TRIAGE

EFFECTIVE DATE: February 27, 2017	REVIEW DATE: March 2, 2017: Law Society Code of Conduct references updated. March 8, 2017: Restriction on release removed. Protocol uploaded to the public CPM.

COMMENTS: This Practice Protocol is designed to provide a standardized method for prosecutors to assess and review files to determine which files can proceed where resources are not adequate to prosecute all otherwise viable charges. It is designed to ensure a principled and proportionate response to crime in these circumstances.

CROSS REFERENCE: Decision to Prosecute Guideline; Adult Alternative Measures Program Guideline (Diversion Guideline forthcoming); Case Viability Protocol; Injecting a Sense of Urgency Report; Negotiated Resolutions Guideline; Strategies to Reduce Trial Length; Charter Notice Prosecution Pointer

CASES: *R v Jordan*, 2016 SCC 27; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24

BACKGROUND

The term "triage" originated when medical personnel, faced with numerous casualties and inadequate resources, had to ration the care of patients based on the severity of their injuries. While prosecutors' decisions do not have the same life and death impact as those faced by medical personnel, they do have very significant individual and cumulative impacts on the justice system. The implementation of triage is not simply a matter of attaching priority or ranking caseload, but determining which cases will not proceed to a prosecution.

The use of triage reflects the gap between the resources allocated to the Alberta Crown Prosecution Service (ACPS) and the number of otherwise viable charges laid by the police. It is a measure born of necessity due to a combination of limited resources and increased demands on the justice system. In the criminal justice context, that combination is the product of:

1. Fiscal Constraints – Provincial budgets have historically reflected the reality of resource revenue and increased budget pressure;
2. Increasing Police Reported Incidents, Crime Severity, and Charges - From 2012-13 to 2014-15 the number of police reported incidents increased over 15%, and the number of charges commenced in Provincial Court increased by 23.4%. In 2015 police reported crime in Canada, as measured both by the crime rate and Crime Severity

Index (CSI), increased for the first time since 2003. Alberta reported an 18% increase in the CSI- the largest increase reported by provinces and territories;
3. Population Increases –The population in Alberta has increased by 10.2% since 2012-13. Population growth, particularly in the 18-24 year old age range dramatically increased demands on the criminal justice system; and
4. Increased Constitutional Pressure and Complexity – The immediate but by no means the only factor increasing complexity and significantly reducing acceptable processing time for cases is the decision of the Supreme Court of Canada in *R v Jordan*, 2016 SCC 27. *Jordan* imposed fixed presumptive time limits for trial within a reasonable time. The transition provisions articulated in that case are unclear. Significant litigation and resulting uncertainty are expected as a result. Also, increasing the complexity is the dramatic change in the nature and volume of evidence. The increase in video evidence, computer and cell phone data, and other electronic evidence also increases the time and effort required for the disclosure process.

Triage represents the principled response to the combined effect of these pressures. The objective of this response is to ensure, to the extent possible within these constraints, that serious and violent crime is given priority and prosecuted effectively. It is an integrated response that requires careful consideration of case viability, early and, where appropriate, alternative resolution, and termination. It is based on the following principles and factors:

1. Proportionality of Response: The criminal justice response to crime should be proportionate to the crime committed. The amount of resources dedicated to a prosecution should reflect the seriousness of the crime. Files should be scrutinized to determine if alternate avenues exist (short of traditional prosecutions in court) that would be appropriate for the offence, offender, and victim;
2. Ethical considerations: A recognition that a proportionate approach, as well as a focused, efficient use of resources can contribute to just outcomes and maintain the reputation of the administration of justice;
3. Caseloads: A recognition that the number of files currently in the system is beyond the capacity of the prosecution service to conduct province-wide, in accord with professional obligations, without applying triage measures;
4. Delay: The volume of files currently in the system is overwhelming the capacity of the courts to the extent that there is unacceptable delay in bringing matters to trial. This delay has led to charges being stayed by the courts. The recent Supreme Court of Canada decision in *Jordan*, which establishes time limits for the completion of files, will result in greater scrutiny of delays in the courts; and
5. Expense: A recognition that the prosecution of an offence is resource-intensive, from investigation through prosecution and trial.

Attention to these factors not only ensures the best use of limited resources within the prosecution service, police, and courts, but maintains the quality of prosecutions, benefits

the administration of justice, and public perception of the justice system as a whole.

Triage requires the consideration of several inter-related concepts, described below.

1. *Case Viability*[1]

The duty of prosecutors is to ensure that only those files that meet the prosecution standard are commenced or continued. This responsibility is on-going and must be applied at every stage of the prosecution.[2] Currently, vast court and prosecution resources are expended on files that are withdrawn close to the trial date or on the date of trial because of lack of evidence. An assessment of the viability of the prosecution must occur as early as possible in order to ensure that those files that do not meet the prosecution standard are removed from the system as soon as possible. Prosecutors must be vigilant in their file review and recognize that expediting the matter through the court system is a priority. In an era of limited resources and applying the principle of proportionality, not every viable file can be prosecuted. Prioritization is necessary.

The sustainability of the ACPS is dependent upon a continuous, on-going, rigorous review of files at every stage of a prosecution. When a matter is first referred to the ACPS for prosecution, prosecutors have an obligation to assess whether the case meets the prosecution standard. A matter that does not initially meet the standard should be reviewed to determine if it is an incomplete file that requires additional investigation, or a file where the evidence is so weak or the investigation so flawed that the likelihood of conviction is remote. The Case Viability Protocol provides more detail regarding this analysis.

At the screening stage, when the prosecutor identifies a gap in the investigation or the absence of evidence, the prosecutor should assess whether the missing evidence will alter the analysis in determining whether there is a the reasonable likelihood of conviction. If there would be insurmountable gaps in the prosecution even if the missing evidence was provided, the charges must be withdrawn.

If the missing evidence will support a reasonable likelihood of conviction, the extent to which the prosecutor should seek that evidence will depend on the seriousness and complexity of the file. For more minor matters, prosecutors may want to consider withdrawing or staying the charges outright, without further requests to the police. If the matter is of medium seriousness and complexity, greater efforts should be made to have the police conduct further investigation or provide the missing evidence. For more serious matters, prosecutors should provide investigators with a greater degree of latitude.

[1] See the Case Viability Protocol

[2] See the Decision to Prosecute Guideline

Withdrawal of charges on the eve of trial due to a lack of evidence in the initial investigation is never acceptable.

The early removal of non-viable prosecutions has a number of benefits, not the least of which is freeing up prosecution resources for serious and violent offences. It places responsibility for complete investigations prior to charges on the investigating agency. The efficient withdrawal of these files also enhances the reputation of the prosecution service as a whole, by proceeding only on viable charges, thereby demonstrating respect for the value of limited court time and resources. It is the responsibility of the prosecution to ensure that accused persons are not facing charges that cannot reasonably be proved.[3]

Files that have a reasonable likelihood of conviction, but do not contain a strong public interest in prosecution also represent an inefficient use of time and other resources. In such cases, it is important to remember the purposes for prosecution – to denounce and deter unlawful conduct, to recognize the harm done to the victims, to have offenders make amends to their victims and society, and to protect society from future harm. In cases of minor crime, prosecutors must consider carefully whether a full prosecution will produce a meaningful, timely result. For some matters, the arrest by the police may be enough of a deterrent. For others, alternative measures (formal or informal) or diversion may be more efficient and result in timely and meaningful consequences for the offender.[4]

2. *Early Resolution*

Once viable prosecutions are identified, prosecution resources must be focused on serious and violent matters. Prosecutors are encouraged to keep in mind that the majority of files result in disposition by guilty plea. Mechanisms must be in place to provide an opportunity for files to be resolved as early in the process as possible. There are a number of ways that prosecutors can encourage early resolution:

- Ensuring that the file, the investigation and all disclosure are complete as soon as possible.
- Providing a written offer for resolution at the first appearance or soon after. The timing of the offer is vitally important. Providing a written offer will alleviate uncertainty and encourage faster resolution. In addition, an accused may be more motivated to plead guilty at earlier stages than later in the proceedings. When drafting the offer, the prosecutor should make clear that the offer is the best offer possible, taking into account the mitigating impact of an early guilty plea. The offer may be time limited and unavailable either after a certain date or after a not guilty plea is entered. The offer should only be repeated at later stages of the proceedings in

[3] *Henry v. British Columbia (Attorney General)*, 2015 SCC 24

[4] See the Adult Alternative Measures Program Guideline (Diversion Guideline forthcoming)

exceptional circumstances. The mitigating factor of an early guilty plea should be noted on the record.

- Personal contact with defence counsel to discuss resolution or narrowing of the issues is predicated on the prosecutor having reviewed the file and determined a position on sentence for an early plea, and a position following trial. This will ensure that defence counsel is aware of the benefits to resolving the file at an early stage. In addition, if early resolution is not possible, it is a good opportunity to narrow the issues and focus court time on appropriate litigation.
- Some matters can be resolved by accepting pleas to lesser offences, if the lesser offence is properly made out on the evidence and acceptance of the plea is done in a principled manner (that is, accepting a lesser plea just to save time is not acceptable if the more serious offence is made out on the evidence.) If the evidence is questionable for the more serious offence, it is acceptable to take a plea to a lesser offence. [5]

3. *Efficient File Management – Culture Change*

Delay in the prosecution of a file puts the prosecution at risk. Many factors contribute to this risk. Not all of these factors are within the control of the Crown. Nevertheless, *Jordan* requires a consistent, continued effort to move files forward. Such efforts must be clear on the record so that further delays can be appropriately attributed to the defence or the accused.

Delay increases the risk of a *Jordan* stay of proceedings. Delay is also the enemy of an effective prosecution. As time passes:

- The accused is less remorseful and less motivated to deal with the charges;
- There is increased risk that the accused may fail to appear, stalling the process;
- Witnesses lose interest or move; and
- Evidence can be lost or weaken over time.

Unfortunately, repeated adjournments and continuations have become so common that they are accepted as inevitable.[6] The Supreme Court has indicated that this culture must change. We play a key role in that change, and must counter the complacency that has come to characterize the progress of some files through the system. To minimize delay to the greatest extent possible, prosecutors:

- Must be cautious in electing by indictment in hybrid matters, particularly if the sentence sought is within the summary range, since it complicates the file and prolongs the ultimate resolution of the file;
- Should oppose docket adjournments after the majority of the disclosure has been

[5] See the Negotiated Resolutions Guideline
[6] See the Injecting a Sense of Urgency Report

provided (and docket crown should know at what stage disclosure is to inform the court);
- Should ensure all disclosure and follow up investigation is done in a timely way;
- Must be aware of Crown disclosure requirements and oppose defence adjournments to seek further disclosure, further investigation or documents/ evidence to which they are not entitled;
- Should ensure that every adjournment request is clear on the record on whose behalf it is made;
- Should have discussions with defence to determine appropriate court time and narrow issues;
- Should limit witness lists and ensure trial time estimates are reasonable to lessen the chance of continuations;[7]
- Should insist on proper notice for *Charter* applications and oppose those with insufficient notice or detail;[8] and
- Should oppose requests for Pre-Sentence Reports (PSR) or psychiatric reports for sentencings when the information is unlikely to have any real impact on sentence.[9]

4. Triage

The objective of all of the preceding steps is to maximize the time available for the prosecution of serious and violent crime. Nevertheless, the combined effect of resource constraints and increased charges may lead to a situation where the termination of otherwise viable and appropriate prosecutions is necessary in order to ensure that more serious cases proceed.

The assessment of files and application of these principles is continuous. The principles in the Decision to Prosecute Guideline, including consultation, always apply. However, for ease of reference and application, the following three scenarios illustrate how triage can be applied:

a. At the File Assignment Stage

Prosecutors have a fundamental obligation to ensure that they have the capacity to properly carry out their legal and ethical obligations in relation to all of their files. The

[7] See Strategies to Reduce Trial Length

[8] See Charter Notice Prosecution Pointer

[9] While courts routinely order these types of reports on request by defence, the preparation of these reports is very expensive and labour-intensive and results in significant delays in sentencing. Most of the relevant information in PSRs particularly could be provided by adequate preparation by defence counsel. For psychiatric reports, there is no section of the Code which mandates a psychiatric evaluation for sentencing. Our psychiatric resources, particularly in the large urban centres, are overburdened with assessments for sentencings when they should be focused on forensic evaluations for fitness and NCR assessments. If there is no obvious psychiatric or major psychological issue, prosecutors should not be encouraging forensic psychiatric assessments for sentencing.

Law Society Code of Conduct imposes obligations that require counsel to ensure that they have the capacity to meet those obligations, and to decline work where they do not have that capacity.[10]

The first and overriding priority is the prosecution of serious and violent crime. If, in light of the approach described above, a prosecutor determines that there are insufficient resources to give effect to that priority, the prosecutor must advise the supervising or assigning prosecutor of the situation. The prosecutor must describe any steps that have been taken to alleviate the problem (if applicable), and identify files that need to be reassigned to enable effective allocation of necessary resources to files involving serious and violent crime.

If there are no other prosecutors available to whom the returned files can be reassigned, the assigning or supervising prosecutor may determine that these prosecutions should be terminated (assuming that no other resolution options are available or appropriate).

As an organization, ACPS has a responsibility to track and report on those matters that have not been prosecuted due to resource constraints, including the time and capacity constraints that arise as a result of *Jordan*. Chief Crown Prosecutors and Executive Directors will take appropriate steps to ensure that all cases that are terminated as a result of the operation of these principles are reported to the Assistant Deputy Minister (ADM). The intent of these reports is to document the extent of the gap between the number of cases that can currently be conducted and the total number of viable cases.

b. At an Intermediate Stage before Trial

The demands of a prosecution caseload are not static. Developments or complications on one file may have a cascading or complicating effect on the other files assigned to a prosecutor. Should such circumstances arise, and the other affected files cannot be resolved or rescheduled appropriately, the assigning or supervising prosecutor should be notified. Consideration should be given to innovative solutions that may make better use of expertise within a particular office, such as assigning a portion or aspect of a case, where possible, to a prosecutor with that expertise.

If the affected files cannot be reassigned appropriately due to a lack of capacity, they may be terminated in order to ensure that more serious and violent cases can be prosecuted. The same tracking obligations apply to files terminated at this stage.

c. On the Day of Trial

Prosecutions that are terminated on the date set for trial represent the last resort, and least efficient and effective use of triage principles. Significant prosecution, police, and other

[10] See Law Society Code of Conduct, 3.1, 3.1-2 and 3.2-1 and associated commentaries.

public resources have already been expended to advance a file to this stage. These resources are effectively "throw away" costs when a file is terminated on the day of trial. Termination on the day of trial may arise where an essential witness does not attend, and it is determined that scheduling a new trial date will compromise the right to trial within a reasonable time, or consume trial or other resources that are no longer commensurate or proportionate to the seriousness of the offence or the public interest in the prosecution.

Termination on the day of trial of an otherwise viable case may arise where trial time on that date must be used to prosecute a more serious and violent offence, and where an adjournment cannot be obtained or would compromise the right to trial within a reasonable time. If all of the other steps in this Protocol and in case management and scheduling are followed, termination on this basis should not arise frequently. Reporting of the termination of these cases may include more detail in order to determine if changes or improvements in other process could have prevented this outcome. Termination of otherwise viable cases on the day of trial, where witnesses are present, represents the least effective and most severe example of the application of the triage principle.

How to determine what is a priority

It may sound simple to say that serious and violent offences are a priority and should be the focus of prosecutorial efforts and resources. Although what is "violent" can be readily determined, it can be more challenging to identify cases that qualify as "serious".

Determining the "seriousness" of a file is not merely a linear exercise of ranking offences by sentence ranges. Numerous factors must be taken into consideration, including:

- Number of victims;
- Impact (physical, psychological, economic) on the victim(s);
- Particular vulnerability of the victim(s);
- Risk of harm;
- Level of planning by the accused(s);
- Societal or public interest in the prosecution;
- Need for general deterrence for the type of crime;
- Potential impact of the prosecution on an individual, organization, industry, etc.;
- Need for interpretation of the law on a significant issue or to push for a change in the law;
- Impact on or protection for the administration of justice; and
- Precedent setting value of the file.

Before any minor file is dismissed as not being a priority, careful consideration should be given to whether the file is, in fact, serious when taking all factors into account.

Even once a file is determined to be prosecutable, not able to be diverted, and is serious or violent, and therefore a priority, it may still not be worth prosecuting to the fullest extent

possible given the anticipated result and resources required. It can be easy to forget as a prosecutor that time and resources are finite. Unlike private law firms, a client's consent to taking certain steps on a file is not required. Prosecutions are not, and should not, be a business, but economics and efficiency have a place in prosecutorial decisions given the reality that resources are limited. We have a duty not only to the court to be efficient in our use of court time, but also to the public to ensure that resources are being used wisely. Just as it is not worth flying in out-of-jurisdiction witnesses for minor files, running a trial of several weeks on a slim chance of obtaining a first degree murder conviction when a plea to second degree has been offered may not be an appropriate use of resources. Likewise, complicated fraud prosecutions requiring several weeks or months of court time may not be justified if the accused has already faced sanctions from professional or regulatory bodies.

Prosecutors will be fully supported in the application of these principles. Difficult and sometimes unpopular decisions will be required in order to ensure that available resources and priorities remain focused on serious and violent crime, especially during times of resource limitations. Prosecutors should be confident that decisions made to sacrifice otherwise viable prosecutions, if done in a principled manner and after consultation (where possible) will be supported by the Assistant Deputy Minister, the Deputy Minister and the Minister.