



NOVASCOTIA
PUBLIC PROSECUTION SERVICE

DOCUMENT TITLE:

**THE DECISION TO PROSECUTE
(CHARGE SCREENING)**

NATURE OF DOCUMENT:	DPP DIRECTIVE
FIRST ISSUED:	JULY 1, 2002
LAST SUBSTANTIVE REVISION:	FEBRUARY 3, 2021
THIS EDITION DISTRIBUTED:	FEBRUARY 3, 2021

NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE CROWN ATTORNEY MANUAL.

CERTAIN WORDS AND PHRASES (SUCH AS "SHOULD", "MAY" and "MUST") HAVE THE MEANINGS ESTABLISHED IN THE "**WORDS & PHRASES**" SECTION OF THIS PART OF THE

THE DECISION TO PROSECUTE

Introduction

The decision to prosecute or to discontinue a prosecution is the most important decision that a prosecutor makes in the criminal justice process. Such decisions must reflect sound knowledge of the law and careful consideration of the interests of victims, the accused and the public at large. Prosecutions which are not well founded in law or fact, or which do not serve the public interest, may unfairly expose citizens to the anxiety, expense and embarrassment of a trial. The failure to effectively prosecute guilty parties can directly impact public safety. Wrong decisions tend to undermine the confidence of the community in the criminal justice system.

Like all decisions by prosecutors, the decisions to prosecute must demonstrate fairness and consistency. A prosecutor may be fair without being weak; a prosecutor may be consistent without being rigid. The criteria for the exercise of this important discretion cannot be drafted in language resembling a mathematical formula; indeed, it would be undesirable to attempt to do so. A broad range of factors comes into play and general principles must be tailored to meet individual cases. In the past several decades, prosecution services in Canada and in other common law jurisdictions have endeavored to state the general principles which guide this important discretion. This is an essential but difficult task. A perfect criminal justice system would ensure the conviction of every guilty party and would preclude the prosecution of every innocent party. History has demonstrated that such perfection is not attainable. As noted by the 1981 Royal Commission (United Kingdom) on Criminal Procedure,

“ The proper objective of a fair prosecution system is not therefore simply to prosecute the guilty and avoid prosecuting the innocent. It is rather to ensure that prosecutions are initiated only in those cases in which there is adequate evidence and where prosecution is justified in the public interest.”

Cmnd 8092, Report p. 127

From this observation, it is apparent that prosecutors must consider two issues when deciding whether or not to prosecute:

- (1) Is there sufficient evidence?; and
- (2) Is the public interest best served by prosecution of the case?

In Nova Scotia, the initial assessment of a case by prosecutors focuses on the evidential threshold i.e. the issue of whether or not there is sufficient evidence to commence or continue criminal proceedings. If the evidential threshold is met, the prosecutor goes on to consider whether or not the public interest is best served by prosecution of the case.

A. The Evidential Threshold

In Nova Scotia, a prosecution will go forward only where the prosecutor is satisfied that, if the case proceeds to trial before an objective trier of fact, the evidence provides **a realistic prospect of conviction**.

Preliminary Matters

A number of preliminary matters relating to a charge must be addressed before the evidential threshold test is applied:

1. there must be no jurisdictional barrier to prosecution; and
2. the Information must be properly sworn before a justice i.e. the informant must act without improper motives and believe, on reasonable grounds, that the described offence has been committed by the identifiable person referred to in the Information.

In Nova Scotia, prosecutors generally do not become involved in prosecutions prior to the initiation of the prosecution by the informant, usually a peace officer. In most cases, a determination that “reasonable grounds” exist for the laying of a charge is made independently of any assessment of the evidence by a prosecutor. [This is in contrast to the approach taken in British Columbia, Quebec, and New Brunswick where there are processes involving charge approval by prosecutors]. Accordingly, the usual decision to be made by a prosecutor in Nova Scotia is whether to continue or to terminate proceedings. The evidential threshold for prosecutors in making this decision differs significantly from that which may be utilized in the laying of a charge.

In certain cases, investigators may find it useful to consult with a prosecutor prior to the initiation of a prosecution. When this occurs, it is appropriate for the prosecutor to give legal advice in regard to such matters as the admissibility of proposed evidence, the elements of particular offences, the propriety of investigative techniques, and criminal procedure [see the PPS policy “Advising the Police”]. The prosecutor may also offer an opinion as to whether or not the available evidence as described by the investigator is capable of providing reasonable grounds for a belief that a suspect has committed an offence. It must be emphasized, however, that it is the belief of the investigator and not the prosecutor that is crucial to the laying of an Information. It is the investigator who decides whether or not charges are to be laid. For that reason, in these circumstances it would be prudent for the prosecutor to refrain from expressing a personal opinion as to the guilt or innocence of the suspect.

A realistic prospect of conviction

Assuming that the preliminary issues are resolved, the prosecutor exercising discretion to prosecute must consider the prospects of conviction. The decision in regard the existence of a realistic prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. The prosecutor is required to find that a conviction is more than technically or theoretically available – the prospect of displacing the presumption of innocence must be real. More than a prima facie case is required. As pointed out by the Law Reform Commission of Canada, it would be wrong to clog the courts with prosecutions that an experienced prosecutor fully expects to fail, simply because a prima facie case exists [see L.R.C.C., Working Paper #62 (“Controlling Criminal Prosecutions...”), at p.81].

The extent to which the evidence must exceed what is necessary for a prima facie case cannot be expressed in mathematical terms and the concept cannot be applied with scientific precision. There are, however, some indicators as to where the evidentiary threshold lies.

First, it must be noted that even when a prima facie case exists, a conviction will be set aside by an appellate court, pursuant to section 686 of the *Criminal Code*, if there is not sufficient, reliable evidence with probative value to satisfy the court that any conviction based on the evidence was reasonable. This may require something well beyond a prima facie case, and all cases which are prosecuted are expected pass this hurdle. However, many of the cases which, in retrospect, may satisfy section 686 do not provide prosecutors assessing the case in advance of a trial with a realistic prospect of conviction. To routinely pursue such cases would be wasteful of resources and would heighten the possibility of convicting an innocent person.

It is recognized that even the most experienced prosecutors may have great difficulty in assessing the strength of a case, particularly when only a summary of the evidence is available. Nevertheless, prosecutors are often able to conclude that an acquittal is clearly more likely than a conviction. This leads to the second indicator of where the appropriate threshold lies: **if, having regard to the amount and nature of the evidence, the prosecutor concludes that an acquittal is clearly more likely than a conviction, the case should not be prosecuted.**

Note:

Some Canadian prosecution services utilize the phrase “a *reasonable* prospect of conviction” to describe the evidential threshold in their jurisdictions. The NS PPS has chosen the phrase “a *realistic* prospect of conviction” for three reasons:

1. The word “realistic” helps to distinguish the evidential threshold utilized by prosecutors from the much different threshold utilized by informants, i.e. “reasonable grounds”, when laying charges;
2. The word “realistic”, which is utilized by the Crown Prosecution Service of England and Wales, more effectively captures the concept described in this Directive; and
3. The word “realistic” helps to distinguish the Nova Scotia evidential threshold from that utilized in other jurisdictions where, for example, a “reasonable prospect of conviction” may mean a 51% likelihood of conviction (which is arguably lower than the Nova Scotia threshold, but not as high as the “substantial likelihood of conviction” threshold used in BC for routine cases).

The cases in which there is a realistic prospect of conviction will, of course, include those cases in which the prosecutor determines that a conviction is more likely than not to occur. Also included may be that relatively small number of cases that are “borderline” -- cases in regard to which the prosecutor, after reviewing the evidence in the manner described below, is not able to determine whether the presumption of innocence is capable of being displaced by the evidence. This might occur, for instance, where the prosecution case is essentially sound, but there are flaws, the impact of which is difficult to assess. Other cases may have strong and weak aspects that are so closely balanced that the outcome cannot be predicted with confidence. Because of the lack of precision inherent in the case review process, however, prosecutors cannot, and should not, attempt to eliminate from prosecution all cases wherein a conviction may not occur. There ought to be, however, a realistic prospect of conviction, as described above.

It should also be noted that this Directive relating to the evidential threshold, like most PPS prosecution policies, is not expressed in absolute terms. There may be exceptional cases in which a departure from the general approach is appropriate. Prosecutors should consult with supervisors and experienced colleagues in regard to the decision to prosecute such cases or in any case where there is uncertainty as to whether the standard has been met (the need for consultation is discussed more fully below).

Most of the cases presented to prosecutors are strong; indeed, most charges are resolved by a guilty plea. This, however, does not diminish the need for prosecutors to scrutinize every case. The cases in which the evidence will not provide a realistic prospect of proving guilt beyond a reasonable doubt must be identified as early as possible.

Assessing the strength of the case

1. In reviewing a case to determine whether or not there is sufficient evidence upon which to found a prosecution, the prosecutor must lean towards the admissibility of evidence

when admissibility is not clear. For example, a statement obtained from the accused may involve a possible breach of the Charter. If the breach is blatant, the assessment of sufficiency of evidence should proceed on the basis that the Crown cannot use the statement as part of the case. On the other hand, if there is an arguable case in favour of admissibility, the appropriate course would be to assume that the statement would not be ruled inadmissible.

2. A limited consideration of defences may also be part of the case assessment. The prosecutor should have regard to any defences which are plainly open to the accused, or which have come to the attention of the prosecutor. If, for example, there is unimpeachable evidence that the accused was in jail at the time of the offence and thus has available the defence of alibi, there would not be a realistic prospect of conviction. It is not necessary for the prosecutor to endeavour to anticipate and consider every possible defence, or to accept at face value all information provided by the accused. While the prosecutor must consider both the inculpatory evidence and the exculpatory evidence, the prosecutor may disregard information that he or she has good reason to believe is not reliable.
3. Prosecutors should consider only the evidence known to be available at the time that the case is being assessed. It would be wrong to base an assessment of the strength of the case on information that investigators hope to uncover in the future, or which might emerge from the accused on the witness stand, depending upon how the trial unfolds.

Note: An exception to this general approach may arise at the early stages of a complex or serious case. The interests of justice may require the prosecutor to make a preliminary decision on the viability of a case while the investigation is still underway. If, for example, the police arrest a suspect on reasonable grounds and believe that the suspect presents a substantial risk to flee or endanger the public if released, the police may lay charges before much of the potential evidence has been collected. In such circumstances, the prosecutor should assess the evidence which is available and consider the likelihood of additional cogent evidence being collected within a reasonable time. If satisfied that evidence providing a realistic prospect of conviction may be available within a reasonable time, the case should not be discontinued. The evidence will have to be carefully reviewed as the investigation continues in order to ensure that the evidential threshold has been met or is likely to be met (see the heading "Continuous Process", below).

4. When the proposed evidence appears to be voluminous or complex, or the applicable law complicated, prosecutors should assume that a jury will understand the evidence and any instructions which will be given on the law. Prosecutors must also guard against having their decisions in regard to the strength of a case or the prospects of conviction hinge upon dubious generalities such as "juries always believe children" or "juries never convict police officers".

5. When the strength or weakness of case is not obvious, the prosecutor must be prepared to look beneath the surface of the statements made by witnesses. In doing so, it is not intended that the prosecutor usurp the role of the court. Assessments of the credibility or capacity of a witness must be based on objective indicators e.g. incontrovertible evidence that a witness is mistaken or lying. Assessments of the more nebulous matters such as demeanor, or whether evidence has “the ring of truth”, must be left to the trial court.

A proper assessment of the strength of the case may involve such questions as these:

- (a) Are there grounds for believing that some evidence may be excluded?
- (b) If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?
- (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?
- (d) Has a witness a motive for telling less than the whole truth?
- (e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- (f) Based on objective indicators, what sort of impression is the witness likely to make?
- (g) How is the witness likely to stand up to cross-examination?
- (h) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?
- (i) If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?
- (j) Are all the necessary witnesses competent to give evidence?
- (k) Where child witnesses are involved, are they likely to be able to give sworn evidence or to give evidence based upon a promise to tell the truth?
- (l) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
- (m) Where two or more accused are charged together, is there a reasonable prospect of the proceedings being severed? If so, is there sufficient evidence against each accused should separate trials be ordered?

The decision to prosecute or discontinue is particularly difficult in those cases in which the accused flatly denies the allegations and the case for the Crown consists of the uncorroborated evidence of a single witness. It would be wrong for the prosecutor to automatically reject such a case as not providing a realistic prospect of conviction. If, for instance, the single witness had a good opportunity to observe the events, was able to give a detailed account without unexplainable inconsistencies, had no history of dishonesty or motive to lie, and was not improperly influenced by third parties, it might be open to the prosecutor to conclude that the anticipated evidence provided a realistic prospect of conviction. On the other hand, if it is clear, based upon objective indicators within the case, that a reasonable doubt could not be eliminated, then the prosecutor would properly conclude that there was no realistic prospect of conviction. This is the sort of case in which consultation with supervisors and experienced colleagues is recommended (see below).

Occasionally, there are cases in which witnesses conflict, but the variance is not related to any human frailty and will not be resolved through close questioning or assessment of demeanor or personal characteristics. In regard to particular scientific issues, for instance, there may be genuine uncertainty within the scientific community. This will be highly significant when a crucial element in the case for the Crown must be proved by opinion evidence. If several well qualified experts present unequivocal, conflicting opinions based upon identical premises, and the opinions are all prepared with a high degree of professionalism, the prosecutor will probably be obliged to conclude that there is no realistic prospect of eliminating a reasonable doubt. Again, consultation is strongly recommended in such cases. The mere existence of a conflict between experts should not automatically cause a case to be discontinued. Careful assessment of the nature of the conflict and its impact on the case is required.

B. The Public Interest

In Nova Scotia, once it has been determined that there is sufficient evidence to provide a realistic prospect of conviction (as described above), the prosecutor must then determine whether the public interest is best served by prosecution of the case. It has, never been a rule of prosecution policy in Canada, England or elsewhere in British Commonwealth that all criminal cases which could be prosecuted must be prosecuted. There would be a public outcry, if, for instance, prosecution resources were expended in prosecuting a theft case in which it was alleged, based on circumstantial evidence, that the accused had entered an orchard two years ago and picked an apple without the owner's permission. On the other hand, if the accused had been caught red-handed, yesterday, by apple growers concerned with widespread damage to orchards by intruders, prosecution might be appropriate. The proper administration of criminal justice requires that the consideration of the public interest in prosecuting a case be carried out on a consistent, principled basis.

Considering the public interest factors

Every criminal case is unique. The factors which can properly be taken into account, and the importance of particular factors in deciding whether the public interest requires a prosecution, will vary from case to case.

Some of the factors which it is proper to consider are these:

- (a) the gravity, or, conversely, the triviality of the alleged incident or that it is of a 'technical' nature only (generally, the more grave the incident, the more likely that the public interest will require prosecution);
- (b) the age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim;
- (c) the staleness of the alleged offence;
- (d) the degree of culpability of the alleged offender in connection with the offence (particularly in relation to any other alleged parties to the offence);
- (e) the obsolescence or obscurity of the law;
- (f) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- (g) the availability and efficacy of any alternatives to prosecution;
- (h) the prevalence of the alleged offence and the need for general deterrence;
- (i) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (j) any entitlement of people or agencies to compensation, reparation or forfeiture if prosecution action is taken;
- (k) the attitude of the victim of the alleged offence to a prosecution;
- (l) the likely length and expense of a trial;
- (m) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- (n) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (o) the necessity to maintain public confidence in Parliament, the Legislature and the administration of justice;

- (p) impact of direct or systemic racism and discrimination experienced by any victim or accused involved in the alleged offence, in accordance with the policies on Fair Treatment of Indigenous Peoples in Criminal Prosecutions and Fair Treatment of African Nova Scotians in Criminal Prosecutions.

Within the list of factors noted above, the determination of the gravity of an incident may require additional guidance. Certain types of offences are dealt with separately at other points in the Crown Attorney Manual and the comments within specific policies should be noted. Generally, the more grave the incident, the more likely that the public interest will require prosecution. The presence of one or more of the following elements (the list is not exhaustive) will add to the gravity of the incident:

- the perpetrators used a weapon, violence or threats of violence;
- the victim was a judicial official, peace officer, or someone preserving public safety;
- the criminal activity was directed at the administration of justice;
- the incident involved premeditation or planning;
- the offence was carried out by a gang or group organized for that purpose;
- the matter involved the corruption of an official;
- the alleged offender was subject to court supervision at the time of the incident;
- the incident was part of a pattern of criminal behaviour, or behaviour likely to be repeated by the offender.

The public interest factors should be looked at as a whole, but it is possible for one factor to outweigh all others.

It is also possible for certain factors, e.g. “the staleness of the offence” or “the likely length and expense of a trial”, to gain or lose significance with the strength or weakness of the prosecution case. If, for instance, the evidence in a complex fraud prosecution barely rises above the evidential threshold, the fact that the case would consume months of court time and would require monumental prosecution resources might lead the prosecutor to conclude, on balance, that the public interest would not be well served by prosecution of the case.

The following factors are to be excluded from consideration in determining whether the public interest is best served by a prosecution:

- (a) the alleged offender's race (except in accordance with the policies on Fair Treatment of Indigenous People in Criminal Prosecutions and Fair Treatment of African Nova Scotians in Criminal Prosecutions), religion, sex, national original, or political associations;
- (b) 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 charging decision.

Crown Attorneys are reminded that they have an important role to play in providing a level of independent review between police investigations and any prosecution that may flow from those investigations. This has been emphasized in the Marshall Inquiry, the Martin Report, and elsewhere. Accordingly, Crown Attorneys have a duty to conduct a careful, principled review of every prosecution brief to ensure that the established threshold is met. The assessment by a prosecutor of both the strength of a case and the public interest must be carried out with integrity and a high level of professionalism. Courage is also required: the appropriate decision may not be the decision desired by investigators or interested parties. Prosecutors must continuously bear in mind their proper relationship to the police, witnesses, the courts, and the general public as they make these decisions.

The decisions to be made by a prosecutor in regard to prosecuting or discontinuing a prosecution are often difficult and many decisions can safely be made only after careful analysis and consultation, as noted below. The responsible, dispassionate application of the stated tests, however, is the best way to minimize the risk of prosecuting innocent persons and to effectively utilize finite justice resources. Declining to exercise this important discretion is likely to be just as destructive to the administration of justice as making inappropriate decisions.

Choice of Charges

In many cases, the available evidence will support an offence outlined in more than one section of the Criminal Code, or in more than one statute. Prosecutors are then faced with the related decision as to which charge should be the subject of criminal proceedings. The fundamental guiding principle on this issue is that the charge or charges selected must adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and provide the court with a proper foundation for sentence.

The following considerations should guide the choice of charges:

- Ordinarily, the charge or charges to be pursued would be the most serious disclosed by the evidence. It may be appropriate to pursue a charge which is not the most serious revealed by the evidence when it is apparent from the outset that the usual length of trial or the usual range of penalty for a particular type of charge is out of proportion to the gravity of the alleged criminal conduct.
- Although in most criminal cases there is an expectation of plea and charge negotiation, it is not appropriate to recommend serious charges with the primary intention of providing scope for subsequent plea negotiation.
- Generally, where the available evidence will support charges under specific federal or provincial legislation designed to address a particular type of conduct, consideration should first be given to proceeding under that specific legislation rather than under the broad provisions of the Criminal Code. If proceedings under the specific legislation would not adequately reflect the nature of the criminal conduct disclosed by the evidence or not provide an adequate penalty, then Criminal Code charges are preferable. For example, the taking of a car by a young adult may be “joyriding” or “theft over”. If the car was recovered undamaged after a short ride, “joyriding” is probably the appropriate charge. More serious facts or a local need for general deterrence might make “theft over” appropriate. The assessment, however, should begin with reference to the more specific charge.
- Crown Attorneys should exercise restraint in recommending conspiracy charges. When there is little or no evidence other than the commission of substantive offences to support the conspiracy charge, strong preference should be given to the pursuit of substantive charges only. When consideration is being given to pursuing conspiracy charges against a number of accused persons jointly, the risk of a joint trial being unduly complex or unfair to some of the accused, must be carefully considered.
- Crown Attorneys must be mindful of specific policies relating to particular types of charges, e.g. impaired driving, which may clarify the application of the general principles set out in this policy document.

Continuous Process

Once a decision has been made to prosecute a charge, that decision must be continuously reviewed as new information is received. There are some procedural landmarks which naturally tend to prompt a review e.g. the end of a preliminary inquiry, but this is not a structured review process—it may occur at any time. The “new information” may include fresh appreciation of existing information, as might occur after witnesses give *viva voce* evidence or if anticipated information does not materialize. If, at any time, a prosecutor concludes that a realistic prospect of conviction no longer exists, or that prosecution is not in the public interest, steps should be taken to discontinue the prosecution as soon as is practicable.

Consultation/Accountability

Just as reasonable, competent people can disagree on whether evidence can provide a realistic prospect of conviction, so too is there a possibility that differing opinions will arise in regard to the need to prosecute or discontinue the case in the public interest. This is frequently a difficult decision and, as has been noted earlier, the guidance available to prosecutors is necessarily given in general terms with room for adaptability to the actual circumstances encountered by prosecutors. In this decision making process, the experience of other counsel is a valuable resource that should be readily utilized. The Law Reform Commission of Canada has noted that the criminal justice system should not be deprived of this experience in regard to prosecutorial decisions. Prosecutors who are faced with difficult decisions concerning the sufficiency of evidence or the public interest are strongly urged to consult with supervisors and experienced colleagues. The need to consult will vary to some extent with the type of case, the experience of the persons involved, and the opportunities for consultation.

The nature of the consultation that should occur will also vary with each case. When the decision to be made in regard to the prosecution of a charge is clear, the consultation will mostly involve the prosecutor keeping the supervisor informed of developments. When the factors to be considered are more finely balanced, there is likely to be a fuller discussion, an exchange of views, and perhaps the giving of advice or instructions. A more formal case conference may be convened by the Chief Crown Attorney for complex, significant cases.

Crown Attorneys who consult with supervisors and colleagues when faced with difficult decisions, and then exercise discretion in a principled way, will be supported in their decision-making.

It is not possible to prepare an exhaustive list of cases and situations which should or must involve consultation and team work. Without limiting the general need for consultation in regard to significant and difficult decisions, the following principles are applicable to consultation in regard to the decision to prosecute cases:

- (1) Prosecutors **must** consult with their supervisors in regard to the decision to prosecute (or to discontinue prosecution) in any case involving:
 - (a) a death, or
 - (b) charges against public figures or persons involved in the administration of justice.

- (2) Prosecutors **should** consult with their supervisors in regard to the decision to prosecute (or to discontinue prosecution) of the following types of cases:
- (a) criminal conduct involving gang or group activity;
 - (b) cases expanding the use of particular Criminal Code provisions, or which raise novel issues relating aboriginal rights or any other legislation, including the *Charter*; and
 - (c) cases which have attracted media attention, or which will likely be of public interest when presented in court.

- (3) Prosecutors are strongly encouraged to consult with supervisors and experienced colleagues in regard to the decision to prosecute all other significant or unusual cases.

The determination of whether a case is significant requires judgment by the prosecutor involved. If a penitentiary sentence appears to be appropriate for the criminal conduct, that is a strong indicator that the matter is significant enough to involve consultation. Cases with multiple victims, large losses of property, or which involve criminal activity at several locations are other examples of cases often considered to be significant.

- (4) Prosecutors are strongly encouraged to consult with supervisors and experienced colleagues before deciding to prosecute any case in which they are unsure of either the strength of the case or whether the public interest is best served by prosecution. Cases where race-based legal issues arise, is an example of a type of case where consultation with respect to realistic prospect of conviction and/or public interest is appropriate. Race-based legal issues can include an allegation of improper race-based police conduct such as profiling, or racial overtones in dealings between witnesses and accused, such as slurs. Experienced colleagues on the PPS Equity and Diversity Committee are available for consultation on such issues as they arise in a case.

The PPS recognizes the need to leave generous amounts of discretion in the hands of local prosecutors (see the Preface to this manual). Occasionally, however, the DPP, in fulfilling his responsibilities in regard to accountability, may become directly involved in the decisions arising in extraordinary cases, or may designate senior counsel to consider particular issues. This approach often flows from a need to have decisions of province-wide impact made by those with a province-wide mandate, or the necessity of bringing maximum prosecutorial experience to bear on certain difficult decisions. Such involvement in local decisions will be rare, but it is a necessary phenomenon in any organization with an accountability structure and does not reflect any lack of confidence in local prosecutors.

Crown Attorneys are reminded of the ongoing need to complete Case Bulletins in appropriate cases and to update these Bulletins as cases move forward.

Generally, prosecutors should make a note in the prosecution file of any consultations which have occurred in regard to the decision to prosecute or to discontinue a case. A note should also be made of public interest considerations which influenced the decision, unless they are obvious. It is particularly important that careful notes be maintained concerning the decisions made in the cases wherein consultation is required pursuant to other provisions of this policy statement on the decision to prosecute.

The decision to discontinue a prosecution after a charge has been laid raises additional considerations. If a charge involves an identifiable victim, the prosecutor has a duty to ensure that the victim is made aware of the rationale for the decision, preferably before any public revelation of the decision is made (a withdrawal or the entering of a stay in court amounts to a public announcement of the decision). The greater the degree of threat, injury or financial loss to the victim, the greater the obligation on the prosecutor to keep the victim informed.

Where circumstances permit, prosecutors should also discuss with the investigating police officers the reasons for not continuing with a charge. It is possible that a case can be strengthened after first presented to the prosecutor, and, where practical to do so, this opportunity should be provided. In appropriate cases, the prosecutor can direct additional investigation [see the PPS policy "Advising the Police"]. If the investigation has been extensive and complete, and the case is not being prosecuted for public interest reasons, the prosecutor should still discuss the decision with investigators prior to announcement of the decision.

In some cases, it is appropriate to place on the record in court brief reasons why a prosecution is being discontinued. This is particularly true when a case has attracted public attention, or there has been a committal for trial. In putting reasons on the public record, or in making a public statement, the prosecutor must be careful not to embarrass the accused or witnesses by disclosing information that will otherwise not be made public. Usually, a simple statement referring to public interest factors will suffice.

Words & Phrases

The following words and phrases appear in the PPS directives, guidelines and policies, and have these meanings:

“should”: indicates that there is a presumption that prosecutors will carry out the task, but recognizes that it may not always be possible or desirable to do so in the particular circumstances of an individual case. Prosecutors must be able to articulate a reasonable basis for departing from the suggested course of action.

“may”: highlights an issue for prosecutors and alerts them to an action or decision which they may or may not take in the exercise of their discretion.

“shall” or “must”: signify an unconditional requirement and usually relate to a legal obligation or procedural necessity. These are few in number.

Appendix A

PPS Equity & Diversity Committee Consultation Request Form



PPS employees seeking to consult with the Equity and Diversity Committee (“EDC”), must submit this form to the EDC Co-Chairs by email. Employees should attempt to complete all sections of the form to assist the EDC in understanding the request; however incomplete forms will still be considered.

Standard turnaround time for consultations to be reviewed and returned with feedback is about 4 weeks.

Date of Submission:	
Submitted by:	
Chief Crown Attorney & Office:	
Accused Name & File Number (if applicable):	
Brief Statement of Facts/Situation: If consultation is sought for a file, provide synopsis of facts (and attach any relevant supporting material). If not file related, briefly describe matter that requires consultation.	
Key Issues for Consultation: Describe the key issues, concerns or knowledge gaps that you would anticipate being addressed by the consultation.	
Previous Consultation and Review: Describe any past involvement by Crown Attorneys, Chief Crown Attorneys, or other PPS staff in this matter.	
Case Law/Legislation/Policy Review: Identify any case law, legislation, policies and/or other resources already reviewed and how it may apply to this matter.	
Are there any timing issues or deadlines that affect when review and feedback are required?	

EDC Review & Advice

Reviewed by: Names of EDC members involved in review & advice.	
Format of Advice (check all that apply):	<input type="checkbox"/> Written feedback <input type="checkbox"/> Verbal feedback <input type="checkbox"/> Case conference
Date Advice Given:	
Advice Provided (attach any supporting documents): Summary of any advice & feedback provided by EDC.	
Outcome of the Case/Situation: Follow-up with individual(s) who submitted request for consultation. Provide a summary of any action taken as a result of EDC advice and provide overall outcome of the matter (i.e. impact on case resolution or trial decisions, press release issued, change in policy, directives from Management, etc).	