Policy:		
Probation – Adults		
Policy Code:	Effective Date:	Cross-references:
PRO 1	April 16, 2019	CHA 1 CHI 1 IPV 1 SEX 1 VUL 1

The central purpose of a probation order is to secure the good conduct of an offender in the future and, specifically, to prevent the offender from committing future offences. This in turn helps to protect society and to facilitate the rehabilitation and reintegration of the offender into the community. Crown Counsel should seek probation conditions only to advance these objectives and for no other purpose.

Offences against the administration of justice, which include failures to comply with probation orders, continue to increase as a proportion of all reported crime in Canada.[1] These offences result in findings of guilt at significantly higher rates than for other types of offences and, upon conviction, result in sentences of incarceration at much higher rates than for other offences.[2] Convictions for offences against the administration of justice account for a very significant and growing segment of the custodial population in British Columbia.

Some breaches of probation amount to willful defiance of the court and its lawful orders and may also create risk to public or victim safety. When they do, they call for an appropriate response. However, not every breach of probation represents willful defiance, an increased risk to public or victim safety, or the offender's return to a life of crime. Many breaches occur as a result of offenders' changing or challenging life circumstances, which can make strict compliance with probation conditions difficult. The latter types of breaches often do not raise significant concerns about public or victim safety, or a return to criminality. Overly stringent enforcement in these circumstances can create or contribute to a cycle of breaches and over-incarceration.

As "ministers of justice", Crown Counsel must exercise principled restraint in seeking and enforcing probation conditions.

1 *Trends in Offences against the Administration of Justice*, Statistics Canada, 2015
2 *Trends in Offences against the Administration of Justice*, Statistics Canada, 2015

Optional Conditions of Probation Orders

Crown Counsel should only seek optional probation conditions that are reasonably necessary to prevent future offences, protect society, and facilitate the offender's successful reintegration into the community. In other words, no matter how seemingly commendable the reason, Crown Counsel should not seek any optional condition unless failure to impose such a condition would undermine the above objectives. Further, conditions of probation should not be punitive, nor should they be aimed at achieving denunciation, retribution, or general deterrence.

Crown Counsel should not seek probation conditions that, if breached, might tend to criminalize or penalize an offender's particular life circumstances (such as poverty, homelessness, alcohol or drug addiction, mental or physical illness, or disability) unless there is a significant connection between those circumstances and the offender's criminal conduct. Conditions that require complete abstinence from alcohol or drugs, banish offenders from their home community, or impose stringent curfews, particularly if there are reasonable alternatives, should be sought only if they are necessary to achieve one or more of the objectives of preventing future offences, protecting society, or facilitating the offender's successful reintegration into the community.

In formulating a position on probation conditions, Crown Counsel should consider the specific guidance regarding sentencing contained in the policies listed below. While these policies are consistent with the approach articulated above, they emphasize the need to have particular regard for the safety of the public, including victims and other family members:

- *Child Victims and Witnesses* (CHI 1)
- *Intimate Partner Violence* (IPV 1)
- *Sexual Assaults – Adult Victims* (SEX 1)
- *Vulnerable Victims and Witnesses* (VUL 1)

Indigenous Offenders

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally-inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of

substance abuse and suicide, and higher levels of incarceration for Indigenous persons.[3] The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.[4]

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for consideration of probation conditions involving an Indigenous offender. These consequences "must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views."[5]

The principles established in *R v Gladue*[6] apply to the consideration of whether and what probation conditions should be imposed for Indigenous offenders. Crown Counsel must consider the contents of a Gladue Report, or any other evidence submitted concerning the offender, the community, or the unique systemic or background factors that may have played a part in bringing the Indigenous offender before the court.

Crown Counsel must also consider the impact such factors, as well as the continuing consequences of colonialism, will have on the Indigenous offender's ongoing interaction with the criminal justice system. This necessarily includes a consideration of the:

- remoteness of the community in which the offender resides
- local conditions for employment, education, access to rehabilitative resources in the offender's community, and the challenges the local conditions may present for compliance with, and enforcement of, probation conditions
- unique cultural connections or traditions within the offender's community
- availability of appropriate rehabilitative programming and community support, regardless of locality

Charge Assessment of Alleged Breaches of Probation

Even if the evidentiary test in *Charge Assessment Guidelines* (CHA 1) is met, justice does not require that every breach of probation must be prosecuted. Crown Counsel should only prosecute a breach of probation if, keeping in mind the requirement to exercise principled restraint, and paying particular attention to the circumstances of Indigenous accused, Crown Counsel concludes that the particular breach requires the full force of the

3 *R v Ipeelee*, 2012 SCC 13
4 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
5 *Ewert v Canada*, 2018 SCC 30 at paras 57 and 58
6 *R v Gladue* [1999] 1 S.C.R. 688

criminal justice system, with all its available sanctions.

When it is alleged that an accused has breached a probation condition, Crown Counsel should consider any available alternatives before approving the laying of a separate charge of breach of probation. This would include:

- taking no action
- applying to vary the probation order under sections 732.2(3) and (6) with a view to better securing the good conduct of the offender in the future and preventing the offender from committing future offences
- noting the breach as an aggravating factor on sentencing, following conviction on a related substantive offence

Further Considerations

Since breach of a court order is an identified risk factor for future instances of intimate partner violence, it is important in those matters for Crown Counsel to consider proceeding with charges, where otherwise appropriate, for breaches of probation as set out in *Intimate Partner Violence* (IPV 1).

It will generally be in the public interest to prosecute an alleged breach of probation if:

- the alleged breach demonstrates a pattern or course of conduct indicating that the offender will likely continue committing substantive criminal offences during the term of the probation order
- the offender poses a significant risk to public safety, including the victim(s) of the preceding or underlying substantive offence
- the alleged breach significantly undermines or defeats the fundamental objective of the probation order
- it is necessary to do so to maintain public confidence in the administration of justice

It will generally not be in the public interest to prosecute an alleged breach of probation if:

- based on the nature of the alleged breach, a conviction is unlikely to result in a significant penalty
- the alleged breach is minor, technical, or involves conduct that is not in itself criminal, apart from relating to a condition of the order

- the offender has resumed compliance with the order
- the offender lacks any significant history of breaches of court orders
- the alleged breach occurred as a consequence of an offender's life circumstances (such as poverty, homelessness, addiction, mental or physical illness, or disability), and did not result in, or substantially increase the risk of, further offending
- *R v Gladue*[7] factors have played a part in the Indigenous person's coming into contact with the criminal justice system, and the alleged breach did not involve:
  - violence or bodily harm
  - conduct that could reasonably result in risk to the safety or security of a victim, a witness, or the public
  - conduct that would undermine the primary purpose of the probation order
- the nature of the alleged breach is such that the social benefit to be gained by a prosecution is outweighed by the length and expense of conducting it

If the charge assessment standard is met, and the breach is incidental to a new substantive offence, Crown Counsel should consider:

- whether the public interest may be satisfied by noting the breach as an aggravating factor on sentencing, following conviction on the substantive offence
- if the public interest requires a prosecution, subject to sections 664 and 789(2), charging the alleged breach on the same Information as the new substantive offence

7 *R v Gladue*, [1999] 1 SCR 688