

## **ATTORNEY GENERAL SUPPLEMENTAL POLICY**

### **SPOUSAL/PARTNER VIOLENCE**

#### **INTRODUCTION**

Spousal/partner violence is a prevalent and serious social problem and any such violence shall be prosecuted with vigour in accordance with the Attorney General's standard test for all criminal prosecutions as set out in Part 2 of the *Public Prosecutions' Operations Manual*.

"Spousal/partner violence" is any and all forms of violence or abusive behaviour between persons who are or who have been involved in a personal relationship. "Personal relationship" is defined for the purposes of this guideline as a relationship between persons who are or who have been legally married, who are or who have been in a common law relationship, or who are or who have been dating. Violence within a personal relationship includes but is not necessarily limited to sexual and physical assault, the threat of violence to person or property, intimidation and criminal harassment by a spouse/partner against the other.

The purpose of this guideline is to assist Crown prosecutors with their responsibilities when dealing with spousal/partner violence prosecutions. This guideline statement is intended to reflect the unique, serious and emotionally charged nature of spousal/partner violence and the destructive effect of the cycle of violence. Public Prosecution Services recognizes the need for a community-based multi-disciplinary response to spousal/partner violence.

#### **1. ARRAIGNMENT AND BAIL**

- (a) Where an accused is brought to court in custody:
- the Crown prosecutor shall, in appropriate cases, make representations in support of a request that the accused not be released on bail. The appropriate case for such representations will be determined by the Crown prosecutor considering the information of the police officers with respect to the following areas of concern:
1. the history of violence or threats of violence by the accused against the victim;
  2. the history of violence or threats of violence by the accused against others;
  3. the nature of the offence, the degree of violence or threats of violence;
  4. whether the victim fears further violence from the accused;
  5. the presence, use or threat of use of weapons;

6. the involvement of drugs or alcohol;
7. the mental health status of the accused;
8. the presence of children during the alleged violence;
9. the concerns of the victim with specific attention to concerns about the likelihood of the accused obeying any terms of release;
10. the criminal record of the accused;
11. court orders relating to custody and access, including protection orders issued pursuant to the *Family Services Act*;
12. such other areas of concern that the Crown prosecutor deems relevant to the particular case.

See: **R. v. E.M.B.**, [2000] A.J. No. 91 (AltaQB)

- (b) In cases other than those described in paragraph 1(a), the Crown prosecutor shall make representations in support of a request that the accused, while on bail, be subject to appropriate conditions including a “no contact” condition. The appropriate case for such representations shall be determined by the Crown prosecutor considering the information of the police officers with respect to the same areas of concern as set out in paragraph 1(a).
- (c) Recognizing that victims’ willing participation in the prosecution diminishes as time elapses between the date of the alleged offence and the date of trial, the Crown prosecutor shall make all reasonable efforts to emphasize to the court the need for an early court date specifically due to the fact that spousal/partner violence is alleged. Requests for adjournment by the defence should be considered with caution and shall be opposed when the requests appear to be frivolous or designed to unduly delay the proceedings.
- (d) In the interests of maintaining the victim’s willing participation in the prosecution, the Crown prosecutor shall ensure that an early referral is made to victim services.
- (e) If an accused is released on bail and there is a breach of any of the conditions, a request shall be made to the court that bail be revoked and that the accused be detained in custody relying on the reverse onus provisions of the *Criminal Code*. Further, the Crown prosecutor shall prosecute without delay all violations of court orders intended to ensure the safety of the victim.
- (f) Where the victim initiates a request to vary a “no contact” condition, the Crown prosecutor should consider all the circumstances of the request. Where appropriate and in the interests of justice to do so, the Crown prosecutor may facilitate the placing of the request to vary the undertaking on the court docket. In all cases, the victim shall describe on the record all of the circumstances of the request.

## 2. POST-CHARGE DIVERSION/ALTERNATIVE MEASURES

- (a) In exceptional cases, where a review of the risk factors outlined in paragraph 1(a) indicates a low risk of future violence and the offence did not result in bodily harm, the Crown prosecutor may refer a case for alternative measures consideration after consultation and agreement with the Regional Crown prosecutor.  
**See also** Director of Public Prosecutions Guideline Directive on Post-Charge Alternative Measures
- (b) Consideration should be given to requesting conditions of release before making a referral for diversion.

## 3. TRIAL

- (a) The Crown prosecutor will provide an opportunity to the victim and other witnesses to meet with the Crown prosecutor prior to the trial.
- (b) In the event that the victim requests that a prosecution be discontinued, the Crown prosecutor shall consider the views and concerns of the victim in assessing the public interest in continuing the prosecution. However, in view of the societal interest in addressing the problem of spousal/partner violence, the victim's concerns alone are not a sufficient basis upon which to discontinue a prosecution of spousal/partner violence.
- (c) Experience demonstrates that victims often recant or refuse to testify in cases of spousal/partner violence. This factor alone is not sufficient to discontinue a prosecution. The Crown prosecutor, in such circumstances, should consider the following:
  - 1. request the police to conduct inquiries into the background of the recantation/refusal to determine its cause;
  - 2. instruct the police to take a statement from the victim concerning the recantation/refusal;
  - 3. advise victim services or other support services that might assist during the court process;
  - 4. attempt to meet with the victim, in the presence of a police officer and/or victim services, to discuss the reasons for the recantation/refusal to testify;
  - 5. assess the strength of the prosecution's case and the likelihood of conviction in light of the recantation/refusal with particular attention to the Supreme Court of Canada decision in **R. v. K.G.B.**, [1993] S.C.J. No. 22; the use of this decision in appropriate cases may allow the Crown prosecutor to use the victim's original statement to police as evidence in court;

6. consider the availability of other evidence;
  7. when a victim recants on the witness stand, the Crown prosecutor should in appropriate cases invoke the provisions of section 9(2) of the *Canada Evidence Act*;
  8. see also paragraph 4 relating to the applicability of s.810 of the *Criminal Code*.
- (d) Where a victim fails to appear in court in response to a subpoena, the Crown prosecutor should take such steps as in the opinion of the Crown prosecutor are necessary to ensure that the Crown retains control and appears to retain control over the prosecution. It is of paramount importance that no one, particularly the victim and/or the accused, perceives that the criminal process can be frustrated by the failure of the victim to respond to a subpoena. Where the victim fails to respond to a subpoena, the Crown prosecutor shall consider the following options:
1. request an adjournment;
  2. request a warrant and, where appropriate, request that it be held for sufficient time to determine the reason the victim failed to appear. Obtaining a warrant is not intended to punish the victim for being reluctant to testify, but rather as a means of keeping the prosecution alive in the hope of protecting the victim in the short and long term;
  3. enter a stay of proceedings (refer to the Director of Public Prosecutions Guideline Directive on Stay of Proceedings in the Public Prosecutions' Operations Manual);
  4. in the event that the Crown's request for an adjournment is not granted, offer no evidence resulting in a dismissal of the Information.

#### **4. SECTION 810 APPLICATIONS**

Where there is insufficient evidence or it is determined not to be in the public interest to lay a criminal charge or to continue a prosecution, the Crown prosecutor should, if there is evidence that the victim fears the accused on reasonable grounds, consider an application pursuant to section 810 of the *Criminal Code*. See also paragraph 3(c) in this guideline relating to victims recanting or refusing to testify.

#### **5. SENTENCING**

- (a) Section 718.2(a)(ii) of the *Criminal Code* stipulates that a court that imposes a sentence shall take into consideration as an aggravating circumstance evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner.

- (b) The impact of a crime on a victim is a relevant and important sentencing consideration. Unless the Crown prosecutor is aware that it has already been done, the Crown prosecutor shall inform the victim or request that the investigating police force inform the victim that information regarding the impact of the crime on the victim provided to the police or the Crown prosecutor may be submitted to the court by the Crown prosecutor.
- (c) The Crown prosecutor shall ensure that the victim knows that a victim impact statement may be made, how to make it and the possible consequences of making it. It should be stressed that this is a voluntary procedure and that if the victim does not wish to provide such a statement, this can be indicated to the Crown prosecutor who can so advise the court.
- (d) Section 722(1) of the *Criminal Code* provides for the following:
- 722(1)** For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.
- (e) Section 722.2 of the *Criminal Code* provides for the following:
- 722.2 (1)** As soon as practicable after a finding of guilt and in any event before imposing sentence, the court shall inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim or victims have been advised of the opportunity to prepare a statement referred to in subsection 722(1).
- (2)** On application of the prosecutor or a victim or on its own motion, the court may adjourn the proceedings to permit the victim to prepare a statement referred to in subsection 722(1) or to present evidence in accordance with subsection 722(3), if the court is satisfied that the adjournment would not interfere with the proper administration of justice.
- (f) In all cases of spousal/partner violence, the Crown prosecutor shall request a victim impact statement through the court unless the victim has expressly indicated that she or he does not wish to prepare a statement. This will ensure, in cases where the victim's wishes are not known, an automatic referral to the Victim Services Branch of the Department of Public Safety.

The Crown prosecutor should be sensitive to the fact that some victims of spousal/partner violence may need time to reflect on their decision whether to prepare a statement and that they may not feel comfortable indicating their wishes in open court or in the presence of the accused.

**See also** paragraph 7 in this guideline dealing with offenders deemed to be “not criminally responsible”.

- (g) At the time of sentencing of the accused, sentences should be sought which do not allow the domestic nature of the relationship between the victim and the offender to mitigate the penalty to be imposed. At the same time, sentences should be sought which will address with some degree of creativity the personal aspects and the rehabilitative prospects, if any, of the relationship between the victim and the offender.
- (h) Where the Crown prosecutor is seeking a term of incarceration, the Crown prosecutor should consider asking the sentencing judge to endorse the warrant of committal with a recommendation that the offender receive treatment related to spousal/partner violence while incarcerated, subject to program availability.
- (i) Where the Crown prosecutor is seeking a term of incarceration of two years or less, the Crown prosecutor should consider recommending that a period of probation with appropriate conditions, including treatment related to spousal/partner violence, subject to program availability, be imposed in addition to the period of incarceration.
- (j) In cases of spousal/partner violence, joint recommendations for conditional sentences shall not be made. However, given the complexity associated with spousal/partner violence offences, Crown prosecutors may, upon consultation with their Regional Crown, make such a recommendation on sentencing having regard to the risk factors listed in paragraph 1(a).

## **6. FIREARMS PROHIBITION ORDERS**

- (a) Section 109(1)(a) of the *Criminal Code* provides that upon conviction or discharge for an indictable offence during the commission of which violence or the threat of violence was used and the offence is punishable by a maximum of 10 years imprisonment, even though a firearm was not used, or the offence is one of criminal harassment (s.264), the court shall make a firearms prohibition order, the length of which is determined in accordance with section 109(1)(b).
- (b) In other cases where violence was used or threatened, even though the offence is not punishable by up to 10 years imprisonment, or where the offence involved firearms, the judge has a discretion to make a prohibition order under

section 110(1) of the *Criminal Code*. In appropriate circumstances the Crown prosecutor should request such orders.

**See also** section 491 of the *Criminal Code* (forfeiture of weapons used in the commission of an offence).

#### **7. SECTION 672.34 “NOT CRIMINALLY RESPONSIBLE” (NCR)**

In the event a matter is referred for disposition to the Review Board pursuant to section 672 of the *Criminal Code*, Crown prosecutors shall request victim impact statements in court prior to the court referral to the Review Board. This will facilitate the immediate referral to the Victim Services Branch of the Department of Public Safety to make contact directly with the victim for the preparation of the statement in time to meet the 45 day time limit for a disposition hearing by the Review Board.

**See** section 672.5(14) *Criminal Code*

(Original signed by)

\_\_\_\_\_  
Honourable Bradley Green, Q.C.  
Attorney General of New Brunswick

(2 May 2006)

\_\_\_\_\_  
Date