Criminal Law and the Elderly: The Prosecution's Perspective in Ontario

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I. Purpose

The purpose of this paper is to outline policy development and implementation for the Criminal Law Division in Ontario. More specifically it will focus on policies pertaining to elder abuse that assist Crown counsel in their day-to-day practice. Finally, the paper will address best practices for Assistant Crown Attorneys in prosecuting elder abuse cases along with offering some practical suggestions as to how the practitioner can assist their own client in private practice if they believe a criminal offence has been committed.

II. Criminal Law Division and the Crown Policy Manual

The primary function of the Criminal Law Division is to represent the Crown in Ontario and to provide prosecutorial services for criminal offences and any other federal or provincial offences as may be required from time to time. In carrying out this function, the Crown prosecutor, by both common law and statutory authority, acts as the Attorney General's agent and exercises the discretionary powers inherent in that role.

The Criminal Law Policy Branch (herein referred to as the Branch) is part of the Criminal Law Division (CLD) in the Ministry of the Attorney General (MAG). As such, it is responsible for providing assistance and support, through the provision of legal, policy and strategic advice, as required.

A primary function of the Branch is to provide policy, practical and legal advice to individual Crown prosecutors with regards to the day-to-day exercise of Crown discretion. Branch counsel are available to consult with front-line prosecutors on a day-to-day basis for policy issues, as required.

The Branch is responsible for the creation of the Ontario Crown Policy Manual (herein referred to as simply "the Manual"). The Manual is a comprehensive compilation of all prosecution policies, directives and guidelines relating to the exercise of discretion by Crown counsel. The purpose of the Manual is to provide Crown counsel with direction about their role in conducting prosecutions and appeals and is divided into three components: policies, practice memoranda (PMs) and confidential legal memoranda (CLMS).

Policies are issued by the Attorney General and are publicly available on the Attorney General's website. They provide brief and clear statements of principle on important areas of Crown practice and discretion.

In contrast, PMs and CLMs are issued by the Assistant Deputy Attorney General (Criminal Law Division). PMs provide specific policy direction and detailed legal and practical guidance to Crown counsel on a variety of issues and are publicly available upon request. CLMs provide confidential legal advice and litigation support and are not available to anyone outside of the Criminal Law Division.

The Criminal Law Policy Branch must also be vigilant in their efforts to keep the Crown Policy Manual up to date, taking into account:

- changes in the law, through legislation or the common law
- recommendations of inquests/inquiries
- changes in the social environment that would have an impact on a Directive or Guideline.

The Crown Policy Manual was first issued in 1994. It was then updated and re-released on March 31st, 2006. Prior to 1994, policy guidance was provided to Crown Counsel through directives which were occasionally issued by the Attorney General or his designate, but most often issued by the Assistant Deputy Attorney General.

The Branch is responsible for ensuring that Crown prosecutors are kept up to date on any legislative developments affecting the conduct of criminal prosecutions or other prosecutions over which they have general carriage. This is especially pertinent in relation to changes made to the *Criminal Code*, *Canada Evidence Act*, *Youth Criminal Justice Act* but may also involve other federal or provincial legislation that may affect the activities of a Crown prosecutor

III. Elder Abuse Prosecutions

Assistant Crown Attorneys prosecute various forms of elder abuse, including physical abuse (which can manifest itself in a family context or through institutional abuse) or via financial abuse (abuse of Power of Attorney and fraud schemes specifically directed at seniors). Crown Attorneys are assisted in conducting these types of prosecutions by various policies within the Crown Policy Manual that provide both practical and legal advice.

Assistant Crown Attorneys are given formal direction with regards to the prosecution of elder abuse cases in the following Practice Memoranda:

- Spouse/Partner Offences
- Victims of Crime
- Witnesses

- Highlights of Bill C-2 – Protection of Children and Other Vulnerable Persons – Amendments to the Criminal Code and Canada Evidence Act
- Victims of Crime: Access to Information and Services Communication and Assignment of Cases
- Victims of Crime: Victims/Witnesses With Special Needs

In particular, the Victims of Crime Practice Memorandum explicitly defines elderly victims as "special needs victim/witnesses." "Special needs victim/witnesses" are in turn defined as follows:

> "'Special needs victims/witnesses'" are those individuals who, because of age, or any impairment of an intellectual, emotional, physical or sensory nature, are unable without assistance to fully access the criminal justice system, or understand or be understood by the participants in the system, including anyone who requires assistance in order that the court obtain a full and candid account of the events in question."

This Practice Memorandum notes that these witnesses should be accorded additional prosecutorial measures. One such measure suggested is a system of early intervention in these cases. It is recommended that a system be established to identify cases with vulnerable victims as well as early assignment of Crown counsel to these prosecutions. This Practice Memorandum also outlines the equality rights of all victims, especially those with mental or physical disabilities.

Other Practice Memoranda provide direction on a wide range of topics designed to enhance the success of these types of prosecutions. This includes advice on interview techniques for vulnerable witnesses as well as guidance in bringing applications to apply for various testimonial aids such as:

i) a court support person;
ii) testimony out of court or behind a screen;
iii) and prohibiting cross-examination by an accused of a vulnerable witness as provided for the by the *Criminal Code*.

IV. Bill C-2 – Tools for Prosecutors:

The passage of Bill C-2 vastly expanded the *Criminal Code*'s testimonial aid provisions in the form of protections for adult victims. This bill was proclaimed in various stages but all portions were in effect as of 2006. The substance of this bill has provided a vast array of tools for prosecutors.

The Practice Memorandum listed above not only outlines the changes in the law but also makes recommendations as to how the new *Criminal Code* provisions should be

employed in prosecutions involving vulnerable victims. Reproduced below are the new provisions of Bill C-2 that would apply to prosecutions involving elderly victims.

S. 486.1(1) of the *Criminal Code* (the old s. 486(1.2)) provides for the presence of a support person where a witness is under 18 or has a physical or mental disability. More recently, the test has changed from proscribing a discretionary requirement to a mandatory one – the Court "shall" make the order "unless … the order would interfere with the proper administration of justice." Perhaps even more dramatic is the change to s. 486.1(2) (the old s. 486(1)) considering that it now allows the section to apply to any witness in any proceeding. The test is for this section is discretionary -- the court may make the order "where necessary to obtain a full and candid account." The mandatory factors to consider include:

- age of the witness
- whether the witness has mental or physical disability
- nature of the offence
- nature of the relationship between the witness and the accused
- any other circumstances that the judge or justice considers relevant

The timing of the application is flexible --- it may be made before or during the proceedings to the presiding justice or judge. One limitation is that a witness cannot be a support person unless it is "necessary for the administration of justice." The trial judge may then order that the support person and witness not communicate with each other while the latter testifies. Finally a new provision has been added in subsection (6) that "no adverse inference may be drawn from the fact that an order is, or is not, made under this section."

Another testimonial aid provision has been created in s. 486.2(1) (the old s. 486(2.1)) which permits a witness to testify outside of the courtroom or behind a screen. This provision, along with the permitted use of a support person, has an obvious benefit where an elderly victim may be fearful of their attacker or the accused is a family member (often a child) that they would have difficulty confronting directly. This section permits a witness to rely on this section where he or she is under the age of 18 or has a physical or mental disability. It now applies in "any proceedings" (not just enumerated/lengthy list) and removes the word "complainant" while leaving in the word "witness" (which includes complainant/victim). The test is changed from discretionary ("may" make the order without specifying upon what conditions) to mandatory ("shall" make the order "unless … the order would interfere with the proper administration of justice").

A completely new component of this provision is contained in s. 486.2(2) which now permits that any witness in any proceeding may make an application to testify outside of the courtroom or behind a screen. However, this is a discretionary test - the court may make the order "where necessary to obtain a full and candid account." The section instructs that the Court should take into account same factors as listed for consideration of a support person.

The prohibitions in the *Criminal Code* pertaining to cross-examination by an accused have also been modified. This section is beneficial in that it would preclude an elderly victim potentially being cross-examined by the caregiver or child that had abused them. Section. 486.3 now applies to any witness in any proceeding on application of any witness. The trial judge should appoint counsel for the cross-examination if it is deemed that it is not necessary for the accused to cross-examine the witness to obtain a full and candid account. The factors to consider are also the same as those set out in s. 486.1(3). Again, the timing of the application is flexible - it may be made either before or during the proceedings to the presiding justice or judge.

A final evidentiary provision revised by Bill C-2 that will be particularly beneficial in elder abuse prosecutions is s. 715.2 which permits a police video-recorded interview to be admitted into evidence in court proceedings. This section stipulates that where a victim or witness has a mental or physical disability that may influence their ability to communicate evidence, the videotaped interview is admissible if the criteria are met unless the admission of the video recording would interfere with the proper administration of justice. This section now applies to any proceedings rather than just to particular enumerated offences. The judge or justice retains the discretion to prohibit any other use of the video recordings in 715.1 or 715.2.

V: The Prosecution: Special Considerations

When conducting an elder abuse prosecution there are additional measures that can be taken by Crown counsel to ensure that the elderly victim is more comfortable with the process and to ensure a more effective prosecution. Crown Attorney's Offices in Ontario have instituted a Case Management Protocol, which has resulted in dedicated screening teams. As a result of these teams, elder abuse cases can be identified and assigned at an earlier stage.

There are additional steps that the assigned Crown can then take, including the preliminary step of conducting an introductory meeting well before the trial date. A best practice would be to conduct multiple interviews. There are in fact multiple benefits to this practice. An early interview with their assigned Crown will alleviate some of the stress associated with the court process. It is a good opportunity for the elderly complainant to get to know their Crown and ask any questions they may have about what to expect in court. Multiple interviews are necessary to ensure vulnerable witnesses become more comfortable with both the court process and the Assistant Crown Attorney prosecuting their case.

However, conducting multiple interviews may also carry an additional benefit that could determine the success of the prosecution itself. These interviews are necessary to assess the communication skills and cognitive level of the elderly witnesses. After assessing their cognitive level, the assigned Crown will then be in a better position to determine if they should be bringing a possible Khan/Smith application or when they should be bringing an application under s. 715.2 to have their videotaped interview admitted at trial.

These interviews will also assist the Crown as to whether various preparation aids – microphones or transcripts reproduced in large print -- will be required for trial.

Another factor that the assigned Crown should consider is the location of where these interviews should take place. Crowns must consider potential mobility/medical problems, privacy issues and comfort levels. The usual practice is for Crown interviews to take place at the police station or courthouse but in the case of elderly victims who may have mobility or health problems, the more appropriate place for an interview may in fact be their residence.

Another crucial factor for the assigned Crown to consider is whether or not this is a case that warrants attempts to expedite the setting of a trial date. In some cases, memories of elderly victims can be frail, especially where capacity is at issue or memory problems are likely. While it should be remembered that the setting of trial dates is beyond the control of the local Crown Attorney's Office – this is a matter solely in control of the judiciary – Crowns can work co-operatively with the trial co-ordinator's office to expedite dates where appropriate.

VI: Civil Counsel: Assisting Elderly Clients

There is a role to play for practitioners within the criminal process. This can arise in two distinct ways. In the course of reviewing a file, you may come to believe that a criminal offence has been committed. In other cases, an existing client may approach you for the sole purpose of asking your advice on whether a criminal offence has occurred.

There are many ways that practitioners can assist their client once it has been agreed that a criminal offence has been committed and your client consents to moving forward with a prosecution. Your first role is to inform your client as to the nature of the criminal process. Many victims are under the misapprehension that the Crown Attorney is in fact their lawyer. The fact that the Crown represents the state and that conversations will not be protected by solicitor/client privilege should be explained. Once they choose to go to the police they will loose the confidentiality protection they enjoyed with civil counsel. Clients should also be made aware that once the criminal process begins, they will not have the same control as they did in the civil context (for example they no longer have the power to terminate the proceedings at a later date). In the criminal proceedings context this would be a decision solely within the discretion of the Crown. Unlike when they are dealing with their own lawyer, the Crown, while receptive to input from victims, does not take instructions from them. You should also indicate that you will not be able to act for them within the scope of the criminal trial itself.

It is perfectly appropriate for counsel to make the initial contact with the police - in fact such a practice is often beneficial. This can take the form of merely arranging for an appropriate time and officer to take your client's statement or it can be more involved. If a practitioner has a long-established relationship with their client, the client may feel more comfortable if they actually accompany them to the initial police interview.

However, counsel should be aware that they may not be permitted to sit in during the actual taking of any evidence.

The final area that counsel can be of assistance to their client is in the area of document production, especially in fraud-related matters. This can arise when a lawyer suspects that the opposing party may be engaging in illegal activities but they are not yet sure and do not have enough information to approach the authorities. If this is the case, it is important that the lawyer document all conversations with the opposing party including the date and time of the call, and the substance of the conversation. Very often this will mean documenting conversations with a family member or even the child of an elderly victim. Counsel should also be aware that they could become a witness in the event that criminal charges are laid. The documented conversations can form key admissions for the prosecution and contemporaneously recording them is of particular importance. In other cases where a great deal of documentation (i.e. financial) or correspondence with the offender has been generated by counsel, this should be turned over to the police. Given the complexity of some fraud or theft of power of attorney schemes, efforts to catalogue and index this information would be helpful to the police and will likely assist in charges being laid. The police or Crown may ask that counsel explain the document trail as well. Counsel should always be aware that any document collection or conversations with either their client or the offender has the potential of making counsel a witness in a criminal proceeding.