nature of crime. The increasing complexity of legal issues associated with investigative practices and techniques, in particular, will necessitate an increasingly active role for the prosecutor in the provision of pre-charge legal advice.

There are and will continue to be natural, healthy tensions between police and prosecutors. They represent two very important but distinct components of the justice system. They have significantly different responsibilities within the criminal justice system, yet are clearly partners in a common enterprise. Our sense during the Review was that insufficient attention on the part of both organizations is being paid to building and sustaining strong and effective working relationships between the two organizations. To some extent, this is an understandable result of the work pressures faced by each organization. However, it is abundantly clear that the need for strong, effective working relationships is more critical now, given the significant challenges to and external scrutiny of the investigative and prosecution components of the justice system. There is a need for enhanced communication at all levels throughout the organizations. There is also a clear need for a renewed commitment to build and maintain strong and effective partnership at all levels of both organizations.

New Working Partnerships

Recommendation #11 – Stronger working partnerships should be developed and nurtured by the FPS with external prosecution agencies, client departments and other participants in the justice system.

Regional Memoranda of Understanding

Recommendation #12 – The national umbrella memorandum of understanding between FPS and the RCMP should be concluded and regional memoranda of understanding should be developed with the RCMP and other policing and investigative agencies to clarify responsibilities, to develop complementary strategic plans, and to promote collaborative approaches and operations.

IV. Managing Complex Cases

The sheer magnitude and duration of most complex cases necessitates the assignment of a group of FPS personnel, lawyers, paralegals and support staff, to bring together the range of skills and experience that the case will demand. Complex cases often result in files that can easily last three years or longer before decisions are rendered. Evidence will frequently be located in a foreign jurisdiction.

Complex cases frequently involve sophisticated criminal organizations that are prepared to resort to intimidation tactics and serious threats of bodily harm to assigned prosecutors. Destabilizing the justice system is clearly an objective of organized crime. This is a very serious issue affecting both the personal safety and security of employees and also the overall morale of the FPS. In general, complex cases remain very stressful experiences for those assigned to lengthy trial proceedings.

i. Co-operation Between the FPS and Investigative Agencies

The RCMP has determined that it will focus on international and inter-provincial investigations involving large quantities of drugs and organized crime. This RCMP priority has broad and significant implications for the FPS as it brings with it long-duration, complex prosecutions which are resource intensive.

Complex cases necessitate FPS intervention at the investigative stage because of the legal issues associated with the collection, organization and admissibility of evidence. The need for pre-

charge co-operation between the police and the prosecution has been recognized by the majority in the Nova Scotia Court of Appeal case of *Regina v. Regan* (1999) 137 C.C.C. (3d) 449 at 513. The majority stated:

“Several factors require close co-operation between investigators and prosecutors. The complexity of many modern prosecutions, particularly in drug and commercial crime cases, the requirements that the police comply with the *Charter*, and the requirement for pre-authorization of investigative techniques, especially wiretap, are examples.”

Pre-charge legal advice is needed in a variety of circumstances, including:

- the legality of the investigative plan;
- the proper ways to collect, organize and classify investigative material for the purposes of subsequent disclosure;
- the preparation of affidavits for judicial authorizations to intercept communications and to obtain search warrants;
- the drafting of requests for legal assistance from other countries;
- evaluating the legality of interception and the relevance of intercepted communications;
- the reasonable development and use of source-agents and protection of the identity of pure sources;
- proper source debriefing and the taking of KGB statements;
- pre-charge screening.

Increased involvement of the prosecutor in pre-charge activities may result in pre-trial *Charter* attacks to the investigation by the defence. One option is to designate lawyers to be involved only at the pre-charge stage, with others designated for the actual prosecution. The major



drawback with this approach is the lack of continuity. The Québec Regional Office has decided against this option and has the same prosecutor involved at all stages.

Others also have concerns with the use of dedicated prosecutors to provide full-time assistance to investigative agencies. Within both the FPS and the RCMP, serious concerns have been raised about the blurring of the investigative and prosecution functions. While it is beyond the scope of this Review to deal with this issue in a comprehensive fashion, it is clear that the increased involvement of prosecutors at the pre-charge stage represents the way of the future and the evolving relationship between prosecutors and the police must be examined.

There are a variety of working arrangements across the country between the FPS and the RCMP. The most formal arrangement is in Québec, where there is a written agreement on the roles and responsibilities of both organizations throughout the various stages of the investigation and prosecution.

Mandatory pre-charge screening of cases exists in BC, New Brunswick and Québec. In Ontario, there is informal pre-charge screening of major drug files. In the Yukon, the RCMP seeks the advice of the FPS. In Alberta, Nunavut, Nova Scotia, Prince Edward Island, Newfoundland and Saskatchewan, there is no formal pre-charge screening for drug cases, but it exists for income tax and other regulatory files. The experience of the three jurisdictions that have formal pre-charge screening has been very positive. While there are differing views on whether it should be introduced elsewhere, all regions agree that there is a need to assist police on complex files prior to charges being laid.

In Québec, where pre-charge approval is mandatory, no charges will be considered unless a complete court brief provided in the prescribed form is furnished in a timely fashion with the

request to prosecute. Further, if pre-trial detention is to be sought, then a report containing all information relevant to the bail hearing must be submitted prior to the authorization to charge. The discipline associated with this regime ensures that the Crown has in-hand all of the essential material that it requires before the cases reach the courts. This minimizes "surprises" which can emerge well into a case and which can have significant impact on the viability of proceeding. Experience has shown that the organizational readiness of the Crown from the outset has a direct bearing on the length (and thus the cost) of the court process.

There are different views within the FPS and within the RCMP on the merits of mandatory pre-charge screening. The essence of this issue is an effective partnership between the FPS and the RCMP and other investigative agencies to ensure that the Crown is fully "up to speed" and actively engaged in a complex case before charges are laid.

ii. Assignment of Personnel

Complex cases can easily last three years or longer. Serious difficulties have been encountered in keeping the same investigators and/or lawyers on the file from start to finish. Ensuring continuity of personnel on both the investigation and prosecution teams is an important objective, both from a resource efficiency point of view and in terms of building a solid relationship of trust and commitment amongst the key players.

iii. International Evidence Gathering

The nature of complex drug cases is such that the evidence will frequently be located in a foreign jurisdiction. The collection of evidence in foreign jurisdictions must be gathered in such a way as to ensure its ultimate admissibility in Canadian courts. It is a costly exercise.

A great deal of the international assistance that Canada receives is arranged through worldwide police networks, notably Interpol. The FPS involvement is pursuant to the *Mutual Legal*

Assistance in Criminal Matters Act and related treaties, as well as the commission evidence provisions set forth in the *Criminal Code* and *Canada Evidence Act*. As with many issues touched on in this Report, the legal complexities associated with the gathering of evidence abroad, as well as its subsequent use in legal proceedings, calls for the collaborative action of investigators and prosecutors.

At present, neither the Québec MOU nor the draft National MOU with the RCMP address the issue of evidence gathering abroad. Given that evidence gathering abroad is growing steadily, this issue needs to be addressed on a formal basis. In particular, the FPS and the police need to consider establishing joint guidelines as to when the use of an MLAT request is appropriate.

iv. Continuous Training of the Police by the FPS
Since the *Canadian Charter of Rights and Freedoms* came into effect nearly 20 years ago, the Courts have afforded the police considerable latitude in terms of their overall approach to the exclusion of evidence obtained in violation of *Charter* principles. However, the court's patience with investigative agencies is not unlimited with regard to systemic shortcomings in police training.

The Québec MOU specifically provides for basic legal training for the RCMP by FPS counsel. The need for ongoing training has been identified in the following areas: search and seizure; wiretap; disclosure; informer privilege; source-agents; statements; and real and testimonial evidence. Elsewhere in the FPS, training of police happens on a more ad hoc basis.

While the use of FPS lawyers as instructors further taxes the resources of the regional office, this resource expenditure is a sound investment in long-term objectives.

v. Assisting the Courts in the Management of Major Cases

Pre-charge co-operation between the police and the FPS provides for the stronger possibility of pre-determining the arrest dates. In turn, this

facilitates dialogue between the FPS and the courts regarding the anticipated need for court resources. The senior Crown is able to meet with the court well in advance of an actual "take-down" and to provide advance notice of the likely need for arrest and search warrants, as well as court time for bail hearings, preliminary inquiries and, ultimately, trials. As a result, the court can plan for the use of its resources in the future.

vi. Staffing and Funding in Major Cases

The successful conduct of a complex case requires a team of prosecutors working in conjunction with an investigative team. The sheer magnitude and duration of most complex cases necessitates the assignment of a group of FPS personnel, lawyers, paralegals and support staff, to bring together the range of skills and experience the case demands. Each complex case team should include a team leader (senior lawyer); a lawyer to deal with all disclosure issues; a junior lawyer to support the team and provide ongoing assistance; and an appropriate number of paralegals. Human resources policies and procedures need to facilitate rapid and flexible deployment of staff to complex case teams.

All team members require a comprehensive understanding of the file as a whole. Consideration must also be given to the prospect of large cases being split up by the courts, potentially necessitating the creation of more than one team. The inter-provincial nature of organized crime will frequently require counsel who are bilingual.

vii. The Impact of Charging Practices

In late 1999, the Department of Justice undertook a review of issues with respect to the emergence of extraordinary, high cost criminal cases. While the main focus of the review was the implications of cases on the national legal aid program, the review also looked at some of the broader issues impacting on the total cost of prosecution. Rick Thomas, Chief Negotiator, Legal Aid, Policy Branch identified charging



practices of prosecutors as one of the cost drivers in criminal cases. Mr. Thomas wrote:

“Crown prosecutors who are extremely zealous in pursuing prosecutions may also be contributing to increased cost of cases. Factors that can contribute to more expensive cases include filing many separate charges, calling excessive numbers of witnesses and filing frequent appeals. Crown prosecutors may also choose to proceed by direct indictment, which often has the effect of lengthening the trial, as matters that would have been dealt with in the preliminary inquiry become part of the trial itself.”⁵

There does not appear to be any empirical data to either support or refute this suggestion. Nonetheless, the essentially unregulated domain of charging practices likely has a bearing on the length, complexity and cost of cases. A detailed examination of this issue is required.

viii. Human Resource Management Considerations

The management of complex cases has an important human dynamic that requires the urgent attention of the leadership of the FPS and the Department of Justice. Complex cases frequently involve sophisticated criminal organizations who are prepared to resort to intimidation tactics and serious threats of bodily harm in relation to assigned prosecutors. Destabilizing the justice system is clearly an objective of organized crime. This is a very serious issue affecting not only the personal safety and security of employees, but also the overall morale of the FPS. A more fulsome description of the situation and corresponding recommendations are set forth in the section of the Review dealing with Human Resource Issues. In the absence of specific threats to the safety and security of prosecutions, complex cases

remain very stressful experiences for those assigned to lengthy trial proceedings. Managers must be attuned to the tell-tale signs of extreme stress and burn-out and seek innovative ways to provide stress relief and “down-time” throughout a lengthy proceeding and once it has been concluded. Again, this issue is addressed in a more comprehensive fashion in the Human Resources Issues portion of this Report in Part V.

Extraordinary Costs of Complex Cases

Recommendation #13 – The FPS must address the issues of resourcing the extraordinary costs of large cases including:

- a resource allocation system within the FPS flexible enough to respond to extraordinary demands as they arise;
- a policy on how to respond to provincial requests for assistance in extraordinary cases; and
- a response to the impact of complex cases generated by both the FPS and provincial prosecution services on Legal Aid needs.

Federal-Provincial Co-operation on Complex Cases

Recommendation #14 – The FPS should initiate the establishment of a federal-provincial network of prosecutors with expertise in complex cases for the purposes of knowledge sharing, advice and support.

Case Management Strategies

Recommendation #15 – FPS Groups Head across the country should continue or institute mechanisms to engage the courts in the province and territories in a dialogue concerning case management strategies to optimize the use of judicial resources.

⁵ Rick Thomas paper entitled “Departmental Policy on High Cost Criminal Cases”, p.2

V. Disclosure

Generally, the larger and more complex the police investigation, the greater the volume of materials that need to be assembled, reviewed, vetted and copied for disclosure purposes. Lengthy undercover operations utilizing wire-taps, police agents and proactive investigative techniques such as reverse stings and storefront money laundering operations, can generate substantial quantities of disclosure materials.

From a practical perspective, the volume of material to be disclosed in many drug and proceeds of crime cases can be substantial. The same is true for tax evasion cases investigated by the Canada Customs and Revenue Agency. In one such case,⁶ the Crown disclosed to the defence approximately 853,000 pages of materials that had been optically scanned onto 47 CD-ROM disks. The court subsequently ordered the Crown to provide this material to the defence in hard copy. In another case, the defence requested disclosure of the RCMP's entire proceeds of crime file. The weight of the exhibits was in excess of 2000 pounds.

Disclosure has essentially become a "growth industry", contributing to the overall complexity of criminal prosecutions. Complex cases tend to raise complex disclosure issues. In a study of case complexity undertaken by the FPS in August 1998, there was a close correlation between the presence of disclosure issues at trial and the overall complexity of the case.

There are many points within the disclosure process where both the police and the FPS expend resources. These include: salary dollars spent compiling, reviewing and editing information for disclosure; photocopying costs; office supplies; postage/courier costs; reproduction of photographs, audio and videotapes; and the costs of transcribing witness statements and intercepted private communications.

The use of technology by the RCMP and other investigative agencies is increasing Justice costs

and imposing additional financial pressure on the Drug Prosecution Fund. The RCMP is currently using a program called Supergravity as a major case management system in their proceeds of crime and commercial crime investigations. As a result, prosecutors have begun to receive Crown briefs and disclosure materials from the police in electronic format. Electronic disclosure will soon become the norm in these types of cases. If defence counsel is not computer literate or the accused does not have a lawyer, judges are inclined to grant orders requiring the Crown to provide a paper version of all the documents on CD-ROM. The police in such cases are passing on the additional costs involved in providing paper disclosure to the Crown.

Disclosure

Recommendation #16 – The FPS should establish a Disclosure Task Force to:

- examine the issues surrounding disclosure by electronic means;
- establish mechanisms to track disclosure costs;
- establish the steps necessary for the adoption of a national disclosure management system;
- examine law reform options; and
- with the FPS Training Coordinator develop training programs for counsel, agents, and police.

The Task Force should work with the RCMP and other police agencies.

VI. Use of Other Service Delivery Methods

While there has been considerable growth in the last few years in the number of FPS lawyers and support staff, there has not been the same rate of increase in the number of paralegals. Further, there is an underutilization of paralegals and students within the FPS, although ratios vary from one region to another.

⁶ *R. v. Hallstone Products Ltd.*, (1999) O.J. No. 4308 (Q.L).



In deciding what staff to assign to particular tasks, the principle of “leverage” should be applied. Under this principle, each task is performed by the most cost-effective service deliverer and at the lowest possible professional level without compromising the quality of services. This principle was endorsed by Consulting and Audit Canada in their review of the Department. They concluded, “there is considerable potential for savings through a carefully designed and implemented program to increase leverage and with it, the mix of staffing levels at DOJ.”⁷ While much of their discussion focused on the assignment of different levels of lawyers to cases, they also found that potential savings could be realized by a greater use of paralegals and students.⁸

Consultations held during this Review revealed the general belief that the Department underutilizes those who are not lawyers and that legal counsel are doing a lot of work that could be performed by paralegals, support staff or students. This may relate, in part, to a lack of appreciation of the range of tasks that other service deliverers can perform. It is often stated that one of the reasons for underutilization is cost, that there is an insufficient number of people in these categories who can be assigned these tasks. If this is the case and given that it is more expensive to employ counsel to perform these tasks, a reassessment needs to be made of the way in which decisions are made with respect to staffing needs. It appears that when additional resources are available, the automatic response is to hire more lawyers, instead of examining if paralegals or students could carry out some or all of the functions.

The assignment of the right people to the right tasks is particularly critical when using a team approach to cases. Complex cases require a multiplicity of skills and a multi-disciplinary approach would appear to be the best way to manage these cases.

It is well worth considering the functions currently performed by prosecutors in the FPS that could usefully be assigned to paralegals. For example, the area of disclosure is a major workload concern. Can paralegals review and organize disclosure documentation? Other kinds of tasks that could be considered for paralegals include: attendance in court on summary conviction offences or in Youth Court; drafting legal documents; drafting joint statements of fact; reviewing evidence; and case preparation. As part of a complex case team, their responsibilities could include: disclosure; the creation of the databases required for the documentary evidence; contacts with expert witnesses and enforcement agencies; and assistance in the preparation for trials.

A model that is worth examining is one used in Tax Law Services, where paralegals perform a variety of legal services, including reviewing documentary evidence, drafting legal documents and attending in Small Claims or Tax Court.

The FPS should approach the hiring and deployment of students in a strategic way. Articling students and law students are valuable for the work they perform and as a primary pool for future prosecutors. The appropriate number of articling positions is currently being examined in the context of an overall human resources strategy for recruitment and retention in the Department. Very few summer student positions currently exist within the FPS due to a shortage of funds. Given the potential of summer students to be the pool for future prosecutors, this would seem to be shortsighted. The allocation of more summer student positions as well as articling student positions needs to be reassessed within the context of the overall departmental human resources strategy, including its Employment Equity objectives.

⁷ Consulting and Audit Canada, “Reference Level Review of Operational Services, the Department of Justice: Demand and Resource Management Issues”, December 1999, p. 44.

⁸ *Ibid.*, p. 43

Use of Multidisciplinary Teams

Recommendation #17 – The FPS should make regular use of multidisciplinary teams of prosecutors, paralegals and other support professionals, particularly in dealing with complex cases. Human resources policies and procedures should be revised so that staff can be quickly deployed to these teams.

Leverage Principle

Recommendation #18 – There should be greater utilization of the “leverage” principle in the assignment of tasks, with work assignments being performed by the most cost-effective service provider without compromising quality. In particular, greater use should be made of paralegals, support staff and students. The roles of managers and senior practitioners also need to be delineated.

VII. Use of Agents

The Minister of Justice appoints members of the private bar to assist the Department in carrying out its role as prosecutor. Agents may be “standing” or “ad hoc”. The majority are “standing” which means that they are appointed to prosecute all offences that arise under defined statutes in a particular location. There are currently 233 firms and 763 counsel appointed as standing agents.

Agents are used to the greatest extent where there is no regional office. They may also be used in locations where there are regional offices in order to respond to excess demand for prosecution services.

The amount of work done by agents is significant. In 1999, 40,000 prosecution files were assigned to agents. This includes a 44% increase in drug matters and a 29% decrease in non-drug matters over the previous year. 72% of the costs of agents from 1996-1999 were attributable to drug prosecutions. It is estimated that 60% of the drug prosecutions by agents are for possession-related offences. Thus, any change in policy with respect to possession would have a significant impact on agent costs. While it is

difficult to compare the work done by agents to that done by in-house prosecutors due to the paucity of data, it is generally accepted that agents do a higher proportion of low-end cases than in-house prosecutors.

The fees for drug prosecution by agents, including the costs of administration and the regional supervision units, are paid out of the Drug Prosecution Fund (DPF), which was transferred from Health Canada to Justice in 1996. No other direct funding for agent supervision is available. The majority of the fund is spent in the BC/Yukon and Ontario regions (37% and 34% respectively). Agents' fees for non-drug matters are charged to the department responsible for the legislation in question. Client departments are not currently charged for the costs of agent supervision.

The work of agents is managed through:

- Agent Affairs Unit (AAU) in Ottawa whose mandate is to maintain the quality of legal services provided by agents, oversee the management of the DPE, and reduce costs;
- Regional Agent Supervision Units (ASUs) in six Regional Offices whose mandate is to: assist in the selection and appointment of agents; maintain quality of legal services; provide litigation support; identify needs and provide training; reduce costs of service; ensure compliance with the terms and conditions of appointment; provide advice on administrative matters; and provide litigation support. While there is only funding for the supervision of drug prosecutions, in some cases, agent supervisors assist in the supervision of non-drug work undertaken by agents.
- Legal Contracts Support Section (LCSS) whose mandate is to monitor activities in relation to the rendering of accounts and to verify agent accounts.

An Internal Audit Division Report in April, 1999, concluded that a greater investment needed to



be made to establish systems for better financial management and the generation of information pertaining to agents. Since that time, many changes have been introduced to improve the management of agents, including changes in their selection, appointment and training; improvements in the management of agents in the regions; improvements in the efficiency and effectiveness in the delivery of prosecution services; and improvement in the provision of management information to better evaluate and control costs. The creation of the AAU and the ASUs was significant in terms of improving agent supervision, and thus, in improving the quality of agents' work.

However, the quality of agents' work continues to be an issue. While there are no studies on this point, anecdotal evidence indicates that, in general, the quality of work done in-house is higher. During the course of this Review, the RCMP indicated that they have concerns about the competence and capacity of agents to handle complex cases, particularly drug cases. There are, of course, exceptions. Agents in the Atlantic region, for example, have developed considerable expertise in fisheries cases. The emergence of complex drug cases outside of major urban areas where FPS does not have a permanent presence will create new pressures on the FPS.

Reduction in the Reliance on Agents

There are two main options for addressing concerns relative to the quality of work undertaken by agents, as well as costs of this service to the FPS.

(i) Devolution of agents' work to the provinces

This could involve devolving all or part of the work currently done by agents. For example, all drug offences currently in the hands of agents could be devolved to the province or a choice could be made to only devolve work in particular

areas, e.g. rural or remote areas. Complex cases arising in areas where there is no FPS presence could be devolved to the provinces, since they may be better positioned to prosecute those cases than are agents. The provinces could be asked to deal with routine matters, such as adjournments and setting trial dates, where they are already present in the court. All these options assume that the provinces would be willing to assume additional responsibilities.

(ii) Repatriation of Work

There are two types of repatriation: assuming the conduct of work in areas that can reasonably be serviced by counsel in a regional office and opening new offices where the quantity of work would justify it. In addition to possible cost-savings, other benefits of repatriation include: federal presence (where a new office is contemplated); familiarity with FPS policies; more rigorous application of the Litigation Strategy and alternatives to prosecution; and greater ability to deal with issues of quality, training and development.

Repatriation pilots have been undertaken in Toronto, Vancouver and Calgary. A study of the Calgary pilot indicated significant cost-savings. As well, judges, police and defence counsel all indicated satisfaction with the pilot.

Under any of these scenarios, the FPS would want to retain the ability to use agents to deal with unanticipated excess demand.

Quality Control

Most of the work currently being done by agent supervisors is in the form of litigation support and mentoring. Supervisors have reported difficulty in being able to manage the work of agents directly given the number of agents that many of them have to supervise. Agent supervisors have indicated that the optimal span

of control is 40:1. The current span of control ranges from 49:1 to 171:1 – the supervisor in Halifax supervises the work of 171 agents in the four provinces. At the high end, there is, arguably, no meaningful supervision possible.

An additional problem is that all supervision is paid for out of the DPF, and some of the anticipated spending on supervision has been used to cover escalating litigation costs. As well, there is no funding available for the supervision of non-drug cases. Adequate resources are also needed for the systematic and on-going training of agents.

Another issue that is related to quality is the appointment of agents. In general, there is little input from DOJ with respect to the qualifications of agents. This is particularly a concern in complex litigation. There have, however, been some initiatives undertaken to address this issue. In the Prairies, for example, a member of a proposed firm is interviewed by the agent supervisor and the section head with respect to their familiarity with criminal law issues. They are required to view a series of training films and take a written exam. Only those firms or individual lawyers who successfully complete this process are submitted to the Minister's Office for appointment. The Ontario Regional Office recently placed an advertisement seeking qualified standing agents. Applicants will be interviewed and assessed before recommendations are submitted to the Minister's Office.

Rates of pay also affect the ability to attract competent agents in some centres. A two-phased approach to increase the hourly rates paid to legal agents has recently been approved. It is anticipated that Phase I will result in a 10% increase in the hourly rates. Phase II will

involve a more comprehensive study of compensation schemes and rates. Rates of pay also need to be examined to determine whether they provide the necessary incentives to encourage agents to carry out policy objectives such as diversion.

Repatriation/Quality Control of Agents' Work Recommendation #19 – The FPS should assess options for the repatriation of agents' work and measures to improve the quality of agents' work. This includes:

- institution of an application process where it is not currently in place;
- incorporation of a formal evaluation process into the selection/appointment process;
- an increase of agent supervision resources to address serious issues in the supervision ratio;
- adoption of a more comprehensive and systematic approach to agent training;
- measures to ensure that agents carry out FPS policies, particularly with regard to alternatives to prosecution;
- exploration of opportunities for the repatriation of agents' work; and
- where there are concerns about agents' ability to undertake complex cases, examination of other options such as: increased involvement of the FPS agent supervisor; collaborative arrangements with the provinces and territories; or repatriation of the work to the FPS.



PART FIVE: BETTER MANAGEMENT PRACTICES AND SYSTEMS

“DOJ is sometimes called “Canada’s biggest national law firm,” but at present, it is a loosely connected group of independent practices, coordinated by the personal efforts of very senior managers whose roles conflict in certain ways. Each practice is run in a different way, virtually without common systems. In our interviews, regional counsel reported that they frequently might be repeating the same argument their neighbor made in court a few weeks before. Research and writing time is being duplicated. However, there is another problem associated with the lack of information sharing: consistency. The Department could find itself taking inconsistent or even conflicting positions in court through lack of information. Except for cases of national prominence, there are only ad-hoc and relationship-based provisions to present contradiction and create consistency.”⁹

One of the key objectives of the Review was to identify internal efficiencies that could be realized to help address the significant resource challenges confronting the Federal Prosecution Service. In this Part we touch on some of the issues and problems that were identified during the course of the Review which provide opportunities for improvement in the way the FPS is organized and managed.

I. Strategic Planning, Budgeting and Management Information

One of the greatest challenges in conducting this Review was the lack of reliable data on the activities of the FPS. The FPS lacks not only more sophisticated information such as costing data and an assessment of case complexity, but also elementary data such as a simple and reliable profile of its caseload. The importance of reliable

data to the FPS to deal with its challenges cannot be overestimated and needs to be made the highest priority.

At the present time, the inputting of data across the country is widely variable. Sometimes, it is not done at all; at other times, it is done inconsistently; and the information is often not used.

There is a variable commitment to information management, both at the management level and in the field. While prosecutors and others might be criticized for not taking their responsibilities in this regard seriously, this attitude exists in an environment that includes a multiplicity of systems and requirements, changing demands, and a belief that the information is often not being used. Those inputting the information receive little or no feedback on how or if the information is being applied.

There are human resources and technical dimensions to addressing the information management problem. The human resources dimension has various aspects. The time and effort taken to deal with information management requirements need to be taken into account when determining the allocation of resources. It cannot just be an add-on to everything else. Training and ongoing support are crucial. Further, timekeeping requirements and the requirements of other systems should not be onerous. The requirements should be as simple as possible – no more than what is needed and what will be used, and integrated into one system, not several. Finally, individuals need to understand why their input is important and relevant, including feedback on how the information is being used. Understandably, people will not spend the time to input data if they feel that the information is not being used.

The technical dimension relates to the human dimension. The Department urgently needs a coordinated and integrated management

⁹ Consulting and Audit Canada Report: Demand and Resource Management Issues, December 15, 1999, p. 46

information system. Management information sources (human resources, financial data, case information, timekeeping, complexity matrix analysis, and agents accounts) need to be consolidated into a single management system across the Department.

Accountability for the FPS's financial resources is problematic. The current situation is characterized by inadequate systems, spotty reporting and limited accountability for resources spent, as well as a lack of planning to ensure that resources are allocated and spent on a strategic basis.

The FPS requires a consistently applied funding allocation system which provides clear accountability with respect to service, cost and demand. Resources should be allocated strategically, not on the basis of out-dated figures or across-the-board increases or cuts. An effective allocation process must reflect FPS priorities and emerging demands, the result of a rigorous planning and priority-setting exercise. Emerging demands and pressures should be assessed according to information received from enforcement agencies, as well as through a more general environmental scan.

In short, the FPS urgently needs greater planning, consistency and transparency in quantifying its workload, establishing priorities, allocating resources, and keeping track of performance and results.

Strategic Planning and Coordination

Recommendation #20 – The FPS must strengthen its strategic planning and coordination capability through greater utilization of tools such as environmental scanning, a complexity matrix, timekeeping, increased electronic integration, and the development of a national tracking and document management system.

Management Information and Budgeting

Recommendation #21 – As the highest priority, the FPS must develop effective management information and budgeting systems for its current and projected workload.

National/Regional Resource Allocation

Recommendation #22 – The FPS should establish a group consisting of representatives of the regional directors, group heads, and headquarters staff, to advise the Assistant Deputy Attorney General on the most effective resource allocation within the FPS, and between Ottawa and the regions, based on current and projected workload.

One area that the FPS should explore with the Treasury Board is the recovery of its costs for the collection of fines. Options for additional flexibilities in managing this program should be investigated so that it does not drain already scarce FPS resources.

Fine Collection Costs

Recommendation #23 – The FPS should initiate discussions with the Treasury Board to achieve full reimbursement for the costs of implementing an FPS-wide fine collection program. Other options that would provide the FPS with additional flexibility in managing this program should also be identified.

II. National Coordination/Specialty Teams

There is insufficient national coordination within the FPS, not only in relation to issues pertaining to the management of the law, but also more broadly in terms of the overall management of a national service. The result is that the wealth of existing knowledge and experience is not broadly shared across the FPS. Further, the development of implementation plans and strategies for national initiatives are largely left to the individual regional offices. While this approach accommodates the varying realities of each region, it tends to result in inconsistencies. A balance must be found so that national approaches and policies recognize regional realities that vary and need to be reflected.

The development of specialties around issues or practice areas often defaults to the regions. Local specialization without appropriate national coordination may result in inconsistent positions and “reinventing the wheel”. Few



consistent national support systems are in place to identify, monitor and disseminate best practices or provide a national perspective to particular investigative techniques, legal arguments or litigation approaches taken by regional counsel. Ad hoc advice is frequently obtained from FPS in Ottawa, but this substantive or procedural advice is rarely formalized into a national position which is widely disseminated throughout the FPS. Frequently, different regions will be seeking input on the same subject, resulting in duplication of effort and time.

In the Tax Law Services Portfolio, this issue has largely been addressed through the creation of national practice groups with representation from each regional office. These practice groups meet regularly via conference call and are organized on the basis of discrete issues or practice areas. In the FPS context, practice groups might be created around such issues as wiretap law, disclosure, funding the defence (Rowbotham hearings), extradition, mutual legal assistance, immigration prosecutions. In 1992, the Tax Law Services Portfolio also created the Good Practices Communications Committee. The mandate of the committee is to: "exchange ideas on good practices, learn from each other's experiences and make suggestions for the development of more efficient and effective practices." The committee continues to represent a dynamic model to harness the collective experiences of tax counsel for the benefit of all counsel working in this area of the law.

The collective expertise of the FPS should be available to all parts of the country through the creation of a group of designated specialists who could provide guidance and advice, and/or actually assume conduct of cases across the system.

The incidence of lengthy, complex or mega cases involving multiple accused and multiple defence counsel has led to an increased use of prosecution teams. The human resources management challenges associated with putting together these sorts of teams are significant in all FPS offices. However, the challenge is particularly great in the small to medium-size locations (Halifax, Winnipeg, Saskatoon, Yellowknife, Whitehorse, Nunavut). At present, this process tends to be very ad hoc, largely handled on a regional basis and generally involving short-term arrangements with loaned provincial prosecutors and/or agents. These sorts of cases are not as frequent in these locales as in major urban centres and the offices do not always have the in-house expertise that is required to manage these files. The creation of a group of specialists, drawn from the ranks of the FPS across the country, could be used as national resources. The group, possibly modeled on the Northern Flying Squad, could be 'on-call' to provide assistance to other regional units of the FPS.

National Practice Groups

Recommendation #24 – The FPS should establish national practice groups with representation from regional offices to disseminate best practices and to provide national perspectives on prosecution issues.

Specialty Teams

Recommendation #25 – The FPS should create a group of specialists drawn from throughout the FPS, to be used as national resources in support of FPS offices facing particularly complex legal issues beyond their capacity. The Northern Flying Squad model could serve as a useful guide for the creation of this group.

III. Increased Use of Technology

Technology offers significant opportunities to enhance information sharing and increase the overall efficiency within the FPS. The record to date is one marked by incompatible and somewhat ad hoc systems and approaches in the various regional offices and across the Department, as well as by overlap and duplication. This is an issue that exists in every corner of the Department and is not limited to the FPS.

There is an urgent requirement for a national, coordinated and accessible data bank of case summaries and issue-based information. At present, legal precedents and materials are largely paper-based and scattered throughout individual offices. Accessing information is more a matter of luck and memory than process. What is currently captured in electronic format is ad hoc and maintained on a highly individual basis. A study is currently underway to determine what the best system would be for use by the FPS. The system identified as having the most potential is CRIME, a system that was developed by the Quebec Regional Office and which captures internal Justice facts, briefs and case summaries.

Outside of FPS and the Department of Justice, other federal and provincial partners in the justice system are also in the midst of the technological revolution. There is an urgent requirement that all justice system partners move forward in a consistent fashion to ensure that systems are compatible. Initiatives by the RCMP, the Customs and Revenue Agency, to name but two partner organizations, have significant ramifications for the FPS. Similarly, provincial justice initiatives, PRISM (Manitoba), Integrated Justice (IJ - Ontario) and JUSTIN (British Columbia) are examples of systems being developed or used to integrate information for the court registries and other provincial justice partners. Further, provincial prosecutors have in-house databases (e.g. Alberta (CLASS) and Ontario (CLO-Crown Law Office)). Given the similarity of issues argued by provincial prosecutors, it would be helpful to have access

to similar information arising within provincial jurisdictions. The FPS as a national institution, but also as a participant in each province and territory, has a significant interest in a seamless flow of information between the regional offices and provincial/territorial departments of justice.

Dedicated IT Managers

Recommendation #26 - The FPS should ensure the appointment of a senior information technology manager to develop a strategic plan that provides for the best means of connecting the FPS electronically with other organizations in the field of prosecutions.

IV. Workload Profile

The FPS does not have adequate management information pertaining to the profile of its total workload. As a result, it is unable to realize potential efficiencies gained from strategic grouping of cases and the application of targeted performance standards.

Two reports in 1999 considered the complexity of prosecution cases handled by the FPS. While lack of data hampered the analyses, the reports did reveal that 7% of cases were identified as ranging from very high complexity to mega cases and accounted for 60% of time spent on all cases. The studies did not attempt to define the various categories of complexity. One might assume that the highest rating (very high complexity to mega cases) is a product, in part, of a case requiring unique solutions to complex issues of fact and/or law, or the sheer length of time required to process the case, or some combination of both factors. Notwithstanding the lack of empirical data, there is clearly a perception within the FPS that, overall, the cases handled by the Service are increasing in complexity. Indeed, it might be noted that the FPS has not made significant progress since the Auditor General reported in 1994 that the Department of Justice, generally, did not have a good understanding of either the volume or nature of its workload.



The FPS needs to gain a more comprehensive understanding of the nature and volume of its workload for many reasons. The obvious ones relate to strategic planning of human and financial resources. A less obvious reason is that there has been a tendency within the FPS (and no doubt the Department) to view a great deal of the workload as unique. The establishment of a well-accepted, meaningful complexity matrix (such as already exists within the Tax Law Services Portfolio) will permit the total workload to be sorted and categorized to permit the application of standards and performance indicators to broad categories of similar types of work.

A rudimentary complexity matrix has been developed for use by the FPS. It represents a very useful starting point for better understanding the profile of the total workload. Unfortunately, the matrix does not appear to have been well-integrated into the day-to-day activities of the FPS. Like timekeeping, the key to obtaining valuable data lies in the consistent entry of the appropriate data. There is clearly an urgent need to :

- a) ensure 100% compliance for all FPS files;
- b) refine and enhance the matrix to fully capture the relevant complexity factors (currently the subject of a DOJ Strategic Investment Fund pilot project);
- c) secure support and buy-in from all FPS counsel to ensure that the complexity rating is regularly reviewed and adjusted as a case proceeds through the various stages of a prosecution.

Sophisticated complexity matrices are currently in use in both the Tax Law Services Portfolio and within the FPS for *Income Tax Act prosecutions*. Both of these models should be examined.

V. Timekeeping Information

Timekeeping provides the FPS with basic information pertaining to total "billable hours", but requires significant enhancements and adaptation to solidify its use as a management tool to describe the precise nature of the work being done by charge or activity.

The FPS, like the rest of the Department has been fully capturing time spent by counsel since 1998. Generally speaking, the experience to date with timekeeping has revolved around capturing total "billable hours" for macro resource management purposes. However, the data available thus far does not, for the most part, identify the precise nature of the work being done by type of charge or key activity. Moreover, the full potential of timekeeping as a key management tool has yet to be realized in terms of assisting managers to identify where efficiencies or inefficiencies are occurring throughout the life of a file. Specifically, timekeeping needs to be enhanced/refined to allow:

- timekeeping data to be used as an effective tool for self-analysis;
- timekeeping data to be used to develop performance standards for file types and key activities'
- identification of training needs/requirements of staff counsel and enforcement agencies, e.g. timekeeping patterns which are suggestive of excessive time spent on particular issues or activities.

VI. Updated Desk Book

The departmental policies of general application, as well as the specific policies of the FPS are not consolidated in a single, user-friendly policy manual. Similarly there is no institutional

mechanism to ensure that all policies are regularly reviewed and updated. A consistent national approach is needed for prosecutions. A new Desk Book, incorporating the Crown Counsel Policy Manual, is currently being prepared. However, this document is not a consolidation of all applicable policies relevant to the work of FPS. An index of all policies currently in effect is required. A regular review of all prosecution-related policies, guidelines and practice directives should be carried out at least every two years.

VII. Human Resources Issues

The strength of the FPS is its people. It is, therefore, critical to the success of the FPS in the future that human resources issues be addressed.

As of March 31, 2000, there were 516 employees working within the FPS. The three main occupational groups were: lawyers (316); secretaries (116); and paralegals (29). The regional breakdown of these three groups was as follows: Whitehorse (20); Yellowknife (20); Iqaluit (1); Vancouver (69); Edmonton (30); Calgary (19); Saskatoon (10); Winnipeg (18); Ontario (96); National Capital Region (81); Québec (60); and Halifax (26). The data are from the Human Resources Management System (PeopleSoft) and are based on the FPS workforce as of March 31, 2000.

An assessment of the data reveals the following:

- two of the three main occupational groups, namely lawyers and secretaries, have grown considerably over the past five years; however, there has been much less of an increase in the number of paralegals;
- there has been limited access in recent years to the senior counsel categories – this suggests that the structure and size of the Senior Complement of the LA Group should be revisited as it relates to its distribution, size and composition;
- the representation of women in the Senior Complement of the LA Group is significantly

lower than that of men and than that of the Department overall – there are significant regional variations, with the situation in the National Capital Region the most serious;

- there is an excessive use of term employment – term employment is most prevalent at the LA1 level and in the administrative support category;
- visible minorities and persons with disabilities are under-represented in the Department – there is a higher than average representation of designated group members who are employed on a term basis;
- overall, the FPS workforce is young; however, there are pockets within the organization where potential retirements must be taken into account.

i. Stress

The pressures on FPS staff across the country are significant and are manifested in various ways: high levels of unpaid overtime; long-term sick leave attributable to stress and 'burnout'; the loss of senior practitioners to the private bar; and difficulties in attracting experienced counsel.¹⁰

Consulting and Audit Canada stated in their Review of the Department:

“Both litigators and prosecutors lead lives that are, by definition, stressful, since their performance is continually judged on the basis of their conduct, under pressure of time and scarce resources, in an adversarial public forum before a critical audience where there is only one winner. Both the current resourcing levels and the resource management practices of DOJ increase that stress in ways that damage staff morale and may be impairing the long-term effectiveness of the organization.”¹¹

While the CAC study was unable to quantify the current demand due to lack of data, it was able to determine that gross caseload, particularly in the FPS, is increasing in most parts of the country.

¹⁰ These difficulties are discussed in “The FPS Story: Understanding the Federal Prosecution Service”, prepared as part of Reference Level Review, June, 1999

¹¹ Consulting and Audit Canada, “Reference Level Review of Operational Services, the Department of Justice: Demand and Resource Management Issues”, December 1999, p. 18



The Review also referred to abundant, convincing anecdotal indications of high levels of stress. Stress is particularly evident in dealing with “mega cases”. The following irritants have been noted in dealing with these kinds of cases:

- intimidation or threats made on prosecutors and their families
- lack of recognition from higher-ups
- perceived lack of support and pressure to win
- psychological attacks, e.g. personal attacks and dirty tactics by defence counsel
- waves of repeated unannounced legal attacks on the case
- threats of complaints to law societies or of legal actions
- repeated unsubstantiated attacks in the media
- being outgunned by the opposing side, in terms of number and experience
- panic generated by fear that a case has not been adequately prepared because it came in too late
- frustration resulting from a resistance on the part of the police to help prosecutors organize the cases
- fear of hidden facts or elements that will damage the case

During the consultations associated with the Review, prosecutors also expressed frustration that their experience-based recommendations for legislative reform are not adequately taken into account in the policy process.

It is critical that the FPS and the Department be able to respond to all of these issues.

ii. Safety and Security

Safety and security, in particular, are critical for FPS employees. Because of the nature of the work that the prosecutors perform, there have, unfortunately, been serious threats to the safety and security of individual prosecutors and to their families. It is critical that the prosecutors have confidence that the FPS and the Department are able to support them and to respond effectively to these threats.

In response to this problem, the Security Division requested the Occupational Health and Safety Agency (OHSA) of Health Canada to assess the situation and make recommendations. OHSA has proposed that a Handbook be developed to provide guidance on managing violent or potentially violent situations. It has also proposed a Critical Stress Management Program that would comprise:

- critical incident stress training for lawyers;
- management and supervisor training to recognize and respond to situations that compromise health, safety and organizational effectiveness;
- critical incident stress debriefing; and
- post-critical incident counselling.

Given the seriousness of threats to safety and security, this issue must be treated as a priority.

iii. Rewards and Recognition

Concerns about rewards and recognition are not just an issue within the FPS, but are Department-wide. Notwithstanding the Department's considerable efforts, this remains an area of concern which needs to be re-examined.

One issue that was frequently identified was the lack of opportunities for promotion in the Department. The freeze of senior practitioner positions, in particular, has had a significant impact.

While reward and recognition issues are not limited to the FPS, it needs to be recognized that the job of a prosecutor is both unique and difficult. The special role of prosecutors needs to be acknowledged and understood within the Department, the government, the larger legal community and the public at large. Prosecutors need to be provided with the tools and supports to do their jobs.

iv. Retention

A recent study on recruitment and retention in the Department was done by Consulting and Audit Canada (CAC).¹² It conducted both a demographic analysis and several focus groups. Based on the demographic analysis, it concluded that the Department does not generally have a turnover problem. Nonetheless, the following areas of concern were identified during the course of this Review and in the CAC focus groups: compensation; lack of promotion and career advancement; lack of career path for those lawyers who do not wish to become part of management; lack of traditional government "perks" such as a balance between work and family life, reasonable hours and reasonable workload; high rate of term employment; flawed performance management and performance pay system; inadequate budgets.

Whether the demographic analysis substantiates a major retention problem, the issues that have been identified are serious. They have a direct impact on morale which, in turn, could have an impact on retention in the future if not addressed. Lack of promotion and other opportunities, particularly access to senior practitioner positions, is of considerable concern to the regions.

v. Workplace Tempo

As noted previously, the job of prosecutors can be extremely stressful. Ways must be found to facilitate and encourage a reasonable workplace tempo and a balance of work and life outside the workplace. Some suggestions for providing balance within the workplace include: following stressful cases with less demanding assignments; rotations; time-off; encouragement and recognition of time spent on writing, teaching and community involvement.

vi. Management Skills

Traditionally, the Department has promoted senior, accomplished counsel into management positions based on the erroneous assumption that a good lawyer will necessarily be a good manager. There is a perception that most FPS managers are appointed to management positions not because of their management skills, but because of their legal skills. There is also a perception that the management aspect of the job is undervalued. Managers often do not have the required management skills or training. Greater emphasis needs to be placed on management skills and/or a demonstrable aptitude to acquire those skills in the recruitment and promotion of staff in management positions.

vii. Positive Work Environment

The FPS must make every effort to become a "workplace of choice" so that it can recruit and retain a complement of excellent people. To respond to increased demands for its services, the FPS must create a positive work environment where employees are properly supported, rewarded and provided with the tools to do their jobs. The FPS should place increased emphasis on becoming a learning organization, promoting training and continuous learning through professional development and the effective management and sharing of knowledge and expertise.

Comprehensive Human Resources Plan

Recommendation #27 – The FPS with the assistance of Human Resources Branch should develop a comprehensive human resources plan in order to become a workplace of choice. This plan should include a recruitment strategy and an employment equity plan to be reviewed and revised on a regular basis as part of coordinated planning within the FPS.

Management Skills

Recommendation #28 – The FPS should place greater emphasis on management skills in the recruitment and promotion of staff in management positions.

¹⁰ Consulting and Audit Canada, "Recruitment and Retention Issues", April, 2000



Composition of the LA Senior Complement

Recommendation #29 – A review of the Senior Complement of the LA Group within the FPS should be undertaken to assess whether its current composition and size is appropriate and to address the under-representation of women.

Positive Working Environment

Recommendation #30 – The FPS with the assistance of the Human Resources Branch should develop, implement and monitor policies and practices to improve the working environment. This should include:

- practices to facilitate and encourage a balance of work and life outside of work;
- an enhancement of assignment, developmental and other opportunities for staff;
- rewards and recognition; and
- the provision of appropriate and timely support for staff working on complex cases and in other stressful situations. Safety and security issues must be addressed as a top priority.

VIII. Training

The provision of training to all FPS employees is critical. Training needs to be broadly defined to include coaching, mentoring, developmental opportunities and supervision. An overall FPS training plan is required as well as individual training plans for each employee. Resources need to be dedicated to training; training is not expendable when budgets are tight.

The FPS requires both national, regional and individual training plans to equip its members with the skills they require to work in an increasingly complex environment. The FPS must make a significant investment, financial and otherwise in training and development to demonstrate that it is serious about a commitment to learning.

Training and professional development are critical components of an overall human resources plan. Within the FPS, training is approached largely on an ad hoc basis and without a long-range objective. Training is often considered an 'extra' and when resources are tight, training is often one of the first things to go. This is particularly problematic in smaller regions and in more remote regions. Training opportunities for FPS employees in the three northern territories are particularly costly. In the result, training opportunities are often more limited for these employees.

Managers in FPS have an important responsibility to work with employees in the development of long-term training plans. To be effective, this process must be an integral component of an on-going and effective performance management system. This requires an open and honest evaluation of performance strengths and weaknesses combined with a clear, measurable action plan to provide training opportunities that build on existing skills. The track record of the Department of Justice in this regard is poor.

FPS managers require assistance and, indeed, training, in effective performance management and the creation of viable training plans. The Department's Legal Education Section should be approached to develop and update training modules relevant to topics and issues identified by the various practice groups within the FPS. These modules should be available at the regional level as part of the orientation and/or training program for legal agents, new Justice counsel and existing employees alike.

The creation and implementation of employee training plans is a time-consuming and exacting process. FPS managers should be supported in this area by a dedicated FPS training coordinator. The training coordinator would work with local managers to develop annual training plans for individuals and groups and would support the ADAG in the development of a national training strategy.

As the Department, generally, moves to define itself as a learning organization, the FPS will need to embrace the following cultural and resource realities:

- training (professional development) covers a broad spectrum of activities over and above attendance at organized courses and seminars. In particular, training includes on-going mentoring, coaching and supervision. Employees and managers alike need to look at training in a more expansive way;
- FPS members who are selected to attend formal courses and seminar should be required to provide a report to colleagues and to take active steps to ensure that the materials distributed and knowledge acquired at such training events are widely known and shared;
- an inventory of training programs should be maintained with electronic access;
- attendance at training programs by video conferencing should be explored;
- training modules in organizing and managing complex cases should be presented by counsel who conduct these cases.

Continuous Learning/Knowledge Sharing

Recommendation #31 – The FPS should develop and implement a plan to promote continuous learning, knowledge sharing and training, including the development of a nationally coordinated and accessible data bank of case summaries and issue-based information and the establishment of national practice groups.

Training Coordinator

Recommendation #32 – A national Training Coordinator should be appointed to work with regional directors, FPS Group Heads and others within the FPS to:

- develop annual training plans for individual and groups;
- implement the Legal Excellence program across the country;

- establish Excellence Programs for paralegals and support staff;
- implement mentoring and coaching programs where they do not currently exist;
- develop a training program for agents;
- develop a training program for the RCMP and other investigative agencies; and
- ensure equal access to training opportunities so that employees in the North or smaller locations are not disadvantaged.

IX. Communications

The fundamental changes proposed for the FPS and the changes in approach to prosecutions and the role of the prosecutor will require extensive and planned communications within the FPS and the Department of Justice, as well as with external partners, associates, stakeholders, and the public at large. FPS members should be actively involved in these communications activities, and, where necessary, they should also be assisted and trained by communications specialists.

One specific area that requires attention is in dealing with the media. More and more cases are developing high public profile and members of the FPS who have direct or indirect contact with the media should receive media relations training. Access should also be provided to departmental resources who can provide on-going assistance and support in high-profile cases.

Communications Campaign

Recommendation #33 – A proactive campaign should be undertaken within the Department, the Government of Canada and with the public at large to promote a broad understanding of the FPS and the role of prosecutors.

Communications Specialist

Recommendation #34 – The Director General, Communications should assign a communications specialist to the FPS to provide media relations training and ongoing communications support and assistance.



PART SIX: THE NORTH

I. Background

The prosecution of all Federal offences, including the *Criminal Code*, is a federal responsibility in the Yukon, the Northwest Territories (NWT), and Nunavut. In 1955, the Department of Justice assumed responsibility for enforcement of the criminal law in the North and created the first Territorial Court of the NWT and of the Yukon Territory.

Responsibility for the criminal justice system is shared between the territorial and federal governments. The federal government is responsible for the development of legislation and policy, with the territorial government, through delegation, responsible for its administration. The federal government continues to be responsible for the entire prosecution function. This creates an important dynamic. The territories have significant responsibility for the administration of criminal justice, including the courts, RCMP, the correctional system including probation and aftercare, victim services, legal aid, the promotion of and support for alternative measures, and any number of other community justice initiatives. Federal prosecution policies and practices have an impact on these systems and programs. However, the territories cannot, except through dialogue, affect federal prosecution policy, practice, budgets, or priorities with respect to what is in the public interest. Close co-operation and collaboration is essential to the effective operation of the justice system in the North.

The line between the territories' management of the courts and the monies they receive from the Department for programs (e.g. legal aid, victims, crime prevention, child support) and the Department's prosecution responsibilities is not impermeable. The management of the Department's entire relationship with the territorial governments needs to be more integrated to actively draw on the experience of

those federal employees who live in the North and deal with the impact of these programs on a routine basis.

II. Unique Prosecution Environment

The reality of prosecutions in the North is very different than in the rest of Canada. Crowns routinely have to travel to very remote locations under difficult conditions. The caseload is heavy and demanding and counsel are required to play a number of different roles, particularly in relation to the handling of victims, civilian witnesses and their families. Witnesses are often unilingual in an aboriginal language and require translation to even speak to the prosecutor, or may not understand the court system. They may be reluctant to testify in front of or against family and friends. Most offences are crimes of violence or property offences. There are, proportionately, many more jury trials in the North than in the South, the majority of which involve sexual assault. Often, the jury does not convict.

Prosecutors in the North spend a great deal of time doing witness preparation, explaining the process, reviewing statements, and keeping witnesses informed. The assistance that Victim Witness Assistants (VWAs) provide to the Crowns in Whitehorse, Yellowknife, and Iqaluit is invaluable both in terms of cross-cultural awareness and insight into the special needs of victims. Expanding the number of VWAs, and actually locating these people in the communities, would produce significant benefits. Victims would be better prepared for court; Crowns would have some valuable time freed-up; Crowns could be confident that the victim/witness was receiving the time and attention required; and, hopefully, the victim would feel less hostile to the process. Further, involving Inuit, First Nations, or Métis VWAs in the prosecution often provides some level of comfort for a victim, a benefit that cannot be measured.

The daily direct involvement with victims is unique to prosecutions in the North. Crown counsel have an important duty to victims of crime as well to the other community members who find themselves before the courts as witnesses. While the prosecutor is neither a victim's advocate nor the victim's counsel, in small Inuit, First Nations, or Métis communities, this fine distinction is not well understood. The reality is that the Crown and the RCMP are the link between the justice system and victims and witnesses. Victims must be informed of the progress of a case and, especially in cases of sexual abuse, there must be follow-up with the victim. Victims of crimes should be informed of victim services that are available and be encouraged to use them. Unfortunately very limited community services are available for victims in small communities. Victims frequently report a lack of comfort with the services that may be available due to the closeness of the community members.

III. Current Operations in the North

The Department of Justice has regional offices in Whitehorse, Yellowknife and Iqaluit, as well as an office in Inuvik which is a sub-office of the NWT Regional Office. The staffing of the northern offices is as follows:

	LA's	Other Staff	Total
Yukon	8	3	11
N.W.T.	10	5	15
Inuvik Sub-Office	1	1	2
Nunavut	4	4	8

At present, the Yukon Regional Office is part of the B.C. and the Yukon Region, whereas both the NWT and Nunavut Regional Offices are part of the Prairie and Arctic Region. While the three Northern Offices are unique within the Department in terms of their responsibility for *Criminal Code* prosecutions, their location, and the issues they confront, each individual office, like each territory, is distinct. Care must be taken not to assume that the Yukon, NWT and Nunavut

are the same just because they all happen to be located north of the 60th parallel.

For many years, various members of the FPS from across Canada have provided short-term back up and support to the Northern Offices as members of the "Northern Flying Squad". The flying squads in the North are composed of federal prosecutors from the Department's southern offices, many of whom have served in the North in the past. Flying squad counsel are called upon to supplement insufficient resident resources due to staffing delays and to back-fill during holidays and training periods. They also handle cases involving the prosecution of police officers; provide specialized expertise in certain areas of the law (wiretaps, organized crime, complex drug conspiracy files) or simply where the size or complexity of a case is beyond the capacity of the resident staff.

The Whitehorse Office also retains agents to do some prosecution work. Agents are not currently used in the other two territories.

Both the NWT and the Yukon Regional Offices currently have a Criminal Litigation Strategy position, with the Crowns in those positions dealing with all files that appear in Yellowknife and Whitehorse Territorial Court. The Strategy has been successful in reducing the Yellowknife caseload and should be applied to all files in the NWT as well.

The Strategy has not, however, been that successful in the Yukon. The Strategy has been successful in NWT in part because significant credit has been given for early guilty pleas (the judiciary have been active participants in the initiative). Sentences in the NWT are generally higher than in the Yukon, and therefore the Strategy may not be as effective where the discrepancy in sentencing before or after trial is not as great. The situation in the Yukon obviously warrants closer inquiry. Consideration should be given to adopting a formal pre-charge screening model, similar to the ones that exist in British Columbia, Québec and New Brunswick.



IV. Future Strategies for Northern Prosecutions

For the future, three distinct but related strategies should be initiated with respect to northern prosecutions. The first relates to the devolution of various aspects of the prosecution function to the territorial governments. The second and third relate to a series of process and operational initiatives within the department to better integrate prosecutions and policy and the organizational structure.

i. Devolution to Territorial Governments

Discussions between the territorial governments and the Federal Government about devolution of the prosecution function have taken place sporadically for many years, invariably at the request of a territorial Justice Minister to the Attorney General of Canada. These discussions have taken place against the backdrop of the devolution of a wide range of non-justice programs and activities by other federal departments and agencies. An in-depth analysis of the pros and cons of devolution of the prosecution function is beyond the scope of this Review. However, until now, concerns over independence of the prosecution function from political interference have worked against a decision to devolve this important responsibility. Similarly, expressions of concern and reluctance on the part of some senior RCMP officers, various members of the judiciary, and some aboriginal/First Nation groups have re-enforced the view that the timing was not right.

To date the Department has operated largely in a reactive mode in relation to the issue of devolution of the prosecution function. However, the creation of Nunavut in 1999 and other recent developments in the North suggest that this reactive approach should be re-visited.

A compelling case can be made for the desirability of having the prosecution function rest with the order of government that is

closest to the people. Northern *Criminal Code* prosecutions are largely local in nature and broadly linked to the communities that they serve. Given the nature of prosecutions and links to communities, territorial governments are arguably better situated than the Federal Government to manage a prosecution service that reflects the values and standards of the people that it serves.

Rather than simply waiting for some or all of the territories to bring forward a case to support devolution, the Department of Justice should indicate to the three territorial governments its willingness to develop plans with them for the devolution of the function within a specified time period, say 10 years. The plans would need to include a concrete, multi-year action plan to ensure that each of the territorial governments acquired the expertise and capacity to assume this responsibility leading up to devolution. The plans could authorize personnel exchanges between the two governments and formalize the practice of consulting the territorial government on prosecution policies and priorities. These discussions must actively engage Inuit, First Nations and aboriginal leaders and should not replace the involvement of aboriginal and First Nations leaders in the on-going dialogue concerning the administration of justice.

The uncertainty regarding the future role of the FPS in the North has periodically been a source of anxiety and concern to employees working in the northern regional offices. Proper regard and attention must be paid to providing employees with regular and timely information on the status of the devolution file.

Devolution of the Prosecution Function

Recommendation #35 – The Department of Justice should formally communicate to the three territories its willingness to work with them in developing a plan for the devolution of the prosecution function in each territory within the next 10 years.

ii. Increasing Policy Integration

The nature of the work of the Northern Offices requires a clear and logical connection between the operational and policy roles of the Department. Prosecutors in the North are responsible for prosecuting all *Criminal Code* offences, and as such, are the only ones in the Department who have daily experience with prosecutions that directly involve victims.

While consultation does take place on an ad hoc basis, the workload of counsel in the North does not allow the time to share the benefit of their considerable experience, especially when the timeframe for input and response is unrealistically short. This situation is the source of considerable frustration for counsel working in the North and contributes to a sense of isolation from the Department. The Northern Offices are sometimes left scrambling in order to comply with their own department's legislation.

The consultation process on all policy, criminal legislation, and Supreme Court criminal matters should be reviewed, and a system should be devised that allows the Northern Offices to offer meaningful input. Mechanisms need to be developed and resources allocated to take advantage of this valuable expertise in the development of criminal law policy and to ensure that Northern prosecutors are kept informed on an ongoing basis of legislative changes and relevant court decisions. One option would be to create a full-time policy position in each of the Northern Offices to make the link between operations and policy development and also to take a proactive role in building and maintaining effective intergovernmental relationships (including Inuit, First Nations, and Métis).

iii. Integration of Organizational Structures

Historically, the linkages between the NWT and the Yukon Regional Offices have not been particularly strong. While the Nunavut and NWT Regional Offices are presently working very closely together, this is due largely to the fact that a good portion of the court work in Nunavut

continues to be handled by the NWT Regional Office. For a number of reasons, the direction of linkages in the North has tended to be north/south – the Yukon with B.C., NWT with Alberta. Nevertheless, there are still important similarities between the three offices and the nature of the legal, social and cultural challenges that they face. It would make good sense to formalize linkages between the three offices. Periodic meetings of northern Regional Directors and/or FPS group heads, cooperative training initiatives, prosecutor exchanges and general information sharing are a few examples of ways to enhance the linkages between the three northern offices.

A number of new organizational structures have also been suggested.

a. Northern Offices Reporting to the Criminal Law Branch (Ottawa)

This option would do little to create a separate "northern voice" and would merely institutionalize existing ad hoc relationships in the department. One variation would have the Yukon Office still report to the BC Regional Office, but these would appear to be only limited benefits to this option.

b. Creating a New Northern Region

While creating a distinct region headed by a Senior Regional Director would provide a northern voice and visibility, it would mask the differences between the three existing territories, including the relative progress on devolution. It would also face the practical disadvantage of existing transportation infrastructure which is oriented north-south.

While a distinct Northern region may have disadvantages, there would appear to be considerable value in providing centralized support to the Northern offices for a number of common functions such as policy development, training, and recruitment.



c. Rearrange the Present Prairies and Arctic Regions

This option which would see two new regions – Alberta/NWT and Prairies/Nunavut – would deal with current management problems in the Prairies/Arctic Region, but would not be a long-term solution.

d. Northern Flying Squad

While the Northern Flying Squad has played a valuable role in the delivery of prosecution services in the North for many years, it is recommended that the practice be discontinued, except in exceptional circumstances. The administrative costs associated with maintaining the Flying Squad, as well as the financial cost of maintaining law society memberships for departmental counsel in the three jurisdictions are very high. Files must be prepared locally before being handed off to the visiting counsel, most of whom arrive in Whitehorse, Yellowknife or Iqaluit a day or two before a circuit is scheduled to begin and leave immediately upon its conclusion. As a consequence, resident counsel must undertake all of the advance preparations and follow-up work.

Additional Resources for Northern Offices

Recommendation #36 – Additional resources should be provided to each of the northern regional offices. At the same time the Northern Flying Squad should be discontinued.

V. Alternatives to Prosecution in the North

There are several diversion projects throughout the communities in the North, and several communities have signed *Diversion Protocols* with the Crown, the Territorial Government, and the RCMP. Generally, diversion takes place outside the formal justice system and involves the police referring cases to local justice committees. Justice committees are common in

all three territories and represent an important link between the justice system and individual communities. The Department has been supportive of these committees as they allow the people in the communities to know more about the justice system; to be involved in its administration, and thereby render it more culturally relevant. Community justice dispositions are likely to have more meaning for an offender, and justice committees tend to be more effective in monitoring the offender's behaviour and quickly responding to situations of non-compliance with diversion agreements. Post-charge diversion is also an available option. The Crown may initiate this directly or through the referral of a case by the police to the Crown for possible diversion.

Justice committees can assist the court in determining the proper sentence to be imposed on an accused. Crown counsel are a key point of connection between the existing justice system and a new, more community-based approach. There are obviously time and resource implications associated with this non-traditional role on the part of the Crown.

In enacting s. 718.2(e) of the *Criminal Code*, Parliament recognized that Inuit, First Nations, and Métis people might not have been dealt with fairly by the justice system. The provision requires that all available sanctions other than imprisonment be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders*. In *R. v. Gladue*, [1999] S.C.R. 688, the Supreme Court of Canada held that this section is remedial, i.e. not simply a codification of existing case law. The section encourages sentencing judges to have recourse to a restorative approach to sentencing, with a new emphasis on decreasing the use of incarceration. This approach is recognized in the Policy Guide for Crown Counsel in Aboriginal Justice Matters that has been developed in both the NWT and the Yukon Regional Offices.

It is the stated policy of the Attorney General to make the justice system more accessible, inclusive and meaningful to Inuit, First Nations, and Métis peoples. The Crown should play a leading role in public education about the law and the legal system, while being sensitive to and taking into account the cultural differences, customs, traditions, and values of the community. The Crown also needs to ensure that all segments of the community are represented. In the North, the Crown's role involves an imprecise balancing act that is difficult, multi-faceted, and time-consuming.

When the court goes to a community, the Crown is there to represent that community. For this concept to have meaning, the Crown has to have an understanding of and be sensitive to aboriginal culture and the local issues in that community. While some efforts have been made to provide northern Crowns with cross-cultural training, the reality is that this knowledge base is largely acquired on a haphazard, "learn-as-you-go" basis. A planned and systematic approach should be developed to achieve the requisite training, either by cultural immersion training, which may be the most effective and meaningful, or through more traditional formal classroom training. In addition, Crowns would benefit from Aboriginal language training. This training should be ongoing and should be taken by all staff working in the Northern Offices.

The justice system is not static and continues to evolve. Increasingly, communities are taking on important roles in the administration of justice, largely through their involvement in pre-charge diversion and the administration of community-based court sanctions. The Crown has an important and complex role to play in linking the justice system to the communities that it seeks to

serve. The traditional roles of the prosecutor as police advisor and court advocate remain valid, but new and different expectations have emerged that place additional duties on the women and men who fulfill these difficult positions. In short, more is expected of Crown Counsel in the North where there is a clear expectation that Crown counsel will encourage and assist the communities to develop a justice system that better meets their needs, is sensitive to their values and culture, and represents them.

Relationships with Northern Governments

Recommendation #37 – The Department of Justice should take steps to formalize the relationship between the northern regional offices and the territorial governments in Northwest Territories, the Yukon and Nunavut. Regional Directors should be tasked to meet with territorial Deputy Ministers of Justice and other territorial officials on a regular basis to formally consult on prosecution policies and priorities.

Integration of Northern Operational Experience

Recommendation #38 – The FPS and the Department of Justice should develop a process that facilitates the full integration of operational experience in the North with policy expertise.

Increased Presence in the North

Recommendation #39 – Northern Regional Directors should be tasked with the development of action plans to increase the presence of the FPS and the Department of Justice in northern communities and to address the need for on-going cross-cultural awareness training for all staff.



PART SEVEN: IMPLEMENTATION

The recommendations made in this report represent a substantial program of change. Implementing them will require leadership and dedicated effort in a continually changing operational environment that is already characterized by demanding workloads and a shortage of resources. Proceeding to execute these recommendations without a carefully devised plan could result in frustrated efforts and reduced staff morale.

Consequently, a comprehensive and fully costed implementation plan should be the first order of business. This plan should include: timetables; the dedicated resources required; the subordinate steps needed to fully implement the recommendations; and the organizations and/or officials responsible for implementation. There should be regular reporting, perhaps on a quarterly basis, to the senior management of the Department concerning progress being made.

The terms of reference for this Review called for the initiation of pilot projects where appropriate. The greatest interest is testing new approaches related to prosecutions. To date, 10 pilot projects have been identified with funding coming from the Department's Strategic Investment Fund. They include the expansion of the Toronto Drug Treatment Court Model to other locations and the development of a pilot project in Yukon that addresses the unique needs of Northern prosecution services.

A complete list of the current pilots is provided in Annex D.

Implementation Plan

Recommendation #40 – A comprehensive and fully budgeted implementation plan must be developed and approved, with the following priorities for implementing the recommendations of this Review:

- a collaborative approach to prosecutions with provinces and territories;
- development of alternatives to prosecution and instrument of choice;
- strengthening working relationships;
- responding to the needs of the North;
- management of complex cases; and
- Management priorities: information management, planning and coordination capacity, human resources planning, training.

PART EIGHT: EMBRACING CHANGE

The Federal Prosecution Service has a long and proud history. Its members have shown the highest commitment to justice and public service. Its clients and partners have developed longstanding relationships with the organization. Changes of the magnitude recommended in our Review will not come about without the commitment of the FPS itself to recognize and manage the critical external and internal factors which have permanently altered its operating environment.

Most fundamental of these changes will be the need to re-think the use of prosecutions within the context of a broader range of public policy alternatives. This is not merely an operational task because the prosecution function is so closely aligned with the persona of the prosecutor. Clearly the role of the prosecutor must be re-examined in light of the changing operational environment and the expectations of the various stakeholders in the justice system. The federal prosecutor of the future must still be a courtroom specialist. But prosecutors must also become active participants in a much wider context – in policy development, in assisting and advising with a choice of instruments that goes beyond prosecution, in closer interactions with client departments, in regular consultation with interested communities, and in formal and informal arrangements with other partners in the criminal justice system.

At the organizational level, we are proposing significant alterations to how prosecutions are managed collectively across the justice system. One approach is to reduce the number of prosecutions in some areas by using alternatives. A second is to expand the overall capacity of the FPS by harnessing the synergies of closer co-operation and integration with other Justice organizations, such as the Policy group, and with federal client departments. Third, greater effectiveness can be achieved through stronger partnerships with other key players in the justice system, such as the provinces and the various police forces.

But critical to all of these changes are the people within the FPS. Their intellectual capacity, skills, experience, and innovation are the keys to the future success of the organization. Consequently, they must themselves acknowledge and embrace the changing directions of the organization. This may require revising and re-aligning organizational and personal expectations. It will also require taking the recommendations in this Review as a starting point, rather than as a final fixed state. Finally, the members of the FPS must represent the face of change inside and outside Justice, and champion the new role for prosecution and prosecutors in the Canadian justice system of the future.



ANNEXES

Annex A - Terms of Reference

Annex B - Steering Committee Members

Annex C - Acknowledgments

Annex D - Pilot Projects

Annex E - Recommendations

ANNEX A

TERMS OF REFERENCE

THE GOVERNMENT OF CANADA'S PROSECUTION FUNCTION: A REVIEW

THE CONTEXT

- The Department of Justice Federal Prosecution Service is facing significant challenges in meeting the escalating demand for its services.¹³ Much of that demand is beyond the Department's direct control. It is linked to policing activity, to the government's policy agenda, and to an increasingly complex and quickly changing criminal law environment. Currently, the demand for prosecution services significantly outstrips available resources. Current trends and the information gathered during the Reference Level Review process suggest that a comprehensive Review of these services is needed to address the growing gap between available resources and demand.
- The Department of Justice must either find new resources for its prosecution services or address the issue of what services it will continue to supply and how those services will be provided (or a combination of both). The issue of what services the Department will provide needs to be examined with the assistance of the Department's partners (e.g. Health Canada, Revenue Canada, the Ministry of the Solicitor General and the RCMP) and must be weighed against other departmental priorities, as well as the Government's overall priorities.

- The Department proposes to conduct a Review of the criminal prosecution process in order to identify, examine and cost policy and administrative options for bringing resources and demand into balance. The Review is limited to prosecution services, but as it could involve changes to policies, practices or laws that would impact on other federal programs, the Review needs to be carried out in consultation with stakeholders.

THE ISSUES TO BE REVIEWED

- What steps can be taken to manage the growth of demand for services, reduce the demand for services or otherwise alter the nature of the services provided?
- Are there ways in which the services can be provided that would be more efficient and more effective?
- In order to answer the first two questions, it is essential to establish a framework against which the various options for change can be assessed. In light of the changing nature of crime, particularly its globalization, there needs to be a consideration of what the core mandate of FPS is. What does the government and the Department want to achieve? What leadership role does the federal government want to play? What are the governmental and Departmental priorities which impact on the role and services of FPS? What other principles and considerations should be taken into account in assessing options (e.g. cost-effectiveness, other means of achieving objectives, fairness, public interest, the *Charter of Rights and Freedoms*)?

BACKGROUND

- The Department of Justice and the Treasury Board are currently conducting a Reference Level Review of the Federal Prosecution Service.

¹³ The services provided by the Federal Prosecution Service include the prosecution of federal offences throughout Canada, as well as the prosecution of Criminal Code offences in Yukon, Nunavut and the Northwest Territories; international assistance work, including extraditions; and strategic policy work. Our prosecution services in the Toronto, Montreal and Vancouver offices are facing particularly difficult resource situations.

- The basic purpose of the Review is to determine what additional resources the Department of Justice needs to fulfil the Prosecution Service's current mandate.
- The first phase of the Review, completed on March 31, 1999, resulted in an estimate of needed resources. The second phase of the Review, to be completed by September 1, 1999, will refine that estimate and produce hard numbers for use in discussions with Finance and as input to Cabinet's 1999 summer planning exercise.
- As part of the first phase of the Review, the Department produced a deck (Annex A to this document) that describes the environment within which FPS operates, the current gap between resources and demand, the consequences of the gap and the pressures that are expected to result from an increase in demand in the future.
- to develop recommendations, and cost estimates, for changes in headquarters and regional business practices that would make the Prosecution Service more efficient and effective and that could be implemented in the short-term. In particular, attention should be paid to those issues set out in sections 7, 10, 11 and 12 of Annex A which can be implemented in the short-term.
- In the medium term, that is, by June 30, 2000, the Department proposes:
 - to develop options over the medium-term for basic changes in the way that the Prosecution Service is managed and administered that would further increase its efficiency and effectiveness;
 - to develop options for basic changes in the way that the prosecution/enforcement activity is carried out, with the objective of bringing prosecution service demand and supply into line; these options may involve enforcement and prosecution policy changes, legislative changes or both;

THE THIRD PHASE OF THE REVIEW

- The Department proposes to embark on a third phase of work which will build on the Reference Level Review and the results of Phase II and will address the basic issues identified on the previous page.
- The Review will have short-term and medium-term deliverables. It will also identify any longer-term issues that cannot be addressed within the life of this Review but that are worthy of further examination.
- In the short-term, between July 1, 1999 and October 1, 1999, the Department proposes:
 - to work with a federal enforcement agency (e.g. the RCMP) to develop a protocol for forecasting, at the headquarters and regional levels, the agency's annual demand for prosecution services; the resulting protocol would serve as a model for protocols with other enforcement agencies at federal, provincial and municipal levels of government;
 - to work with other enforcement agencies to apply and implement the protocol developed with the RCMP;
 - to work with others (e.g. Health, RCMP, provincial and municipal police forces, provincial and territorial governments) to develop options for ways in which they can assist to address the demand for services and the nature of the services provided and to develop a mechanism for prioritizing demands for FPS services; and
 - to cost the options for policy and administrative changes that arise from the Review.



- The Department will ask senior representatives of our law enforcement partners and central agencies to participate actively in the Review, including representatives of:
 - departments actively engaged in law enforcement (Solicitor General, Health Canada, Fisheries and Oceans, Bureau of Competition Policy and Revenue Canada);
 - Finance;
 - the Treasury Board Secretariat; and
 - the Privy Council Office.
- The Department will also consult with provincial and territorial governments, provincial and municipal police forces, Legal Aid Plans, the defence bar, academics, judges and community groups. (It should be noted that these consultations could impact on the length of time required to conduct the Review.)
- A distinction needs to be made between high-volume, routine matters and the smaller number of complex cases which take up proportionately more of the resources. Strategies need to be found to deal with both.
- Specific questions that the Review should address are set out below. The following includes both short and medium-term deliverables.

ISSUES TO BE STUDIED

1. Information Base

The information needs for the Review will be identified as well as the on-going information needs of the FPS. (To the greatest extent possible, these information needs will be incorporated into the second Phase of the Review.) Information from other jurisdictions regarding their prosecution services and lessons they have learned will be included.

2. Framework

The Review will develop a framework against which options should be assessed:

- What should be the core mandate of FPS?
- What is FPS's mandate in the international sphere with respect to operational and policy matters?
- What is the government and the Department trying to achieve through FPS?
- What governmental and Departmental priorities and policies are relevant to the role and services of FPS?
- What is the impact of the *Charter of Rights and Freedoms* and other public policies (e.g. gender equality, diversity)?
- Are there other laws, principles or policies which are relevant?
- What are the roles and responsibilities of the various players in the system?
- What is the role of the prosecutor?
- What should the relationship be between the prosecutor and the police?
- What other means are available to achieve public policy objectives currently achieved through prosecution?

3. Current and Future Demand

The Review should describe, in both quantitative and qualitative terms, the current demand for prosecution services, and identify and assess the probable sources, types and extent of future demand.

4. Structural Issues

The structural and administrative arrangements for FPS within the Department of Justice will be examined:

- Do the current accountability and organizational structures work both within head office and as between head office and the regions? As between portfolio heads and senior regional directors?
- Are there structural changes within the Department that would enhance effectiveness and efficiency?

5. Delivery of Federal Prosecution Services

The Review will consider who should be delivering federal prosecution services.

- How are decisions made as to whether a case should be handled in-house or referred to an agent (given the fact that the Drug Prosecution Fund is part of the FPS budget)?
- Is there the right mix of in-house counsel and legal agents? Should it be changed?
- Are there ways in which the Agent side of delivery of services can be made more efficient and effective? e.g. changes to the appointment process, management of their work, supports, how they are paid.
- Can some of the work of lawyers be done by law students, paralegals or law clerks?
- Is the work appropriately allocated amongst the different levels of lawyers? Between the regions and head office?

6. The Division of Prosecutorial Responsibility

The Review will consider the allocation of roles and responsibilities within the current system and whether a reallocation or redefinition of those roles could lead to efficiency gains.

- Should the current allocation of responsibilities for criminal prosecution as between the federal and provincial governments be altered?

- Should the federal responsibility for criminal prosecutions in the territories be devolved?
- Are there ways in which provincial and federal prosecutors can work together more effectively?
- Are there ways in which one can build on the existing mandate of the Heads of Prosecution and other networks of prosecutors to improve coordination and co-operation?

7. Limits on and Changes to Caseload

This section primarily addresses high-volume, relatively straightforward cases; other strategies will be required for the more complex cases.

Are there ways in which caseload can be limited? This involves a consideration of both a limit on the quantity of cases as well as qualitative changes to the caseload. It includes changes to the caseload at various stages of the process, both pre-charge and post-charge.

Some of these changes are already well underway and need to be assessed; others are longer-term.

Strategies to be examined include:

- an examination of the efficiencies and effectiveness of the contraventions and fine collection programs;
- decriminalization of offences to be replaced by other sanctions, such as ticketing;
- other options to charging by police: diversion, warnings;
- pre-charge screening;
- use of crown discretion to reduce minor cases;
- use of pre-trial diversion and other pre-trial mechanisms;
- drug courts to divert people to treatment programs;



- changes to criminal procedure, e.g. reclassification of offences;
- impact of crime prevention programs;
- use of alternative forms of dispute resolution; and
- other changes?

8. Management of Complex Cases

Although complex cases are fewer in number, they account for a majority of the work and resources (i.e. approximately 80% of the resources are expended on 20% of the cases). The Review will consider how complex cases should be managed, resourced and staffed. The application of project management approaches will be considered.

9. Disclosure Costs

Are there ways in which disclosure can be made less costly and more efficient? Can technology be employed? How can police assist in facilitating the disclosure obligations?

10. Practice Efficiencies

In addition to other issues noted above, are there other changes in the way in which services are delivered that would make them more efficient, effective and less costly? This will include a consideration of best practices and lessons learned from IPOC units, the Extradition Working Group, tax teams and mega teams as well as best practices and lessons learned from other prosecution services. The possibility of benchmarking identified efficiencies will be explored.

11. Administrative Issues

Are there administrative practices that can be introduced that would result in efficiencies and cost-savings? Does FPS have the necessary infrastructure and systems to manage finances, people and caseload? For example:

- Reporting mechanisms to track workload and productivity;
- The development of a workload forecasting model;
- Improvements to the timekeeping system, e.g. national implementation of caseview on a national basis for both Agents and in-house counsel;
- Centralization or other changes to financial and workload reporting to enhance the timeliness, consistency and usefulness;
- Uses of technology; and
- Other changes?

12. Human Resources Issues

Do we have the right people doing the right things? Are staff receiving the supports they need to do their jobs? Will we have the work-force we need in 10 years? Many of the issues noted, below, are already underway and need to be assessed.

The consideration of these questions should include:

- A comprehensive analysis of the current workforce;
- An analysis of the workforce in 5, 10 years;

- Analysis of the skill sets the FPS needs now and in the future, including both management and legal skills;
- Analysis of what lawyers at different levels need and should be doing;
- What supports do people (lawyers, students, paralegals, law clerks and agents) need to do their jobs? e.g. research, tools;
- How can the role of the prosecutor be communicated and recognized?;
- Mentoring and training needs;
- Developmental opportunities for staff, e.g. secondments, interchanges with other governments, exchanges with the private sector, international work;
- Career planning;
- Succession planning;
- Employment equity; and
- Jurisdictional mobility.

13. Equality and Diversity

A Review of the FPS necessitates a Review of the impact of any proposed changes on women and equity groups. A consideration of changes to prosecution practices in the north, for example, must include a consideration of the aboriginal context and perspective as well as gender impact. Similarly, an examination of changes to drug prosecutions in large cities must consider issues of race and culture.

14. International Issues

- What is the international role of the FPS, both operationally and with respect to policy matters (e.g. extradition, mutual legal assistance and negotiation of international instruments related to criminal law)?
- Can our international obligations be altered, prioritized or carried out more efficiently?

**ANNEX B****MEMBERS OF THE FPS REVIEW
STEERING COMMITTEE**

1. Sheila Arthurs (Justice)
2. Daniel Bellemare (Justice)
3. Myriam Bordeleau (Justice)
4. Rory Edge (Justice)
5. Richard Fadden (Treasury Board)
6. David Gates (Justice)
7. Thea Herman (Justice)
8. Paul Kennedy (Solicitor General)
9. Robert Lafleur (Health)
10. Richard Mosley (Justice)
11. Margaret Purdy (Privy Council)
12. John Sims (Justice)
13. Andrew Watt (Justice)
14. Deputy Commissioner Giuliano Zachardelli (now Commissioner, RCMP)
15. Assistant Commissioner William Lenton (RCMP)

ANNEX C

ACKNOWLEDGMENTS

There have been many people who have contributed to this report and, more often than not, their contribution has been in addition to their "day job". People have been extremely generous in providing us with information, input and, in the case of the topic champions, in preparing background reports for the Review.

We would like to thank the topic champions who provided so much of the substance of this Review. They are:

Sheila Arthurs	Carole Millett
Howard Bebbington	Bob Prior
Clyde Bond	Graham Reynolds
Mary-Lynn Courtney	Corinne Richards
Ab Currie	Paul St. Denis
Marion Fortune-Stone	Bernadette Schmaltz
Françoise Girard	Richard Starck
Nancy Irving	Jodie Van Dieen
Joanne Klineberg	Kay Van Nort
Carolyn Kobernick	

A special thanks to Monique Gagné who, as project administrator, took on the bulk of the administrative tasks for the Review. After Monique left, her duties were assumed by Vittoria Alcamo who helped to prepare this report.

Steering Committee members devoted days and hours of their time in providing the Review with the benefit of their views and experience. They are listed in Annex B.

Many others provided information and valuable input :

Marc Fortin	Marius Nault
George Thomson	Kim Prost
Janice Charette	Robert Bourgeois
Croft Michaelson	Elaine Krivel
Paul Evraire	Bev Wilton
Kwing Hung	Stan Lipinski
Valerie Howe	Roberta Russell
Nathalie Quann	Angela Connidis
Kim Matthews	Kofi Barnes
Marjorie Ward	Rob Adlard
Stephen Bindman	Pierre Loiselle
Nancy Boillat	Barrie Miller
Don Beardall	Deborah Flak
Robert Doyle	Rob Frater
Susan Mickus	Hugh O'Connell
Myles Kirvan	Pam McCurry
Judith Bellis	



ANNEX D

PILOT PROJECTS

In accordance with the terms of reference for this Review, the following projects have received funding from the Department's Strategic Investment Fund:

Yukon Pilot Project

This project is aimed at addressing the unique needs of providing prosecution services in the North. It will test a mix of best practices and resources.

Expansion of Adult Drug Treatment Court Model

There is a desire to expand the Drug Treatment Court Model in Toronto to other urban centres. A Drug Treatment Court in Vancouver has been approved.

Disclosure Pilot Projects (Ontario and B.C.)

The projects will provide for more active pre-charge involvement of prosecutors.

Enhanced Agent Supervision (B.C.)

The management of agents is a critical issue. Four priority areas have been identified: focus on areas with the highest agent billings; apply early case intervention to major files; agent training; improvement in the taxing of accounts.

Caseview Data Entry

The extent of Caseview data entry is variable across the country which has created a barrier to the FPS having the data it needs to carry out meaningful planning. This project seeks to bring data entry up to date across the country.

Complexity Matrix

The Review identified the importance of having and using an effective complexity matrix. The content of the matrix needs to be identified and then implemented.

Alternatives to Prosecution - Possession of Small Amounts of "Soft" Drugs

There is a lack of reliable data concerning the number and profile of cases being prosecuted for the possession of soft drugs. Research on the current caseload and the full range of alternatives is underway.

Arrest Referral

This project is based on an approach taken in the UK to divert some drug cases to treatment and other alternatives at the point of arrest.

Partnerships with the Provinces – Youth Drug Treatment Court

Work is underway to adapt the adult Drug Treatment Court model to youth.

ANNEX E

RECOMMENDATIONS

PRINCIPAL RECOMMENDATIONS

New Role and Mandate

Recommendation #1 – The FPS should meet with the provinces and territories, both multilaterally and bilaterally, to examine how the prosecution function and prosecution resources in the country could be collectively managed and rationalized, consistent with the goals of achieving a justice system that is fair, equitable and accessible, and which would provide high quality services more efficiently and effectively. These discussions should include the consideration of a variety of approaches including: joint management of prosecutions; joint prosecution of cases; maximizing efficiencies through increased collaboration; and devolution of responsibility for certain types of cases and/or bodies of work.

Criminal Litigation Strategy

Recommendation #2 – The FPS should utilize the Criminal Litigation Strategy as a key mechanism for managing demand by:

- assigning very senior and experienced prosecutors to its development and on-going management;
- considering the creation of senior practitioner positions across the FPS to underscore its importance;
- extending the Strategy to Nunavut; and
- developing performance measures to identify and track the impacts and results of the Strategy.

Alternatives to Drug Prosecutions

Recommendation #3 – The Department of Justice should work with Health Canada to develop a range of measures to deal with prohibited drugs in addition to prosecution as part of a comprehensive and integrated health strategy.

Alternatives to Regulatory Prosecutions

Recommendation #4 – The FPS should work in collaboration with client departments and departmental legal service units to develop a range of measures to achieve regulatory compliance, with prosecution as only one of many strategies.

Review of the International Assistance Function

Recommendation #5 – The FPS should review the international assistance function within the context of the Department's international functions and the role of the FPS in international assistance. In particular, the review should consider: the role and responsibilities of the International Assistance Group; the role and responsibilities of the regions; how this work should be organized and performed; resource allocation; opportunities for efficiencies; and the involvement of the provinces. Following this review, strategic and operational planning should be undertaken on a regular basis. This planning should include the identification of priorities and resources.

Integration of Policy and Prosecution Functions

Recommendation #6 – The FPS and the Department of Justice must take steps to achieve greater integration within the Department of Justice while still respecting the principle of prosecutorial independence, so that policy and prosecution initiatives inform each other in an on-going and substantive way. In particular, the expertise of prosecutors should be used in criminal procedure reform and the expertise of Northern prosecutors should be used in the development of criminal law and Aboriginal justice policy.

Independence of Prosecutors

Recommendation #7 – The FPS should undertake a dialogue involving all staff in all regions concerning the evolving role of prosecutors and in particular the concept of prosecutorial independence.



Departmental Role in Regulatory Prosecutions

Recommendation #8 – The FPS should establish a working group in collaboration with departmental officials to examine the respective roles of FPS and departmental counsel and agents in the conduct of regulatory prosecutions.

Regulatory Prosecutions Group

Recommendation #9 – A Regulatory Prosecutions Group should be established to:

- develop a system for workload projections and forecasting;
- examine best practices in communications between the FPS and DLSUs;
- work with the Training Coordinator to develop and deliver a training program for prosecutors on regulator prosecutions and for client investigators and inspectors on basic legal principles and practices;
- develop a “lessons learned” protocol for significant regulatory prosecutions;
- reinstitute the Prosecution Guides for regulatory prosecutions

Review of Shared Responsibility/Client-Driven Service Process

Recommendation #10 – Corporate Management in the Department, in conjunction with the FPS and client Departments, should examine improvements to the system of shared financial responsibility for regulatory prosecutions as well as review the administrative procedures associated with the Client-Driven Services (CDS) process in order to streamline the procedures.

New Working Partnerships

Recommendation #11 – Stronger working partnerships should be developed and nurtured by the FPS with external prosecution agencies, client departments and other participants in the justice system.

Regional Memoranda of Understanding

Recommendation #12 – The national umbrella memorandum of understanding between FPS and the RCMP should be concluded and regional memoranda of understanding should be developed with the RCMP and other policing and investigative agencies to clarify responsibilities, to develop complementary strategic plans, and to promote collaborative approaches and operations.

Extraordinary Costs of Complex Cases

Recommendation #13 – The FPS must address the issues of resourcing the extraordinary costs of large cases including:

- a resource allocation system within the FPS flexible enough to respond to extraordinary demands as they arise;
- a policy on how to respond to provincial requests for assistance in extraordinary cases; and
- a response to the impact of complex cases generated by both the FPS and provincial prosecution services on Legal Aid needs.

Federal-Provincial Co-operation on Complex Cases

Recommendation #14 – The FPS should initiate the establishment of a federal-provincial network of prosecutors with expertise in complex cases for the purposes of knowledge sharing, advice and support.

Case Management Strategies

Recommendation #15 – FPS Groups Head across the country should continue or institute mechanisms to engage the courts in the province and territories in a dialogue concerning case management strategies to optimize the use of judicial resources.

Disclosure

Recommendation #16 – The FPS should establish a Disclosure Task Force to:

- examine the issues surrounding disclosure by electronic means;
- establish mechanisms to track disclosure costs;
- establish the steps necessary for the adoption of a national disclosure management system;
- examine law reform options; and
- with the FPS Training Coordinator develop training programs for counsel, agents, and police.

The Task Force should work with the RCMP and other police agencies.

Use of Multidisciplinary Teams

Recommendation #17 – The FPS should make regular use of multidisciplinary teams of prosecutors, paralegals and other support professionals, particularly in dealing with complex cases. Human resources policies and procedures should be revised so that staff can be quickly deployed to these teams.

Leverage Principle

Recommendation #18 – There should be greater utilization of the “leverage” principle in the assignment of tasks, with work assignments being performed by the most cost-effective service provider without compromising quality. In particular, greater use should be made of paralegals, support staff and students. The roles of managers and senior practitioners also need to be delineated.

Repatriation/Quality Control of Agents' Work

Recommendation #19 – The FPS should assess options for the repatriation of agents' work and measures to improve the quality of agents' work.

This includes:

- institution of an application process where it is not currently in place;

- incorporation of a formal evaluation process into the selection/appointment process;
- an increase of agent supervision resources to address serious issues in the supervision ratio;
- adoption of a more comprehensive and systematic approach to agent training;
- measures to ensure that agents carry out FPS policies, particularly with regard to alternatives to prosecution;
- exploration of opportunities for the repatriation of agents' work; and
- where there are concerns about agents' ability to undertake complex cases, examination of other options such as: increased involvement of the FPS agent supervisor; collaborative arrangements with the provinces and territories; or repatriation of the work to the FPS.

Strategic Planning and Coordination

Recommendation #20 – The FPS must strengthen its strategic planning and coordination capability through greater utilization of tools such as environmental scanning, a complexity matrix, timekeeping, increased electronic integration, and the development of a national tracking and document management system.

Management Information and Budgeting

Recommendation #21 – As the highest priority, the FPS must develop effective management information and budgeting systems for its current and projected workload.

National/Regional Resource Allocation

Recommendation #22 – The FPS should establish a group consisting of representatives of the regional directors, group heads, and headquarters staff, to advise the Assistant Deputy Attorney General on the most effective resource allocation within the FPS, and between Ottawa and the regions, based on current and projected workload.



Fine Collection Costs

Recommendation #23 – The FPS should initiate discussions with the Treasury Board to achieve full reimbursement for the costs of implementing an FPS-wide fine collection program. Other options that would provide the FPS with additional flexibility in managing this program should also be identified.

National Practice Groups

Recommendation #24 – The FPS should establish national practice groups with representation from regional offices to disseminate best practices and to provide national perspectives on prosecution issues.

Specialty Teams

Recommendation #25 – The FPS should create a group of specialists drawn from throughout the FPS, to be used as national resources in support of FPS offices facing particularly complex legal issues beyond their capacity. The Northern Flying Squad model could serve as a useful guide for the creation of this group.

Dedicated IT Managers

Recommendation #26 – The FPS should ensure the appointment of a senior information technology manager to develop a strategic plan that provides for the best means of connecting the FPS electronically with other organizations in the field of prosecutions.

Comprehensive Human Resources Plan

Recommendation #27 – The FPS with the assistance of Human Resources Branch should develop a comprehensive human resources plan in order to become a workplace of choice. This plan should include a recruitment strategy and an employment equity plan to be reviewed and revised on a regular basis as part of coordinated planning within the FPS.

Management Skills

Recommendation #28 – The FPS should place greater emphasis on management skills in the recruitment and promotion of staff in management positions.

Composition of the LA Senior Complement

Recommendation #29 – A review of the Senior Complement of the LA Group within the FPS should be undertaken to assess whether its current composition and size is appropriate and to address the under-representation of women.

Positive Working Environment

Recommendation #30 – The FPS with the assistance of the Human Resources Branch should develop, implement and monitor policies and practices to improve the working environment. This should include:

- practices to facilitate and encourage a balance of work and life outside of work;
- an enhancement of assignment, developmental and other opportunities for staff;
- rewards and recognition; and
- the provision of appropriate and timely support for staff working on complex cases and in other stressful situations. Safety and security issues must be addressed as a top priority.

Continuous Learning/Knowledge Sharing

Recommendation #31 – The FPS should develop and implement a plan to promote continuous learning, knowledge sharing and training, including the development of a nationally coordinated and accessible data bank of case summaries and issue-based information and the establishment of national practice groups.

Training Coordinator

Recommendation #32 – A national Training Coordinator should be appointed to work with regional directors, FPS Group Heads and others within the FPS to:

- develop annual training plans for individual and groups;
- implement the Legal Excellence program across the country;

- establish Excellence Programs for paralegals and support staff;
- implement mentoring and coaching programs where they do not currently exist;
- develop a training program for agents;
- develop a training program for the RCMP and other investigative agencies; and
- ensure equal access to training opportunities so that employees in the North or smaller locations are not disadvantaged.

Communications Campaign

Recommendation #33 – A proactive campaign should be undertaken within the Department, the Government of Canada and with the public at large to promote a broad understanding of the FPS and the role of prosecutors.

Communications Specialist

Recommendation #34 – The Director General, Communications should assign a communications specialist to the FPS to provide media relations training and ongoing communications support and assistance.

Devolution of the Prosecution Function

Recommendation #35 – The Department of Justice should formally communicate to the three territories its willingness to work with them in developing a plan for the devolution of the prosecution function in each territory within the next 10 years.

Additional Resources for Northern Offices

Recommendation #36 – Additional resources should be provided to each of the northern regional offices. At the same time the Northern Flying Squad should be discontinued.

Relationships with Northern Governments

Recommendation #37 – The Department of Justice should take steps to formalize the relationship between the northern regional offices and the territorial governments in Northwest Territories, the Yukon and Nunavut. Regional Directors should be tasked to meet with

territorial Deputy Ministers of Justice and other territorial officials on a regular basis to formally consult on prosecution policies and priorities.

Integration of Northern Operational Experience Recommendation #38 – The FPS and the Department of Justice should develop a process that facilitates the full integration of operational experience in the North with policy expertise.

Increased Presence in the North

Recommendation #39 – Northern Regional Directors should be tasked with the development of action plans to increase the presence of the FPS and the Department of Justice in northern communities and to address the need for on-going cross-cultural awareness training for all staff.

Implementation Plan

Recommendation #40 – A comprehensive and fully budgeted implementation plan must be developed and approved, with the following priorities for implementing the recommendations of this Review:

- a collaborative approach to prosecutions with provinces and territories;
- development of alternatives to prosecution and instrument of choice;
- strengthening working relationships;
- responding to the needs of the North;
- management of complex cases; and
- Management priorities: information management, planning and coordination capacity, human resources planning, training.