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Charge Assessment Guidelines		
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CHA 1	January 15, 2021	ABD 1 BAI 1 CHA 1.1 CHI 1 ELD 1 HAT 1 IPV 1 VUL 1

The Charge Assessment Function

The decision to start or continue a prosecution is one of the most important duties of Crown Counsel. The *Crown Counsel Act* authorizes Crown Counsel, under the direction of the Assistant Deputy Attorney General (ADAG), to "examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that Crown Counsel considers appropriate" (section 4(3)(a)). In carrying out this function Crown Counsel are constitutionally required to act independently of all partisan concerns and improper motives. The independence of Crown Counsel is confirmed by section 5 of the *Crown Counsel Act*, which requires that any intervention by the Attorney General with respect to the approval or conduct of a prosecution "must be given in writing to the ADAG, and published in the *Gazette*."

The independence of Crown Counsel must also be balanced with measures of accountability. Crown Counsel must review the available evidence and applicable law and exercise their discretion in accordance with published policies. This ensures consistent and principled decision-making.

The charge assessment function of Crown Counsel is also independent of the investigative responsibility of the police. Reasonable cooperation and effective communication between Crown Counsel and the police are essential to the proper administration of justice. However, Crown Counsel must guard against becoming too closely connected to the police or doing anything else to hamper their ability to conduct objective charge assessments.

The police have authority to lay an Information charging a person with an offence, but Crown Counsel have the ultimate authority to decide whether to continue or terminate the prosecution. The BC Prosecution Service expects that, unless it is impracticable to do so, police will lay an Information only after the approval of charges by Crown Counsel, or, if

charges are not approved, after exhausting the review process that is provided by policy (*Charge Assessment Decision – Police Appeal* (CHA 1.1)).

The discretionary decisions of Crown Counsel are entitled to reasonable deference and should not be overturned or second-guessed by other Crown Counsel, including Regional Crown Counsel, Directors, or their respective deputies, unless they are wrong in fact or law, unreasonable, or contrary to the public interest, or unless there has been a material change in circumstances. On any review of a Crown Counsel's discretionary decision-making, a standard of reasonableness applies.

The Charge Assessment Standard

As the necessary legal context for any charge assessment decision Crown Counsel must consider the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and the prosecutor's fundamental obligation to act as a "minister of justice," and see justice done. In discharging the charge assessment function, Crown Counsel must independently, objectively, and fairly measure all the available evidence against a two-part test:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether the public interest requires a prosecution.

This two-part test continues to apply throughout the prosecution.

Evidentiary Test – Substantial Likelihood of Conviction

Subject only to the exception described below, the evidentiary test for charge approval is whether there is a substantial likelihood of conviction. The reference to "likelihood" requires, at a minimum, that a conviction according to law is more likely than an acquittal. In this context, "substantial" refers not only to the probability of conviction but also to the objective strength or solidity of the evidence. A substantial likelihood of conviction exists if Crown Counsel is satisfied there is a strong and solid case of substance to present to the court.

In determining whether this test is satisfied, Crown Counsel must consider the following factors:

- what material evidence is likely to be admissible and available at a trial
- the objective reliability of the admissible evidence
- whether there are viable defences, or other legal or constitutional impediments to the prosecution, that remove any substantial likelihood of a conviction

In assessing the evidence, Crown Counsel should assume that the trial will unfold before an impartial and unbiased judge or jury acting in accordance with the law, and should not usurp the role of the judge or jury by substituting their own subjective view of the ultimate weight or credibility of evidence for those of the judge or jury.

Public Interest Test

If Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must then determine whether the public interest requires a prosecution.

Protection of society is a paramount concern of the criminal justice system. Justice does not require that every provable offence must be prosecuted. The resources of the criminal justice system are not unlimited. If reasonable alternatives are available, they should be pursued. Prosecution should be reserved for cases requiring the full force of the criminal justice system, with all its available sanctions.

In assessing the public interest, Crown Counsel should take into account the particular circumstances of each case and the reasonable public safety concerns of the local community. Hard and fast rules cannot be imposed. Crown Counsel should consider and weigh the following factors to the extent they are relevant to any particular case.

1. Public Interest Factors that Weigh in Favour of Prosecution

- the seriousness of the allegations
- the likelihood of significant sentence upon conviction
- the seriousness of the harm caused to a victim
- the use, or threatened use, of a weapon
- the relative vulnerability of the victim (*Abduction of Children by Parent/Guardian* (ABD 1), *Child Victims and Witnesses* (CHI 1), *Elder Abuse – Offences Against Elders* (ELD 1), *Intimate Partner Violence* (IPV 1), and *Vulnerable Victims and Witnesses (*VUL 1))
- the overrepresentation of Indigenous women and girls as victims of violent offences
- the alleged offender's history of relevant previous convictions or previous allegations that resulted in alternative measures
- the alleged offender's position of authority or trust in relation to the victim
- evidence of premeditation

- evidence that the offence was motivated by bias, prejudice, or hate based on colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, mental or physical disability, or any other similar factor (*Hate Crimes* (HAT 1))
- a significant difference between the actual or mental ages of the alleged offender and the victim
- that the alleged offender was under an order of the court at the time of the offence
- reasonable grounds for believing the offence is likely to be continued or repeated
- the offence occurs frequently in the location where it was committed
- the offence is one that affects the integrity, safety, or security of the justice system or its participants
- the offence is a terrorism offence
- the offence was committed for the benefit of, at the direction of, or in association with a criminal organization

2. Public Interest Factors that Weigh Against Prosecution

- the need to reduce overrepresentation of Indigenous persons as accused within the criminal justice system, particularly where *R. v. Gladue*[1] factors have played a part in the Indigenous person's coming into contact with the criminal justice system
- bias, racism, or systemic discrimination played a part in the accused coming into contact with the criminal justice system, with particular attention to the circumstances of Indigenous accused
- a conviction is likely to result in an insignificant penalty
- the public interest has been or can be served without a prosecution by the BC Prosecution Service, including through restorative justice methods, alternative measures, Indigenous community justice practices, administrative or civil processes, or a prosecution by another prosecuting authority
- the harm caused by a breach of bail can be addressed through procedures for bail review or revocation (*Bail – Adults* (BAI 1))
- the offence was committed as a result of a genuine mistake or misunderstanding of fact

1 [1999] 1 S.C.R. 688

- the loss or harm was the result of a single incident and was minor in nature
- the alleged offender's lack of history of relevant previous convictions or recent previous allegations that resulted in alternative measures
- the offence is of a trivial or technical nature
- the law giving rise to the offence is obsolete or obscure
- the offence was investigated by a private individual or group whose investigative techniques (i) potentially put public or individual safety at risk; (ii) if used by police would possibly result in exclusion of evidence gathered or a judicial stay of proceedings, either due to a *Charter* breach, or a violation on limits of police powers under the *Criminal Code* or common law; or (iii) would otherwise negatively affect public confidence in the administration of justice.

3. Public Interest Factors that May Weigh Either in Favour of or Against a Prosecution

- the youth, age, intelligence, physical health, mental health, or other personal circumstances of a witness or victim
- the personal circumstances of the accused
- the alleged offender's degree of culpability in relation to other parties
- the length and expense of a prosecution when considered in relation to the social benefit to be gained by it
- the time which has elapsed since the offence was committed
- the need to maintain public confidence in the administration of justice

Indigenous Persons

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons (First Nations, Métis, and Inuit), 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.[2]

2 *R v Ipeelee*, 2012 SCC 13

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

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for any charge assessment involving an Indigenous person as a victim or potential accused. 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."[4]

At an early stage in the charge assessment process, Crown Counsel should try to determine whether the accused or victim identifies as an Indigenous person and, therefore, whether public interest considerations specific to Indigenous persons apply. To make this determination Crown Counsel should refer to any information contained within the Report to Crown Counsel (RCC) or otherwise readily available to them.

If at any time during the life of a file Crown Counsel determines that the accused or victim identifies as an Indigenous person, Crown Counsel should ensure that this information is recorded on the file.

Where Crown Counsel determines after charge approval that an accused identifies as an Indigenous person, they should consider this information and decide whether the public interest continues to require a prosecution.

Exceptional Evidentiary Test – Reasonable Prospect of Conviction

In exceptional circumstances, where the relevant public interest factors weigh so heavily in favour of a prosecution that it is necessary to resort to a lower charge assessment standard in order to maintain public confidence in the administration of criminal justice, a charge may still be approved even though the usual evidentiary test is not met. Crown Counsel must exercise particular caution in such cases because the nature or quality of the available evidence or the exceptional circumstances said to justify resorting to a lower charge assessment standard (for example, the gravity of the offence, the identity of the alleged offender, or the degree of public outrage about the offence) could materially increase the risk of a miscarriage of justice. Under such circumstances, the minimum evidentiary standard, which continues to apply throughout the prosecution, is whether there is a reasonable prospect of conviction.

A reasonable prospect of conviction requires more than just "some evidence" on each essential element of an alleged offence but it does not require that a conviction be more likely than an acquittal. The term "reasonable" means based on reason; rational; objective, as opposed to

3 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
4 *Ewert v Canada*, 2018 SCC 30 at paras 57 and 58; *R v Barton*, 2019 SCC 33 at paras 198-200

subjective. "Prospect" is forward-looking. It involves the expectation of a potential outcome, informed by previous experience and common sense. A "reasonable prospect of conviction" exists if experienced Crown Counsel, informed of all the relevant facts, is satisfied there is a rational and realistic basis for obtaining a conviction according to law.

In determining whether this test is satisfied, Crown Counsel must consider the following factors:

- what material evidence is arguably admissible and available at a trial
- the objective reliability of the admissible evidence
- whether the evidence is overborne by any incontrovertible defence

In assessing the evidence, Crown Counsel should assume that the trial will unfold before an impartial and unbiased judge or jury acting in accordance with the law, and should not usurp the role of the judge or jury by substituting their own subjective view of the ultimate weight or credibility of evidence for those of the judge or jury.

When Crown Counsel concludes that it is necessary to resort to the lower charge assessment standard in order to maintain public confidence in the administration of criminal justice, Crown Counsel must consult with the Regional Crown Counsel or a Director prior to concluding the charge assessment. Crown Counsel must ensure that the decision is noted on the file.

Cases Involving Death or Significant Concern for the Administration of Justice

Crown Counsel must refer to Administrative Crown Counsel any Report to Crown Counsel:

- when the allegation is that a person is responsible for a death
- for any serious allegation about which there has been, or is likely to be, significant public concern for the administration of justice

In these cases, Administrative Crown Counsel should consult with a Regional Crown Counsel, Director, or their respective deputy, before completing a charge assessment.

Practice Issues

In applying the charge assessment standard, Crown Counsel should:

- make the charge assessment decision in a timely manner, recognizing the need to expedite the decision when an accused is in custody, when a RCC requests a warrant, or when the charge involves allegations of violence

- in serious cases, or those likely to attract a significant degree of public concern, unless it is impracticable to do so, discuss in advance with the police the intention not to approve a charge recommended by the police
- for any charge assessment decision that differs from the police recommendation, record the reasons in sufficient detail to fully explain the decision and allow for a review should one be requested in accordance with policy
- when appropriate, communicate the decision to those affected, including the police, so that they understand the reasons for the charge assessment
- in cases when the proposed charges are serious and the conduct giving rise to them is likely to attract a significant degree of public attention, discuss the charge assessment with a Regional Crown Counsel, Director, or their respective deputy, to allow for consideration of whether a clear statement to the public explaining the charge assessment is necessary

Form and Content of the RCC

In order for Crown Counsel to be able to make a fully informed and appropriate charge assessment decision, the RCC must provide an accurate and complete description of the available evidence in support of the charges recommended by police. In form and content, the RCC, and its attachments, must comply with the terms and conditions of any agreement or understanding governing the transfer of disclosure materials between the BC Prosecution Service and police.

Subject to any special arrangements agreed to in advance between police and Crown Counsel regarding any particular file, if the RCC does not comply with the applicable agreement or understanding governing the transfer of disclosure materials, Crown Counsel should return the RCC to police without conducting a charge assessment. In doing so, Crown Counsel should outline for police what specifically is lacking.