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<p><b>CHAPTER II – CHAPITRE II :</b></p> <p><b>The Decision to Prosecute Décision d’engager une poursuite</b></p>	<p>Readers are referred to the list of Related Documents at the end of this Policy for additional information.</p> <p>Les lecteurs peuvent se référer à la liste des documents connexes notés à la fin de cette politique pour information supplémentaire.</p>	

## PRE-CHARGE SCREENING

### 1. Introduction

New Brunswick employs a pre-charge screening, or charge approval process, that requires the Crown Prosecutor to review and, ordinarily, approve charges before the police or other investigative agency can lay the information. Pre-charge screening promotes fairness, efficiency, and objectivity in prosecutions by ensuring that only cases with a reasonable prospect of conviction and that are in the public interest proceed.

### 2. Pre-charge Screening

On completion of an investigation, where the police or other investigative agency is satisfied that there is sufficient evidence to lay an information, the police or other investigative agency will either proceed by way of alternative measures, where appropriate, or formulate a charge, or charges, based on its assessment of the case, and then forward a full report or court brief to the appropriate Public Prosecution Services office for a pre-charge screening. For the purposes of an investigative body investigating serious incidents under the Police Act, section 7 outlines the relationship and processes between the Public Prosecution Service and the investigative body.

Where the Crown Prosecutor receives a report or court brief from the police or other investigative agency and must decide whether to prosecute, the Crown Prosecutor shall conduct a two-part pre-charge screening, or charge approval process, consisting of an evidential test followed by a public interest test. This ensures that the Crown Prosecutor assesses the viability of the proposed charge and identifies any procedural issues. Where the proposed charge passes the evidential test, the Crown Prosecutor will apply the public interest test. Ordinarily, where the proposed charge passes both tests, the charge approval standard has been met and the Crown Prosecutor will proceed with a prosecution.

Where the proposed charge does not pass the evidential test or the public interest test, the Crown Prosecutor cannot proceed with a prosecution, regardless of the importance or seriousness of the proposed charge. Both the evidential test and the public interest test involve essential considerations. The Crown Prosecutor must apply both tests in deciding whether to prosecute.

#### 2.1 The Evidential Test

The Crown Prosecutor must be satisfied that there is evidence to provide a reasonable prospect of conviction against each alleged offender on each charge. Whether the evidence establishes a reasonable prospect of conviction is an objective determination the Crown Prosecutor makes by considering whether an impartial trier of fact properly directed in accordance with the law, is more likely

than not to convict the accused on the offence charged based on the evidence available. In applying the evidential test the Crown Prosecutor shall consider all material evidence. The Crown Prosecutor must consider and determine whether the evidence can be used and is reliable. The Crown Prosecutor must also consider what the defence case may consist of and how it is likely to affect the prosecution case. The Crown Prosecutor must draw on his or her experience to evaluate how strong the case is likely to be when presented in Court.

Whether or not the charge is approved, the Crown Prosecutor shall complete and maintain a copy of the Charge Approval Sheet, a sample of which is included in Appendix A. **When the charge is not approved, the Crown Prosecutor shall provide written reasons.** The Charge Approval Sheet is a privileged document that is not subject to disclosure.

## 2.2 The Public Interest Test

Where the proposed charge passes the evidential test, the Crown Prosecutor will then consider whether the public interest requires a prosecution.

Public interest factors that may affect the decision to prosecute usually depend on the nature of the offence or on the circumstances of the offender or the victim. Some factors may increase the need to prosecute while others may suggest that another course of action should be taken. The Crown Prosecutor shall carefully balance factors for and against prosecution. It follows that the more serious the offence, the less likely that the public interest will support a disposition other than prosecution.

The following lists of common public interest factors, both for and against prosecution, are not exhaustive. The application of relevant factors will depend on the facts in each case. A decision based on the public interest test does not simply result from adding up the number of factors on each side. The Crown Prosecutor must decide how important each factor is in the circumstances of each case and make an overall assessment based on its weight.

### 2.2.1 Factors That Support a Prosecution

The following factors support a prosecution:

- (a) the offence is serious, with conviction likely to result in a significant sentence;
- (b) a weapon was used or violence was threatened or used during the commission of the offence;
- (c) the offence was premeditated;
- (d) the offence was committed against a public official;
- (e) the accused allegedly committed the offence while under an order of the court;
- (f) the accused was in a position of authority or trust;
- (g) the offence was carried out by a group;
- (h) the accused was allegedly a ringleader or an organizer of the offence;
- (i) there is a marked difference between the actual or mental ages of the accused and the victim;
- (j) the victim was vulnerable, has been put in considerable fear or suffered personal attack, damage, or disturbance;
- (k) the offence was allegedly motivated by a form of discrimination against the victim's ethnic or national origin, gender identification, religious beliefs, sexual orientation, or political views or associations;
- (l) a successful prosecution facilitates entitlement to compensation, reparation, or forfeiture;
- (m) the criminal history of the accused is relevant to the present offence;

- (n) there are grounds for believing that the offence is likely to be continued or repeated, such as the accused having a history of recurring conduct;
- (o) although not serious in itself, the offence is widespread in the area where it was committed; and
- (p) where it is necessary to maintain public confidence in the government, courts, and the administration of justice.

### 2.2.2 Factors That Do Not Support a Prosecution

The following factors do not support a prosecution:

- (a) the offence is trivial or of a technical nature and would likely result in imposition by the court of a very small or nominal penalty;
- (b) the consequences of a conviction would be unduly harsh in relation to the seriousness of the offence;
- (c) the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by misjudgment;
- (d) a prosecution is likely to have an adverse effect on the victim's physical or mental health;
- (e) the advanced age or ill-health of the accused;
- (f) the degree of culpability of the accused is slight;
- (g) the length and expense of a trial;
- (h) the law is outdated or cannot be enforced on an equitable basis;
- (i) the likely adverse effect of a prosecution on public order and morals;
- (j) there has been a long delay between the offence taking place and the time of the charging decision, unless the offence is serious, the delay has been caused in part by the accused, the offence has only recently come to light, or the complexity of the offence has resulted in a lengthy investigation; and
- (k) details may be made public that could harm sources of information, international relations, or national security.

### 2.2.3 Factors That Cannot Be Considered

The following factors cannot be considered:

- (a) the Crown Prosecutor's personal feelings concerning the ethnic or national origin, gender identification, religious beliefs, sexual orientation, or political views or associations of the accused or the victim
- (b) the Crown Prosecutor's personal or professional relationship with counsel for the accused;
- (c) any partisan political advantage or disadvantage which might flow from the decision;
- (d) the possible adverse effect on the personal or professional circumstances of those responsible for the charging decision; and
- (e) any known or preconceived views held by the judge who is expected to hear the case.

### **3. Determining the Appropriate Charge**

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#### **3.1 Choice of Charges**

Where more than one charge may apply, the Crown Prosecutor will choose the most appropriate charge(s) to reflect the circumstances of the case. The Crown Prosecutor will not lay two charges for the sole purpose of being able to negotiate a guilty plea.

#### **3.2 Alternative Charging**

Where two or more proposed charges meet the charge approval standard, Crown Prosecutor shall proceed with all appropriate charges and then withdraw any alternative charge(s) where there has been a finding of guilt on the other charge(s). In such circumstances the following procedure shall be followed:

1. The Crown Prosecutor shall approve all appropriate charges and ensure that they are all laid in one Information.
2. Where the accused enters a guilty plea to one of more of the counts, the Crown Prosecutor shall proceed to sentencing as soon as practicable, and once sentencing has been completed, proceed to withdraw any alternative counts.
3. Where the accused enters a not guilty plea and a trial is held, the Crown Prosecutor shall ask the court to adjudicate on all counts.
4. Where the court finds the accused guilty in respect of any count, the Crown Prosecutor shall ask the court to enter a conviction on the most serious offence and a conditional judicial stay on the lesser offence. The stay shall be conditional on the final disposition of the charge for which the conviction was entered, such that the stay will dissolve if the accused successfully appeals the conviction, but will become permanent if an appeal taken by the accused is dismissed or if the accused does not appeal within the time prescribed for an appeal to be taken.
5. Where the accused appeals the conviction, the Crown Prosecutor shall ensure that the accused is served with a notice advising that, should the appeal be successful, the Crown will seek to have a conviction entered on the charge that was stayed. The Crown Prosecutor shall ensure that the accused is served with this notice before the date of the appeal hearing or, if that is not possible, at the appeal hearing.
6. Where the accused successfully appeals the conviction, the Crown Prosecutor shall ask the court to enter a conviction on the charge that was conditionally stayed, and shall advise the court that the onus is on the accused to establish that a conviction should not be entered.

#### **3.3 Crown Election – Dual Procedure Offences**

Where the offence is a dual procedure offence, the Crown Prosecutor must elect whether to proceed by summary conviction or indictment. The Crown Prosecutor should proceed by summary conviction in the absence of reasons that warrant proceeding by indictment.

Reasons that may warrant proceeding by indictment include serious factual situations, situations where an accused has a lengthy criminal record, and situations where the accused has previously committed the same or a similar offence.

Ordinarily, the Crown Prosecutor should not proceed by indictment solely to overcome the summary conviction limitation period. Proceeding by indictment in order to overcome a limitation period may be appropriate in the following circumstances:

- (a) the offence was not disclosed, or the accused was not identified in time for a complete investigation before the expiration of the limitation period;
- (b) the investigative agency acted with due diligence, but the investigation continued beyond the limitation period because of the complexity of the case; or

(c) the accused contributed significantly to the delay.

#### **4. Application of the Policy to Provincial Offences**

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In prosecutions of public provincial offences, Crown Prosecutor shall apply the policies in this Manual with such modifications as the circumstances require.

The Crown Prosecutor does not prosecute the following matters:

- (a) offences under private provincial acts such as the *Medical Act* or the *Law Society Act*; or
- (b) violations of municipal by-laws made under the provisions of provincial legislation.

#### **5. Laying the Information**

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Subject to section 7 below, where the police or other investigative agency and the Crown Prosecutor reviewing the charge agree that the charge should be laid, the police or other investigative agency will lay the information.

Subject to certain provisions of the *Criminal Code* that require the consent of the Attorney General to institute proceedings, anyone, who on reasonable grounds, believes that a person has committed an offence may lay an information in writing and under oath before a provincial court judge. This absolute right in law to lay an information includes situations where a police officer or other investigative agent lays a charge without first submitting it for pre-charge screening or obtaining approval from a Crown Prosecutor. In such circumstances the Crown will consider the matter as if it were a private prosecution.

#### **6. Resolution of Disagreements or Disputes Concerning Pre-charge Screening**

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##### **6.1 Review of Pre-charge Screening Decision**

Where an interested party disputes the Crown Prosecutor's decision to not lay a charge, he or she may apply, by written application, to the Regional Director or the Executive Director, as the case may be, to have the Crown Prosecutor's decision reviewed to determine whether it was reasonable and well founded at law and on the facts, and was made in accordance with this Manual.

Where appropriate, the Regional Director or the Executive Director, as the case may be, will review the Crown Prosecutor's pre-charge screening decision to determine whether it was reasonable and well founded, and was made in accordance with this Manual. The Regional Director or the Executive Director, as the case may be, will then advise the interested party accordingly.

Where appropriate, the Regional Director or the Executive Director, as the case may be, may discuss the matter with the senior police officer or senior investigator involved as part of the review.

In circumstances where an interested party disputes a pre-charge decision made by the Regional Director or the Executive Director, this section does not apply. In such circumstances, the interested party may dispute the pre-charge decision by proceeding as set out in section 6.2 below.

##### **6.2 Resolution of a Dispute Concerning a Final Decision on Pre-charge Screening**

Where the interested party is not satisfied with a decision made by the Regional Director or the Executive Director, he or she may apply, by written application, to the Director of Public Prosecutions to have the decision of the Regional Director or the Executive Director reviewed to determine whether it was properly made. A properly made decision is one that is not made arbitrarily or for improper purposes, but that is made in good faith, in consideration of the relevant factors, and in accordance with this Manual.

Where the Director of Public Prosecutions receives an application for review, he or she shall assign the file to an appropriate senior Crown Prosecutor to review. Where the reviewing Crown Prosecutor opines

that the pre-charge screening was conducted properly, whether or not the reviewing Crown Prosecutor would have arrived at the same conclusion, he or she shall so advise the Director of Public Prosecutions. The Director of Public Prosecutions shall advise the interested party accordingly.

Where the reviewing Crown Prosecutor opines that the pre-charge screening was improperly conducted, he or she shall advise the Director of Public Prosecutions, who shall address the situation as he or she sees fit.

### **6.3 The Interim Charge Approval Standard**

Where the police or other investigative agency propose a charge with respect to an alleged offender who is in custody in relation to the proposed charge, the offender presents a substantial bail risk, and not all the evidence is available at the time the charge is presented, the Crown Prosecutor may apply the Interim Charge Approval Standard. A charge may only be approved using the Interim Charge Approval Standard where the Crown Prosecutor is satisfied that:

1. the entirety of the evidence is currently unavailable;
2. there are reasonable grounds for believing that further evidence will become available within a reasonable period;
3. the seriousness or the circumstances of the case justifies the making of an immediate charging decision; and
4. there are continuing substantial grounds to either object to the release of the alleged offender or to require strict conditions on the release of the alleged offender in accordance with the Judicial Interim Release provisions in Part XVI of the Criminal Code.

Both the evidential test and the public interest test must be satisfied to approve a charge under the Interim Charge Approval Standard, and the Crown Prosecutor must consider the evidence then available. This evidence may take any form so long as the Crown Prosecutor is satisfied that:

1. it is relevant; and
2. it is capable of being put into an admissible format for presentation in court.

### **Reviewing an Interim Charge Approval**

A decision to charge under the Interim Charge Approval Standard must be kept under review. The evidence must be regularly reassessed to ensure that the charge is still appropriate until such time as the Pre-Charge Screening process is applied in full. That must be done as soon as is reasonably practicable.

## **7. Pre-Charge Advice and Process in Regard to Criminal Investigations of Serious Incidents of Police Officers by an Investigative Body**

7.1 The purpose of this section is to both recognize the independence of an investigative body with the power to investigate serious incidents under the New Brunswick *Police Act* (the Nova Scotia Serious Incident Response Team (“SiRT”) or other body under the *Police Act*) (hereinafter “investigative body”) and to avoid any real or perceived perception of bias; for example, that the officer being investigated or prosecuted might receive preferential treatment because of a working relationship they may have with a particular Crown Prosecutor or Crown Prosecutors’ Office. There is a goal of mutual respect and collaboration, while recognizing the independence and separate roles of Crown Prosecutors and an investigative body.

7.2 For the purpose of Section 7, Section 2 of this policy shall not apply to an investigative body as defined under the New Brunswick Police Act. To maintain the independence of an investigative body to lay an information, at the conclusion of an investigation or if such circumstances similar to those identified in subsection 6.3 exist, the head of an investigative body, if satisfied there is sufficient and compelling evidence, may lay an information in Court without prior approval of a Crown Prosecutor, unless prior consent of the Attorney General is required by the Criminal Code or other statute, upon following the procedures and process as outlined in this section.

7.3 The investigative body investigations will be supported by Specialized Prosecutions. The investigative body may seek advice and consult on various aspects of its investigation, including pre- and post-charge, as necessary and required.

7.4 Prior to laying an information, the head of an investigative body will refer the matter to the Director of Specialized Prosecutions to ensure Specialized Prosecutions are provided an opportunity to assign the matter to a Crown Prosecutor with the requisite experience and capacity, to ensure these matters are appropriately managed and to ensure Specialized Prosecutions has an opportunity to review the matter.

7.5 Any pre- or post-charge advice requested will be provided by a member of Specialized Prosecutions or by a Crown Prosecutor from a region other than where the officer being investigated works.

7.6 The referral referenced in subsection 7.4 should include a report containing an overview of the investigation, the findings, a list of pending charges and a summary or assessment of the evidence relied upon, including, but not limited to :

- the number of witnesses
- nature of evidence from scene
- use of video/wiretap/digital or cyber evidence
- supporting documents
- expert witnesses
- such other evidence which will assist in the determination of the complexity of the matter.

7.7 Depending on the nature and complexity of the investigation, the head of the investigative body may consult with Specialized Prosecutions to determine the length of time required to review the matter prior to proceeding. These matters will be given priority by Specialized Prosecutions.

7.8 Once a matter is referred from the investigative body to Specialized Prosecutions for assignment and review, and the assigned Crown Prosecutor has had a reasonable amount of time to review the file and respond to any requests from the investigative body, or to make recommendations, the head of an investigative body may proceed with laying an information in Court should they deem it appropriate. In all cases, the head of the investigative body will provide reasonable notice of its intention to lay an information to Specialized Prosecutions.

7.9 Upon receipt and review of the final investigative body's file, should the Crown Prosecutor determine that further investigation is necessary to sustain, strengthen the prosecution, or clarify facts, the Crown Prosecutor may request that further investigation be undertaken, which may be undertaken at the discretion of the head of the investigative body.

7.10 If after consultations between the Crown Prosecutor and the head of the investigative body pursuant to sub-paragraphs 7.4 to 7.9, the Crown Prosecutor determines there is no reasonable prospect of conviction or that the matter should not be prosecuted as it is not in the public interest, the Crown Prosecutor shall seek the approval of the Director of Specialized Prosecutions to withdraw the information and shall provide prior notice of such to the head of the investigative body.

7.11 Should the Director of Specialized Prosecutions grant approval to withdraw the information, the head of the investigative body shall be provided reasonable notice of same.

7.12 Should the head of the investigative body disagree with a decision to withdraw the information, the review process as outlined in Section 6, the “Resolution of Disagreements or Disputes Concerning Pre-charge Screening”, above shall apply noting, however, the pre-charge screening references and provisions in Paragraphs 6.1 and 6.2 are not applicable to investigations pursuant to Section 7.

#### Related Documents

Policy 9	Alternative Measures
Policy 12	Proceeds of Crime
Policy 49	Private Prosecutions