

DECISION TO PROSECUTE

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This Guideline provides direction to Crown prosecutors on the exercise of their discretion when determining whether to commence or continue a prosecution and the public interest factors that may be considered in that assessment.

BACKGROUND

The decision to prosecute or to discontinue a prosecution is among the most significant of the decisions that will be made by a Crown prosecutor. Prosecutions which are not well founded in law or fact, or which do not serve the public interest, may needlessly expose citizens to the anxiety, expense, and embarrassment of a trial. On the other hand, the failure to effectively prosecute a meritorious case can directly impact public safety. Both situations tend to undermine the confidence of the community in the criminal justice system. As such, considerable care must be taken in each case to ensure that the best possible decision is made.

Fairness, consistency, flexibility, and transparency are key objectives in this decision-making process. With these objectives in mind, prosecution services in Canada have endeavoured to identify general principles and criteria to guide Crown prosecutors in this important exercise of discretion. The existence of published criteria helps to create consistency and transparency, while fairness and flexibility are achieved through the broad range of factors which are included in the criteria and which can be tailored to meet individual cases. However, to be clear, while each decision to prosecute must be supported by the established criteria, the exercise of this aspect of prosecutorial discretion cannot and should not be reduced to something resembling a mathematical formula for which there is always a clear and obvious answer.

Consistent with the policies used by Attorneys General throughout Canada, the governing principles and criteria in Alberta are rooted in these observations of the 1981 Royal Commission (United Kingdom) on Criminal Procedure:

The proper objective of a fair prosecution system is not therefore simply to prosecute the guilty and avoid prosecuting the innocent. It is rather to ensure that prosecutions are initiated only in those cases in which there is

*adequate evidence and where prosecution is justified in the public interest.*¹

From this observation, it is apparent that the criteria must reflect two general considerations: the sufficiency of the evidence and the public interest. A Crown prosecutor's initial assessment of any case will focus upon the evidential threshold (i.e., the issue of whether or not there is sufficient evidence to commence or continue criminal proceedings). If the evidential threshold is met, the prosecutor will go on to consider whether the public interest is best served by prosecution of the case.

Preliminary Matters

In Alberta, Crown prosecutors generally do not become involved in cases prior to the initiation of the prosecution by the informant, usually a peace officer. Therefore, in most cases, the determination as to whether "reasonable grounds" exist for the laying of a charge is made independently of any assessment of the evidence by a prosecutor. As such, the usual issue for the prosecutor is whether to continue or to terminate proceedings.

As a preliminary matter however, Crown prosecutors must ensure that the Information preferred has been properly sworn before a justice.

Should an investigator seek advice from a Crown prosecutor prior to the initiation of a prosecution, it is permissible for the prosecutor to give legal advice in regard to such matters as the admissibility of proposed evidence, the elements of particular offences, the propriety of proposed investigative techniques (e.g., Does the technique offend the *Canadian Charter of Rights and Freedoms*? Would it be considered abusive?), and criminal procedure. It must be emphasized, however, that it is the belief of the investigator and not the prosecutor that is crucial to the laying of an Information. Moreover, because at this stage Crown prosecutors are typically only privy to a portion of the case, in responding to requests for pre-charge advice it would be prudent for the Crown prosecutor to refrain from expressing an opinion as to the existence of grounds to lay an Information or an opinion as to the guilt or innocence of the suspect. To be clear, however, none of this prohibits the development of more detailed pre-charge consultation protocols that allow Crown prosecutors to opine upon the reasonable likelihood of conviction in light of the evidence gathered by the police to that stage.

¹ Report (Cmnd. 8092) (London: HMSO, 1981), p. 127

GUIDELINE

Consultation is Critical

Consultation, including the seeking out of second opinions and discussions regarding legal, practical, and advocacy strategies, can be an important aspect of prosecutorial decision-making. Such consultation can, for example, help Crown prosecutors avoid succumbing to so-called *tunnel vision*. While consultation may not be necessary or appropriate for every case, or even for every serious case, the responsible exercise of prosecutorial discretion, including deciding whether to prosecute, often requires consultation with colleagues uninvolved in the prosecution of the case, with superiors and/or with investigators. Indeed, in cases involving the most serious of offences, particularly homicides, and those involving novel arguments or unusual circumstances, consultation with colleagues uninvolved in the prosecution of the case may be critical to the decision to proceed (or not) with the prosecution. In respect of such cases, this consultation ought to take place early on in the process, but no later than on completion of a preliminary inquiry.²

While it is not possible to prepare a precise list of situations in which consultation is required or even preferred, the following principles are applicable. Prosecutors are strongly encouraged to consult with supervisors and experienced colleagues in regard to the decision to prosecute significant or unusual cases. The determination of whether a case is significant requires judgment by the prosecutor involved. The following are examples of cases that would, in the norm, be regarded as significant:

1. A case involving a death;
2. Charges against public figures or persons involved in the administration of justice;
3. Criminal conduct involving gang or group activity;
4. Prosecutions which require an expanded or novel interpretation of the governing legislation or which engage significant *Charter* issues; or
5. Cases which have attracted or will attract significant media attention, or which will likely be of public interest when presented in court.

If a penitentiary sentence appears to be appropriate for the criminal conduct that is also a strong indicator that the matter is significant enough to merit consultation.

Prosecutors are strongly encouraged to consult with supervisors and experienced colleagues before deciding to prosecute any case in which they are unsure of whether the evidential and/or public interest thresholds are met.

² See The Lamer Commission of Inquiry, Report and Annexes, pp. 139, 155 and FPT Heads of Prosecutions Committee Working Group Report on the Prevention of Miscarriages of Justice, p. 39

Choice of Charges

While the decision to prosecute is often expressed as a decision to commence or continue a prosecution, the decision may also involve an assessment of what charging sections to employ. In applying this Guideline, Crown prosecutors may decide to continue with the original charges in the Information or Indictment, to change the charges, or to stop the prosecution entirely. In deciding upon the particular charges to allege, Crown prosecutors should proceed with those charge(s) which:

1. Adequately reflect the nature and seriousness of the entirety of the alleged criminal conduct (ordinarily, the charge pursued would be the most serious disclosed by the evidence);
2. Provide the court with appropriate range of options respecting sentencing and the making of post-conviction orders (e.g., DNA databank orders); and
3. Avoid unnecessarily complicating the proceedings (which complication can jeopardize a fair trial and an effective prosecution).

A Continuous Process

That there is an initial review of the merits of a prosecution does not mean that once the decision has been made to proceed, that decision is never revisited. Quite the contrary. Once a decision has been made to prosecute a charge, that decision must be continuously reviewed as new information is received. There are some procedural landmarks which naturally tend to prompt a review (e.g., the end of a preliminary inquiry), but this is not a structured review process. It may occur at any time. Moreover, the “new information” may include a fresh appreciation of existing information; as might occur after witnesses give *viva voce* evidence or if anticipated corroboration does not materialize. If, at any time, a prosecutor concludes that a reasonable likelihood of conviction no longer exists, or that prosecution is not in the public interest, steps should be taken to discontinue the prosecution as soon as is practicable.

This Guideline applies equally to the consideration of proposed guilty pleas (See also the *Negotiated Resolutions Guideline*). An accused person may surrender their constitutional right to a trial and plead guilty to the offence(s). Crown prosecutors must ensure that an accused pleads guilty only to offences that reflect the provable facts. Where appropriate, Crown prosecutors may decide to consent to a guilty plea from the accused to some, but not all of the offences. Further, Crown prosecutors may properly consent to a guilty plea to other offence(s) based on the sufficiency of the evidence, the provable circumstances of a particular case, or some other appropriate reason consistent with the public interest. In deciding to consent to a guilty plea in any particular case, Crown prosecutors must consider:

1. The sufficiency of the evidence of the accused's guilt;
2. The public interest factors in this Guideline;
3. Any specific guidelines or protocols relating to the type of offence for which the accused has been charged; and
4. The fitness of the sentencing options that would be available should the accused plead guilty.

The Governing Criteria

Crown prosecutors must consider two overarching questions when determining whether to prosecute. First, is the evidence sufficient to justify the commencement or continuation of proceedings? Second, if it is, is the commencement or continuation of the prosecution in the public interest?

Sufficiency of the Evidence

The first consideration in commencing or continuing a prosecution is the sufficiency of the evidence. A prosecution may only be commenced or continued if – and as long as – there is a reasonable likelihood of conviction when the known evidence as a whole is considered. The following principles inform the application of this evidential test:

1. The standard permits a prosecution to be commenced or continued only if the Crown prosecutor has sufficient evidence to believe that a reasonable jury, properly instructed, is more likely than not to convict the accused of the charge(s) alleged;
2. To be clear, this standard contains both a subjective and objective element. The Crown prosecutor must believe that a conviction is likely and that belief must be reasonable in the circumstances;
3. In circumstances in which there are multiple accused or multiple counts, Crown prosecutors must apply the evidential threshold to each accused and each charge. A prosecution should only proceed against those accused and on those charges that meet the threshold test; and
4. Crown prosecutors must not simply adopt the views and enthusiasm of others, such as the complainant or investigator. Prosecutors must critically assess the Crown's evidence and must take into consideration reliable defence evidence. While no single answer is determinative, the most important of the questions that must be asked as regards the evidence are the following:
 - a. Are there inherent (e.g., as with in-custody informants) or other concerns respecting the accuracy, credibility, or reliability of any of the Crown's witness?
 - i. Do any of these witnesses have improper motives that may affect his or her credibility?
 - ii. Is there evidence that may support or detract from the credibility of any of these witnesses?

- b. If the identity of the offender is in issue, of what strength is the evidence identifying the accused as the offender?
- c. Are there grounds for believing that some inculpatory evidence will likely be excluded?
- d. If the case depends in part on an admission by the accused, is there evidence that might support or detract from the reliability of this statement?
- e. Has the accused attempted to explain the (alleged) conduct or present a defence? If so, is it clear that the explanation or defence (by itself or in the context of other evidence or information) will be sufficient to raise a reasonable doubt?
- f. Does the evidence, as presented by police, include information which, if believed, would constitute a viable defence? If so, who bears the onus as it relates to that defence? (For example, where there is an air of reality to the defence of self-defence, the prosecution bears the onus of disproving the defence beyond a reasonable doubt. Section 34(2) of the *Criminal Code* sets out a number of factors that must be considered in determining whether a purported act of self-defence was reasonable in the circumstances. These factors include, among others, the “nature of [any] force or threat” presented, the “relevant circumstances of the [accused]” and the accused’s “role in the incident”. If an incident occurs in a remote or rural location, and self-defence is raised, a prosecutor may give consideration to the nature of the location when weighing all of the relevant factors.)

The Public Interest

If the evidence justifies the commencement or continuation of the proceedings, the Crown prosecutor should then consider whether the public interest requires a prosecution. As then-Attorney General for England and Wales, Lord Shawcross, expressed, the guiding principle is as follows:

It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should . . . prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration....³

³ Great Britain House of Commons Debates, volume 483, column 681, January 29, 1951;

A prosecution may only be commenced or continued if it is in the public interest to do so.

Crown prosecutors must carefully balance the factors that favour a prosecution against the factors against such proceedings. While it would be impossible to articulate and catalogue all of the possible public interest factors that might inform every decision to prosecute, some of the most common factors are as follows. The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case. It is possible for one factor to outweigh all others.

It is generally in the public interest to proceed with a prosecution where the following factors exist or are alleged:

1. The conduct was serious, because, for example:
 - a. Weapons were used;
 - b. Violence was used or threatened;
 - c. The conduct was planned and/or premeditated;
 - d. There was significant harm, loss, or injury caused to the complainant and/or the community;
 - e. The victim was vulnerable, (e.g., a child, a senior, an intimate partner, a person who was dependent upon the accused, a person who serves the public, a person with a history of substance abuse, poverty or homelessness, a person with a history of abuse or trauma, a person who resides in a rural or remote geographical location) with particular attention given to the circumstances of Indigenous victims;
 - f. The offence involved an abuse of a position of authority or trust; and
 - g. The offence was directed at the administration of justice;
2. The accused's degree of culpability and responsibility was significant (especially if in relation to any other parties who were involved in the conduct);
3. The offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity or expression, or any other similar factor;
4. The accused is likely to continue or repeat the conduct absent a prosecution, resulting in a need for individual deterrence (e.g., the accused is a repeat offender, the accused has reoffended or breached while bound by bail or sentencing conditions); and/or
5. There exists a need to denounce the conduct and deter others.

The following are some of the public interest factors that may militate against commencing or continuing a prosecution:

1. The offence is of a trivial or technical nature;
2. A conviction is likely to result in a very small or insignificant penalty;
3. The consequences of a prosecution or conviction would be unduly harsh or oppressive for the accused;
4. The accused has remedied the loss or harm (although accused persons must not avoid prosecution solely because they make restitution);
5. The accused has demonstrated genuine remorse and has taken steps towards rehabilitation, such as participation in a restorative justice process (the significance of the steps taken must be assessed in the context of the seriousness of the offence);
6. The desired result could be achieved through an alternative to prosecution (e.g., the matter could be effectively addressed through the *Alberta Adult Alternative Measures Program* when dealing with adult offenders, or *Youth Criminal Justice Act Extra-judicial Sanctions* when dealing with young persons);
7. The law that is alleged to have been breached is obsolete or obscure; and/or
8. A prosecution could publicize information that could harm confidential informants, ongoing investigations, international relations or national security, or other important local and national interests.

The following are additional factors that may be considered in respect of the public interest criterion:

1. The circumstances of the accused, including his or her age, maturity, mental health, criminal antecedents (including other outstanding charges or extant court orders) and background;
2. The likely effect of a prosecution on public morale and the public's confidence in the justice system;
3. The length and expense of the trial when considered in relation to the seriousness or triviality of the offence, the likely sentence that would result from a conviction, and the attendant public benefit(s);
4. The degree of past or anticipated cooperation of the accused in the investigation, apprehension or prosecution of others;
5. The willingness and ability of witnesses, including – where necessary – the complainant, to testify in the proceedings;
6. The time which has elapsed since the offence was committed;
7. The availability of compensation, restitution, or reparation to any person or body upon a successful prosecution, including any entitlement criminal compensation, reparation or forfeiture if a prosecution action is taken; and/or
8. Whether, due to the passage of time, the alleged offence is triable only on indictment.

In addition, the public interest considerations for regulatory prosecutions include a consideration of the following factors:

1. Whether other methods of enforcement or compliance have proven ineffective or there is reason to believe that other methods of enforcement will not be effective;
2. Whether the alleged offender's conduct was willful or fell significantly below the standard of due diligence;
3. The degree of harm occasioned by the conduct, including harm to the public's confidence in the government's ability to regulate its programs, or the potential for such harm;
4. The public interest in upholding the values encompassed by the applicable legislation; and
5. Whether the conduct involved a breach of trust, including false reporting.