



Ontario
Civil Liberties
Association

“The OCLA takes a vigorous and highly principled approach to defending free speech rights, which is an approach that is sorely needed in Canada today.”

— John Carpay,
President,
Justice Centre for
Constitutional Freedoms

“I am very pleased to learn of the Ontario Civil Liberties Association, and wish it the greatest success in its work, which could not be more timely and urgent as elementary civil rights, including freedom of speech, are under attack in much of the world, not excluding the more free and democratic societies.”

— Noam Chomsky,
Institute Professor, MIT

“Freedom of expression is our most fundamental and most precious freedom. It has been under attack in Canada for years. The Ontario Civil Liberties Association has taken a position on freedom of expression that is both courageous and principled. The OCLA now stands alone and its position should be supported by all Canadians who cherish democracy and freedom.”

— Robert Martin,
Professor of Law,
Emeritus,
Western University

ocla.ca



October 2, 2014

By Email

Hon. Suzanne Anton
Attorney General of BC
Room 232, Parliament Buildings
Victoria, BC V8V 1X4
JAG.Minister@gov.bc.ca
suzanne.anton.mla@leg.bc.ca

Honourable Suzanne Anton:

Re: October 1, 2014 email from the Criminal Justice Branch

The Ontario Civil Liberties Association (OCLA) wrote to you on September 24, 2014, regarding the criminal proceedings against Mr. Arthur Topham (*R v Topham*).

In our September 24 letter, we referred to the section of the *Criminal Code* at issue in *R v Topham*, s. 319(2), and requested that you withdraw your consent to institute criminal proceedings against Mr. Topham pursuant to this section.

We received what appears to have been intended as your response to our letter, in the form of an email dated October 1, 2014, from an unnamed representative of the Criminal Justice Branch (enclosed).

The said October 1 email does not address our request to you contained in our September 24 letter.

Our request is that you retract your consent for instituting the criminal proceeding against Mr. Arthur Topham.

The *Criminal Code* is clear that the s. 319(2) proceeding against Mr. Topham can only have been initiated with the express consent of your office. Indeed, s. 319(6) states:

Consent

[319](6) No proceeding for an offence under subsection [319](2) shall be instituted without the consent of the Attorney General.

Furthermore, the *Criminal Code* (at s. 2) expressly defines “Attorney General” as meaning “the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his or her lawful deputy”. The proceedings against Mr. Topham (*R v Topham*) are taken in BC.

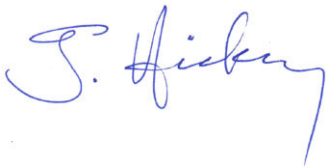
Thus, to use the colloquial expression, the buck stops at your office, Madame Attorney General.

With these clarifications, we therefore respectfully reiterate our request that you retract your consent for the proceeding against Mr. Topham, for the reasons expressed in our letter of September 24.

We also wish to inform you that the OCLA's request is supported by hundreds of Canadian and BC citizens who continue to sign the on-line petition at the following webpage:
<http://www.change.org/p/hon-suzanne-anton-attorney-general-of-bc-jag-minister-gov-bc-ca-hon-suzanne-anton-retract-your-consent-for-the-criminal-proceedings-against-mr-arthur-topham>

We look forward to your response.

Yours truly,

A handwritten signature in blue ink, appearing to read "J. Hickey". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Joseph Hickey
Executive Director
Ontario Civil Liberties Association (OCLA) <http://ocla.ca>
613-252-6148 (c)
joseph.hickey@ocla.ca

Cc: Mr. Arthur Topham (radical@radicalpress.com)
Cc: Office of the Assistant Deputy Attorney General (ADAG.Webfeedback@gov.bc.ca)

Encl.

Joseph Hickey - OCLA

From: AG CJB ADAG WebFeedback AG:EX [ADAG.Webfeedback@gov.bc.ca]
Sent: October 1, 2014 6:41 PM
To: joseph.hickey@ocla.ca
Subject: Your Email of September 24, 2014 (411456)
Attachments: G__CJB_VictoriaHQ_Shr__STRATEGIC PLANNING OFFICE__MAIL
REGISTRY__HTally__WORKING DRAFTS__CHA1_ChargeAssessmentGuidelines.pdf

Mr. Joseph Hickey
Executive Director
Ontario Civil Liberties Association
Email: joseph.hickey@ocla.ca<<mailto:joseph.hickey@ocla.ca>>

Dear Mr. Hickey:

Your letter of September 24, 2014, addressed to the Honourable Suzanne Anton, Minister of Justice and Attorney General, has been forwarded to the Criminal Justice Branch for a response. The Criminal Justice Branch is responsible for the conduct and supervision of criminal prosecutions in British Columbia.

It is not the role of the Attorney General to become involved in individual cases.

As you may know, section 11 (d) of the Canadian Charter of Rights and Freedoms guarantees any person charged with an offence the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. Crown Counsel work hard to ensure that this principle is not violated, and there are considerable safeguards in our justice system to ensure that the rights of the accused are preserved.

A person accused of an offence is presumed innocent and has a constitutional right to make full answer and defence. The accused, through the trial process, is entitled to test the Crown's case.

When the police conclude an investigation into criminal allegations, they have the discretion to submit a Report to Crown Counsel (RTCC) to the Criminal Justice Branch for a determination on whether its charge assessment standard is met. If charges are approved, a prosecution is initiated.

British Columbia's charge assessment model provides for a careful scrutiny of the investigative report from police to determine whether the evidence supports a substantial likelihood of conviction, and whether the circumstances are such that a prosecution is required in the public interest. Charges can only be approved for offences that are substantiated by the evidence in light of their specific legal requirements. As such, each case involves an individualized assessment based on the file as a whole, with a detailed analysis of the available, admissible evidence and the governing law.

You may wish to review the BC Prosecution's Charge Assessment policy (CHA 1) for more information on public interest factors that favour a prosecution proceeding. We have attached CHA 1 for your reference, and you are able to access the Crown Counsel Policy at the following website:

www.ag.gov.bc.ca/prosecution-service/policy-man/index.htm<<http://www.ag.gov.bc.ca/prosecution-service/policy-man/index.htm>>

The provisions you reference in your letter are the responsibility of the federal Department of Justice and may only be amended by the federal government. As such, you may wish to share

your views with the Honourable Peter Gordon MacKay, QC Minister of Justice and Attorney General of Canada. Minister MacKay is responsible for proposing such amendments to Parliament and may be reached at the following:

The Honourable Peter Gordon MacKay, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa ON K1A 0H8
Email: peter.mackay@parl.gc.ca<mailto:peter.mackay@parl.gc.ca>
Telephone: 613-995-1547
Facsimile: 613-992-7910

We hope you find this information of assistance.

Sincerely,

Office of the Assistant Deputy Attorney General Criminal Justice Branch Ministry of Justice



CRIMINAL JUSTICE BRANCH, MINISTRY OF JUSTICE
CROWN COUNSEL POLICY MANUAL

ARCS/ORCS FILE NUMBER: 55100-00	EFFECTIVE DATE: October 2, 2009	POLICY CODE: CHA 1
SUBJECT: Charge Assessment Guidelines		CROSS-REFERENCE: ABD 1 CHA 1.1 CHA 1.2 CHI 1 DIS 1 ELD 1 HAT 1 RES 1 SPO 1

POLICY

Under the *Crown Counsel Act*, Crown Counsel have the responsibility of making a charge assessment decision which determines whether or not a prosecution will proceed.

In discharging that charge assessment responsibility, Crown Counsel must fairly, independently, and objectively examine the available evidence in order to determine:

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

A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court.

Once Crown Counsel is satisfied that there is a substantial likelihood of conviction (the evidentiary test), Crown Counsel must determine whether the public interest requires a prosecution by considering the particular circumstances of each case and the legitimate concerns of the local community. Public interest factors include those outlined below.

Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test is not satisfied. Such circumstances will most often arise in cases of high risk violent or dangerous offenders or where public safety concerns are of paramount consideration. In these cases, charging decisions must be approved by Regional or Deputy Regional Crown Counsel and the evidentiary test is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction.

The requirement to meet the two-part charge assessment standard, consisting of the evidentiary test and the public interest test, continues throughout the prosecution.

For the cases listed below, Crown Counsel should discuss the charge assessment decision with Regional or Deputy Regional Crown Counsel before any decision is made:

1. where the allegation is that a person is responsible for a death; and
2. for any serious allegation about which there has been, or is likely to be, significant public concern with respect to the administration of justice.

DISCUSSION

Introduction

The decision to initiate or continue a prosecution is one of the most important duties of Crown Counsel. The *Crown Counsel Act* authorizes Crown Counsel, under the direction of the Assistant Deputy Attorney General, to “examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate” (section 4(3)(a)).

The independence of this function is confirmed by section 5 of the Act. Any intervention by the Attorney General with respect to the approval or conduct of a prosecution “must be given in writing to the Assistant Deputy Attorney General and published in the *Gazette*.”

The independence of Crown Counsel must also be balanced with measures of accountability. Principled charge assessment decisions are assured when Crown Counsel experienced in assessing evidence exercise discretion in accordance with Branch public policies when reviewing the available evidence and applicable law.

During the charge assessment process, Crown Counsel does not have the benefit of hearing the testimony of Crown witnesses, either in direct or cross-examination, nor the defence evidence, if any. During the course of a preliminary hearing, when preparing for trial, or during trial, the Crown’s case may be materially different than at the charge assessment stage. The requirement to meet the charge assessment standard continues throughout the prosecution.

The Criminal Justice Branch recognizes that the police have the authority to lay an Information; however, Crown Counsel have the ultimate authority to direct a stay of proceedings. Therefore, it is expected that the police will lay an Information only after the approval of charges by Crown Counsel, or, if charges are not approved, upon exhaustion of an appeal of that decision by the police (see policy CHA 1.1).

Recognizing that the charge assessment responsibility of Crown Counsel and the investigative responsibility of the police are independent, cooperation and effective communication between Crown Counsel and the police are essential to the proper administration of justice. In serious cases, or those of significant public interest, Crown Counsel discuss with the police, where practicable, their intention to not approve a charge recommended by the police (a “no charge” decision).

Evidentiary Test – Substantial Likelihood of Conviction

Subject to the exception described below, the usual evidentiary test to be satisfied is whether there is a substantial likelihood of conviction.

A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is satisfied, Crown Counsel must determine:

1. what material evidence is likely to be admissible;
2. the weight likely to be given to the admissible evidence; and
3. the likelihood that viable, not speculative, defences will succeed.

Evidentiary Test in Exceptional Cases

Exceptional circumstances may require that a prosecution proceed even though the usual evidentiary test described above is not satisfied. Such circumstances will most often arise in cases of high risk violent or dangerous offenders or where public safety concerns are of paramount consideration. Such charging decisions must be approved by Regional or Deputy Regional Crown Counsel.

The evidentiary test in such cases is whether Crown Counsel is satisfied that there is a reasonable prospect of conviction. This test is higher than that of a prima facie case. A weighing of admissible evidence and viable defences is not required. Crown Counsel should consider:

1. what material evidence is arguably admissible;
2. whether that evidence is reasonably capable of belief; and
3. whether that evidence is overborne by any incontrovertible defence.

Public Interest Test

It has never been the rule that all criminal offences which meet the evidentiary test must automatically be prosecuted. Sir Hartley Shawcross, Q.C., former Attorney General of England (later Lord Shawcross), outlined the public interest principle:

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.¹

Once Crown Counsel is satisfied that the evidentiary test is met, Crown Counsel must determine whether the public interest requires a prosecution. Hard and fast rules cannot be imposed as the

¹ U.K., H.C. Debates, vol. 483, col. 681, (29 January 1951).

public interest is determined by the particular circumstances of each case and the legitimate concerns of the local community. In making this assessment, the factors which Crown Counsel will consider include the following:

1. Public Interest Factors in Favour of Prosecution

It is generally in the public interest to proceed with a prosecution where the following factors exist or are alleged:

- (a) the allegations are serious in nature;
- (b) a conviction is likely to result in a significant sentence;
- (c) considerable harm was caused to a victim;
- (d) the use, or threatened use, of a weapon;
- (e) the victim was a vulnerable person, including children, elders, spouses and common law partners (see policies ABD 1, CHI 1, ELD 1 and SPO 1);
- (f) the alleged offender has relevant previous convictions or alternative measures;
- (g) the alleged offender was in a position of authority or trust;
- (h) the alleged offender's degree of culpability is significant in relation to other parties;
- (i) there is evidence of premeditation;
- (j) the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor (see policy **HAT 1**);
- (k) there is a significant difference between the actual or mental ages of the alleged offender and the victim;
- (l) the alleged offender committed the offence while under an order of the Court;
- (m) there are grounds for believing that the offence is likely to be continued or repeated;
- (n) the offence, although not serious in itself, is widespread in the area where it was committed;
- (o) the need to protect the integrity and security of the justice system and its personnel;
- (p) the offence is a terrorism offence;
- (q) the offence was committed for the benefit of, at the direction of or in association with a criminal organization.

2. Public Interest Factors Against Prosecution

It may not be in the public interest to proceed with a prosecution where the following factors exist or are alleged:

- (a) a conviction is likely to result in a very small or insignificant penalty;
- (b) there is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch. This could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service. Crown Counsel need not conclude, in advance, that a prosecution must proceed in the public interest if a referral for an alternative measure is not acceptable. Information with respect to the suitability of a candidate for diversion or alternative measure is a factor to be taken into consideration by Crown Counsel in reaching a final charge assessment decision;
- (c) the offence was committed as a result of a genuine mistake or misunderstanding (factors which must be balanced against the seriousness of the offence);
- (d) the loss or harm can be described as minor and was the result of a single incident, particularly if caused by misjudgment;
- (e) the offence is of a trivial or technical nature or the law is obsolete or obscure.

3. Additional Factors to be Considered in the Public Interest

- (a) the youth, age, intelligence, physical health, mental health, and other personal circumstances of a witness or victim;
- (b) the personal circumstances of the accused, including his or her criminal record;
- (c) the length and expense of a prosecution when considered in relation to the social benefit to be gained by it;
- (d) the time which has elapsed since the offence was committed;
- (e) the need to maintain public confidence in the administration of justice.

PROCEDURE / PRACTICE

In all cases, in applying the charge assessment standard, the important obligations of Crown Counsel are to:

1. make the charge assessment decision in a timely manner, recognizing the need to expedite the decision where an accused is in custody, where a Report to Crown Counsel requests a warrant, or where the charge involves violence;
2. record the reasons for any charge assessment decision which differs from the recommendation of the police in the Report to Crown Counsel;
3. where appropriate, communicate with those affected, including the police, so that they understand the reasons for the charge assessment decision; and
4. consider whether proceeding by indictment after the expiry of a limitation period could constitute an abuse of process based on any failure by Crown Counsel or the police to act in a timely manner.

Report to Crown Counsel

In order that Crown Counsel may appropriately apply the charge assessment standard, the Report to Crown Counsel should provide an accurate and detailed statement of the available evidence. The following are the basic requirements for every Report to Crown Counsel whether the information is provided electronically or not:

1. a comprehensive description of the evidence supporting each element of the suggested charge(s);
2. where the evidence of a civilian witness is necessary to prove an essential element of the charge (except for minor offences), a copy of that person's written statement;
3. necessary evidence check sheets;
4. copies of all documents required to prove the charge(s);
5. a detailed summary or written copy of the accused's statement(s), if any;
6. the accused's criminal record, if any; and
7. an indexed and organized report for complex cases.

If the Report to Crown Counsel does not comply with these standards it may be returned to the investigator with a request outlining the requirement to be met.