

## **British Columbia Charge Assessment Review**

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## Background to the Review

On February 8, 2012, British Columbia announced a justice reform initiative to identify how the government, judiciary, legal profession, police and others can work together to improve the efficiency and effectiveness of the provincial justice system.

The scope of the reform agenda is set out in a Green Paper entitled “Modernizing British Columbia’s Justice System” that was released with the announcement. The initiative follows an internal audit conducted in 2011 to assess growing resource pressures on the justice system.

Geoffrey Cowper Q.C. was appointed Chair of the Review. He is to consult with stakeholders across the justice system to look at the challenges set out in the Green Paper. He is to identify top issues affecting the public’s access to timely justice and what can be done to ensure that efficiencies already underway have the desired impacts while respecting the independence of the judicial system.

As part of the broader justice system review, Gary McCuaig Q.C. has been engaged to conduct an independent review of the way in which criminal charges are assessed and laid in British Columbia.

British Columbia is one of three provinces that designate Crown prosecutors as the decision makers in the laying of charges. In other provinces, police make the decision to lay charges, with Crown prosecutors reviewing the charges once laid to determine if they will proceed with the prosecution. The relative merits of the systems are to be considered, including whether pre-charge assessment should be maintained, and if so, whether improvements to the system can be made.

## Executive Summary

The issues of court delays and increasing costs are not unique to BC. These are pressing concerns of all governments across Canada.

This Review was undertaken to examine the pre-charge assessment regime in place in BC. There has been a long-standing desire by segments of the police community to revert to a post-charge assessment process. The arguments have been based on constitutional authority and jurisdiction. There is some thought that a post-charge system is more efficient but there is no evidence to support this claim. This topic has been the subject of debate and analysis by a number of provincial Commissions and Inquiries going back to the 1980s. Each of them endorsed the existing system.

On a day to day basis, the two models differ little in any significant manner.

In summary, this Review has considered the following questions:

1. Is the charge standard of 'substantial likelihood of conviction' the appropriate one?
2. Should the Ministry retain the pre-charge assessment model or adopt a post-charge model?
3. What improvements to the assessment process would be appropriate?

After reviewing a portion of the written material on this subject and speaking with over 90 people, I have concluded that the pre-charge assessment regime – the charging standard and the existing assessment processes (as set in the Crown Counsel Manual Guidelines) – should be retained. The basics of the system are sound. Overall, it has worked well for almost 30 years. There is neither a general consensus nor compelling evidence that the process needs to be markedly changed, or that reverting to a post-charge system would increase efficiencies.

The Crown has legitimate needs and concerns in the process:

1. The need both legally and practically to have most files in a 'disclosure-ready' condition before or immediately after a charge is laid.
2. Recognition that its resources to assess and prosecute and the resources of the courts to hear cases are finite and the need to conserve all of these, as far as practicable, for more serious cases. The Crown is the most effective gatekeeper.

However, there are two parts of the process that should be examined to address police concerns:

1. Police resources needed to satisfy the Report to Crown Counsel (RTCC) requirements. This issue can be addressed by examining the types of cases where a charge assessment might be done (without lessening the quality of the assessment) using an abbreviated RTCC. As well, the police might be encouraged to consider alternate forms of investigative tools in certain cases to lessen their own workload in compiling reports.
2. Whether more public order offences/administrative offences should be prosecuted in some locales than now is believed to happen. This examination should include both a statistical component and whether the public interest factors, listed in the Charge Assessment Guidelines, need clarifying commentary, as they may, as now structured, suggest conflicting directions. For example, the need to protect the integrity of the justice system is a factor in favour of prosecution: it is a factor against prosecution if a conviction is likely to result in a very small or insignificant penalty. This scenario often presents itself in administrative offences.

## Introduction and Terms of Reference

The public controversy in BC is focused on delays and court costs. It is important to remember that these issues are not unique to BC. Every city of any size and every province in Canada is struggling with the same issues. They are topics of almost endless discussion with officials of provincial and federal governments.

In conducting this Review, I have spoken to over 90 people: judges, Crown Counsel, defence lawyers, correctional officials, legal aid and government officials (past and present), and others working in or interested in criminal justice. I have also had the invaluable assistance of Ministry officials and staff, particularly James Deitch, Wendy Jackson, Paula Bowering, Amber Ward and Dubravka Ceganjac. They have made my job immeasurably easier.

Without exception, all to whom I spoke gave generously of their time to educate me and help focus my thoughts. To them I extend my thanks. They are acutely aware of their responsibilities to their communities, the public and the accused. They are all genuinely committed to making the system better, more responsive, and fair to all.

In summary, I have been asked to examine the Charge Assessment process in use in British Columbia and determine:

1. Is the charge standard of 'substantial likelihood of conviction' the appropriate one?
2. Should the Ministry retain the pre-charge assessment model or adopt a post-charge model?
3. What improvements to the assessment process can be recommended?

In addition to answering these questions, I would like this Report to serve an educational purpose for those unfamiliar with the assessment process. So it is best to start by setting out some truths and caveats:

- Our criminal justice system is not an inquiry into truth. It is not about whether an accused actually committed a crime but whether there is sufficient evidence to prove that he committed it. To put it simply: it is not about whether an accused 'did it' but whether the Crown can prove it.
- Our criminal justice system, which has evolved and been refined over centuries, can be slow to respond to societal changes and public expectations. This is as it should be, as it is designed to provide a fair, rational hearing to an accused on the evidence presented, as free as possible from extraneous emotion.

The limited timeline for this Review has largely eliminated the possibility of gathering statistical data to support my analysis and conclusions. My comments and conclusions are based on the opinions of experienced and informed observers and system participants. My

recommendations are meant only to highlight areas that may benefit from a more detailed study.

There is no system that cannot be improved upon. But to justify changing fundamental and long standing practices, there must be compelling evidence that significant positive results will (not may) be achieved. Change without making the end product demonstrably better is disruptive, costly and serves no purpose.

If there is a crisis of public confidence in the justice system (assuming that public surveys and media comments are an accurate gauge of this), the best way to rebuild that trust is to try to do the right thing on every case and ensure, as far as possible that justice is done. And to explain to the public much better than in the past how the system works and what we as a society should realistically expect of it.

### The Vancouver Riot Charges

The controversy surrounding criminal charges arising out of the 2011 Vancouver Stanley Cup riot provides a very timely and useful springboard to discuss parts of the charge assessment process.

There has been much criticism over the length of time that it has taken to bring charges to the courts. This demonstrates some of the general misunderstanding of the process.

It is clear that the investigation and prosecution involve almost unprecedented police and Crown resources. Accused number in the hundreds. The video evidence alone is comprised of thousands of clips. Lastly, the police and prosecution teams working on this project are not extra resources but have been reassigned from other duties.

Any new project, particularly of this size, will involve some trial and error. But rather than using the riot prosecutions as an example of what is wrong with the charge assessment system, they should be viewed as an example of how we would wish it could operate on all occasions.

To answer the criticisms:

- It is simply not feasible to charge everyone who can be charged. It is necessary to closely examine all of the investigations to focus on the most involved persons.
- Some of the trials will inevitably involve lengthy evidentiary arguments that may result in landmark rulings.
- To obtain an appropriate sentence, Crown Counsel must show the full extent of an offender's involvement. To do this takes hours of review of the evidence. It is rarely as simple as seeing someone throw a brick through a window. The main charges are those of participating in a riot, not wilful damage.
- As a matter of law, an accused is entitled to disclosure of all of the evidence against him. The earlier in the process that he sees full disclosure and the strength of the case he faces, the sooner his counsel can give him informed advice as to whether he should plead guilty. Indeed, no counsel would advise a guilty plea without seeing all of the evidence against his client.
- Comparison to other jurisdictions does not advance the argument. There has been comment that the UK dealt with its 2011 rioters much more quickly and why can't we do the same? Such comments overlook that the UK legislation provides more

options and broader prosecution and court powers than exist in Canada. As well, several of the more publicized sentences meted out early have been reduced by appeal courts.

The police and prosecution have weathered much criticism for what has or has not happened in the court process. This is both inaccurate and unfair. They have devoted significant personnel to this investigation. Both have been working full time for months to organize a huge amount of material so that the right people can be brought before the courts with strong evidence and the appropriate charges.

### A History of Charge Assessment in British Columbia

Up until the mid-1970s, a variety of post-charge assessment systems were in use in various municipalities in the province.

In 1974, a more uniform charge assessment practice began to develop with the establishment of the Crown Counsel system. At that time, significant court delays and stays flowing from inadequate police reports and unprovable charges had become a problem. There was still no one charge approval standard in use throughout the province. Some prosecutors used a *prima facie* case test, others a "reasonable chance of conviction" test and still others required that the evidence needed to establish the case beyond a reasonable doubt.

In 1982, a Ministerial Task Force recommended that the Crown take over the charging function to help improve the quality both of police reports and cases moving forward. These recommendations were adopted and widely credited with improving efficiencies and saving costs.

Circa 1983, the Attorney General's Department adopted a two-tiered test similar to what it is today: an evidentiary threshold of substantial likelihood of conviction, followed by a consideration of public interest factors. The decision to lay charges remained that of the Crown. The basics of that system continue to today.

The existing regime has not gone unchallenged. It has been the subject of discussion - directly or otherwise - on several occasions in BC:

1987 – Access to Justice: Report of the Justice Reform Committee – Ted Hughes Q.C.

1990 – Discretion to Prosecute Inquiry – Stephen Owen Q.C.

2010 – Special Prosecutor Review – Stephen Owen Q.C.

2011 – The Frank Paul Inquiry – William Davies Q.C.

The Hughes Commission in 1987 confirmed that the prosecution should retain the charging function but recommended that there should be an appeal procedure available to the police when they disagree with a Crown decision not to lay charges.

Stephen Owen, in his Discretion to Prosecute Inquiry (1990), examined the assessment standard and process in detail. He heard the arguments for and against retaining the existing system but found no compelling reason to recommend changing the regime. He did recommend that the charging standard be changed from 'substantial likelihood' to 'reasonable likelihood' (Volume 1 pp. 98-104).

In response, the Attorney General's Department struck a committee to consider Commissioner Owen's recommendations. The committee decided against changing the standard but did clarify the policy as to what the wording meant. As well, out of this came the Crown Counsel Act which statutorily recognized the independence of the Crown Counsel.

Since then, the charging Policy and Guideline has been periodically refined and added to, particularly:

- The addition of the 'exceptional case' standard; and
- An increase in the number of listed public interest factors that Crown Counsel must consider.

## The Charging Standard

The Charge Assessment Guidelines of the BC Crown Counsel Policy Manual read:

*Under the Crown Counsel Act, Crown Counsel have the responsibility of making a charge assessment decision which determines whether or not a prosecution will proceed.*

*In discharging that charge assessment responsibility, Crown Counsel must fairly, independently, and objectively examine the available evidence in order to determine:*

1. *Whether there is a substantial likelihood of conviction; and, if so,*
2. *Whether a prosecution is required in the public interest.*

*A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court.*

*Once Crown Counsel is satisfied that there is a substantial likelihood of conviction (the evidentiary test), Crown Counsel must determine whether the public interest requires a prosecution by considering the particular circumstances of each case and the legitimate concerns of the local community. Public interest factors include those outlined below.*

*Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test is not satisfied. Such circumstances will most often arise in cases of high-risk violent or dangerous offenders or where public safety concerns are of paramount consideration. In these cases, charging decisions must be approved by Regional or Deputy Regional Crown Counsel and the evidentiary test is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction.*

*The requirement to meet the two-part charge assessment standard, consisting of the evidentiary test and the public interest test, continues throughout the prosecution.*

There follows a discussion of general principles:

*The independence of Crown Counsel must also be balanced with measures of accountability. Principled charge assessment decisions are assured when Crown Counsel experienced in assessing evidence exercise discretion in accordance with Branch public policies when reviewing the available evidence and applicable law.*

*During the charge assessment process, Crown Counsel does not have the benefit of hearing the testimony of Crown witnesses, either in direct or cross-examination, nor the defence evidence, if any. During the course of a preliminary hearing, when preparing for trial, or during trial, the Crown's case may be materially different than at the charge assessment stage. The requirement to meet the charge assessment standard continues throughout the prosecution.*

*The Criminal Justice Branch recognizes that the police have the authority to lay an Information; however, Crown Counsel have the ultimate authority to direct a stay of proceedings. Therefore, it is expected that the police will lay an Information only after the approval of charges by Crown Counsel, or, if charges are not approved, upon exhaustion of an appeal of that decision by the police (see policy CHA 1.1).*

*Recognizing that the charge assessment responsibility of Crown Counsel and the investigative responsibility of the police are independent, cooperation and effective communication between Crown Counsel and the police are essential to the proper administration of justice. In serious cases, or those of significant public interest, Crown Counsel discuss with the police, where practicable, their intention to not approve a charge recommended by the police (a 'no charge' decision).*

#### *Evidentiary Test-Substantial Likelihood of Conviction*

*The usual evidentiary test to be satisfied is whether there is a substantial likelihood of conviction.*

*A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is satisfied, Crown Counsel must determine:*

1. What material evidence is likely to be admissible;
2. The weight likely to be given to the admissible evidence; and
3. The likelihood that viable, not speculative, defences will succeed.

#### *Comment*

British Columbia uses the standard of 'substantial likelihood' while all other provinces (including Quebec and New Brunswick, which are also pre-charge assessment provinces) use the standards of 'reasonable prospect' or 'reasonable likelihood'. Articles and the Charging Guideline itself suggest that there is an articulable difference and that 'substantial' connotes a higher or stricter test than 'reasonable'.

Some police officers feel that there is a difference, as do some Crown Counsel. Others see no difference.

The use of the word 'substantial' is not incidental, nor has it been arrived at lightly. There has been considerable debate about it over time (see History in BC). It has been in use since the 1980s and its interpretation has been refined in the policy Guideline since that time. Nor should it be overlooked that Commissioner Owen, in his 1990 Report, recommended that the test be changed to that of 'reasonable likelihood', and that the Attorney General's Department deliberately chose to retain the "substantial likelihood" standard.

In practice, the views again diverge. A number of police, Crown Counsel, and judges were asked whether they saw any real difference in the application of the different standards. There was far from any consensus. Some felt that there would be no difference in assessing a file; others felt that there would be. This is consistent with the divergent opinions expressed in the Decision to Prosecute Inquiry back in 1990.

It is difficult to envision a situation in which the assessment of the case – whether to charge or not charge – would be different using the different standards. To rephrase in another way: what a prosecutor asks himself/herself in making an assessment decision is: “Is the admissible evidence such that I believe that I can prove this case beyond a reasonable doubt?”

If there is in fact a practical difference, the cases where there would be a difference in the charging decision would be few.

An obvious question has been asked – if there is little or no practical difference between the substantial and reasonable standards, and since all other Canadian jurisdictions use reasonable, then why should BC not adopt the reasonable standard, particularly since Stephen Owen recommended it in 1990?

Firstly, it is useful to consider that to change to a reasonableness standard could have several negative consequences:

- A significant mindset change in all of its Crown prosecutors and officials, as all have been working with the ‘substantial’ standard for almost 30 years.
- Crown Counsel may have less confidence in their own decisions with resulting potential delays in making charge decisions.
- A potential lowering of the evidential bar over time.
- A potential reduction in the quality of police investigations/reports, since the bar could be considered as lowered, even by a small margin.

As well, its long history in BC and the fact that the Ministry made a considered, principled decision to retain it previously.

As noted earlier, a change in the standard or process must be justified by a real probability of positive change. This is not so when we talk of the actual charging standard. BC may be alone in its choice of the standard but that does not mean that the choice is wrong. There is no evidence that changing it would bring tangible benefits. Whatever issues there may be with the process do not arise from the standard.

This would be change for the sake of change.

## Public Interest Test

*Once Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must determine whether the public interest requires a prosecution. Hard and fast rules cannot be imposed as the public interest is determined by the particular circumstances of each case and the legitimate concerns of the local community. In making this assessment, the factors which Crown Counsel will consider include the following:*

### ***1. Public Interest Factors in Favour of Prosecution***

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

- (a) *the allegations are serious in nature;*
- (b) *a conviction is likely to result in a significant sentence;*
- (c) *considerable harm was caused to a victim;*
- (d) *the use, or threatened use, of a weapon;*
- (e) *the victim was a vulnerable person, including children, elders, spouses and common law partners (see policies ABD 1, CHI 1, ELD 1 and SPO 1);*
- (f) *the alleged offender has relevant previous convictions or alternative measures;*
- (g) *the alleged offender was in a position of authority or trust;*
- (h) *the alleged offender's degree of culpability is significant in relation to other parties;*
- (i) *there is evidence of premeditation;*
- (j) *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, or any other similar factor (see policy HAT 1);*
- (k) *there is a significant difference between the actual or mental ages of the alleged offender and the victim;*
- (l) *the alleged offender committed the offence while under an order of the Court;*
- (m) *there are grounds for believing that the offence is likely to be continued or repeated;*
- (n) *the offence, although not serious in itself, is widespread in the area where it was committed;*
- (o) *the need to protect the integrity and security of the justice system and its personnel;*
- (p) *the offence is a terrorism offence;*
- (q) *the offence was committed for the benefit of, at the direction of or in association with a criminal organization.*

## 2. Public Interest Factors Against Prosecution

*It may not be in the public interest to proceed with a prosecution where the following factors exist or are alleged:*

- (a) *a conviction is likely to result in a very small or insignificant penalty;*
- (b) *there is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch. This could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service. Crown Counsel need not conclude, in advance, that a prosecution must proceed in the public interest if a referral for an alternative measure is not acceptable. Information with respect to the suitability of a candidate for diversion or alternative measure is a factor to be taken into consideration by Crown Counsel in reaching a final charge assessment decision;*
- (c) *the offence was committed as a result of a genuine mistake or misunderstanding (factors which must be balanced against the seriousness of the offence);*
- (d) *the loss or harm can be described as minor and was the result of a single incident, particularly if caused by misjudgment;*
- (e) *the offence is of a trivial or technical nature or the law is obsolete or obscure.*

## 3. Additional Factors to be Considered in the Public Interest

- (a) *the youth, age, intelligence, physical health, mental health, and other personal circumstances of a witness or victim;*
- (b) *the personal circumstances of the accused, including his or her criminal record;*
- (c) *the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;*
- (d) *the time which has elapsed since the offence was committed;*
- (e) *the need to maintain public confidence in the administration of justice.*

## Comment

The decision to discontinue or proceed with a prosecution after consideration of the relevant public interest factors ultimately represents a decision by Crown Counsel about what is the appropriate use of limited resources and what constitutes the appropriate response to an offence in a particular community. It is also an acknowledgement of the long-accepted view that not all criminal conduct needs to be prosecuted and that resorting to the criminal court process should generally be the last response to anti-social behaviour, rather than the first.

The public interest factors are aimed in part at sorting out those offences that can be dealt with more appropriately by means other than the court system. This could mean that the alleged offender is dealt with in an alternative way (such as by a diversionary program), or it could mean that the offence is simply not prosecuted. For example, an offence might be relatively minor and result in a very small penalty in the event of a conviction. These factors would weigh against a prosecution. However, it may be that the same relatively minor offence is widespread in the community and, as such, requires prosecution in order to achieve a deterrent effect (pp 35-36 Pre-Charge Assessment in British Columbia; A Review of the Process – Criminal Justice Branch Ministry of the AG January 2012).

The number of public interest factors has been increased over the years (from 5 to 14). Most other provinces have similar factors (some less detailed) in the public interest branch of their charging standards.

There has been no suggestion that the listed factors are wrong or in need of change. It is in their application that some criticisms have been made (see The Charge Assessment Process).

### Exceptional Cases

Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test is not satisfied. Such circumstances will most often arise in cases of high-risk violent or dangerous offenders or where public safety concerns are of paramount consideration. In these cases, charging decisions must be approved by Regional or Deputy Regional Crown Counsel and the evidentiary test is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction.

### Evidentiary Test in Exceptional Cases

Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test described above is not satisfied. Such circumstances will most often arise in cases of high-risk violent or dangerous offenders or where public safety concerns are of paramount consideration. Such charging decisions must be approved by Regional or Deputy Regional Crown Counsel.

The evidentiary test in such cases is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction. This test is higher than that of a *prima facie* case. A weighing of admissible evidence and viable defences is not required. Crown Counsel should consider:

1. what material evidence is arguably admissible;
2. whether that evidence is reasonably capable of belief; and
3. whether that evidence is overborne by any incontrovertible defence.

#### Comment

In 1996, the charge assessment policy was amended by the addition of the exceptional case standard. It was aimed at high-risk or violent offenders or where the public safety concerns were heightened and permitted Crown Counsel to approve a charge in those instances if there was a reasonable, not substantial, prospect of conviction. Such approval had to be preceded by consultation with Regional Crown Counsel (RCC).

In 1999, this portion of the Guideline was amended by setting out what Crown Counsel had to consider before charge approval. It also now required the consent of RCC or Deputy RCC before charge approval.

This part of the guideline is a compromise between two approaches. It was suggested at one point that this type of case be dealt with by allowing Crown Counsel to approve a charge based solely on the public interest factors. This argument was rejected.

Although there may be an argument that this prong of the policy means that not everyone is subject to the same standard, it is preferable to allowing a charge to be laid without any evidentiary standard. The additional safeguard of senior Crown approval is present.

This section of the standard has been used in only a handful of cases and is satisfactory as drafted.

## Charging Standards – Other Jurisdictions

These charging standards are found in the prosecution policies of each respective province:

Alberta: reasonable likelihood of conviction – a reasonable jury, properly instructed, is more likely than not to convict the accused of the charge(s) alleged.

Saskatchewan: reasonable likelihood of conviction.

Manitoba: reasonable likelihood of conviction.

Ontario: reasonable prospect of conviction – does not require a probability of conviction.

Prince Edward Island: reasonable likelihood of conviction – the prospect of displacing the presumption of innocence must be real.

Nova Scotia: realistic prospect of conviction – the prospect of displacing the presumption of innocence must be real.

New Brunswick: reasonable prospect of conviction – more likely than not to convict.

Newfoundland: reasonable likelihood of conviction – the prospect of displacing the presumption of innocence must be real.

Public Prosecution Service of Canada: reasonable prospect of conviction.

### Comment

In formulating its standard, each province has engaged in a rigorous examination of the literature on point and adopted the standard it has. None of these were arrived at without thought and discussion.

In addition to the sufficiency of evidence branch, every province has a second branch to be considered only after Crown Counsel has determined that there is sufficient evidence to proceed. These are the public interest factors which may affect the decision to prosecute. Each province has a similar list of factors. These can be reviewed by the prosecutor to decide either in favour of or against proceeding. They recognize established law and common sense that not every crime, however provable, need be prosecuted. Each case must be assessed on its own merits.

## The Charge Assessment Process

The Guideline reads as follows:

*In all cases, in applying the charge assessment standard, the important obligations of Crown Counsel are to:*

1. *Make the charge assessment decision in a timely manner, recognizing the need to expedite the decision where an accused is in custody, where a Report to Crown Counsel requests a warrant, or where the charge involves violence;*
2. *Record the reasons for any charge assessment decision which differs from the recommendation of the police in the Report to Crown Counsel;*
3. *Where appropriate, communicate with those affected, including the police, so that they understand the reasons for the charge assessment decision; and*
4. *Consider whether proceeding by indictment after the expiry of a limitation period could constitute an abuse of process based on any failure by Crown Counsel or the police to act in a timely manner.*

### Report to Crown Counsel

*In order that Crown Counsel may appropriately apply the charge assessment standard, the Report to Crown Counsel (RTCC) should provide an accurate and detailed statement of the available evidence. The following are the basic requirements for every RTCC whether the information is provided electronically or not:*

1. *A comprehensive description of the evidence supporting each element of the suggested charge(s);*
2. *Where the evidence of a civilian witness is necessary to prove an essential element of the charge (except for minor offences), a copy of that person's written statement;*
3. *Necessary evidence check sheets;*
4. *Copies of all documents required to prove the charge(s);*
5. *A detailed summary or written copy of the accused's statement(s), if any;*
6. *The accused's criminal record, if any; and*
7. *An indexed and organized report for complex cases.*

*If the RTCC does not comply with these standards it may be returned to the investigator with a request outlining the requirement to be met.*

## Comment

From all accounts and statistics, Crown Counsel make their charging decisions (and approve a majority of RTCCs on first submission) in a timely manner. According to the 2010/2011 Criminal Justice Branch Annual Report, 71% of RTCCs are reviewed within 5 days of submission.

In most cases, the reasons given for a no-charge decision or a request for further information are in accordance with the Guideline. The police do seek greater consistency in the decisions themselves and in reasons given for charge rejection of similar offences. This can vary according to location.

The Ministry has undertaken a number of initiatives to ensure the proper processing of RTCCs and resolution of issues with the police:

- Police/Crown liaison committees have been established at both a senior level for systemic issues and an operational level for day-to-day problems.
- Initial charge assessment is done by experienced Crown Counsel (although all counsel continue to assess the evidence during the life of a case). In those offices where numbers allow, there is a separate assessment section staffed by experienced counsel. In smaller offices, more experienced counsel does charge assessment whenever possible.
- The Ministry provides training for its staff at Crown conferences and through instructional materials available on the Branch intranet site.
- The Ministry has provided materials and training for police in the preparation of an RTCC. Of particular value is the recent creation of a checklist for the police setting out what is needed in an RTCC package for various offences.
- In high volume locales, Crown offices have instituted procedures to deal with off-hours work, such as having assessment Crowns and staff on duty at night and on weekends.
- The police and the Ministry have entered into MOUs (Memorandums of Understanding) detailing the expectations of the parties with respect to RTCCs and Disclosure.

In speaking to various police services, one common concern was the view that Crown Counsel too often reject the laying of administrative offences (fail to appear in court/fail to comply with bail conditions/breach of probation) and public order offences (wilful damage/causing a disturbance). Police view these types of charges as important for offender management in their communities. That is, offenders who breach bail or probation conditions must know that they cannot re-offend with impunity. Otherwise, there is no deterrent to their continuing misconduct.

Crown Counsel have a different perspective:

- These charges often go hand in hand with substantive charges. Often, laying a separate breach charge would accomplish no more than proceeding on the substantive charge and advising the judge of the breach at sentencing.
- A stand-alone administrative charge may well be considered so minor by the court that only a nominal penalty would result, when alternative measures might accomplish the same end – making the accused responsible for his conduct.
- Occasionally, the offence itself is just part of the accused's more frequent anti-social (but not criminal) conduct and the proper context is not adequately detailed in the RTCC.

However, where these kinds of charges are recommended by the police, several of the public interest factors in the Guideline seem at odds with one another:

#### **Public Interest Factors in Favour of Prosecution**

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

- (a) *The alleged offender has relevant previous convictions or alternative measures;*
- (b) *The alleged offender committed the offence while under an order of the Court;*
- (c) *The offence, although not serious in itself, is widespread in the area where it was committed;*
- (d) *The need to protect the integrity and security of the justice system and its personnel.*

#### **Public Interest Factors Against Prosecution**

*It may not be in the public interest to proceed with a prosecution where the following factors exist or are alleged:*

- (a) *A conviction is likely to result in a very small or insignificant penalty;*
- (b) *There is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch. This could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service. Crown Counsel need not conclude, in advance, that a prosecution must proceed in the public interest if a referral for an alternative measure is not acceptable. Information with respect to the suitability of a candidate for diversion or alternative measure is a factor to be taken into consideration by Crown Counsel in reaching a final charge assessment decision;*
- (c) *The loss or harm can be described as minor and was the result of a single incident, particularly if caused by misjudgment;*
- (d) *The offence is of a trivial or technical nature or the law is obsolete or obscure.*

## Additional Factors to be Considered in the Public Interest

- (a) *the youth, age, intelligence, physical health, mental health, and other personal circumstances of a witness or victim;*
- (b) *the personal circumstances of the accused, including his or her criminal record;*
- (c) *the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;*
- (d) *the need to maintain public confidence in the administration of justice.*

These competing factors can cause confusion between Crown Counsel and investigators and need to be examined more closely to determine if their respective views on these types of charges can be brought more into line with each other.

## The Charge Assessment Decision – Police Appeal

The Ministry Guidelines set out an appeal procedure when the police disagree with a charge assessment decision:

### Policy

*Where the police disagree with a charge assessment decision, they should discuss their concerns with the Crown Counsel who made the decision and then follow the appeal procedure outlined below if not satisfied with that discussion.*

### Appeal Procedure

*After discussing their concerns with the Crown Counsel who made the decision and if not satisfied with that discussion, the police should contact Administrative Crown Counsel as the first step in appealing a charge assessment decision.*

*If the matter is not resolved following a discussion with Administrative Crown Counsel, and a Chief Constable, Officer in Charge of a detachment or more senior officer of the RCMP disagrees with the charge assessment decision, Regional Crown Counsel may be asked to review the decision and respond to the police.*

*If a Chief Constable, Officer in Charge of a detachment or more senior officer of the RCMP, disagrees with the decision of Regional Crown Counsel, the Assistant Deputy Attorney General may be asked to conduct a further review of the charge assessment decision and respond to the police.*

*If upon exhaustion of this appeal process the police decide to swear an Information, it is anticipated that it would be sworn by, or on behalf of, a Chief Constable or the Assistant Commissioner of the RCMP, as the case may be, and that the Assistant Deputy Attorney General would be notified in advance of the Information being sworn.*

*Where Information has been sworn by the police contrary to a charge assessment decision by Crown Counsel without exhaustion of the appeal process outlined above, the Private Prosecutions policy applies (see policy PRI 1).*

## Comment

This was added to the Guideline following the recommendation of the Hughes Commission in 1987.

By all reports, it has never needed to be carried through to its ultimate end where the police have laid an Information against all advice from the Crown. Where there have been disagreements, they have been resolved through discussion between the police and Crown Counsel.

This is one aspect of this Guideline that should be amended. If a dispute goes to the Assistant Deputy Attorney General and the police lay an Information, the appointment of a Special Prosecutor should be mandatory, rather than leaving the decision to be made on a case-by-case basis. By the time the last stage is reached, both the proper administration of justice and its appearance dictate that someone other than Crown Counsel conducts the prosecution.

## Pre and Post-charge Assessment – A Comparison

### Pre-Charge

In a pre-charge regime, a police officer will investigate an offence and then prepare a Report to Crown Counsel (RTCC), including recommended charges, and forward it to the Crown. Only if Crown Counsel is satisfied that the evidence is sufficient to meet the Ministry's charging standard (evidentiary and public interest factors) will a charge be laid.

Sequence Summary:

1. *Investigation*
2. *Crown Assessment*
3. *Information Laid*

### Post-Charge

In a post-charge regime (all provinces except British Columbia, New Brunswick, and Quebec), an officer will investigate an offence and lay what he views as the appropriate charge(s). As soon as a charge is laid, a police report containing the evidence (or some of it) is forwarded to the prosecutor in time for the accused's first court appearance. As soon as the prosecutor has the police report, he /she will determine whether the evidence meets the charging standard of that province – evidentiary and public interest factors – and decide whether the charge should continue or be stayed.

Sequence Summary:

1. *Investigation*
2. *Information Laid*
3. *Crown Assessment*

### Comments

It cannot be overemphasized that in a post-charge system, once a charge is laid, it does not simply appear in a trial court months later without any assessment by Crown Counsel.

From the accused's first appearance, the Crown has a duty to continually assess the case according to that province's charging standard. This standard is similar in all provinces and is at a higher level (reasonable likelihood/reasonable prospect) than the police require (reasonable grounds) to lay a charge. If at the beginning, or at any time afterwards, the evidence fails to meet the charging standard, the charge must be stayed.

Every post-charge province has developed internal processes in its prosecution services to encourage the streamlining of issues and resolution of charges.

In all provinces, including BC, the courts, as part of modern court and case management, require the prosecution and defence to appear at an interim court proceeding(s) on more serious cases to ensure that they have discussed the case and either narrowed the trial issues or settled the case.

In either system, late or last minute stays can happen for a variety of reasons: missing/deceased witnesses, additional evidence putting the circumstances in a new light, and/or a change in attitude of the victim.

There is less difference between the two systems than appears on the surface. One of the only real differences is when the evidence is assessed by Crown Counsel:

- In a pre-charge regime, the adequacy of the investigation is assessed at an earlier stage. This benefits the efficiency of the court system but has some drawbacks, notably for police in the resources required to prepare an RTCC. As a plus, cases which for a variety of reasons ought not to go further are stopped or diverted, saving valuable police time from being wasted attending court.
- In either regime, the police will be required to provide an equal amount of information to the Crown long before the trial date, whether before the charge is laid or at some point after arrest and first appearance. The only difference is when it is provided.

Lastly and very importantly, in almost all post-charge provinces, the police and prosecution services have entered into formal or informal protocols calling for pre-charge consultation in serious cases and/or in specialized areas (such as larger frauds in Alberta). This effectively converts the process to a pre-charge approval regime, as the police would be very reluctant to lay a charge in a case where the Crown was of the view that there was insufficient evidence.

Such protocols also establish a mindset in the parties for other types of cases, so that there is little hesitation in either the investigator or Crown Counsel to call his counterpart for advice or additional information.

## Pre- and Post-Charge Assessment – Pros and Cons

The main question asked by this Review – whether the province should revert to a post-charge system – assumed that it would be one in which the police would all criminal charges.

However, during discussions with various police services, a third option was raised: to allow the police to lay all summary conviction and certain lesser hybrid charges using a ‘reasonable likelihood of conviction’ standard.

What follows is not any adverse comment on the ability of the police to lay charges, nor to understand what is needed for a successful prosecution. The police, with significant additional costs and adjustments, could do the job. But the Crown can do it better.

As has been noted elsewhere, neither pre- nor post-charge regime is perfect, nor is either one inherently flawed. Both aim for the same result. It is a question of which regime a province chooses to enact.

The respective arguments (more fully set out in the Discretion to Prosecute Inquiry (1990) at pp. 20-27) as have been stated to me are:

### Reverting to Post-Charge Assessment

#### 1. Police Independence

Police Position: It would affirm the historical independence and jurisdiction of the police to lay charges (Section 504 (s.504) of Criminal Code).

Crown Position: The police s.504 argument is seductive but misleading. The issues of independence and authority are separate. S.504 has been in the Code for almost a century and was inserted at a time when police not only investigated crime but also acted as the prosecutor. It predates the creation of separate prosecution services.

Police independence lies in its investigative authority. No one can or should improperly influence them in who or what or how they investigate. The charge assessment system is not connected to that authority. There is no case or charge to assess until the police bring one forward.

Under s 504 of the Code, anyone can lay an Information. This does not give exclusive authority to do so to the police. So it follows that the charge assessment system in BC does not contravene the law. The police services in BC agreed decades ago, and confirmed that agreement more recently by the MOUs signed by the police and the province, to the system now in place. They still lay the charges, subject to approval of the Crown.

## 2. Transparency

Police Position: The process is not open.

This argument has several aspects:

1. There are times when no explanation, at least initially, is given to the investigator for a no-charge decision. This is not productive to either the education of the investigator as to what he needs for a successful investigation nor to the Crown/police relationship.
2. When the police do not know why a charge was not approved, they cannot explain the decision to the victim and may in turn be criticized by the victim. In fact, the police have done all that they believe is necessary.
3. The victim does not get his “day in court” and doesn’t know why.
4. If no charge is approved, the offender’s identity remains unknown to the public.

In a post-charge regime, if a charge is laid by the police and then stayed by Crown Counsel, the public will know that a person was charged and brought before the courts. The investigator will know what happened. If a victim questions why the case didn’t go ahead, it should be the prosecutor’s responsibility to answer. To put it in other terms, an accused has his alleged misconduct noted on the public record, even if the charge is eventually stayed.

Crown Position: When talking of a decision to lay or not lay a charge, it is important to examine what happens in each of a pre-charge vs. post-charge regime.

In a post-charge system, the police investigate and lay a charge. It is not until an accused is charged that his name becomes public. The police do not usually, nor should they, issue public statements about whom they are investigating until a charge is laid. The result is no different in a pre-charge regime. No accused’s name becomes public until a charge is laid.

The police argue that there is no public accountability in a pre-charge regime, as no one knows about the suspect’s conduct if he is not charged. It is further argued that the result in a post-charge regime is preferable, for if a person is charged, appears in court and then has the charges stayed, the public at least knows about the conduct. This argument confuses the purpose of the justice system. It is to determine the sufficiency of evidence, not out an accused where there is insufficient evidence.

If a charge is laid and then stayed because of a lack of evidence, an accused may be exposed to all the negative consequences of being charged – publicity, employment

problems, border crossing problems, child access problems if a family violence charge – when he arguably should not have been charged at all. This is particularly so in cases of sexual misconduct, where no amount of explanation after a stay can undo the damage to an accused's reputation. Some may say that this argument is one for the accused or his counsel to raise but it is the responsibility of the Crown to see, as far as possible, that the fair and proper thing is done.

The high-profile case of Michael Bryant, a former Ontario cabinet minister may serve to illustrate what can happen when a charge is laid on insufficient evidence. Bryant was driving in downtown Toronto, became involved in a heated argument with a cyclist, attempted to drive off and was involved in a collision, resulting in the cyclist's death. Within days he was charged with very serious charges. A media firestorm ensued. As the investigation proceeded, it became apparent that there was another side to what had happened and that he had committed no criminal offence. The charges were very publicly stayed. Bryant had the resources to defend his name publicly, but what of someone in his situation with lesser resources?

It is said that it is unlikely that this situation would have occurred in BC, as the requirement for a complete investigation and RTCC would mean that no charges would have been laid.

### 3. Unnecessary Police Resources

**Police Position:** It would save the police from expending as many resources on a full 'disclosure ready' court brief (RTCC) before a charge is even laid, as a number of persons charged with low level offences plead guilty almost immediately and less information is needed.

**Crown Position:** Many minor offences require only a very basic RTCC and material, so not much police time is saved. In all cases, even those where the accused pleads guilty very early in the process, it is essential that Crown Counsel know all of the circumstances of the offence so that the court can know and impose the appropriate bail conditions or sentence. A very brief summary of the offence risks an accused getting an inappropriately lenient bail release or sentence because Crown Counsel does not have all of the details of the accused conduct to tell the court

For those lesser charges that proceed to trial, an accused is entitled to disclosure of all of the evidence. So the investigator will need to provide a complete package in any event, be it right at the beginning or later in the process. In fact, most defence counsel will require full disclosure before the accused enters a plea, within several weeks of the first appearance.

#### 4. Usurping the Court's Role

**Police Position:** Under the present system, the Crown, via the charging standard, puts itself in the position of the judge. It is the perception of some police that Crown Counsel requires a certainty of conviction before it will approve a charge. A common phrase used is "let the judge decide". Reverting to a post-charge system would allow the judge to make the decision, not the prosecutor.

**Crown Position:** A 'letting the judge decide' approach ignores certain realities. In a post-charge regime, Crown Counsel will assess every case coming into the system by the Branch standard. By whatever standard, either 'substantial' or 'reasonable', the Crown has an ongoing responsibility as an agent of the Minister of Justice to assess the evidence in his/her cases to ensure that only the proper cases go forward and absorb precious court resources. To merely stand by and let whatever charges are laid proceed without further assessment is not only a recipe for a paralyzed court system but also a failure to fulfill a duty.

The criminal justice system can be looked at as a series of filters, with each successive stage employing a finer screen:

- a. The police use the screen with the widest mesh – 'reasonable grounds'. Once evidence meets that standard, a charge can be recommended to the Crown.
- b. Next comes the prosecution with either a 'substantial likelihood' or a 'reasonable likelihood' test, being a finer mesh.
- c. If the evidence is sufficient to pass through that screen, the court can convict only if the evidence is fine enough to pass through the finest mesh – "beyond a reasonable doubt."

In the end, only those against whom the evidence is the strongest can be found guilty.

#### 5. Efficiency

**Police Position:** Allowing police to lay a charge is more efficient. Using court liaison officers to review the RTCCs prior to submission and then lay Informations upon Crown Counsel approval makes for convoluted paper trails and can result in delays.

**Crown Position:** The public appearance is more objective (the same person conducting the investigation doesn't decide on charges) and efficient (need for fewer replacement Informations).

## 6. Police Morale

It would improve police morale and 'buy-in', as officers who are now discouraged by Crown Counsel's no-charge decisions, particularly on administrative offences, would become more engaged as they assume more responsibility. It would also improve the quality of the initial reports as the police would rely on the prosecutors less in the initial stages.

## 7. Better Investigations

Police Position: There are some investigations that would be advanced by charges, even if all of the investigation was not complete. For example, in a gang case, if an accused were charged and in custody, witnesses may feel more comfortable coming forward to the police.

Crown Position: This argument has some validity but the cases where this would apply, although generally more serious, will be few. If witness protection is a concern, there are other avenues to accomplish this

## 8. Offender Management

Police Position: A repeating offender charged, brought before the court and released on bail, would be subject to bail conditions. This can facilitate offender management in the community. If he is not charged pending completion of the complete report, he may reoffend pending RTCC approval.

Crown Position: This can be true but it is a question of whether this goal can be achieved through other means so as to meet the concerns of the police while limiting the new charges coming into the system.

## 9. Importance of Lesser Offences

For lesser offences, not charging offenders has negative effects:

- It leads to public and victim disenchantment with the system: they retreat from lawful enjoyment of public facilities because of illegal activities of others.
- It fosters disrespect for the law: people who obey the law see others disobey it with no consequences.
- It promotes crime: petty offenders who see no consequences to their actions may graduate to more serious crime.

## Other Arguments

1. The police are experts in investigations. Crown prosecutors by their training know the law. Given the complexity of the law today, it is unfair to expect the police to master the subtleties of the criminal law as well as their other responsibilities.
2. The Charter clock starts to run from the laying of an Information, not from the beginning of the investigation. Any time spent in compiling an RTCC package does not count towards a delay argument. If a charge is laid and further time and court delay is needed for disclosure or additional investigation, that time counts towards a Charter breach of delay.
3. If the police are able to lay charges, it is inevitable that additional charges – be they summary conviction or hybrid – will enter the system, even using a ‘reasonable likelihood’ standard. These additional charges will have to be dealt with, and Crown and court time used, when there may be other ways to address the same problem (Alternative Measures/revocation of bail) rather than a separate charge.
4. It is human nature (and shown by the experience of post-charge jurisdictions) that once a charge is laid for lesser offences, an investigator has other cases to deal with. If follow-up investigation is needed, it can take a back seat to more current cases and be more difficult to obtain. All the while the Charter clock is ticking and more interim court appearances are needed. As well, this can lead to delays in being able to make a decision as to guilty pleas or whether the case should be stayed or withdrawn.
5. An argument is sometimes heard that the BC system results in an inordinate number of stays and withdrawals and that it is less efficient than a post-charge system.

From the Canadian Center for Justice Statistics, we can get a picture over several years:

	Fiscal year	Total Decisions	Guilty	Acquitted	Stay/ Withdrawn	Other
Alberta	2007/2008	56,948	34,498	656	20,747	1,047
Alberta	2008/2009	57,877	37,320	656	18,748	1,153
Alberta	2009/2010	58,397	37,082	649	19,490	1,176
British Columbia	2007/2008	47,821	33,213	1,001	13,249	358
British Columbia	2008/2009	47,000	33,144	1,129	12,337	390
British Columbia	2009/2010	45,736	31,978	993	12,425	340

From this we can see that BC, with a larger population, has fewer charges coming into the system than Alberta. One reason for this is the front end screening system in BC. As well, we can calculate percentages of stays and withdrawals to total decisions:

	<u>Alberta</u>	<u>BC</u>
2007-8	36.4%	27.7%
2008-9	32.4%	26.2%
2009-10	33.4%	27.2%

There can be many variables in any set of statistics but one note of explanation is needed here: Stays and withdrawals are not just those where there was insufficient evidence. Those numbers include cases where an accused pleaded guilty to some charges and others were withdrawn or stayed. In fact, those situations may make up the bulk of the numbers in that column.

Again, the pre-charge assessment process in BC can be seen to screen out charges that Alberta must deal with later and with less efficiency.

This is but one set of numbers and Alberta is but one province but it does show that over several years, in comparison to at least one post-charge province, BC compares favourably.

## Comment

In my interviews, most of the players – judges prosecutors, defence counsel and others supported retention of the pre-charge system. There is a segment of the police community which expressed a desire to return to a post-charge system. Their concerns range from historical and constitutional to the practical. These have all been outlined above.

But there is no real consensus.

Many of the officers to whom I spoke have had policing experience in post-charge provinces and for a variety of reasons, generally prefer working in a post-charge regime. But they also have been in BC for enough time to adapt to the pre-charge system. Others have policed in BC for their entire careers.

They recognize that reverting to a post-charge system would involve significant training and cost issues. Most significantly, they acknowledged that reverting would not make the system more efficient. It would in fact add to the charges now coming into the system.

However, they are most concerned over resource and offender management issues and consistency of advice received from the Crown. They do not particularly want to take back the charging function but are prepared to do so if that is the only answer to these practical issues.

It is also useful to consider that the other two pre-charge provinces – Quebec and New Brunswick – strongly support the pre-charge process and would oppose any move to go back to a post-charge system. And in at least several post-charge provinces, justice ministries would not be averse to converting to pre-charge, but with the protocols in place, their systems work efficiently.

The arguments of the police are not without merit but do they outweigh the benefits of the existing system? Are there other avenues to address their concerns?

The real concerns of the police, as expressed to me, lie not in the charging standard but with parts of its daily application. They are more resource-founded than in any position of authority or jurisdiction.

### Effects of Reverting

If British Columbia were to revert to a post-charge system, there would be many costly adjustments needed:

- Police would need more reviewing officers and would need enhanced reviewing and legal training. This could be a much bigger adjustment than anticipated. In a post-charge regime, the police, in laying charges, do little actual screening. Charges are laid when there are “reasonable grounds” as per s. 504 of the Code. There is little assessment of any viable defences, nor can the police be expected to be current on sophisticated Charter issues and decisions. So if they were to take back the charging function, officers would need significant legal training and a sea change mindset shift.
- With more charges and more trials, more officers would have to attend court as witnesses.
- Crown Counsel – with more charges, would need more prosecutors and staff to assess and try the charges coming into court and would need to devote more time to training police.
- Witnesses – with more trials, would need to take more time off work.
- Court – with more charges, would need more court time (guilty pleas/trials) – and more judges and staff.
- Public – with more cases and more accused coming into court – would need more public money spent on all parts of the system.
- Municipalities and province – more officers would be needed – at a cost to these governments.

3. *What Improvements to the Assessment Process Can be Recommended?*

(a) *The Need for Directives*

The nuts and bolts of the screening process are contained in the Charge Assessment Guidelines. They have been developed and refined over the years in response to other Inquiry recommendations and daily experience.

There have been no directions issued by the Assistant Deputy Attorney General with respect to who should be doing charge assessment. Nor need there be any. Daily experience and the abilities of those in charge of the various Crown Counsel offices have resulted in Charge Assessment Crowns with the necessary experience, wherever possible, being given that assignment.

There have been and continue to be substantial educational initiatives undertaken by the Ministry through conference presentations and online materials.

The existing Guidelines themselves do not need to be made more specific. They provide good guidance to Crown Counsel, yet allow for flexibility in adapting to local conditions.

Recommendation 3(a): No directives are needed.

(b) *Who Does Pre-Charge Assessment / Where Is It Done?*

In the larger Crown offices, separate units of experienced prosecutors on longer term assignments perform the function. In smaller and mid-size offices, there is not the luxury of devoting separate long-term resources, but senior prosecutors do the assessments whenever possible.

As a general rule, Crown Counsel doing charge assessment should have a minimum of 5 years prosecutorial experience. This is a somewhat arbitrary number, as the content of that 5 years of experience must be looked at. The more trial experience that a prosecutor has the better feel he/she will have for what really happens in court and what are realistic charges/sentences.

There is always the caveat that smaller offices may not have the experienced staff to meet this suggestion.

The suggestion of a centralized charge approval unit for the province has drawbacks.

BC is a highly diverse province geographically and culturally. Crime and public interest considerations vary from place to place and over time. A centralized unit with (or without) more detailed guidelines would almost inevitably be slower and more cumbersome and could jeopardize local relationships between Crown Counsel and police (and the communication that goes with them). More importantly, it would result in the loss of local sensitivity in the

charge assessment process. This local sensitivity is recognized in the public interest factors in the existing Guideline.

Recommendation 3(b): Wherever possible, the assessment function should be done by local Crown Counsel who have significant trial experience.

*(c) Timeliness/Content of Assessment Decisions*

The feedback that I received indicates that the timeliness and content of Crown decisions on charge assessment varies throughout the province. This is to be expected, given the variability of office size, available resources and workload. For most files, the majority of RTCCs are reviewed within several working days. More serious cases benefit from more immediate Crown/police liaison and are streamlined once the police investigation is complete.

The timeliness of communication with the police needs to remain flexible, and attuned to local conditions. Further written guidelines in this area can be counter-productive. But the Crown needs to remain cognizant of the need for sufficient explanations for no-charge decisions.

Recommendation 3(c): That no further guidelines setting out timelines need be issued but that the Ministry investigate ways to enhance Crown/police communication at an early stage in the process.

*(d) Police Appeal Procedure*

This process was put into the Guidelines in response to a recommendation in the Hughes Report. It has not, in anyone's memory, been used to its end, but is an important confirmation of the authority of the police to lay a charge.

However, the need for a Special Prosecutor, if the appeal process is fully invoked, should be formalized.

Recommendation 3(d): That the Guideline be amended to provide that where the appeal process has been exhausted and the police lay an Information, a Special Prosecutor will be appointed.

*(e) What Public Reporting, if Any, Should Occur Regarding Charge Assessment Decisions?*

The first part of this question focuses on the transparency of individual charge assessment decisions and has been discussed in detail at pp 29-30. As noted there, in either a pre or post-charge regime, a suspect's name need not and should not be made public unless and until a charge is approved/laid. Once a charge is laid, then subject to any statutory restrictions (e.g.- Youth Criminal Justice Act/court imposed publication bans), the name of the accused is a matter of public record. The laying of the charge can be considered as the public reporting.

Where there is a no-charge decision, there may be occasions when it is proper and necessary and in the public interest to explain the reasoning behind the decision to the victim (and in rare cases to the public). One of the concerns of the police now is that they are sometimes called upon to liaise with the victim and to try to explain a no charge decision that they may neither agree with nor fully understand. Since it is a decision of Crown counsel, it seems more logical that the prosecutor (or the Ministry issue a public statement if that is called for), either alone or in conjunction with the investigator, and subject to any privacy and operational concerns.

In the aggregate, statistics are now kept as to numbers of RTCCs submitted and approved/rejected. Collection of these numbers should be continued as they can highlight trends or problem areas that need to be addressed.

**Recommendation 3(e):** Where there is a no-charge decision, there should be no public reporting or comment, as the name of a suspect should be kept confidential by the police and prosecutor until a charge is laid.

On those occasions when a no-charge decision is made and the public interest requires an explanation to the victim or the public, it should be the responsibility of the prosecutor (or the Ministry), either with or without the investigator, to do so.

Statistics on the numbers of RTCCs submitted and approved/rejected should continue to be compiled.

#### *4. Public Order and Administrative Offences*

A constant thread throughout discussions with police is their desire for the laying of more charges for public order and administrative offences. It is their view that the Crown rejects too many of these charges. The positions of the Crown and the police are set out earlier in this Report.

As there is some disconnect here, this issue merits further discussion at a provincial level.

**Recommendation 4:** That the Ministry review the issue of the laying of public interest/administrative offences to determine how much of the police concern is borne out by statistics and to examine initiatives by which this concern may be addressed.

5. *Police Resources Required for RTCCs*

A continuing police concern is that of the amount of police resources required to produce a disclosure ready file before a charge assessment will be done.

As elsewhere, this issue varies from place to place.

Conversely, there are areas where the police might consider alternative investigative methods to reduce the drain on their own resources.

**Recommendation 5:** That the Ministry review the issue of police resources to determine if there are RTCCs that could be assessed with a reduced investigative package.

## 8. *Police Training*

New BC police recruits receive their training through one of two vehicles. The RCMP trains its officers in Regina. Municipal officers attend at the Police Academy section of the BC Justice Institute. There is a basic legal component to all of this training but a new officer must master a multitude of street skills in a short time. He/she is not being trained to be a lawyer.

Newly minted officers are mentored by more experienced officers once they are fully accredited. Depending on workload, demographics and transfers, this field supervisory training can be of variable effectiveness.

All police services require their officers to engage in on-going training.

The most knowledgeable people to assist in the legal training of police officers are Crown Counsel. The degree of involvement of Crown Counsel in police training in BC has varied, depending on location, time and availability. Where they have the resources, Crown offices have played an important role in police training.

This interaction has the additional benefit of exposing Crown Counsel and police officers to the perspectives of the other

**Recommendation 8:** That the police services and the Ministry investigate the feasibility of providing officers with enhanced training on legal concepts and evidentiary requirements and that the role of Crown Counsel in this training be increased wherever practicable.

## 9. *Police Reports*

While great strides have been made in the quality of police reports, there is no system that cannot be improved.

The focus of this review has been on the charge assessment process. Integral to the process is the quality of police reports. Some recent initiatives show that in some locales, the quality of reports may still be problematic.

Larger police services dedicate experienced officers to review reports before they are sent to Crown Counsel. This has improved quality in those areas but modern technology may help even more.

As an example, the Edmonton Police Service has recently developed its own computerized file review system (IMAC) that has markedly improved the quality of its reports. Other services have signalled an interest in this program.

**Recommendation 9:** That police services investigate the need and feasibility of computerizing and enhancing their report reviewing processes.

#### 10. Legal Aid and Court Delays

One of the issues discussed during this review was the legal aid system in BC. It has been the victim of substantial budget cutbacks over the past few years. There are now far fewer lawyers who are willing to do legal aid work.

Anyone who has been in any courtroom in Canada will know that an unrepresented accused at trial takes up far more court time than someone who has counsel. The judge must take time to explain the process to the accused (often repeatedly).

One area where legal aid continues to help is through Duty Counsel. Private counsel are retained by the Legal Services Society for the day or the week to assist accused at non-trial appearances. But by the short term nature of their appointments, continuity and some familiarity with local issues and personnel can be lost.

Some other provinces (e.g., Alberta) have full-time salaried Duty Counsel working out of the major courthouses. These groups provide continuity of service and advice and as a by-product have earned the confidence and trust of the local bar and judiciary.

**Recommendation 10:** That the Legal Services Society examine the feasibility of employing Duty Counsel on a longer term basis.

#### 11. Additional Resources

Although it has been made clear many times that government resources are tight, police, judges and other officials all confirmed to me that the charge assessment Crown Counsel are severely overworked. This varies by location but is acute in some of the larger offices. This apparently has been exacerbated by the court closures in 2002, which closed a number of courthouses and Crown offices and relocated their workloads, in some cases to offices which were already at capacity.

But it seems that additional Crown resources have not kept pace with other developments:

- During the past few years, additional funding has been made available to the police. More officers have been hired. When that happens, more charge recommendations inevitably follow. More RTCCs add to the Crowns' workload.
- Bill C-10 (the federal "Tough on Crime" legislation) will add to the workload of both the police and the Crown (and others) but to an unknown degree.
- As the population of the province grows, the volume of crime will inevitably increase.

**Recommendation 11:** That the Ministry continue to develop measures to gauge the workload of its staff and the effects of additional federal crime measures and population growth.

## 12. *Educating the Public*

A genuinely informed public is essential to societal acceptance of any justice system. Uninformed comments about what is happening in a system lead to generalities, wrong conclusions and misunderstandings.

Traditionally, the criminal justice system has not been effective in explaining itself to the public. Long academic articles do not reach those who need or want to understand the system. Responses to questions about an on-going case – “it is before the courts and we cannot comment” — while correct, can appear evasive.

Some of the dissatisfaction and angst surrounding criminal justice in all provinces flows from public ignorance of its real workings. This is fed by popular TV shows (e.g., Law and Order, CSI), from which the viewing public concludes that our system is similar to what is shown on television. Little could be further from the truth.

It is time for the Ministry, together with the courts, defence bar and the police, to adequately explain the system to the public. This by itself should quell many of the negative comments we hear.

**Recommendation 12:** That the Ministry examine its present approach to public statements and media relations with a view to proactively educating the public on how the justice system works and the daily roles and responsibilities of the Criminal Justice Branch and Crown Counsel.

## Summary of Recommendations

**Recommendation 1:** That the present standard of 'substantial likelihood' be retained.

**Recommendation 2:** That the pre-charge screening process be retained in its existing form.

**Recommendation 3(a):** No additional formal directives are needed at this time.

**Recommendation 3(b):** Wherever possible, the assessment function should be done by local Crown Counsel who have significant trial experience.

**Recommendation 3(c):** That no further guidelines setting out time lines be issued but that the Ministry investigate ways to enhance Crown/police communication at an early stage in the process.

**Recommendation 3(d):** That the Guideline be amended to provide that, where the appeal process has been exhausted and the police lay an Information, a Special Prosecutor will be appointed.

**Recommendation 3(e):** There is no need for public reporting of no-charge decisions, for either cases where there is a specific victim or those where there is no named victim.

**Recommendation 4:** That the Ministry review the issue of the laying of public interest/administrative offences to determine how much of the police concern is borne out by statistics and to examine initiatives by which this concern can be addressed.

**Recommendation 5:** That the Ministry review the issue of police resources to determine if there are RTCCs that could be assessed with a reduced investigative package.

**Recommendation 6:** That the Ministry investigate whether there is value in instituting a pilot file ownership project in Crown offices.

**Recommendation 7:** That the Ministry examine whether there would be value in re-establishing a dedicated Crown Counsel project.

That the Ministry work with the police to examine the feasibility of a pilot project to assign a police officer to work in a Crown office with the charge approval Crown Counsel.

**Recommendation 8:** That the police services and the Ministry investigate the feasibility of providing officers with enhanced training on legal concepts and evidentiary requirements and that the role of Crown Counsel in this training be increased wherever practicable.

**Recommendation 9:** That police services investigate the need and feasibility of computerizing and enhancing their report reviewing processes.

**Recommendation 10:** That the Legal Services Society examine the feasibility of employing Duty Counsel on a longer term basis.

**Recommendation 11:** That the Ministry continue to develop measures to gauge the workload of its staff and the effects of additional federal crime measures and population growth.

**Recommendation 12:** That the Ministry examine its present approach to public statements and media relations with a view to proactively educating the public on how the justice system works and the daily roles and responsibilities of the Criminal Justice Branch and Crown Counsel.

## Conclusion

At the beginning of this report, I mentioned the commitment of the people to whom I have spoken. This bears repeating:

The abilities and enthusiasm of judges, prosecutors, police, defence counsel and others who are part of the system are remarkable. The citizens of British Columbia are fortunate to have these people superintending criminal justice in the province. It is unfortunate that this fact is so rarely noted.

The work I have done on this project has reaffirmed for me certain facts that hold true regardless of the system in place:

- Prosecutions have become much more complex in ways that are beyond the authority of the provincial government to change. Truly effective improvements to the trial process can come only from the Bench (if given enhanced case management authority) and the federal government. Recommendations in these areas are more properly within the mandate of other reviews.
- Expending resources, whether those of the prosecution or police, pays greater dividends when concentrated at the beginning of the process. This comes at a cost but results in a more efficient justice system.
- Location and personalities are important. Factors such as the size and workload of Crown Counsel offices, court locations and police detachments and the experience of police officers and prosecutors in a given area can determine whether a part of the process is an issue in one place but not another. It is preferable to have policies and guidelines that are flexible enough to be adaptable to local conditions.
- While there must be formal protocols in place to establish minimum requirements on certain processes, one of the most valuable assets for any Crown Counsel or police officer to have is a good day-to-day working relationship with his or her counterparts. These need not in any way affect their respective independence. Simply being able to call someone you know can help clear up confusion or misunderstanding. Prosecutors and police have separate and independent roles but have similar values and goals: the appropriate enforcement of the law and the proper administration of justice. The working relationship in BC is good, the result of hard work over time by many people. But any relationship can be improved with better communication and understanding of each other's roles.

This Review has focused on the charge assessment regime in BC. The process is neither broken nor in crisis. Parts of it bear examination and possible refinement but no wholesale changes are needed.

## Appendices

- A. Terms of Reference – Charge Assessment Review
- B. Terms of Reference – Chair-Justice Reform Initiative (Geoffrey Cowper Q.C.)
- C. Green Paper – Modernizing BC’s Justice System (February 2012)
- D. Crown Counsel Act
- E. Crown Counsel Policy Manual – Charge Assessment Guidelines
- F. Previous Commissions/Inquiries
  - i. Access to Justice: Report of the Justice Reform Committee (Hughes) 1987 (excerpt)
  - ii. Discretion to Prosecute Inquiry (Owen) 1990 (excerpt)
  - iii. Special Prosecutor Review (Owen) 2010
  - iv. Alone and Cold (Davies) 2011 (excerpt)
- G. Participants
- H. Other Jurisdictions – Links to Crown Prosecution Policies
  - [Alberta](#)
  - [Saskatchewan](#)
  - [Manitoba](#)
  - [Ontario](#)
  - [Quebec](#)
  - [New Brunswick](#)
  - [Nova Scotia](#)
  - [Prince Edward Island](#)
  - [Newfoundland and Labrador](#)
  - [Public Prosecution Service of Canada](#)