or absence of other factors, and the interrelationship of those factors. It cannot be forgotten that a prosecutor's experience will provide much unwritten guidance to any assessment of the public interest. The factors that the Committee discusses below are simply intended to be illustrations of matters that may affect, in varying ways, the exercise of prosecutorial discretion. They are not, nor are they intended to be, exhaustive. Nor are the factors below discussed in any necessary order of importance. Ultimately, the exercise of sound prosecutorial discretion brings the prosecutor's experience to bear on *all* of the circumstances of the individual case. In the words of one writer,[43]

> There will, however, undoubtedly remain a substantial area of discretion, regulated only by a large number of competing factors that, in their cumulative impact and interaction, produce somewhat unpredictable, case-specific results. This seems to be inherent in the nature of criminal justice discretion; to the extent that we seek to achieve a variety of goals through the criminal process, while recognizing a large number of moral and social principles, we are forced to make complex judgments involving a large number of imprecise factors.

The Gravity of the Incident

7. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the charge or charges that best reflect the gravity of the incident.

---

[43] R.S. Frase, "The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion", 47 *U.Chi.L.Rev.* 246, at pp. 298-99. See also R.K. Daw, The "Public Interest" Criterion in the Decision to Prosecute (1989), 53 *J. Crim. L.* 485, at p. 500:

> What is certain is that an examination of where the public interest lies in a given case is frequently a complex and difficult process and cannot be seen as a precise science.

The Committee agrees with the following statement from the English *Code for Crown Prosecutors* that captures the essential relationship between the gravity of the incident and the public interest.[44]

> The factors which can properly lead to a decision not to prosecute will vary from case to case, but broadly speaking, the graver the offence, the less likelihood there will be that the public interest will allow of a disposal less than prosecution, for example, a caution.

While some criminal offences, such as murder, are clearly very serious regardless of the circumstances of their commission, many other criminal offences can range in seriousness from the most minor or technical to the most grave. This fact is reflected in part in the relative scarcity of minimum penalties in our criminal law, and the wide availability of conditional and absolute discharges, pursuant to s. 736 of the *Criminal Code*. However, even the broad range of available penalties for most offences does not, in the Committee's view, capture entirely the variation in gravity of the incidents that may lead to a criminal charge being considered. It is entirely possible that an incident may be so minor that, notwithstanding that an offence is made out on the evidence, and the evidence provides a reasonable prospect of conviction, a criminal prosecution is not warranted. Traditionally, the gravity of the incident has been a factor considered by police officers in exercising their discretion to charge. However, that is no reason to assume that it need not also be considered by Crown counsel in determining whether a prosecution is in the public interest.

In addition, care must be taken in assessing the gravity of the incident to properly understand the nature of the incident in all of its relevant dimensions. For example, the theft of a small amount of money, might be seen as less serious if it were the impetuous act of an immature youth than if it were the calculated act of a trusted bookkeeper, or someone else in a position of trust. Likewise, a sexual offence, or an offence of violence, may be seen as more serious if the victim is particularly vulnerable by reason of, for example, youth, or

---

[44] *Crown Prosecution Service Annual Report 1991-92*, at p. 49.

physical or mental handicap. Ultimately, assessing the gravity of the incident is a matter of ascertaining the inherent nature of the act in question, or the degree of malevolence that it manifests, and the seriousness of the consequences.

Having assessed the gravity of the incident in this way, the charge or charges laid must be consistent with such a view of the case. For example, a culpable homicide with no evidence capable of establishing the requisite *mens rea* for murder, ought not to be charged as murder. Likewise, if the evidence clearly supports a murder charge, it would be inappropriate to charge simply manslaughter.

Care must also be taken to ensure that there are not more charges laid than are necessary. Multiple charges are appropriate in some circumstances. However, charges cannot be "inflated or duplicated for the purpose of maximizing leverage in plea negotiations."[45] The role of Crown counsel in ensuring that there are neither too many nor too few charges laid is discussed further, below.

8. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should not consider any political consequences for the government flowing from the prosecution.

Political Consequences

It is a clear and inflexible principle of constitutional law that when assessing the public interest in a given prosecution, the partisan political fortunes of the government of the day, or of any particular member of the government, must play no role whatsoever. Sir

[45] *Sentencing Reform: A Canadian Approach - Report of the Canadian Sentencing Commission* (1988), at p. 418. See generally the discussion at pp. 418-420.

Hartley Shawcross, then Attorney General of England, emphasized this constitutional principle in his famous 1951 speech in the House of Commons:

> [T]here is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the government's political fortunes; that is a consideration which never enters into account.[46]

This constitutional responsibility of the Attorney General, and thus of his or her agents, is undoubtedly the position in Ontario, too: see the *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5(d). In 1969, the Honourable J.C. McRuer stated:

> [The Attorney General] must of necessity occupy a different position politically from all other Ministers of the Crown. As the Queen's Attorney he occupies an office with judicial attributes and in that office he is responsible to the Queen and not to the Government. He must decide when to prosecute and when to discontinue the prosecution. In making such decisions he is not under the jurisdiction of Cabinet nor should such decisions be influenced by political considerations. They are decisions made by the Queen's Attorney, not as a member of the government of the day.[47]

Because the Attorney General is at once the Queen's Attorney and a member of the Cabinet, as well as typically a high profile member of a partisan political party, the danger that the public will perceive the administration of justice to be tainted by partisan political

---

[46] H.C. Debates, Vol. 483, col. 682, as quoted in Edwards, *The Law Officers of the Crown*, *supra*, at pp. 222-223. The statements of Shawcross in this 1951 speech are entitled to such weight in part because, prior to making the speech, it had been reviewed by Viscount Simon, Viscount Jowitt, Lord Kilmuir (all former Attorneys General who had subsequently become Lord Chancellors), Sir Theobold Mathew, then Director of Public Prosecutions, and Mr. Herbert Morrison, Lord President of the Council and Deputy Prime Minister. Viscount Simon provided extensive comment, recognizing that Shawcross would be "making a classical pronouncement which ought to stand for the future": See Edwards, *The Attorney General, Politics, and the Public Interest*.

[47] The Hon. J.C. McRuer, *Report of the Royal Commission Inquiry into Civil Rights* (1969), at pp. 933-934 See also Edwards, *Law Officers*, *supra*, at p. 215; *The Attorney General*, *supra*, at pp. 222-223, 319, 360; I.G. Scott, "The Role of the Attorney General and the *Charter of Rights*" (1986-87), 29 *Crim. L.Q.* 187, at pp. 187-192. For discussion including a collection of various statements of this principle by Canadian Attorneys General, see the *Marshall Commission*, Vol. 1, at pp. 223-226.

considerations is both serious, and ever present.[48] Maintaining public confidence in the administration of justice therefore places a heavy responsibility upon the Attorney General, not only to keep his or her quasi-judicial and partisan political duties strictly and uncompromisingly separate, but also to manifestly appear to keep them separate.[49]

The Victim

9. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the circumstances and attitude of the victim. The attitude of the victim is not, however, decisive.

In Ontario, at present, our system of prosecuting criminal offences is, for the most part public, rather than private. Agents of the Attorney General appear on behalf of the Crown, not the victim, in furtherance of the important principle that a criminal prosecution is not aimed solely at pursuing the victim's interest, but rather at promoting the public interest.

However, it can never be overlooked that the very subject matter of a criminal prosecution is an alleged act that has adversely affected the victim, perhaps in painful and

---

[48] See, for example, K.Chasse, "The Role of the Prosecutor" in S. Oxner (ed.) *Criminal Justice* (1982), at p. 79.

[49] The *Marshall Commission* made a recommendation (No. 35, Vol. I, at pp. 230-231) that resulted in Nova Scotia in *An Act to Provide for an Independent Director of Public Prosecutions*, S.N.S. 1990, c. 21. The recommendation was in part motivated by concern over a perception of political interference in the prosecutorial process. Likewise, in the aftermath of the Owen Inquiry in British Columbia, the Legislature enacted the *Crown Counsel Act* (1991), SBC chap. 10, Index Chap. 84.5. Sections 2-6 of the Act ensure that Crown counsel are subject to the direction of the Attorney General in the conduct of prosecutions only if such a direction is in writing and published in the *Gazette*. The Hughes Commission has recommended that in Newfoundland the Director of Public Prosecutions be given "statutory recognition that he is not, in so far as his control of the prosecutorial function is concerned, accountable to the deputy minister or any associate deputy minister." The Hughes Commission also recommends that the Attorney General be required to make a statement in the House whenever he declines to follow the advice of the D.P.P. in any prosecution: Vol. 1, Recommendation 21, at pp. 442-443. Legislation in Australia, the *Director of Public Prosecutions Act (1983)*, likewise separates not only the investigative and prosecutorial processes, but also separates the prosecutorial process from the political arena.

humiliating ways. And, while the identity of the perpetrator may be in issue throughout the prosecution, the identity of the victim, and the injury suffered by him or her, is usually in no doubt whatsoever. It is, therefore, proper to consider the circumstances and attitude of the victim in assessing the public interest in conducting a prosecution. This, of course, includes, in homicide cases, those close to the deceased. The English *Code for Crown Prosecutors*, s. 8, states that "the interests of the victim are an important factor ... and should be taken into account." Such considerations, however, are not decisive.[50]

Different victims may, depending on their unique personal circumstances and the circumstances of the offence in issue, have varying attitudes toward the prosecution that will affect, in different ways, the decision as to whether a prosecution is in the public interest. For example, an attitude of forgiveness on the part of the victim in a minor property offence may well militate against proceeding with a prosecution. By way of contrast, an attitude of deeply felt and genuine loss by the victim as a result of an offence of the same magnitude would not have the same effect. Further, an attitude of vindictiveness by the victim toward the perpetrator of an offence would be a factor that is entitled to little, if any, weight in assessing the public interest in the prosecution. It may, in some circumstances, be appropriate for Crown counsel to resist the wishes of a vindictive victim. A victim of domestic assault may demonstrate some reluctance to have the prosecution proceed. However, as the Court of Appeal for Ontario has held recently, in *R.* v. *Bonello*, (16 October, 1992, as yet unreported):

---

[50] The victim of crime has a much more pronounced role to play in other jurisdicitons. For example in Germany, the victim has a right to institute formal proceedings to have a prosecution go forward: H. Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany* (1970), 18 *Amer. J. of Comparative Law* 508, at p. 512. One writer has argued that the victim ought to have similar rights in the Canadian criminal justice system: See J.L. Halyk, *Initial Screening and the Crown Prosecutor in Canada* (1991), unpublished LL.M. thesis, University of Toronto, at pp. 118, 161. See also W.A. Logan, "A Proposed Check on the Charging Discretion of Wisconsin Prosecutors", [1990] *Wis. Law Rev.* 1695, wherein the author argues that the courts should be more vigilant in reviewing decisions not to prosecute, to provide "crime victims a critically important avenue of redress in the event a prosecutor unjustifiably refuses to charge."

The Availability of Compensation, Restitution, or Reparation

10. *The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the entitlement of the victim to compensation, reparation, or restitution if a conviction is obtained.*

---

[57] Nova Scotia Department of the Attorney General and Department of the Solicitor General, *Protocol for Investigation and Prosecution of Cases Involving Persons with Special Communication Needs* (1991); Manitoba Department of Justice, Public Prosecutions, Guideline No. 2:INV:1, *Investigation/Prosecution of Cases Involving Persons with Special Communication Needs* (1991).

The availability of compensation for a victim, or the possibility of restitution or reparations to him or her, is, of course, one aspect of the victim's position that merits consideration in assessing the public interest in a prosecution. Compensation or restitution may affect the attitude of the victim toward the continuance of the prosecution. Prompt restitution in a property offence, in conjunction with other factors such as the attitude of the victim, may militate in favour of discontinuing a prosecution where the evidence none the less meets the threshold test of sufficiency.

On the other hand, a conviction may enhance the victim's opportunities for compensation, for example, by way of an appropriate order by the sentencing judge. See, for example, *R.* v. *Scherer* (1984), 16 C.C.C. (3d) 30 (Ont. C.A.); leave to appeal to S.C.C. refused, (1984), 16 C.C.C. (3d) 30. In *Scherer*, the Court of Appeal for Ontario held that, despite the very limited means of the offender, the sentencing judge had properly imposed a compensation order for more than two million dollars, pursuant to then s. 653(1) (now s. 725). In that case, the offender, a solicitor, was convicted of theft. Prior to compensating the victims, the Law Society required that the victims exhaust their remedies against the offender. The Court held, at p. 38, that "the least expensive and most expeditious way for an applicant for compensation to satisfy this requirement is to obtain an order under s. 653."

The British Columbia Court of Appeal has held in *R.* v. *Hoyt* (1992), 17 C.R. (4th) 338 at 346, that a compensation order is properly regarded as a form of punishment. The Court noted that such orders are, "a valuable weapon in the arsenal of the sentencing judge", and have a relevant role to play in deterring acts of vandalism. In that case the court held that the compensation order was properly made, and there was a reasonable expectation that it would be satisfied. However, it must also be emphasized that the criminal law is not, nor can it be seen as, an alternative to the various compensatory mechanisms that exist in our society, such as civil litigation and applying to the Criminal Injuries Compensation Board. Many criminal prosecutions, for example, many driving offences and frauds, occur with respect to incidents that also spawn civil litigation. In these circumstances, the public interest requires that the criminal prosecution neither be, nor be seen as, an adjunct to civil

proceedings. It is wrong to put the liberty of an accused in jeopardy by invoking the blunt mechanisms of the criminal law simply to further the efforts of another private individual to acquire monetary compensation for an alleged wrong.

The Committee also observes that, pursuant to s. 141 of the *Criminal Code*, it may be an offence to threaten indictable criminal proceedings unless a debt is repaid, and it may be an offence to agree to halt indictable criminal proceedings if a debt is repaid.[58] This does not, of course, preclude Crown counsel faced with, for example, a minor property offence, from taking into account the fact that full restitution has been promptly made or will be made when exercising prosecutorial discretion.

The Status in Life of the Accused or Victim

11. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should not consider the status in life of either the accused or the victim.

---

[58] Section 141 of the *Criminal Code* reads as follows:

> (1) Every one who asks for or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or to conceal an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (2) No offence is committed under subsection (1) where valuable consideration is received or obtained or is to be received or obtained under an agreement for compensation or restitution or personal services that is
>
> > (a) entered into with the consent of the Attorney General; or
> > (b) made as part of a program, approved by the Attorney General, to divert persons charged with indictable offences from criminal proceedings.

See also *Panel Discussion: Ethics, Persuasion and the Role of the Trial Judge*, 20 October, 1990, Criminal Lawyers' Association Annual Convention and Education Programme, Edited Transcript of Proceedings, at pp. 13-18.

Much like partisan political considerations, the status in life of an accused or victim must play no part in assessing the public interest in a prosecution. By "status in life," the Committee means the social standing of an accused or victim. The Committee is of the view that the following statement in the Legislature by former Attorney General, the Honourable Roy McMurtry (as he then was), aptly puts forth the principle:

> It would be absolutely unacceptable if a prominent person escaped being charged under circumstances in which ordinary members of the public would be charged. It would be equally unacceptable if a public figure were charged under circumstances in which an ordinary citizen would not be....
>
> ... It is not, therefore, a question of whether the individual is rich or poor, prominent or not. Rather, it is a question of whether the proceedings are appropriate, taking into account the public interest in the fair administration of justice.[59]

The Court of Appeal for Ontario has also recently confirmed that, in the context of sentencing for sexual assault, the standing of a person in his or her community is irrelevant, and cannot be a mitigating factor.[60] It follows, therefore, that standing in the community must also be irrelevant to the decision to institute or discontinue criminal proceedings.

Status, understood in terms of social standing, is, in the Committee's view, to be distinguished from other more particular circumstances of the accused or victim. For example, when considering a prosecution for the wilful promotion of hatred, it may be important to consider whether the potential accused is a harmless, eccentric figure in the

---

[59] *Legislature of Ontario Debates*, 2nd Session, 31st Parliament, 23 February, 1978, at pp. 50-52.

[60] *R.* v. *Gordon M.* (1992), 11 O.R. (3d) 225 (C.A.).

community whom no one takes seriously, or whether the potential accused is in a position to influence others.

It is, of course, highly improper to prosecute someone just because of, for example, their colour, or sex, or cultural background. It is equally improper to refrain from proceeding with a prosecution where, on the evidence, there is a reasonable prospect of conviction, on account of the colour, sex, or cultural background of the victim or complainant, or any other witness. Racism, sexism, and other forms of discrimination have no place in the administration of criminal justice.

Race or cultural background may, however, in some circumstances, be a factor to be taken into account in assessing the impact of a particular sentence. Race or cultural background may also justify admitting an offender to a particular program tailored to the special needs of the offender, for example, placing an accused in a program involving community service and withdrawing the charge if the accused performs the community service. See *R.* v. *Fireman* (1971), 4 C.C.C. (2d) 82, where the Court of Appeal for Ontario held, in the context of sentencing, that the cultural background of an individual, in that case a native Canadian, was a proper factor to consider, along with other circumstances of the case, in determining the impact that the criminal proceedings would have on him or her. In the result, the Court of Appeal reduced the sentence imposed from ten years to two years. Ultimately, applying this factor in the public interest is a matter of some considerable sensitivity.

Characteristics such as age, mental disability, and physical disability may, in some circumstances, be relevant to the exercise of prosecutorial discretion in the public interest. A clear example is a young person caught shoplifting who may not, because of his or her youth or limited experience, fully appreciate the seriousness of the transgression. It may be that such a person is more appropriately dealt with in ways other than a criminal

community whom no one takes seriously, or whether the potential accused is in a position to influence others.

It is, of course, highly improper to prosecute someone just because of, for example, their colour, or sex, or cultural background. It is equally improper to refrain from proceeding with a prosecution where, on the evidence, there is a reasonable prospect of conviction, on account of the colour, sex, or cultural background of the victim or complainant, or any other witness. Racism, sexism, and other forms of discrimination have no place in the administration of criminal justice.

Race or cultural background may, however, in some circumstances, be a factor to be taken into account in assessing the impact of a particular sentence. Race or cultural background may also justify admitting an offender to a particular program tailored to the special needs of the offender, for example, placing an accused in a program involving community service and withdrawing the charge if the accused performs the community service. See *R.* v. *Fireman* (1971), 4 C.C.C. (2d) 82, where the Court of Appeal for Ontario held, in the context of sentencing, that the cultural background of an individual, in that case a native Canadian, was a proper factor to consider, along with other circumstances of the case, in determining the impact that the criminal proceedings would have on him or her. In the result, the Court of Appeal reduced the sentence imposed from ten years to two years. Ultimately, applying this factor in the public interest is a matter of some considerable sensitivity.

Characteristics such as age, mental disability, and physical disability may, in some circumstances, be relevant to the exercise of prosecutorial discretion in the public interest. A clear example is a young person caught shoplifting who may not, because of his or her youth or limited experience, fully appreciate the seriousness of the transgression. It may be that such a person is more appropriately dealt with in ways other than a criminal

prosecution.[61] Likewise, there may be no public interest in prosecuting a very elderly person, suffering from a terminal illness, who has committed an offence. It is wrong, however, to, in effect, supplant the careful, case-by-case exercise of discretion with fixed policies based on age, such as arbitrary decisions that no one under or over a given age will be prosecuted.

Public Confidence and Public Order

Since the earliest days of the criminal law,[62] criminal prosecutions have been understood as more than a method of addressing wrongs suffered by the victim of the alleged criminal act. They have been seen as reactions by the community at large to acts that have breached the sovereign's peace, or have interfered with the orderly life of the community as a whole.

This sense of the criminal prosecution as a community response to a wrong felt by the whole community not only has deep historical roots, but it continues to flourish at present, both in form and substance.[63] One writer has recently stated that the Attorney

---

[61] The *Young Offenders Act*, R.S.C. 1985, c. Y-1 as amended, particularly through the general principles set out in s. 3, provides further criteria that may lead to different treatment of a young person based on age. The *Act* specifically recognizes this eventuality when it states, in s. 3(1)(a) that "young persons should not in all instances be held accountable in the same manner... as adults...."

[62] Professor Stenning, in *Appearing for the Crown* (1986), at pp. 6-14, notes that since the early Middle Ages, three of the "principal institutions" of the administration of criminal justice in the Anglo-Canadian tradition have been:

> a sovereign who laid claim to jurisdiction throughout the kingdom over offences against his or her "peace;" a concept of the sovereign's "peace" which was broad, and which applied not only to the sovereign's person and household, but also to all public and most private places; [and] a system of royal justices and courts which serviced the entire kingdom, and before which violations of the sovereign's peace... could be prosecuted....

[63] For example, many of the most serious criminal prosecutions are tried by juries composed of members of the community whose peace it is alleged has been breached. Further, there is a presumption in our law that cases will be tried in the locality where the criminal act is alleged to have occurred: changes of venue are the exception rather than the rule. And third, the prominence accorded many criminal trials in our mass media

General "institutes prosecutions on the sovereign's behalf and in his name, his concomitant discretion to do so springing from the Royal Prerogative of Justice and its enforcement in maintaining the King's Peace."[64] Given the intimate connection between a criminal prosecution and the well-being of the community, it is important for those exercising prosecutorial discretion to consider the need to maintain public confidence in the administration of justice and the effect of the incident or prosecution on public order. This important aspect of prosecutorial discretion was emphasized in Sir Hartley Shawcross' famous speech in the House of Commons when he stated:

> The true doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order....[65]

The Committee is of the view that while the principle stated by Sir Hartley Shawcross is an important one, the phrase "public morale" does not lend as much assistance in applying the principle as does the phrase "the need to maintain public confidence in the administration of justice and the effect of the incident or prosecution on public order".

12. The Committee therefore recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order.

---

attests to the extent to which the criminal act continues to be perceived as a matter of genuine interest to the community as a whole.

[64] D.C. Morgan, "Controlling Prosecutorial Powers: Judicial Review, Abuse of Process and Section 7 of the Charter" (1986), 29 *Crim. L.Q.* 14, at p. 19.

[65] H.C. Debates, Vol. 483, cols. 683-684, January 29, 1951; as cited in Edwards, *The Attorney General, supra*, at p. 319.

The phrase "public confidence in the administration of justice and the effect of the incident or prosecution upon public order" clearly has two parts. The first is the need to maintain public confidence in the administration of justice. By focusing on the need to maintain public confidence in the administration of justice, the Committee wishes to emphasize how, in the exercise of prosecutorial discretion, the Attorney General and his or her agents are public servants, duty bound to keep the criminal justice system in touch with, and responsive to, the needs of the community as a whole. Prosecutorial discretion ought to be exercised in a manner consistent with the community's desire to have a justice system that protects them, through the apprehension and punishment of offenders, but does not oppress them, through heavy-handed prosecution of trivial matters.

The notion of public order is somewhat different than the need to maintain public confidence in the administration of justice. While the latter is concerned with the repute of the justice system, the former focuses on the impact of either the incident giving rise to the charge, or the particular decision to prosecute or not on the community itself. For example, public order may be enhanced by a prosecution which has the effect of deterring unlawful sexual activity in a public park, whether predatory or otherwise, of a sort that interferes with the right of the public to enjoy the park. Another clear example of the need to keep public order in mind when exercising prosecutorial discretion is s. 319 of the *Criminal Code*, which prohibits the communication in a public place of statements inciting hatred against an identifiable group, where such incitement is likely to lead to a breach of the peace: see *R.* v. *Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.). In short, those exercising prosecutorial discretion must be aware that some criminal offences, either by their inherent nature, or by the circumstances of their commission, interfere with the orderly conduct of community life much more directly, and more seriously, than others. Therefore, if all other things are equal, the greater the interference in orderly community life caused by the offence, the stronger the interest in prosecuting.

Alternatives to Prosecution

14. *The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the availability and efficacy of alternatives to prosecution.*

As stated above, the Committee's view is that the criminal law is a blunt instrument of social policy that ought to be used with restraint. The criminal law aims to achieve rehabilitation, specific deterrence, general deterrence, and the protection of society. However, there is no reason to think that the criminal law is the only method of achieving these socially desirable goals. Accordingly, it is clearly in the public interest to consider the existing alternatives to any given prosecution, and their efficacy, remembering that these alternatives may be able to deal more sensitively and comprehensively with the particular problem at hand, while at the same time meeting the goals of the criminal justice system.

There is evidence that the use of alternatives to prosecution has greatly affected the exercise of prosecutorial discretion in recent years. See, for example, J. Tombs and S. Moody, "Alternatives to Prosecution: The Public Interest Redefined", [1993] *Crim. L.R.* 356.

wherein the authors study prosecutorial practices in Scotland and conclude, at p. 367, as follows.

> The change over the last decade or so from a non prosecution rate of 8 per cent. at the time of our original study to one of 47 per cent in 1991 is indicative of much wider changes in the administration of justice. Procurator fiscals are now, somewhat paradoxically, making much greater use of their discretion not to prosecute although they operate within a more structured context than they did 10 years ago. A wider range of formal alternatives to prosecution is available to them in making decisions and this appears to have had a decisive influence.... There is ... little doubt that the process of change which has taken place over the last 10 years will continue and that this will articulate what prosecution in the public interest means.

Alternatives to prosecution may be many, and varied in nature. At their most informal, they can include a decision not to charge a young person caught committing a minor offence because it is known that the family will ensure that the young person appreciates the error of his or her ways. They may also include the most formal programs with established criteria for admission, and structured procedures to address such issues as restitution, compensation, victim/offender reconciliation, rehabilitation, or even alternatives to punishment. Many options in between these two examples may be available. For example, a mentally ill accused who has committed a relatively minor offence may be more appropriately channelled into proper treatment as necessary, rather than prosecuted.

The Committee has been provided with information on proposed or operative programs that may serve as alternatives to criminal prosecutions. These materials have been informative, and serve to demonstrate that there has been, and continues to be, a broad range of thought and effort directed toward designing alternatives to criminal prosecutions that will meet the needs served by such prosecutions. The Committee does not, however, see it as part of its mandate to evaluate alternative measures programs in existence, or those being proposed, beyond indicating that, indeed, many are praiseworthy, and many more are worthy of careful study on their own.

The Committee does, however, think it necessary to set out some general concerns it has with respect to structured alternatives to criminal prosecutions. First, the Committee is concerned that formal alternatives to criminal prosecutions not inadvertently become simply a method of "widening the net," or subjecting greater numbers of persons to the criminal process or something akin to it. Alternatives to criminal prosecutions must, in the Committee's view, be just that, alternatives. They must not be programs for those who would otherwise not be prosecuted. Again, the fundamental goals of the criminal justice system, namely, specific deterrence, general deterrence, rehabilitation, and protection of society, must be kept firmly in mind, and alternatives resorted to only where those goals need to be, and can be, advanced.

Second, the Committee is concerned that formal alternatives to prosecution be designed, implemented, and reviewed with due consideration for their cost-effectiveness relative to the criminal justice system they replace. In an era of limited resources, it is, in the Committee's view, necessary to ensure that formal programs run as an alternative to prosecution hold out some promise of reducing the overall cost to society of the administration of criminal justice. The Committee recognizes that cost cannot be the sole, or even necessarily the governing, indicator of an alternative program's suitability. For example, alternatives designed to meet the needs of native Canadians, such as are in operation in northern Ontario at present, may have advantages for the communities served that warrant any additional expenditure required.

Subject to the two foregoing concerns, therefore, the Committee generally endorses responsible and thoughtful efforts to devise, implement, and operate programs that achieve the aims of the criminal justice system equally or more effectively, in alternative ways. Indeed, the *Young Offenders Act,* R.S.C. 1985, c. Y-1 contains a statutory declaration that alternatives to prosecution should be considered. It is very important, however, for anyone exercising prosecutorial discretion, to consider closely both the availability of such alternatives, *and* their efficacy. The aims of the criminal justice system are simply too

important to the community to be lightly abandoned to untested or uncertain alternative programs.

Other Factors

15. *The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.*

In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, the Commissioners listed certain factors which might arise for consideration in deciding whether the public interest required a prosecution, and also listed certain factors which are to be eliminated from consideration in determining whether the public interest required a prosecution:[67]

> (b) the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:
>
> (i) the triviality of the alleged offence or that it is of a "technical" nature only;
>
> (ii) the age, physical health, mental health or special infirmity of an alleged offender or witness;
>
> (iii) the staleness of the alleged offence;
>
> (iv) the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);
>
> (v) the likely effect of a prosecution on public order and morale;
>
> (vi) the obsolescence or obscurity of the law;

[67] *Marshall Commission*, Recommendation 38, Vol. 1, at pp. 235-236.

(vii) whether the prosecution would be perceived as counter-productive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);

(viii) the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;

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

(x) whether the consequences of any resulting conviction would be unduly harsh or oppressive;

(xi) any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;

(xii) the attitude of the victim of the alleged offence to a prosecution;

(xiii) the likely length and expense of the trial;

(xiv) 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;

(xv) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

(xvi) the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice;

(c) the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:

(i) the alleged offender's race, religion, sex, national origin, political associations or beliefs;

(ii) the prosecutor's personal feelings concerning the victim or the alleged offender;

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

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

institution of criminal proceedings. Likewise, if there is a reasonable prospect of conviction, the public interest in the due enforcement of the criminal law will in most cases, without more, require that the matter be brought before the courts for a decision on the merits.

Some of the public interest factors set out above will arise for consideration more frequently than others in deciding whether a criminal prosecution should be undertaken. Among the public interest factors which will arise most frequently are:

(i) the triviality of the alleged offence or that it is of a technical nature only;
(ii) the age, physical health, mental health or special infirmity of an alleged offender or witness;
(iii) the prevalence of the alleged offence and any related need for deterrence.

Furthermore, it seems clear that public interest factors will vary with the charge under consideration. Included in the public interest factors is "(iii) the staleness of the alleged offence." Staleness is entitled to little or no weight, for example, where the offence alleged to have been committed is murder, a war crime, or any other serious offence. The staleness of the charge may carry more weight where the offence alleged to have been committed is a minor assault or an offence against property. Mere delay between the alleged commission of the offence and the laying of the charge does not automatically infringe the accused's right to a fair trial protected by ss. 7 and 11(d) of the *Charter*.[71]

The Committee is of the view that great care must be taken in relying upon the "obsolescence or obscurity of the law" in deciding not to institute a prosecution. The consideration of this factor must be strictly curtailed, for the reasons stated by Professor Edwards:

[71] R. v. L. (1991), 6 C.R. (4th) 1 (S.C.C.).

> Our system of criminal justice has never required that those who exercise the responsibilities of law enforcement, of prosecuting offenders, or of sitting in judgment upon their fellow citizens, should subscribe uncritically to the righteousness of all parts of the criminal law. Such a utopian view of the role of the police, Crown Attorneys and judges is neither humanly possible nor realistic, given the subjective nature of human values. At the same time, there is an obligation, accepted at the time of assuming office in each of these positions, to uphold the law as enacted by Parliament and the various provincial legislatures.[72]

Chief Justice Freedman made the same point forcefully in *R.* v. *Catagas* (1977), 38 C.C.C. (2d) 298 at 301 (Man. C.A.), when he stated:

> The Crown may not, by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.

See also *R.* v. *Morgentaler* (1988), 37 C.C.C. (3d) 449 at 481-483 (S.C.C.) where Chief Justice Dickson, for a unanimous Supreme Court on this point, held that it was improper to invite a jury to acquit simply on the basis that they thought the law under which the accused was prosecuted should not be applied.

With respect to item (xiii), the likely length and expense of the trial, the Committee notes that Crown counsel cannot refrain from fulfilling his or her duty to prosecute simply because of the cost. The administration of justice cannot be compromised by purely monetary concerns. However, it is certainly in the public interest that limited public resources be allocated responsibly. Therefore, a higher threshold test, such as a likelihood of conviction, or even a substantial likelihood of conviction, may properly be applied in, for example, complex fraud cases in which the trial will be lengthy and costly. Requiring a higher threshold test may, however, be unwarranted in an offence of serious violence, even if the trial promises to be lengthy.

---

[72] J.Ll.J. Edwards, "Criminal Law and its Enforcement in a Permissive Society" (1969-70), 12 *Crim. L.Q.* 417, at p. 420.

THE LAMER COMMISSION OF INQUIRY INTO THE PROCEEDINGS PERTAINING TO:

RONALD DALTON
GREGORY PARSONS
RANDY DRUKEN

REPORT AND ANNEXES

The Right Honourable Antonio Lamer,
P.C., C.C., C.D., L.L.D., D.U.

The Report of the Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons, Randy Druken may be obtained from:

Office of the Queen's Printer
P.O. Box 8700
St. John's, NL
A1B.4J6

Telephone: (709) 576-3649

ISBN: 1-55146-318-0 Report and Annexes
The Lamer Commission of Inquiry into the Proceedings Pertaining to:
Ronald Dalton
Gregory Parsons
Randy Druken

(d) Stay of Proceedings:

There are a number of ways in which a prosecution may be terminated other than by proceeding to a verdict. The Crown has a discretion as to which avenue to choose and this prosecutorial discretion, ordinarily, is not reviewable by the courts. The Crown may:

(1) Withdraw a charge at any time prior to a plea by the accused, or with the leave of the court, after a plea has been entered;
(2) Enter a stay of proceedings;
(3) Proceed with the trial but elect not to call any evidence or to stop calling further evidence, and asking the judge or jury to acquit.

The control of a prosecution, and the ability to terminate it as well as the ability to select the manner of termination is an important dimension of the Crown's *quasi-judicial* responsibilities. See *supra*, at pp. 134-7, and, particularly, the passage quoted from Wayne Gorman's article, at p. 136.

The avenues that the Crown selects in terminating a prosecution have different consequences and the choice will depend on the particular circumstances involved. The withdrawal of a charge might be most appropriate when the Crown disagrees with the police that reasonable and probable grounds exist, or where the Crown decides that there is no reasonable prospect of a conviction. The charges of attempting to obstruct justice should have been withdrawn, both because reasonable and probable grounds did not exist and because of the extraordinary nature and timing of these charges, *supra*, at p. 267.

I wish to focus on the decision of the Crown whether to enter a stay of proceedings or to obtain an acquittal by adducing no evidence. A stay of proceedings simply puts the charge on "hold". The proceedings may be recommenced at any time within a year, again, at the sole discretion of the Crown. If the proceedings are not recommenced within a year, they then are "deemed never to have been commenced".

There is a significant legal consequence flowing from which avenue has been chosen. If the accused is acquitted, he is immune from any future prosecution for the same conduct. After a stay has expired, the former accused may be charged with the same offence for the same conduct at any time. This makes the stay of proceedings a much easier choice for the Crown. There is "nothing to lose" by entering a stay so the Crown is relieved of the burden of having to assess the evidence and determine whether a subsequent prosecution is a realistic possibility.

But there is a downside for the accused. A stay of proceedings may leave an impression with the public that the charge is merely being "postponed" or "the

authorities", in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal.

The brief prepared by AIDWYC and submitted to me on the Systemic Phase of this inquiry had this to say about the Crown's power to stay proceedings:

> ... the privilege of the stay is such that the Crown never has to say it's sorry – or, for that matter, anything at all. Subject to the rarely exercised power to revive within one year, a stay permanently terminates a prosecution. ... Some empty phrases might accompany the entry of a stay – the invocation of an "ongoing investigation," "after careful consideration," the ever-handy "public interest" – but rarely anything of substance. The Crown, in short, never has to publicly justify its use of the power to stay proceedings.

The brief goes on to refer to the "grey-zone" message conveyed by a stay of proceedings:

> A stay, it is clear, is not an exoneration. There is no admission here of a misconceived or ill-executed prosecution. The defendant is left in a legal – and very public – limbo: no longer an accused but forever shrouded in a cloud of officially induced suspicion. This is a conscious and likely deliberate consequence of the Crown decision to enter a stay of proceedings. It preserves, if barely, the propriety of the initial prosecution and, simultaneously, indelibly tarnishes the defendant.

AIDWYC speaks largely from the perspective of an accused who has been wrongfully convicted. However, the validity of these observations extends to an accused who cannot be exonerated but for whom it is unreasonable to expect any future prosecution in relation to the charge in question.

Counsel for the DPP's Office took issue with any such view. She argued that the presumption of innocence prevails throughout the charging and the one-year period in which the stay is operative. Once that period expires, the accused is deemed never to have been charged so that:

> ... In this respect he is the same as any other person. The assertion that a Stay of Proceedings leaves a cloud of suspicion over a person is a specious argument that undermines the presumption of innocence. This position has no foundation in law and is arguably misleading.

With respect, this analysis is legally correct but practically unrealistic. For example, a person facing a charge of murder is also presumed innocent but is there not a cloud hanging over such an accused?

In contrast to a stay of proceedings a statement by the Crown, in open court, that it has no evidence to present often carries an implicit message that this person should not have been charged. Once the Crown has decided to prosecute (i.e. not to withdraw the charges laid by the police), the accused should be given an acquittal where that decision proves to be ill-founded.

Of course, there may be circumstances where a stay of proceedings is appropriate. In some cases, there may well be a reasonable expectation that the prosecution will be pursued in future.

Meanwhile, I recommend that the *Crown Policy Manual* of Newfoundland and Labrador be amended by replacing the subject: "Withdrawal of Charges, Staying Charges" with the following:

Termination of Proceedings

It is the prerogative of the Crown Attorney to withdraw charges, to enter a stay of proceedings or to call no (further) evidence and request an acquittal. This broad prosecutorial discretion is not ordinarily subject to judicial review, which imposes an event greater obligation on the Crown Attorney to ensure that it is exercised in a fair and principled manner. The following are guidelines to assist in achieving that goal:

1.(a) A **Withdrawal of the Charge** is appropriate where the Crown Attorney decides that;

(i) Reasonable and probable grounds did not exist to lay the charge;

(ii) There is no probability of a conviction; or,

(iii) It is not in the public interest to proceed with the charge.

(b) A **Stay of Proceedings** is appropriate where there is a reasonable likelihood of recommencement of the proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. It is not a basis to stay proceedings merely because a judge has made a ruling unfavourable to the Crown.

(c) It is appropriate for the Crown to commence the trial but to elect **To Call No Evidence**, and request an acquittal, where there is no probability of a conviction nor a reasonable likelihood of recommencement of the proceedings.

(d) Where the Crown has called evidence it is appropriate **To Call No Further Evidence**, and request an acquittal, where the Crown Attorney determines that the evidence is so manifestly unreliable that it would be dangerous to convict. This follows even though there may be some evidence on which the trial judge likely would deny a motion for a directed verdict.

2.(a) The Crown Attorney is encouraged to consult with the Senior Crown Attorney, when circumstances permit, in any case which raises a doubt about the proper course to follow.

(b) Such consultation is particularly desirable in relation to a major charge or where special circumstances exist. Such circumstances might include the prosecution of a public official such as a police officer.

(c) The Director of Public Prosecutions may issue further directions, from time to time, as to when such consultation is required.

3.(a) Wherever a Crown Attorney terminates a prosecution under this Policy, a written report shall be provided to the Senior Crown Attorney that summarizes the circumstances and reasons for the decision that was taken.

(b) Such reports shall be filed in the DPP's Office and made available to all

They are not binding but are merely to provide guidance. They may also form the basis for developing more specific policies in future.

4.(a) As a general practice, the basic reasons for exercising the discretion addressed in this policy, should be expressed in open court. Where a stay of proceedings is entered, the basic reasons should be provided to the accused, the police and the victim, in most cases.

(b) The public reasons provided for a stay of proceedings may be limited by the confidentiality of an ongoing investigation. Still, they should be articulated in the reasons provided to the Senior Crown Attorney.

(e) Post-script:

After this Report was completed, I learned that the *Crown Policy Manual* had been amended a few months earlier by adding a new "Topic 460" entitled "Stays/Withdrawals/Calling No Evidence". No attempt was made to integrate this with "Topic No. 455" entitled "Withdrawal of Charges, Stay of Charges" quoted *supra*, at p. 321, and there is considerable overlap. The new section still does not establish criteria for determining when and how proceedings should be terminated. Both the original policy and the recent addition should be replaced by the policy I recommended in the previous section.

The recently adopted policy refers to a "Commentary" which contains a discussion of stays of proceedings and raises some of the issues addressed in my recommendation. Such discussion papers cannot replace an integrated and coherent policy with clear criteria to guide in decision-making and render it more accountable. Indeed, the Preface to the *Crown Policy Manual* refers to "various other directives and memoranda" that outline administrative policies of the Public Prosecution Division, that "should be read in conjunction with this Manual".

This adoption of Topic No. 460, merely reinforces my earlier recommendation of the need for a comprehensive review and revision of the *Crown Policy Manual*.

(f) Conclusion:

The Report of the Second Investigation should have put an end to the prosecution of Randy Druken. The results should have been taken at face value, as they were by Assistant DPP, Bernard Coffey. A realistic assessment of the evidence, particularly with Mr. X out of the picture, should have led to the conclusion that there was no reasonable probability of a conviction and no reasonable prospect of the recommencement of proceedings. The Third Investigation appears to have been driven not by the police but by the DPP's Office and, in particular, Tom Mills, who played an increasing role, ultimately becoming the Director of Public Prosecutions and dealing directly with the police on this matter.