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The Assistant Deputy Attorney General Responds to Recent Public Criticisms of the Criminal Justice System

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The criminal justice system has been the focus of much public discussion recently. Politicians at all levels, along with some police officers, members of the public, and media outlets have voiced repeated concerns about public safety, "prolific offenders", and random acts of violence. This appears to have led to perceptions that the overall crime rate is up across British Columbia.

Concerns about crime and public safety are a normal feature of public discourse but the sharper focus on these issues this year is quite understandable. We are emerging from more than two years of a global pandemic, which has had significant and untold impacts on every aspect of modern life, including the criminal justice system. We are grappling with an addiction and toxic opioid crisis that has been ongoing for more than seven years. We are in the lead up to municipal elections this fall. Police are increasingly called upon to respond to people suffering mental health crises, while at the same time facing calls for "defunding". The health, mental health, and housing support systems are seriously strained, and the often tragic consequences are being reported in the media every day.

When other sectors of society appear challenged or overwhelmed, citizens tend to look to the criminal justice system to fill the gaps. Although it has a critical role to play and must inevitably be part of society's response, the criminal justice system acting alone lacks the capacity, the tools, and the legal authority to remedy underlying social problems and to fill all the gaps left by other sectors of society.

The Role of the BC Prosecution Service

The BC Prosecution Service (BCPS) mandate requires us to make principled charge assessment decisions and conduct fair and effective prosecutions and appeals. Crown Counsel are legally required to act as "Ministers of Justice", exercising their prosecutorial discretion independently of government and police, and without regard for inappropriate pressure from any quarter. In carrying out these functions, Crown Counsel must follow the law, as set out in the federal *Criminal Code* and interpreted by the Supreme Court of Canada. Crown Counsel are guided by BCPS policy, which reflects current legislation and caselaw.

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In British Columbia, the *Crown Counsel Act* gives me, as Assistant Deputy Attorney General, effective responsibility over the administration of all provincial prosecution functions, subject only to specific public directions from the Attorney General. Day-to-day prosecution functions are carried out by the lawyers I designate as Crown Counsel.

The Charge Assessment Standard

The *Crown Counsel Act* authorizes each Crown Counsel in British Columbia to "examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate." The prevailing charge assessment standard, which has been in place in British Columbia for decades, requires Crown Counsel to apply a two-part test:

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

Every few years the charge approval process and the charge assessment standard come up as topics of significant public discussion. Most recently, as part of a comprehensive justice review and reform initiative in 2012, Attorney General Shirley Bond engaged Geoffrey Cowper QC to provide a report on modernizing the justice system in British Columbia. Mr. Cowper enlisted Gary McCuaig QC, a retired senior Alberta prosecutor, to review British Columbia's charge approval process. Mr. McCuaig concluded that the existing system was sound and should remain in place. This comes from his Executive Summary:

> *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.*
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> *The Crown has legitimate needs and concerns in the process:*
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> 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.*

Disclosure and Quality Control Standards

For more than a decade, police and Crown Counsel in British Columbia have been parties to a Memorandum of Understanding on Disclosure (MOU) governing their obligations to make full and timely disclosure to the defence.

In his 2012 report, Mr. Cowper referred to the MOU and specifically endorsed a set of reform initiatives BCPS was undertaking to "achieve long-term, sustainable change and efficiencies." These included:

> *…quality control measures … to ensure file completeness for purposes of charge assessment, disclosure compliance, witness availability and trial readiness.*

In 2014 the BCPS formally implemented the quality control and file management standards endorsed by Mr. Cowper. These included strict enforcement of both the two-part charge assessment standard and the disclosure rules agreed to under the MOU.

Time Limits on Prosecutions: *R v Jordan*

Full and timely disclosure before charge approval became even more critically necessary after the Supreme Court of Canada's decision in *R v Jordan*, 2016 SCC 27. The Court in that case imposed strict time limits for the completion of the criminal trial process, starting from the moment a charge is formally laid. In the wake of *R v Jordan,* Crown Counsel must be prepared to proceed as quickly as possible after a charge is laid to minimize the risk of delay. Any significant delay can result in charges being judicially stayed (i.e., dismissed) under the *Charter of Rights and Freedoms*.

The current version of the MOU, which was agreed to and signed by the BCPS and all police agencies in the province in 2020, makes it clear that police must provide full disclosure before charges are sworn. Crown Counsel generally will not approve charges before receiving full disclosure but in cases where urgency or public safety might be an issue, police can consult with Crown Counsel to seek a waiver of the strict application of the general rule.

The hard work that BCPS and British Columbia police agencies have been doing on quality control and timely disclosure helps to explain why very few cases in British Columbia have been dismissed for unreasonable delay since the *R v Jordan* judgment.

"Prolific Offenders" and the Bail Process

Much of the recent public discussion about criminal justice has focussed on "prolific offenders", a label that has no clear legal definition under the *Criminal Code* and can mean different things to different people.

Crown Counsel in British Columbia always consider the specific circumstances of every accused person or offender and the specific circumstances of every offence, whenever they are conducting charge assessment, or formulating a position on bail, or determining a sentencing position after conviction. This includes considering the background and history of the accused person or offender and the number and nature of all their previous criminal convictions.

Crown Counsel Operate under Strict Legal Limits: "The Principle of Restraint"

The *Charter of Rights and Freedoms* guarantees every person charged with an offence the right not to be denied reasonable bail without just cause. Under the *Criminal Code,* every person arrested for an offence is legally entitled to be released by the police or brought before a judge

for a bail hearing as soon as possible. The judge decides whether to detain the person in custody or release the person on bail and on what conditions.

Despite the constitutional right to reasonable bail, the numbers of accused persons denied bail and held in pretrial custody increased dramatically after the enactment of the *Charter of Rights and Freedoms*. This increase disproportionately affected accused persons from disadvantaged and vulnerable communities. Pre-trial detention tends to increase an accused's risk of future criminalization. It also tends to increase the already unacceptable over-representation of Indigenous persons within the Canadian criminal justice system.

In response, Parliament amended the *Criminal Code* in 2019, imposing on judges and police the requirement to:

> *give primary consideration to the release of the accused at the earliest reasonable opportunity, on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with…*

On top of this statutory requirement, the Supreme Court of Canada has delivered several judgments in recent years confirming that pretrial release (i.e., bail) is the rule and pretrial detention is the exception.

The Supreme Court has emphasized the obligation on all parties, including Crown Counsel, to act with restraint in all matters affecting bail:

> *All persons involved in the bail system are required to act with restraint and to carefully review what bail conditions they either propose or impose. Restraint is required by law, is at the core of the ladder principle, and is reinforced by the requirement that any bail condition must be necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the specific statutory risk factors under s. 515(10) [of the Criminal Code] of risk of failing to attend a court date, risk to public protection and safety, or risk of loss of confidence in the administration of justice ... The principle of review means everyone involved in the crafting of conditions of bail should stop to consider whether the relevant condition meets all constitutional, legislative, and jurisprudential requirements.*
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> *All participants in the bail system also have a duty to uphold the presumption of innocence and the right to reasonable bail ... This is because the "automatic imposition of bail conditions that cannot be connected rationally to a bail-related need is not in harmony with the presumption of innocence" ... The Crown, defence, and the court all have obligations to respect the principles of restraint and review. (R v Zora, 2020 SCC 14,* at paragraphs 101 and 102*)*

It is incorrect to suggest, as some have done recently, that the legal principle of restraint and the strong presumption in favour of pretrial release on bail are creations of provincial government law or policy. Since assuming the position of Assistant Deputy Attorney General in October 2016, I have received no directions from any of the four Attorneys General under whom I have served regarding the BCPS policy on either charge assessment or bail. The only changes made to BCPS policies since October 2016 have been at my direction. They reflect and are intended to

give effect to the Constitution and the principles of criminal law passed by Parliament and interpreted by the courts, particularly the Supreme Court of Canada.

Some have described the constitutionally and legally mandated law of bail as "catch and release". This phrase tends to undermine a basic principle underlying all enlightened criminal justice systems: respect for the humanity of all individuals, including those who are accused of crime. It also ignores or makes light of how fundamental, complex, and fact-specific the bail process is. When deciding whether to oppose or consent to bail, and on what terms, Crown Counsel must try to balance the public's right to safety against an individual's constitutional right to liberty, and their right to be presumed innocent until proven guilty. Crown Counsel are obliged to consider the negative impacts that pretrial detention can have on a person's "employment and income, housing, health and access to medication, relationships, personal possessions, and ability to fulfill parental obligations" *(R v Zora,* at paragraph 62). Crown Counsel are specifically prohibited from seeking pre-trial detention or bail conditions to punish an accused or to encourage or enforce treatment of an accused's underlying mental health or addiction issues *(R. v. Zora,* at paragraph 85), as some have suggested we should do.

The right to reasonable bail is granted to all accused, even those who are unhoused, or who are suffering from addiction or mental health issues. The *Criminal Code* has special rules for accused persons who suffer from mental disorders. The criminal justice system is not a mental health system and Crown Counsel are not permitted to try to use the criminal law to craft a treatment regime for mentally ill offenders.

Many bail hearings take place within hours of the accused person's arrest. Because of very strict timelines under the *Criminal Code*, Crown Counsel are often balancing the competing rights and interests and making bail decisions under severe time pressure based on limited information. They need to make some very tough calls in formulating bail positions that are consistent with both the spirit and letter of the law.

Crown Counsel cannot predict the future actions of the accused with certainty, and they cannot eliminate all risks. This is inevitable in a justice system based on the presumption of innocence, in which every accused person has a constitutional right to reasonable bail.

Dealing with Perception Versus Reality: Crime Data

In addition to repeated references to "prolific offenders", recent public commentary and media reports have featured an intense focus on incidents of random violence perpetrated on unsuspecting members of the public. Such violence is deplorable and inexcusable. The criminal justice system will continue to respond, as it must and always has, to protect British Columbians.

Against the backdrop of these random violent attacks, and the frequent talk of "prolific offenders", some have claimed that crime rates are out of control and that the criminal justice system of British Columbia is "broken". This appears to have led some to believe that crime rates have risen drastically across British Columbia.

The fact is that overall crime rates in British Columbia, are about as low as they have been for many years.

In its most recent report on police-reported crime, Statistics Canada confirms widespread decreases in police-reported criminal incidents across Canada in recent years, including in British Columbia. While the volume and rate of police-reported criminal incidents in other parts of the country showed a small increase in 2021, these volumes generally continued to decline in British Columbia. As noted in the Statistics Canada report, it is reasonable to assume that this data was affected by the COVID pandemic and, specifically the shift to remote work arrangements, the closure and restrictions on businesses and travel during the pandemic, and the reduced opportunities for breaches and failures to appear, given the reduction in court processes and in person hearings.

Statistics Canada does report a slight rise in violent crime in British Columbia (less than 1% in 2020 and 2021). From the data, however, it appears this slight increase in the number of violent incidents in British Columbia is attributable primarily to increased reporting of sexual assaults.

These trends in violent crime are generally consistent across most of our urban centres.

Conclusion

Crown Counsel diligently strive every day to give effect to the criminal law as laid down by Parliament and the Supreme Court of Canada. As British Columbians, who live in and actively contribute to the communities where they work, Crown Counsel recognize that some neighbourhoods have been suffering disproportionately from certain types of offending lately. To some extent, Crown Counsel can try to factor current local conditions into considerations about whether an accused person is detained or released on bail before trial. But the primary focus at a bail hearing must be on the specific accused person before the court and the specifics of their alleged offence, which Crown Counsel must and do consider whenever they deal with the issue of bail.

The system is *not* broken. No system is perfect, however, and public confidence in the criminal justice system is vital to its success. Public scrutiny, informed discussion, and reasoned debate help to ensure that our criminal justice system is functioning properly. It also assists us in making improvements and adjustments when necessary to make sure we can fulfill our mandate as an independent, effective, and fair prosecution service.

But public confidence can be undermined by uninformed or inaccurate public statements. In the ongoing discussion and debate about the criminal justice system, the public deserves to receive the real facts: about the criminal justice process; about the strict legal requirements imposed by Parliament and the Supreme Court of Canada; and, about the real limits on what Crown Counsel (and the criminal justice system) can and cannot do to address broader social issues like mental health and the addiction crisis.