Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

PROSECUTORIAL STANDARDS AND ETHICS

TAB 6

THE PROSECUTOR and STAYING CHARGES

Manitoba
Department of Justice
Prosecutions

Guideline No. 2:INI:1.1

Policy Directive

Subject: Laying and Staying of Charges
(including Withdrawing or Forbearing to Lay Charges)
Date: April 2001

POLICY STATEMENT:

The twofold test for prosecutorial discretion to proceed with or to instruct that charges be instituted is:

1. Whether or not there exists a reasonable likelihood of conviction, and

2. Whether or not there exists a public interest in proceeding.

Similarly, the test for exercising the discretion to stay charges is whether there continues to be a reasonable likelihood of conviction and whether there continues to be a public interest in proceeding. During the course of a preliminary hearing or in preparing for a trial, the Crown's case may be materially different than the initial assessment. Therefore, the requirement to meet the charging standard continues throughout the prosecution.

"REASONABLE LIKELIHOOD OF CONVICTION"

In the assessment of the evidence, a bare *prima facie* case is not enough: the evidence must demonstrate that there is a reasonable likelihood of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. Crown Attorneys are to make this evaluation impartially and according to law.

A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown Attorneys should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the likelihood of a conviction.

THE PUBLIC INTEREST:

The Crown Attorney must also consider whether the public interest requires a prosecution. This is a difficult judgment call which must be taken with appropriate care and discretion. A general rule can be found in the words of Lord Shawcross, endorsed by his successors in the office of Attorney General of England and Wales, and echoed in the Marshall Inquiry (1990):

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

When making an assessment of the public interest, it is necessary to carefully balance a variety of interests, some of which may be in conflict. These include the need for respect for the rule of law, the interests of the victim or victims and protection of the public. The following are some specific factors which should be considered:

i) the triviality of the alleged offence or the fact that it is of a "technical" nature only; broadly speaking, the graver the offence, the less likely there will be a public interest that will permit a disposal other than prosecution.

ii) the physical health, mental health, special infirmity or other medical condition of the alleged offender or witness; this must be balanced against the nature of the alleged offence and concerns of the victim;

iii) the staleness of the alleged offence;

iv) the degree of culpability of the alleged offender (particularly in relation to the other alleged parties to the offence);

v) the likely effect of a prosecution on public order and respect for the rule of law including the necessity of maintaining confidence in the legislature, courts and the administration of justice.

vi) the obsolescence or obscurity of the law;

vii) whether an acquittal would or might produce consequences contrary to the public interest; For example, an unsuccessful prosecution involving hate literature will probably give it increased and undesirable notoriety. Such decisions are to be made by Senior Management of the Crown

viii) the availability and efficacy of any alternatives to prosecution, within or associated with the criminal justice system, in the light of the purposes of the

criminal sanction. These include pre-charge mediation, post-charge mediation and restorative justice options;

ix) the prevalence of the alleged offence and any related need for deterrence or denunciation;

x) consideration of the victim including the entitlement of the victim or any person to compensation, forfeiture or reparation and the victim's attitude toward proceeding with the prosecution (note the exception to this when dealing with domestic violence - Policy2:DOM:1 and 2:DOM:1.1);

xi) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so (refer to Policy 2:IMM:1 – Immunity Arrangements);

xii) whether the consequences of any resulting conviction would be unduly harsh or oppressive; this is to be balanced against the effect on the victim.

However, when considering the latter factor, it must be remembered that the criminal justice system is to be regarded as the primary method by which society deters, denounces and penalizes criminal conduct. Accordingly, no regard should be had to the following:

i) the possible effect on the personal or professional circumstances of the alleged offender;

ii) the existence of other non-criminal proceedings or penalties (e.g., professional discipline) in respect of the alleged offence and the effect of those proceedings on the circumstances or reputation of the alleged offender;

iii) the public notoriety of the alleged offence and the effect of that notoriety on the circumstances or reputation of the alleged offender.

iv) the possible embarrassment that would result to the offender from a prosecution.

It is a basic principle of justice that all persons shall be treated equally. Therefore, a decision whether or not to commence or continue criminal proceedings must not be influenced by the following:

a) the alleged offender's irrelevant personal characteristics. including:

i) ancestry, including colour and perceived race;
ii) nationality or national origin;
iii) ethnic background or origin;
iv) religion or creed, or religious belief, religious association or religious activity:
v) age (unless some mitigating medical condition is present);
vi) sex;

vii) sexual orientation;
viii) marital or family status;
ix) source of income;
x) political belief, political association or political activity;
xi) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

b) the Crown Attorney's personal feelings concerning the victim or the alleged offender;

c) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or

d) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision.

PROCEDURE – Laying Charges:

The following guidelines apply to the laying of charges:

1. Where available, charges for all non-custody matters are reviewed by the Crown Attorney at the pre-charge screening level and a recommendation is made to the police as to the appropriate charge(s) to be laid.

2. Charges for accused in custody are laid by police, subject to consultation with the Crown Attorney in appropriate cases.

3. The police have the right and responsibility to lay an information charging an individual with an offence, subject to the Crown Attorney's right to withdraw or stay a charge after it has been laid.

4. The ultimate discretion to pursue a prosecution rests with the Crown Attorney.

5. In any case of possible perception of conflict of conduct or perception of bias, outside counsel should be retained at the earliest possible opportunity in the process.

6. No Crown Attorney shall disclose the fact of a police investigation, other on a need to know basis within the prosecution service, so as to maintain confidentiality and secrecy respecting the identity of a person who is the subject of a police investigation.

7. Crown Attorneys are to respond to any request from the police for consultation concerning the drafting of an information charging a person with an offence, in a timely way.

8. Police officers should be encouraged to consult with a Crown Attorney concerning the drafting of charges, particularly in difficult, sensitive and complex cases.

PROCEDURE – Staying Charges:

The statutory and common law basis for the exercise of discretion to stop or prevent prosecutions is found in the *Criminal Code* and in the leading authorities of Blasko v. R. [1976] 33 C.R.N.S. 227 (Ont.); K. Chasse, "The Crown's Power to Withdraw Charges" (1976), 33 C.R.N.S. 218; and R. v. Karpinski (1957) 117 C.C.C. 241 (S.C.C.). See generally: C. Sun "The Discretionary Power to Stay Proceedings" (1973-74), 1 Dal.L.J. 482.

Where the Crown Attorney decides not to undertake or to stop a prosecution by reason of a public interest factor, a notation of this decision **must** be placed in the file relating to the case in question. Where reasons of the public interest and the administration of justice do not demand otherwise, and the stay or withdrawal occurs in a court of record, the reasons therefor shall be stated by the Crown Attorney.

Before terminating a prosecution the Crown Attorney should, where possible, consult with the investigator and/or the victim of the alleged offence. The final decision as to whether a prosecution will be terminated or will continue rests with the Crown Attorney.

RATIONALE:

The laying of charges is to be governed by a high standard of care. It is a decision which "should only be taken after a very careful decision of all the available evidence, calmly, and in the light of day because a wrong decision can have pretty disastrous consequences" (Peter Barnes D.P.P., London, cited by Edwards (1984) at p. 410).

Of all the decisions which have to be made by those with the responsibility for the conduct of criminal or quasi-criminal cases, by far the most important is the initial one as to whether or not a charge should be laid. Naturally, the degree of importance depends to some extent on the gravity of the offence but a wrong decision either way can have disastrous consequences affecting not only the suspect but, in certain circumstances, the whole community. If a guilty person is not charged, he or she may go on to cause untold further harm; yet, if an innocent person is charged, that person and his or her family may be seriously affected even if the offence is comparatively minor and he/she is ultimately acquitted. These same consequences may flow when charges are stayed or withdrawn.

Relevant Passages from Manitoba Justice website, "Prosecutions: The Criminal Case: Step-by-Step"

http://www.gov.mb.ca/justice/prosecutions/stepbystep.html#3

...

3. Deciding whether to prosecute

The Crown attorney is responsible for deciding whether to proceed with charges against an accused person. He or she is required to prosecute cases fairly and treat all parties in the case, including victims, witnesses and the accused, in a fair manner. He or she must also consider the public interest in making a decision. The Crown attorney must answer two very important questions:

* Is there a reasonable likelihood of conviction?
* Is it in the public interest to proceed?

If the answer to both of these questions is yes, the Crown attorney will prosecute. If the answer to either or both of these questions is no, the Crown attorney will not prosecute. In this way, the Crown attorney exercises prosecutorial discretion. Another element of this discretion is that the Crown attorney may decide that it is not beneficial to proceed with all the charges against the accused. In that case, some of the charges may be dropped.

...

Relevant Passages from the *Inquiry Regarding Thomas Sophonow*, Report (2001), "The Third Trial and the Allegation of Sexual Assault"

The Hon. Mr. Justice Peter Cory (Manitoba, 2001), http://www.gov.mb.ca/justice/publications/sophonow/trial3/index.html

...

...it must be remembered that there should not be any undue interference with Crown Counsel's decision as to the manner in which a case is to be prosecuted. If there is a basis upon which a position could be put forward with regard to the prosecution, Crown Counsel should be permitted to do so without restriction. However, in this case, there was no evidence, or at best grossly inadequate evidence, upon which an allegation of sexual assault could be based. The evidence was so inadequate and the effect so prejudicial that the allegation should never have been made. Restraint was required to ensure a fair trial. That element of restraint was missing.

...

Recommendation

* Crown Counsel should always maintain high standards of fairness in their role of prosecutor. That duty requires them to consider issues carefully and to exercise great restraint before raising an issue which will be highly prejudicial to the accused in situations where there is little evidence to support it. To do so may well result in an Appellate Court very properly finding that the trial was unfair.

Relevant Passages from the *Federal Prosecution Service Deskbook*, ch.15, "The Decision to Prosecute" (2005)

15.1 Introduction

...

Deciding whether to prosecute is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system1.

Fairness and consistency are important objectives in the process leading to the institution of criminal proceedings. However, fairness does not preclude firmness in prosecuting, and consistency does not mean rigidity in decision-making. The criteria for the exercise of the discretion to prosecute cannot be reduced to something akin to a mathematical formula; indeed, it would be undesirable to attempt to do so. The breadth of factors to be considered in exercising this discretion clearly demonstrates the need to apply general principles to individual cases and to exercise good judgment in so doing.

15.2 Statement of the Policy

Crown counsel must consider two issues when deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued?

As noted above, this policy is consistent with policies used by Attorneys General throughout Canada and by prosecution agencies throughout the Commonwealth. The strength of this consensus has been recognized by the Martin Committee in Ontario, which stated as follows:

> It is a fundamental principle of the administration of justice in this country that not only must there be sufficient evidence of the commission of a criminal offence by a person for a criminal prosecution to be initiated or continued, but the prosecution must also be in the public interest.

15.3 Application of the Test

15.3.1 Sufficiency of the Evidence

In the assessment of the evidence, a bare prima facie case is not enough; the evidence must demonstrate that there is a reasonable prospect of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law.

A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction; for example, the existence of a Charter violation that will undoubtedly lead to the exclusion of evidence essential to sustain a conviction. Crown counsel must also zealously guard against the possibility that they have been afflicted by "tunnel vision," through close contact with the investigative agency, colleagues or victims, such that the assessment is insufficiently rigorous and objective.

This evidential standard must be applied throughout the proceedings – from the time the investigative report is first received until the time of trial. When charges are laid, the test may have to be applied primarily against the investigative report, although it is certainly preferable – especially in borderline cases -- to look beyond the statements of the witnesses. Later in the proceedings, especially after a preliminary inquiry, counsel may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and of course there can never be an assurance that a prosecution will succeed. Nonetheless, counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction. If counsel are not so satisfied, they may direct that a stay of proceedings be entered.

15.3.2 The Public Interest Criteria

If satisfied that there is sufficient evidence to justify the institution or continuation of a prosecution, Crown counsel must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.

It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Sir Hartley Shawcross, Q.C., then Attorney General of England (later Lord Shawcross), outlined the following principles which have since been accepted as correct by successive Attorneys General of Canada:

> It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first

> regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute, amongst other cases: "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest." That is still the dominant consideration.

The factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued.

The resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases. The corollary is that the available resources should be employed to pursue with due vigour those cases worthy of prosecution.

In some cases it will be appropriate for Crown counsel to obtain the views of the investigative agency or client department when determining whether the public interest requires a prosecution to be commenced or continued. This can, in most instances, be accomplished through discussion with the investigators or the Departmental Legal Services Unit attached to the client department. Ultimately, however, Crown counsel must decide independently whether the public interest warrants a prosecution.

Where the alleged offence is not so serious as plainly to require criminal proceedings, Crown counsel should always consider whether the public interest requires a prosecution. Public interest factors which may arise on the facts of a particular case include:

a. the seriousness or triviality of the alleged offence;

b. significant mitigating or aggravating circumstances;

c. the age, intelligence, physical or mental health or infirmity of the accused;

d. the accused's background;

e. the degree of staleness of the alleged offence;

f. the accused's alleged degree of responsibility for the offence;

g. the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;

h. whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;

i. the availability and appropriateness of alternatives to prosecution;

j. the prevalence of the alleged offence in the community and the need for general and specific deterrence;

k. whether the consequences of a prosecution or conv would be disproportionately harsh or oppressive;

l. whether the alleged offence is of considerable public concern;

m. the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;

n. the attitude of the victim of the alleged offence to a prosecution;

o. the likely length and expense of a trial, and the resources available to conduct the proceedings;

p. whether the accused agrees to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;

q. the likely sentence in the event of a conviction; and

r. whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest.

The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case.

The proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Mitigating factors present in a particular case can then be taken into account by the court in the event of a conviction.

Where a decision is made not to institute proceedings, it is recommended that a record be kept of the reasons for that decision. Furthermore, counsel should be conscious of the need in appropriate cases to explain a decision not to prosecute to, for example, the investigative agency. Ensuring that affected parties understand the reasons for the decision not to prosecute, and that those reasons reflect sensitivity to the investigative agency's mandate, will foster better working relationships. Victims of crime may also feel aggrieved by decisions not to prosecute, so steps may need to be taken to maintain confidence in the administration of justice.

The need to maintain confidence in the administration of justice may also necessitate, in some circumstances, public communication of the reasons for not prosecuting.

The need to maintain confidence in the administration of justice may also necessitate, in some circumstances, public communication of the reasons for not prosecuting. Such a communication may consist, for example, of a statement in court by Crown counsel at the time charges are stayed or withdrawn, or a press release. Communications of this type should only be made, if at all, after consultation with the FPS Director and the ADAG (Criminal Law).

...

15.4 Irrelevant Criteria

a. the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;

b. Crown counsel's personal feelings about the accused or the victim;

c. possible political advantage or disadvantage to the government or any political group or party; or

d. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Relevant Passages from the Ontario *Crown Policy Manual* (2005), "Charge Screening"

PRINCIPLES

The decision to continue or terminate a prosecution can be one of the most difficult for Crown counsel to make. The community relies upon Crown counsel to vigorously pursue provable charges while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction. Every charge must be screened in accordance with the charge screening standards of "reasonable prospect of conviction" and "public interest" as outlined in this policy and in Memoranda issued by the Assistant Deputy Attorney General (Criminal Law Division). Further background information about charge screening may be obtained from "Report of the Attorney General's Advisory Committee on Charge Screening Disclosure and Resolution Discussions (the Martin Committee Report)".

Crown counsel are to screen every charge as soon as practicable after the charge arrives at the Crown's office and prior to setting a date for preliminary hearing or trial. The Crown Attorney in each jurisdiction is to set up a protocol for all charges to be screened.

The obligation to screen a charge is ongoing as new information is received by Crown counsel in preparation for and during the conduct of bail hearings, pre-trials, preliminary hearings, trials and appeals.

Reasonable Prospect of Conviction: When considering whether or not to continue the prosecution of a charge the first step is to determine if there is a reasonable prospect of conviction. This test must be applied to all cases. If the Crown determines there is no reasonable prospect of conviction, at any stage of the proceeding, then the prosecution of that charge must be discontinued.

The threshold test of "reasonable prospect of conviction" is objective. This standard is higher than a "prima facie" case that merely requires that there is evidence whereby a reasonable jury, properly instructed, could convict. On the other hand, the standard does not require "a probability of conviction," that is, a conclusion that a conviction is more likely than not.

Public Interest: If there is a reasonable prospect of conviction, then Crown counsel must consider whether it is in the public interest to discontinue the prosecution, notwithstanding the existence of a reasonable prospect of conviction. The public interest factors must only be considered after the threshold test, a reasonable prospect of conviction has been met. No public

interest, however compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction.

Scope of Policy: All cases, including child abuse, sexual assaults and spouse/partner offences, must be screened in accordance with the "reasonable prospect of conviction" and "public interest" standards. The personal, professional or "political" consequences of a screening decision should never affect Crown counsel's judgment. Nor should stereotypes about certain categories of witnesses such as child witnesses, witnesses with mental disabilities and complainants of spouse/partner abuse or sexual offences, affect Crown counsel's judgment. Since this is an area of discretion where reasonable people will differ, it is always advisable to consult with experienced colleagues when faced with a difficult charge screening decision. Crown counsel will be supported by the Ministry when they make difficult judgment calls in the proper exercise of their discretion.

ESSENTIALS OF
CANADIAN LAW

ETHICS AND CANADIAN CRIMINAL LAW

HON. MICHEL PROULX

Quebec Court of Appeal

DAVID LAYTON

of the Ontario Bar

IRWIN LAW

A Quicklaw Company

ETHICS AND CANADIAN CRIMINAL LAW

Published in 2001 by
Irwin Law
Suite 930, Box 235
One First Canadian Place
Toronto, Ontario
M5X 1X8

ISBN: 1-55221-044-8

National Library of Canada Cataloguing in Publication Data

Proulx, Michel
Ethics and Canadian criminal law

(Essentials of Canadian Law)
Includes bibliographical references and index.
ISBN 1-55221-044-8

1. Criminal procedure–Moral and ethical aspects–Canada.
I. Layton, David II. Title. III. Series.

KE339.P76 2001 174'.3 C2001-901531-3

Printed and bound in Canada

1 2 3 4 5 05 04 03 02 01

2) Applying the Discretion: Sufficiency of Evidence and Public Interest

Our common law tradition does not require the automatic laying or prosecuting of a charge every time an allegation of criminal conduct is made.[211] Rather, the decision whether or not to launch and continue a prosecution requires the exercise of a discretion. The decision whether to prosecute thus becomes, to borrow the words of the Martin Committee, a pivotal event that "prevents the process of the criminal law from being used oppressively."[212] Given the substantial consequences that a charge can have for the liberty and security of an accused, the fact and appearance of fairness is crucial. As Monroe Freedman has pointed out, it may be that the Crown never wins or loses a case, but even the accused who is exonerated after being charged may "carry for life the severe scars of that encounter with justice."[213] Exercising the discretion to lay or stay a charge is thus vital to the integrity of the system and the rights of individuals who may have been or may be accused of a criminal offence.

We have already seen that the existence of prosecutorial discretion does not offend the principles of fundamental justice,[214] and in keeping with this position, courts have afforded considerable deference to the exercise of the discretion to prosecute.[215] "A judge does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them."[216] The courts have refused to interfere with Crown discretion in this regard except in cases of flagrant impropriety, in essence applying the demanding standard of abuse of process.

---

210 See Rosenberg, above note 24 at 6; *R.* v. *Dowson*, [1983] 2 S.C.R. 144; *Kostuch (Informant)* v. *Alberta (A.G.)* (1995), 101 C.C.C. (3d) 321 (Alta. C.A.); *R* v. *Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.); and *Quebec (A.G.)* v. *Chartrand* (1987), 40 C.C.C. (3d) 270 (Que. C.A.).

211 See Rosenberg, above note 24 at 16; and Archibald, above note 53 at 81–83.

212 *Martin Committee Report*, above note 106 at 51.

213 M. Freedman, *Lawyers' Ethics in the Adversary System* (Indianapolis: Bobbs-Merill, 1975) at 29.

214 See section C, "The Principle of Prosecutorial Discretion," in this chapter.

215 See *Power*, above note 8.

216 *T.(V.)*, above note 53, quoting Powell J. in *Wayte* v. *United States*, 470 U.S. 598 (1985).

What then are the factors to consider in exercising the discretion? The *Criminal Code* provides no guidance on this point, nor do Canadian rules of professional conduct have anything specific to say. The Supreme Court of Canada has noted a number of considerations that can properly bear upon the decision to prosecute, including the strength of the case, the general deterrence value of proceeding with the charge, and the government's enforcement priorities.[217] Most attorneys general in Canada have adopted policies or standards that help delineate the proper exercise of the prosecutorial discretion. The leading current example is the FPS Deskbook, which sets out the criteria regarding the decision to prosecute. The manual reflects what is accepted wisdom in setting out two main prongs that determine whether a prosecution will be launched or continued: first, the evidence must be sufficient to warrant proceeding, meaning that there exists a reasonable prospect of conviction; and second, the public interest must otherwise justify prosecuting the charge.[218]

The FPS Deskbook goes further, however, providing more detail by setting out a number of irrelevant criteria, which must *not* be taken into account in deciding to proceed with a prosecution. According to the manual:

> A decision whether to prosecute must clearly *not* be influenced by any of the following:
>
> (a) The race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;
> (b) Crown counsel's personal feelings about the accused or the victim;
> (c) Possible political advantage or disadvantage to the government or any political group or party; or
> (d) The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.[219]

Relying on any of these enumerated factors constitutes a serious breach of the prosecutor's fundamental duty to act with fairness and impartiality. Even where a prosecution is clearly justified, reliance on an

---

217 See *T.(V.)*, above note 53 at 761. In describing these factors, however, the court was making the point that such considerations are not easily amenable to judicial review, resulting in the limited degree of judicial supervision already mentioned.

218 See also Brooks, above note 200 at 233–34.

219 *FPS Deskbook*, above note 30 at §15.4.

irrelevant or improper factor in launching or continuing with a case seriously detracts from the appearance of justice.[220]

3) Staying a Charge

As to the stay of a charge, it is well settled that, though an individual has the right to initiate a private prosecution, the attorney general has the right to intervene and take control of the matter. Included in the right to intervene and take control is the power to direct a stay pursuant to section 579 of the *Criminal Code*. Except in cases of flagrant impropriety, the exercise of this discretion to stay will not be interfered with by the courts.

Report of the Attorney General's
Advisory Committee
on

Charge Screening, Disclosure, and Resolution Discussions

The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D.
Chair

Ontario

Published by the
Ontario Ministry of the Attorney General

Canadian Cataloguing in Publication Data

Ontario Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions.
Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions

Includes bibliographical references.
ISBN 0-7778-1515-X

1. Prosecution-Ontario. 2. Indictments-Ontario. 3. Plea bargaining. I. Ontario Ministry of the Attorney General. II. Title.

KEO574.A25057 1993 345.713'072 C93-092583-1

Copies are available in person from:

Ontario Government Bookstore
880 Bay Street (Main Floor)
Toronto, Ontario

or by mail through:

Publications Ontario
50 Grosvenor Street (Main Floor)
Toronto, Ontario
M7A 1N8

For more information call (416) 326-5300
toll free 1-800-668-9938

4. The Committee's Formulation of the Threshold Test

The Committee is of the view that the following three step method of formulating a threshold test for the commencement of a prosecution is helpful.

> At whatever level of authority the decision is ultimately taken to prosecute or not to prosecute, the evaluation process involves three separate but inter-related stages....
>
> The first objective is to ensure that there are no insuperable legal or jurisdictional obstacles that could constitute a fatal flaw to the prosecution of a case....
>
> The second stage ... is concerned with the issue whether the evidence in the case is sufficient to justify instituting criminal proceedings....
>
> ... Having decided that the evidence is sufficient to justify criminal proceedings, [the prosecutor] must then go on to consider whether the provable facts and the whole of the surrounding circumstances are such that

> it is incumbent upon [him or her], in the public interest, to institute a prosecution....[19]

In accordance with this approach to the threshold test for commencing or continuing a prosecution, the Committee is of the view that there must, of course, be at least a *prima facie* case. A case that does not meet this hurdle, as it has been defined in cases such as *Mezzo*, and *Sheppard*, *supra*, will not ever be left with the trier of fact in any event. It should never be proceeded with, as it will needlessly subject an accused person to the ordeal and expense (which will be borne by the state if the accused receives legal aid) of a criminal prosecution, and will needlessly expend limited judicial and prosecutorial resources in the fruitless effort of reaching a foregone conclusion.

The second stage in formulating an appropriate threshold test is, in the Committee's view, much more involved. For the reasons stated above, the Committee rejects the idea that the threshold test for commencing a prosecution in Ontario should be the 51 per cent rule.

However, for the reasons also stated above, the Committee is of the view that Crown counsel, in determining the future of a prosecution, should do more than ascertain the existence of evidence capable of making out each of the necessary elements of the offence. The Committee agrees with the Law Reform Commission that prosecutorial experience can and should be brought to bear on a case. Such experience is an important resource, that ought to be well utilized in a system where discretion is so necessary, and where the consequences of the discretionary decisions to be made are so weighty. Since the Committee is of the view that some assessment of the credibility of witnesses, the admissibility of evidence, and a consideration of likely defences is both desirable and necessary, the Committee is, therefore, also of the view that a higher threshold standard than a *prima facie* case is necessary to institute or continue a prosecution.

---

[19] Edwards, *The Attorney General*, *supra*, at pp. 413, 423.

As stated above, the Law Reform Commission of Canada has proposed a rule that, in addition to the *prima facie* test, there must be "a reasonable chance" of conviction. The Law Reform Commission of Canada has stated that its proposed test is a higher standard than the *prima facie* case test, and lower than the 51 per cent rule. The Law Reform Commission's test, therefore, occupies a similar middle ground to the test which the Committee ultimately favours. For this reason, the Law Reform Commission's test has much to recommend it.

The Committee has, however, ultimately settled on a differently worded test. In the Committee's view, the threshold test of a "reasonable chance" of conviction suffers from the shortcoming that the word "chance" may suggest an element of luck, in the minds of some people. It would be unfortunate if any member of the public were to perceive that the decision to put the liberty of an individual in jeopardy by invoking the criminal process involved an element of chance, in the sense of fortuitousness. As one member of the Committee put the point, "conducting a criminal trial is not simply a throw of the dice."

There is of course an accepted use of the word, "chance," that imports no element of luck. For example, to ask about the chances of winning a particular appeal, one is seeking a professional assessment of the merits of the position advanced, and the degree of probability that that position will prevail: luck has nothing to do with such an assessment. Similarly, a "reasonable chance of conviction" can be seen as a reasonable degree of probability that the trial will end in conviction: likewise a standard that embraces no notion of luck. However, given the dual meaning of the word "chance," it is, in the Committee's view, preferable to formulate the threshold test using a word that captures the idea of one of those meanings, i.e. a degree of probability, without any possible connotation of the other meaning, i.e. luck.

The "reasonable likelihood of conviction" test was recommended by the *Owen Report* to replace the existing test used in British Columbia, which required a "substantial likelihood of conviction" as the appropriate threshold test. "Likelihood" means the state of being likely

or probable. Standing alone, the word "likelihood" conveys the meaning of more likely than not. This is similar to the 51 per cent rule. However, the word "likelihood" is often qualified. For example, one might say that a proposed plan has little likelihood of success, or that there is a strong likelihood that the plan will succeed.

The word "likely" is often equated with the word "probable" and either word, standing alone, means that a certain event is more likely than not to happen. However, "reasonably probable" indicates a lesser degree of certainty than the word "probable" standing alone. In *Air New Zealand Ltd.* v. *Commerce Commission*, [1985] 2 N.Z.L.R. 338, Davison, C.J., said at p. 342:

> on a graduated scale one might place expressions of likelihood in the following order of certainty: possible; distinct or significant possibility; reasonably probable; probable; highly probable.

In the threshold test proposed in the *Owen Report*, that there must be "a reasonable likelihood" of conviction, the word "likelihood" is modified by the word "reasonable". It might therefore be argued that it means something less than probable, i.e. something less than more likely than not. However, the Committee concludes that the threshold test of "a reasonable likelihood" of conviction may nonetheless be interpreted as requiring a judgment by a person invoking the criminal process that a conviction is more likely than not, particularly when one considers the British Columbia standard which Commissioner Owen suggested it replace. The risk of such an interpretation arises from the use of the word "likelihood" in the test. Standing alone, the word "likelihood" clearly does mean more likely than not. As stated above, it is, practically speaking, impossible to quantify the percentage below which it cannot be said that there is "a reasonable likelihood" of conviction. This is a matter of sound judgment. Therefore, a phrase which invites such numerical quantification ought to be avoided.

Although "likelihood" is modified by "reasonable" in the test proposed by the Owen Commission, the difficulty with the word "likelihood" remains, in the same sense that

difficulties remain with the word "chance" in the "reasonable chance" of conviction test. Both pose some risk of misinterpretation, which makes a phrase less vulnerable to misinterpretation desirable.

A reasonable prospect of conviction is the threshold test adopted in New Brunswick, although it appears that it is interpreted in that province as requiring that a conviction be more likely than not.[20] This test has also recently been proposed by the federal Department of Justice in lieu of the "reasonable likelihood" of conviction threshold test.[21]

The word "prospect" is a word of wide meaning and, essentially, indicates a mental survey of the future. One dictionary definition of prospect is "outlook" for the future; for example, the outlook for A's recovery is poor or, as the case may be, is good. Another of the dictionary meanings of prospect is "expectation." *The Shorter Oxford English Dictionary*, 3rd Edition, Volume 1, at page 655, defines expectation, in part, as "the degree of probability of the occurrence of any contingent event."

An expectation with respect to the happening of a future event may cover a broad spectrum of certainty of the happening of that event. An expectation may be slight or very strong. In this sense, therefore, the "prospect" of something happening is very much like the "chance" of something happening, using the meaning of "chance" that has no connotation of luck. The "reasonable prospect" standard, is therefore much like the "reasonable chance" standard. "Prospect," however, does not have the association with games of chance that led the Committee to reject the "reasonable chance" formulation.

---

[20] New Brunswick Department of Justice *Public Prosecutions Operations Manual*, Topic 120, "Criteria for Prosecutions."

[21] *The Decision to Prosecute,* Department of Justice (Canada), July, 1992.

5. The Threshold Test and the Public Interest

Once the threshold test for the sufficiency of the evidence has been met, it is, of course, necessary to ascertain whether a prosecution is, in all of the circumstances, in the

public interest. In 1925, Sir John Simon, then Attorney General of England, put the principle this way in a much quoted speech in the House of Commons:

> [T]here is no greater nonsense talked about the Attorney General's duty, than the suggestion that in all cases the Attorney General ought to decide to prosecute merely because he thinks there is what lawyers call "a case". It is not true, and no one who has held that office supposes it is.[38]

Sir Hartley Shawcross, Attorney General in 1951, echoed this fundamental principle in his famous speech in the House of Commons when he stated that "it has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution.... [T]he public interest ... is still the dominant consideration."[39] In Ontario, Attorneys General and their agents have clearly recognized this constitutional obligation to act, at all times, in the public interest when exercising prosecutorial discretion: see, for example, *Campbell* v. *The Attorney General of Ontario* (1987), 31 C.C.C. (3d) 289 (Ont. H.C.); aff'd 35 C.C.C. (3d) 480 (Ont. C.A.); leave to appeal to S.C.C. refused 35 C.C.C. (3d) 480n; I.G. Scott, "The Role of the Attorney General and the Charter of Rights" (1986-87), 29 *Crim. L.Q.* 187, at pp. 189-192.[40]

Accepting, then, the overriding obligation of the Attorney General and his or her agents to exercise their prosecutorial discretion in the public interest, it is necessary to address how this consideration of the public interest ought to be carried out in the circumstances of any given prosecution. As stated above, the Committee accepts Professor Edwards' analytical approach to the exercise of prosecutorial discretion. Therefore, it is the Committee's opinion that consideration of the public interest in a prosecution must only be

---

[38] H.C. Debates, Vol. 188, col. 2105, December 1, 1925. See J.Ll.J. Edwards, *The Law Officers of the Crown*, at p. 222.

[39] H.C. Debates, Vol. 483, col. 681, January 29, 1951.

[40] See also Ontario Legislative Assembly, *Debates*, 23 February, 1978 at pp. 51-52, wherein then Attorney General Roy McMurtry explained the decision not to lay charges against Francis Fox, then Solicitor General of Canada, who resigned when it was found out that he had forged the name of the husband on a consent form required to carry out an abortion.

taken into account *after* it has been determined that there is both a *prima facie* case, and a reasonable prospect of conviction.[41] In the Committee's opinion, no public interest, however compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction. As one commentator has observed, "Public outrage at an incident which leads to a clamour for prosecution is no substitute for evidence in court, and to conclude otherwise would be to take the initial step down the path of persecution rather than prosecution."[42] The Committee also observes that an appellate Court is empowered to set aside a conviction if it is unreasonable in the circumstances: see s. 686(1)(a)(i) of the *Criminal Code* and *R.* v. *R.W.* (1992), 74 C.C.C. (3d) 134 (S.C.C.).

6. *The Committee recommends that public interest factors should only be considered after the threshold test has been met, and then should only be used to refrain from commencing, or to discontinue a prosecution.*

As stated above, the due enforcement of the criminal law is fundamentally important to Canadian society. It follows, therefore, that if there is both a *prima facie* case against an accused person and, upon a closer review of the case, a reasonable prospect of conviction, it will, in most circumstances, be presumptively incumbent upon Crown counsel to prosecute: in other words, it will be in the public interest to do so. When the evidence meets the threshold test for sufficiency recommended by the Committee, the community, through the courts, should generally, although not invariably, be presented with the opportunity to reach a conclusion as to the guilt or otherwise of the accused in a fair and public hearing. The general importance of proceeding with a prosecution where there is a reasonable prospect of conviction has been well and poignantly demonstrated by the circumstances that

---

[41] On this point, Sir Hartley Shawcross stated (H.C. Debates, Vol. 483, Col. 68):

> It is not in the public interest to put a man upon trial, whatever the suspicions may be about the matter, when the evidence is insufficient to justify his conviction, or even to call upon him for an explanation.

[42] R.K. Daw, The "Public Interest" Criterion in the Decision to Prosecute" (1989), 53 *J. Crim. L.* 485, at p. 490.

culminated in the Hughes Commission, as discussed above. Prosecuting counsel must be "resolute" in bringing those reasonably suspected of having committed criminal offences before the courts.

The public interest in a prosecution is, however, very broad, and may be comprised of a great number of diverse aspects. Further, those individual aspects of the public interest may vary greatly from case to case. For this reason, the Committee has endeavoured to identify some factors that may be relevant in assessing whether, despite the existence of a reasonable prospect of conviction, a prosecution is not in the public interest. The Committee reiterates, however, that these factors which follow cannot be used to justify commencing a prosecution where the threshold test for the sufficiency of the evidence has not been met. Rather, these factors can only be used to refrain from commencing, or to discontinue a prosecution where there is, on the evidence, a reasonable prospect of conviction.

In the Committee's view, postponing the consideration of public interest factors until after it has been decided that there is a reasonable prospect of conviction, and then using those factors only to decide whether a prosecution which otherwise would proceed ought not to, ensures the greatest possible equality of treatment among potential accused persons. The case against all potential accused persons is evaluated in accordance with the same standard: whether there is a reasonable prospect of conviction. Thereafter, the differential treatment of accused persons is justified by the various public interest factors that are or are not present in the particular case.

6. Various Public Interest Factors that May be Relevant

The various public interest factors discussed below may or may not be relevant to a consideration of the public interest in prosecuting any given case. Likewise, factors discussed below, and indeed others not mentioned, that may be present in many cases, may be present to varying degrees, or may be accorded varying weight depending on the presence