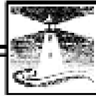

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PREFACE TO PART I – POLICIES GUIDING THE EXERCISE OF DISCRETION

Purpose of This Part of the Crown Attorney Manual

This part of the Crown Attorney Manual includes directives and policies of the Public Prosecution Service which relate to decision-making by Crown Attorneys in the course of prosecuting criminal cases. The policies and directives are, in essence, the instructions of the Attorney General to his agents, the Crown Attorneys. Cumulatively, they are the principle device through which the Attorney General strives to achieve the level of consistency necessary to ensure fair and equal treatment of all citizens involved in prosecutions or affected by prosecutions.

This part of the Manual serves two main purposes. First, it is a convenient vehicle through which to distribute and consolidate the policies which have been developed for the guidance of prosecutors. It helps to ensure that the current policies are readily available to the Crown Attorneys who must utilize them on a daily basis.

A second purpose of this part of the Manual is to enhance transparency in the decision making process. Accused persons, victims and the public are entitled to be informed in regard to the basis upon which important decisions in the criminal process are made. Such transparency instills public confidence in the administration of justice and fosters respect for the decision makers.

There is, to some degree, statutory recognition of this need for transparency. The Public Prosecutions Act requires that certain directives of the Attorney General and the Director of Public Prosecutions be published. It is anticipated that the broad distribution of this part of the Manual will help meet that statutory obligation and also go beyond what is required by law. Generally, protocols and procedures developed to meet recurring issues in the criminal process will also be made public.

The Context in Which Policies are Presented

The directives and policies contained in this part of the Manual do not purport to cover all aspects of the criminal process. Some issues are not addressed at all; other issues are more comprehensively covered. Even where a policy has been drafted to give relatively complete guidance in regard to a particular sort of decision, it is impossible to anticipate the infinite variety of circumstances in which criminal cases arise. There will often be a gap, sometimes slim and sometimes broad, between the ambit of the policies and the reality encountered by prosecutors. Accordingly, it is essential that readers and users of this part of the Manual understand and remember the context in which these policies are presented. This requires an appreciation of where Crown Attorneys fit into the criminal process, and an understanding of the fundamental role of a Crown Attorney, particularly as described by leading jurists. It also

involves a recognition that the courts have placed certain limitations on the scope of directives which can be issued to Crown Attorneys. Most importantly, it involves an appreciation of the spirit in which the directives and policies are issued and this will emerge, hopefully, from a holistic reading of this Preface and the policies themselves.

The Authority to Prosecute

The Attorney General of Nova Scotia is the law officer of the Crown in Nova Scotia and under our constitutional legislation is responsible for ensuring that the criminal law is enforced in a "just and proper manner" in Nova Scotia. The Attorney General is specifically included in the definition of "prosecutor" in the Criminal Code, and this definition is adopted in the Summary Proceedings Act and other provincial legislation. Even where, as in the Criminal Code, it is possible in certain circumstances for others to fall within the definition of "prosecutor", the law is now settled that the Attorney General can intervene as prosecutor in any prosecution at any time.

It is, of course, impossible for the Attorney General to appear personally in all prosecutions or to have direct involvement in all prosecution decisions across the province. The appointment of counsel to appear as agents of the Attorney General is a practical necessity. The Crown Attorneys fulfill this need. The authority of these agents to prosecute flows through the Attorney General and is not detached from the authority given to the Attorney General.

Independence

It is a well established legal principal that the Attorney General as prosecutor is to act independently of political influence. This issue has been the subject of extensive discussion by learned authors and much judicial comment. Typical of the judicial comments are those of Henry, J. in the 1976 case, R. v. Harrigan and Graham 33C.R.N.S.60 (Ont.H.C.), at p.62:

> "In the discharge of his responsibility for the enforcement of the criminal law in a just and proper manner (and I speak of the Attorney General of Canada acting in the federal field as well as the Attorneys General of the provinces) he has the final authority to decide whether or not a prosecution for an indictable offence shall proceed. He also has the ultimate authority to enter a stay of proceedings (nolle prosequi) where a prosecution for an indictable offence has been launched. ...In exercising both these powers, which vitally concern the rights and liberty of the individual, he must take into account not only the interests of the individual but also what the public interest requires. In so doing he makes his decision alone. This is particularly true of the power of prosecution. He is not to be instructed by the government as to the action he should take. There is no restraint upon him (other than such as may be found in the statutes) except his final accountability to Parliament or the Legislature. In him is vested the responsibility for ensuring that the power of prosecution is not abused. The ultimate control on the Attorney General in the exercise of this power and duty

> to prosecute lies in the democratic processes of Parliament. It goes without saying that he must discharge his responsibility honestly, fairly, and in the public interest in a way that will stand scrutiny in the House of Commons or the Legislature."

In Nova Scotia, by virtue of the Public Prosecutions Act, this important principle of political independence is facilitated and preserved. The Act gives the Director of Public Prosecutions a general authority to conduct all prosecutions independently of the Attorney General. This minimizes the allegations of political interference which may arise when a member of government is involved in a prosecution.

The principle of political independence, however, continues to exist apart from the legislation and it connotes more than freedom from interference by politicians. As the Honourable Fred Kaufman noted in his 1999 Review of the Nova Scotia Public Prosecution Service:

> "First and foremost, there must be freedom from direction, control or influence by politicians and others exercising actual or perceived political authority. Second, there must be protection from actual or attempted direction, control or influence from other sources, such as the public, the media and special interest groups, which might impair or diminish the DPP's ability to freely exercise his or her judgment." [Review, p.15]

This principle of independence extends to all agents of the Attorney General. It requires that all decisions made by Crown Attorneys be made in the public interest and free from improper influences, whether or not there is a specific policy or directive requiring consideration of the public interest.

The Duty of Fairness

The previously noted comments of Henry, J. include a reference to the duty of the Attorney General to prosecute fairly. More frequently cited is the following dictum of Rand, J. in Boucher v. The Queen (1954), 110C,C.C. 263 (S.C.C.), at p.270:

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

This fundamental aspect of the role of a Crown Attorney is well known and well respected by prosecutors. It should also be noted that Crown Attorneys in Nova Scotia are bound by the

Legal Ethics and Professional Conduct regimen of the Nova Scotia Barristers' Society which specifically adopts the language of Rand, J. in Boucher. The dictum is reproduced here primarily for the benefit of those less familiar with the criminal process.

The duty to act fairly and to seek a just result in judicial proceedings does not diminish the ability of a Crown Attorney to be a vigorous advocate. In that regard, a further comment from the Supreme Court of Canada in R. v. Cook (1997) 114 C.C.C.(3d) 481, per L'Heureux-Dube, J., at p. 489, is instructive:

> "[W]hile it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence, [cites omitted] it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for truth... Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: [cites omitted]. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function."

Accountability

In the present context, "accountability" refers to the obligation of an individual or agency to be answerable for fulfilling responsibilities that flow from the authority given to that individual or agency. Historically, provincial Attorneys General have been accountable to the electorate and have had to answer in legislatures for all decisions relating to the administration of justice, including the decisions made by their agents. This is confirmed and clarified in the Public Prosecutions Act of Nova Scotia which specifically states that the Attorney General is accountable to the Assembly for all prosecutions.

It has been noted earlier in this Preface that it is the Director of Public Prosecutions who actually conducts prosecutions and oversees criminal prosecutions in Nova Scotia. Just as it would be impossible for the Attorney General to be aware at all times of the countless decisions for which he is accountable to the Assembly, so to is it unrealistic to expect the Director of Public Prosecutions to be personally involved in the many thousands of cases which arise across the province each year. For that reason, in addition to the accountability inherent in any principal-agent relationship, there is a continuum of accountability extending from the Director of Public Prosecutions to the individual Crown Attorneys who make the prosecution decisions on a day to day basis. The accountability relationship is also confirmed in the job descriptions for each member of the Public Prosecution Service.

It should also be noted that all prosecuting agents of the Attorney General and the Director of Public Prosecutions are included in the accountability regime. Whether appearing pursuant

to a full-time appointment, a short term contract or as an occasional per diem prosecutor, all prosecutors are accountable. They are all obliged to make decisions in accordance with stated directives and policies (with which they are assumed to be familiar), and they must otherwise act with the integrity and sense of fairness required of Crown Attorneys.

The process of accountability involves the establishment of certain expectations, and some degree of control. The prosecution policies issued by the Attorney General and the Director of Public Prosecutions play an integral role in outlining what is expected of Crown Attorneys. They also, of course, promote the consistency in decision making necessary to ensure fair and equal treatment of all citizens.

As indicated at the beginning of this Preface, the degree of control which the Attorney General and/or Director exert through directives and policies does not reach all corners of prosecution activity. The Public Prosecution Service accepts the suggestion stated in the 1993 Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Ontario) –the "Martin Report", that policies and directives which bind the discretion of Crown Attorneys in the conduct of a case should be "few and far between". That Report noted that it was important to preserve a certain degree of relatively unfettered discretion for Crown Attorneys for two reasons:

> "First, in the Committee's view, comprehensive prosecutorial discretion is necessary to appropriately respond to the infinite variety of circumstances that may lead to an allegation of criminal wrongdoing. For example, in any class of cases in which a charge of break and enter is laid, the needs of the community, the victim, the witnesses, and the accused may vary so greatly that the charge laid is the only feature common to those cases. Only a broad discretion as to how those cases are to be prosecuted or resolved will adequately address such important and extensive differences. Second, comprehensive prosecutorial discretion is, in the Committee's view, necessary to preserve and perpetuate sensitivity in the administration of criminal justice to unique local conditions, local practices, and local needs." [p. 40]

This position is consistent with the comment made by LaForest, J. in Regina v. Beare (1989), 45 C.C.C.(3d) 57 (S.C.C.), at p. 76, that "a system that attempted to eliminate discretion would be unworkably complex and rigid." The fact that a generous amount of discretion is left in the hands of Crown Attorneys, however, does not detract from the proposition that Crown Attorneys are fully accountable for their decisions. In the absence of specific policies, the expectations and guidance in regard to decision making are to be found in the more general judicial comments and policy statements which describe the role of the Crown Attorney and which demand an extremely high standard of integrity from all counsel conducting a criminal case.

The fact that Crown Attorneys are accountable to their superiors for the exercise of discretion in the criminal process and that there is an expectation of compliance with policy directions should not cause Crown Attorneys to be fearful of making difficult decisions. Only a small

number of policies eliminate options or demand consultation with a superior before decisions are made. The vast majority of decisions which are left to Crown Attorneys envisage a range of options. A common challenge for a prosecutor is to select from those options the one, which, in the prosecutor's assessment of the public interest at the time that a decision must be made, is most responsive to the circumstances at hand. It is clearly understood at all levels of the Public Prosecution Service that the exercise of judgment in the criminal process is not an exact science. Reasonable, competent people often disagree. Frequently, there is no single "right" answer. When the balancing of competing factors is precarious, inexperienced counsel are encouraged to consult with supervisors and other experienced counsel in order to arrive at an appropriate decision. Similarly, when there is uncertainty in regard to what should be done in the absence of specific guidance in the manual, the fullest possible discussion of the issues with supervisors and colleagues is strongly encouraged.

It is important for counsel to be aware that to neglect or to avoid making a necessary decision can be more harmful to the administration of justice and the public interest than actually making a decision that, in retrospect, is challenged.

Just as the failure to exercise available discretion can be destructive, so too would be the blind, unthinking application of stated policies. Prosecuting, even by experienced counsel, requires careful analysis of issues, and consultation. Crown policies are not designed to be "automatic" decision makers or to be a substitute for judgment. The criminal law requires that people be treated as individuals in unique situations, and policies are not intended to distort this approach. There cannot, for instance, be a single approach prescribed in advance for a class of persons. Prosecuting counsel must carefully consider criminal cases, one at a time, and the particular nuances of each case must be reflected in the decision making process.

Because the very idea of discretion implies that a range of reasonable options exists, Crown Attorneys are entitled to assume that their decisions will be supported by their supervisors whenever the decision that is made falls within the range of reasonable options. It is clearly recognized that the effective functioning of the criminal justice system depends on flexible decision making at the local level.

The need for Crown Attorneys to exercise judgment is continuous - it does not arise only at isolated points in the prosecution process. Once a decision has been made, for example, to go forward with a prosecution, the prosecutor must continuously assess the viability of the case having regard to the evidentiary threshold and the public interest considerations.

Crown Attorneys must also be mindful of their role in relation to the police. In the vast majority of cases processed in Nova Scotia, the police gather evidence and determine whether or not reasonable grounds exist to lay a charge. They usually do this entirely without the involvement of Crown Attorneys. The police may seek the advice of the Crown
where they think it appropriate to do so, but they are not bound to follow that advice in regard to the conduct of investigations and the laying of charges. The Crown likewise exercises independent judgment in prosecuting and has no obligation to prosecute simply because a charge is laid by the police. As noted in the Martin Report and by the Marshall Commission, this separation of power, and the insertion of a level of independent review between the

investigation and any prosecution that may ensue, helps to ensure that both investigations and prosecutions are conducted more thoroughly and thus more fairly. This observation emphasizes the need for Crown Attorneys to actively use their best judgment at all times.