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Victims' Opportunities to Review a Decision not to Prosecute made by the Crown Prosecutor

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Victims' Opportunities to Review a Decision not to Prosecute
made by the Crown Prosecutor

by

Li, Tian

Graduate Program in Law

A thesis submitted in partial fulfillment
of the requirements for the degree of
Master in Law

The School of Graduate and Postdoctoral Studies
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Abstract

In Canada, Crown prosecutors and the Attorney General are not always as fair as we expect when making charging decisions, and therefore victims could be personally aggrieved by unfair and unjust decisions not to prosecute. When this happens, victims have limited remedy to redress the unfairness and unjustness in order to uphold their interests in a criminal proceeding. Conversely, the European Union, United Kingdom, and the United State have taken steps to let victims challenge decisions not to prosecute to some extent. Drawing on experiences of the abovementioned jurisdictions, I propose a two-level process of review for decisions not to prosecute---Internal Review and Judicial Review---in Canada in order to provide victims a way to have problematic decisions reversed. This proposal can provide a direction or framework for future reform in this area in Canada.

Keywords

Victims Participation, Prosecutorial Discretion, Standards of Review, Decision not to Prosecute

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For any errors or inadequacies that may remain in this work, of course, the responsibility is entirely my own.

Table of Contents

ABSTRACT	II
ACKNOWLEDGMENTS	III
TABLE OF CONTENTS	IV
CHAPTER I	1
1 INTRODUCTION	1
1.1 USE OF THE TERM “VICTIM”	8
1.2 STRUCTURE OF THE THESIS.....	10
CHAPTER II	13
2 PROBLEMS IN THE CURRENT SYSTEM	13
2.1 CHARGING PROCESS AND CHARGING DECISION	13
2.1.1 <i>Discontinuance of the prosecution</i>	16
2.2 CHARGING DECISION-MAKING IS SOMETIMES PROBLEMATIC	19
2.3 INSUFFICIENT REMEDIES AND RIGHTS	29
2.3.1 <i>Information Receiver</i>	29
2.3.2 <i>Civil Proceedings</i>	33
2.3.3 <i>Informal Complaint</i>	37
2.3.4 <i>Difficulties of Access to Current Judicial Review</i>	38
2.3.4.1 <i>Judicial Reluctance to Interfere</i>	40
2.3.4.2 <i>High Standard of Review</i>	43
2.3.4.3 <i>Lack of Supporting Documents and Jurisprudence</i>	48

2.3.4.4	Limited Ground to Review	51
CHAPTER III	54
3	VICTIMS SHOULD HAVE THE OPPORTUNITY TO CHALLENGE A DECISION NOT TO PROSECUTE	54
3.1	VICTIMS’ INTERESTS IN CRIMINAL PROCESS ARE AT STAKE	54
3.2	THE STATE SHOULD NOT IGNORE VICTIMS’ INTERESTS IN CRIMINAL PROCEEDINGS 58	
3.2.1	<i>The Attorney General, Crown Prosecutors and Charging Guidelines</i>	62
3.2.1.1	Role of the Attorney General and the Crown prosecutors	62
3.2.1.2	Charging Guideline	64
3.3	VICTIMS HAVE RIGHT TO EQUAL PROTECTION	69
3.4	VICTIMS CAN OBTAIN SATISFACTION AND CLOSURE	71
3.4.1	<i>Satisfaction</i>	71
3.4.2	<i>Closure</i>	73
CHAPTER IV	77
4	PRIVATE CHALLENGE OF THE DECISION NOT TO PROSECUTE IN OTHER JURISDICTIONS	77
4.1	EUROPEAN PROTECTION.....	77
4.2	REGIONAL PROTECTION	77
4.2.1	<i>Practice in Civil Law Countries</i>	81
4.3	UNITED KINGDOM (UK).....	83
4.3.1	<i>Internal Review</i>	84

4.3.2	<i>Judicial Review</i>	87
4.3.2.1	Standard of Review	88
4.3.2.1.1	Error in Law.....	92
4.3.2.1.2	Evidential Insufficiency.....	95
4.3.2.1.3	Procedural Fairness.....	99
4.3.2.2	Relief sought	100
4.4	AMERICAN EXPERIENCE.....	103
4.4.1	<i>Compelling a prosecution</i>	106
4.4.2	<i>Disapproval of private prosecution</i>	111
4.4.2.1	Legal Considerations.....	111
4.4.2.1.1	Evidential Insufficiency.....	111
4.4.2.1.2	Decision made based on error of law	114
4.4.2.2	Public policy.....	115
4.5	CONCLUSION	120
	CHAPTER V	124
5	PROPOSED REFORMS	124
5.1	GENERAL OVERVIEW	124
5.1.1	<i>Definition of Victims: “who may seek review”</i>	124
5.1.2	<i>Internal Review System</i>	127
5.1.2.1	Process.....	129
5.1.2.2	Scope	131
5.1.3	<i>Judicial Review in Competent Court</i>	134
5.1.3.1	Process.....	134

5.1.3.2	Statutory Power of the Crown Prosecutor to Discontinue a Prosecution	
		136
5.1.3.3	Participation of the accused.....	136
5.1.4	<i>Issue on limitation periods for summary conviction offences</i>	139
5.2	INTERNAL REVIEW SCHEME	140
5.2.1	<i>The victims should receive full explanation through an Internal Review Scheme</i>	140
5.2.1.1	After the application for internal review	142
5.2.2	<i>The Crown prosecutor should be allowed to overturn his original decision not to prosecute without introducing new evidence</i>	146
5.2.2.1	Limitations and Notification	147
5.2.2.1.1	Ireland	147
5.2.2.1.2	United Kingdom	152
5.2.2.1.3	Solutions	153
5.3	JUDICIAL REVIEW.....	154
5.3.1	<i>Prerogative power of the Crown prosecutor to decide whether to prosecute should be replaced by statutory power</i>	155
5.3.2	<i>The broader standard of review for other discretionary decisions should be used in judicial review for the decision not to prosecute</i>	157
5.3.3	<i>Application of Various Standards of Review for Decisions not to Prosecute</i>	160
5.3.3.1	Definition of different standards of review	161
5.3.3.2	Compelling a prosecution.....	163
5.3.3.3	Quashing a decision not to prosecute and directing reconsideration	166
5.3.3.3.1	Deviance from published guideline	170

5.3.3.3.2 Misinterpretation of law	172
5.3.3.3.3 Maintaining a decision not to prosecute after reconsideration	173
5.3.3.4 Termination of a private prosecution: quash a decision to stay a private prosecution	176
5.3.3.4.1 Evidential Sufficiency	176
5.3.3.4.2 Public Interests.....	183
5.3.4 <i>Potential Impact on the Accused</i>	185
CHAPTER VI.....	188
6 CONCLUSION	188
6.1 LIMITATION OF THE STUDY.....	193
6.2 SIGNIFICANCE	193
BIBLIOGRAPHY	195
CURRICULUM VITAE.....	214

CHAPTER I

1 Introduction

In recent years, there has been a significant international trend towards increasing victims' participatory roles in the criminal justice process. Canada should place a greater degree of emphasis on the recognition and the protection of victims' interests in its criminal justice process in order to catch up to or comply with international standards.¹ After conducting a thorough pre-1999 literature review on the victims' role in criminal justice, Young concluded that, after intense debates about victims' proper roles and functions during that period, authors in the 1970s and 1980s had generally agreed that increasing victims' participatory roles in the criminal process is a part of state policies.² At that time, many articles suggested legislative reforms in Canada in order to guarantee victims' interests in criminal proceedings that have been recognized domestically or internationally.³ This later became a global movement in the late 1980s. Legislators worldwide started recognizing the fact that victims' interests should be at least taken into account in decision-making.⁴ Later, it was generally agreed that victims have significant interests in criminal proceedings, and the focal point was moved to how to protect these interests effectively.⁵ Therefore, much literature post-1990 suggested legislative and procedural reforms with the intention of incorporating victims' participatory roles into criminal proceedings. In particular, many studies have been done on perfecting the use of victim

¹ Department of Justice Canada, "The Canadian Statement of Basic Principles of Justice for Victims of Crime", Online: Department of Justice Canada: <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/guide/secn.html>> [*Basic Principles for Victims*].

² Department of Justice Canada, *The Role of the Victim in the Criminal Process: A literature Review-1989 to 1999* by Alan N Young (Ottawa: Policy Centre for Victims Issues, Canada Department of Justice, 2001) at 18.

³ Victims' interests will be discussed in Chapter 3.

⁴ Young, *supra* note 2 at 18.

⁵ *Ibid.*

impact statements in criminal proceedings.⁶ As Professor Tobolowsky wrote:

Unlike the situation existing prior to the Task Force Work (pre-1982), the relevant inquiry is no longer whether victims should have participatory rights in the criminal justice process. The incredibly rapid adoption of constitutional and legislative victims' rights provisions over the last fifteen years ensures that victims will have a participatory role in the criminal justice process. The relevant current focus therefore must be to ensure that these victim participatory rights are appropriate and meaningful in the context of the varied individual and societal interests involved in criminal prosecutions.⁷

As a positive result, Canada has taken significant steps to make sure that victims are formally granted participation in the sentencing and parole process through using victim impact statements.⁸ However, while improving victims' participatory roles at later stages of a prosecution has been a dominant focus for years, the entry stage of whether a prosecution will be instituted, and all that entails for victims, still falls short of systemic study and attention. Other than being informed of the status of a prosecution, victims are generally excluded from charging decisions in Canada.

The Crown prosecutor will make a decision based on his or her discretion after the police lodge a charge against a suspect. Such a decision includes whether or not to continue a prosecution against an accused and on what charges. For the purpose of this thesis, "charging decisions" refers only to decisions to decide whether to continue a criminal prosecution, either public or private, against an accused person. This thesis focuses only

⁶ Ibid.

⁷ Peggy M Tobolowsky, "Victim Participation in the Criminal Justice Process: Fifteen Years after the President's Task Force on Victims of Crime" (1999) 25 New Eng J on Crim & Civ Confinement 21 at 103.

⁸ "Use of Victim Impact Statements at Sentencing and Parole" (10 April 2013), online: National Victims of Crime Awareness Week <<http://www.victimsworld.gc.ca/res/r58.html>> [Use of Victim Impact Statements].

on decisions not to prosecute made by the Crown prosecutor and Attorney General. The reason behind this will be further explained in Chapter 2 when discussing the Canadian charging process. To be more specific, the phrase “decisions not to prosecute” refers to the Crown prosecutor’s decisions to withdraw charges after the laying of charges or stay a prosecution permanently. In practice, the Crown prosecutor makes these decisions on behalf of the Attorney General.

In the past half century, noticing that the rights of the accused in the criminal process might be violated by arbitrary prosecution or abuse of process by Crown prosecutors, the Canadian system has developed a series of doctrines and processes to deal with improper decisions to lodge charges, such as judicial reviews for flagrant impropriety of a decision to prosecute, abuse of process doctrine, and tort proceedings against a Crown prosecutor. However, more recently, influenced by the increasing concerns about victims’ rights and interests in the criminal justice process, a few authors have been struck by the following thoughts: what if a Crown prosecutor improperly uses his or her discretionary power to discontinue a prosecution? Should a victim just accept such a decision?

In a sense, decisions *to* prosecute are more likely to attract judicial scrutiny than decisions *not to* prosecute.⁹ The former will be followed by a whole trial process, through which judges can re-examine the legitimacy and accuracy of charges against the accused and therefore minimize the effect of prosecutorial misconduct in charging decisions.¹⁰

Moreover, as a part of the accused’s procedural rights and Charter rights in a criminal

⁹ See *R v DPP, Ex parte Manning and another*, [2001] QB 330 at para 23 [*Manning*]; Ian Dobinson, “The Decision not to Prosecute” (paper delivered at the 15th International Conference of the International Society for the Reform of Criminal Law held at Canberra, Australia, 26 - 30 August 2001), [unpublished] at 2.

¹⁰ Dobinson, *supra* note 9 at 2.

proceeding, the accused is able to file motions to move to dismiss the charges or stay the proceeding by attacking the prosecutor's alleged mistakes in charging decision-making.

In contrast, after a charge has been pressed, the decision *not to* prosecute lies solely on the prosecutorial charging discretion made by Crown prosecutors, any defects of which are difficult to trace. It is possible that public prosecutors make unjust and unfair decisions not to prosecute in certain circumstances. Because of this, victims may well be affected - in a most profound and personal manner - by such Crown prosecutor's discretionary power to prosecute a suspect or not. Indeed, most victims' recognized interests only appear in post-trial stages when the accused has been convicted. However, post-trial stages should not be singled out from the criminal process when dealing with victims' participation in criminal proceedings. Any criminal prosecution runs like a chain from the charging stage to the sentencing stage. Each stage in the criminal process is closely linked to whether or not victims can get to the post-trial stage where most of their interests lie. Only once every stage is conducted in a correct manner can victims be guaranteed that their recognized interests will be respected. As argued by Sarah N. Welling, victims exercise their rights in criminal proceedings on the premise that a genuine prosecution is taking place.¹¹ In other words, if the termination of a prosecution is improper, victims could be unfairly deprived of exercising interests and rights that would otherwise have been recognized at a later stage in the process. Therefore, methods to protect victims' interests in criminal proceedings should be started from the very beginning of a criminal process.

¹¹ Sarah N Welling, "Victims in the Criminal Process: a Utilitarian Analysis of Victim Participation in the Charging Decision" (1988) 30 Ariz L Rev 85 at 85.

When unjust and unfair decisions not to prosecute occur, victims can only count on themselves to seek redress for the issue. Victims might start a private prosecution if the police refuse to investigate an alleged event or decline to press charges against a suspect. However, when it comes down to Crown prosecutors deciding to stop a prosecution, such a decision is rarely touchable by victims, and victims can do nothing unless Crown prosecutors change their minds. It is very rare that the accused ever wants to challenge a decision not to prosecute that is in his or her favor.¹²

Unfortunately, in the Canadian criminal justice system, victims only have the right to notification and a limited right to information in the charging stage, and have the comparative lack of effective methods to overturn unjust and unfair decisions not to prosecute. Even though victims can seek remedies through a tort proceeding, on some occasions, civil remedies are typically not sufficient to comfort victims. The decision not to prosecute is one of the major turning points in the criminal process for victims. For victims who prefer a criminal proceeding and have reasonable grounds to believe that the prosecution is improperly stopped, the logical remedy they want is the re-institution of the criminal prosecution. The only way to do so is to have the decision not to prosecute reversed.

Victims' review of decisions not to prosecute made by public prosecutors is not new. The review can be either internal, judicial, or both. This has been exercised in civil law countries such as the Netherlands, Poland, France, Germany, Belgium, Luxembourg,

¹² In cases where jurisdictional issues are involved, the accused might challenge the decision not to prosecute in one jurisdiction in order to avoid the prosecution on the same ground in another jurisdiction for better or favored treatment.

Spain, Switzerland, and Turkey for years.¹³ In the late 1980s, accompanied with the popularity of victims' rights in criminal justice systems around Europe, such a review of decisions not to prosecute gradually has become victims' legally recognized right in European regional practices.¹⁴

By contrast, judicial review of decisions on whether to prosecute made by public prosecutors has traditionally been extremely limited in common law jurisdictions. Charging decision-making falls into the discretionary power of the Crown prosecutor, which is a branch of government, and therefore reviewing prosecutorial discretion by judges may raise the issue of separation of powers.¹⁵ However, in recent decades, influenced by civil law traditions and the European Union (EU)'s recent practice, the United Kingdom (UK) has adopted a review system in its domestic system.¹⁶ In the United States (US), some states have provided private challenges to prosecutorial decisions on whether to prosecute in certain circumstances and qualified challengers are not limited to accused persons. This is because of increased concerns about the victims' interests in criminal proceedings and the danger of public prosecutor's unfettered discretionary power.

Judicial review of a decision not to prosecute is theoretically available for victims in

¹³ Matti Joutsen, "Listening to the Victim: The Victims' Role in European Criminal Justice System" (1987-1988) 34 Wayne L Rev 95 at 109 -112; Associação Portuguesa de Apoio à Vítima, *Project Victims in Europe, Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union* (Portugal: Associação Portuguesa de Apoio à Vítima 2009) at 44 [*Implementation of the EU Framework Decision*]

¹⁴ Council of Europe, Committee of Ministers, Recommendation No. R(85)11 (1985), art B7 [Victim's Rights Recommendation]; EU, *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, [2012] OJ, L 315/57 at 69 [*Victims' Rights Directive*].

¹⁵ Robert J Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 20.

¹⁶ "Victims' Right to Review Scheme" (Jun 2013), online: The Crown Prosecution Service <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html> [*Review Scheme*]

Canada, but its use as a remedy to overturn unjust and unfair decisions not to prosecute is very limited and ineffective. Only in extremely rare circumstances could victims succeed in judicial review applications. In fact, such applications have never succeeded in Canada.¹⁷ This is in part because the Canadian judiciary is extremely reluctant to question the exercise of discretion by Crown prosecutors and the Attorney General, and therefore Canada's courts have been employing a relatively high standard of review.¹⁸

The lack of effective remedies to overturn unjust and unfair decisions not to prosecute establishes a point that victims cannot effectively protect their recognized interests from unjustifiable violations by the Crown prosecutor. Hence, I believe that a reform to help victims review the decision not to prosecute is necessary.

It should be noted that such a reform does not intend to give victims veto rights. Canadian legislators have emphasized a point that the promotion of victims' participatory roles aims at giving victims voices in criminal proceedings, not veto power.¹⁹ To provide an effective remedy for victims to question decisions not to prosecute does not necessitate giving them a veto in charging decision-making. Even in the judicial review or internal review process, victims should have no power to veto a decision not to prosecute. Victims can only convince competent authorities to exercise their power to reverse a decision not to prosecute through presenting legal arguments, together with solid evidence, in a formal proceeding.

¹⁷ Frater, *supra* note 15 at 41.

¹⁸ Frater, *supra* note 15 at 20-24.

¹⁹ The House of Commons, Standing Committee on Justice and Human Rights, *Victims' Rights - A Voice, not a Veto* (October 1998) (Shaughnessy Cohen, MP) (Victims ask for a voice at each stage of the criminal justice process, not a veto power).

1.1 Use of the term “victim”

Some people might prefer the term “alleged victims” because calling a complainant “victim” might insinuate the guilt of an alleged offender to a judge, jury and the public, which seems to be a violation of offender’s right to be presumed innocent. However, in my opinion, it is important to treat complainants with respect, and it is very offensive to refer a complainant as an “alleged victim”. In addition, the use of the term “victim” in the charging stage where the guilt of the accused has not yet been proven has been generally accepted. In the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration), a complainant may be considered a “victim” in the charging stage:

A person may be considered a victim, under this Declaration, *regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted* and regardless of the familial relationship between the perpetrator and the victim.²⁰

In accordance with the Declaration, the Canadian government also adopted the Canadian Statement of Basic Principles of Justice for Victims of Crime (the Canadian Statement)²¹ requiring governments and ministers at all levels to guarantee fair treatment of victims in the criminal justice process. At that time, no definition of the term “victims” was written down in the Basic Principles. It can be assumed that Canada implicitly follows the definition used in the UN Declaration.

For the purpose of victim impact statements in sentencing, section 722 (4) of the Criminal

²⁰ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGAOR, 40th Sess, Supp No 49, UN Doc A/RES/40/34, (1985), annex A, art 2 [emphasis added].

²¹ *Basic Principles for Victims*, *supra* note 1.

Code of Canada formally defined victims as “a person to whom harm was done or who suffered physical or emotional loss *as a result of the commission of the offence*”.²² According to the plain meaning of this definition, the existence of “victims” and the real commission of a crime seem inseparable. Perhaps, realizing the limitation of this definition on providing rights to complainants in the pre-conviction phase, the definition of “victim” in the Criminal Code have started including the “victim” of an alleged offence since 1999.²³

It is true that the definition in section 722 (4) remains in use, in spite of the different wordings, in most documents about victims’ rights adopted prior to 1999 such as legislation relating to victims’ rights in most provinces and territories and the Corrections and Conditional Release Act.²⁴ However, even without declaring the inclusion of *alleged* victims, in the legislation and the Basic Principles for Victims, some principles and rights are nevertheless extended to pre-conviction stages, such as the right to notification, the right to information, and the right to protection.²⁵ For example, some information is meaningful only if it is provided in early stages of the criminal justice process, such as the status of the investigation, the scheduling, progress, and final outcome of the proceeding.

²² *Criminal Code*, RSC 1985, c C-46, s 722 (4) [*Criminal Code*].

²³ *Ibid*, s 2; Bill C-79, *An Act to amend the Criminal Code (victims of crime) and another Act in consequence*, 1st Sess, 36th Parl, 1999, cl 1.

²⁴ *An Act Respecting Assistance for Victims of Crime*, RSQ, c A-13.2, art 1 [Quebec, *An Act Respecting Assistance for Victims of Crime*]; *The Victims’ Bill of Rights*, CCSM c V55, s 1 (1) [Manitoba, *The Victims’ Bill of Rights*]; *Victims of Crime Act*, RSNWT (Nu) 1988, c 9 (Supp), s 1 [Nunavut, *Victims of Crime Act*]; *Victims of Crime Act*, RSNWT 1988, c 9 (Supp), s 1 [Northwest Territory, *Victims of Crime Act*]. The term “victim” is written down in the relevant legislations to include alleged victims only in Manitoba, Nunavut, Northwest Territory and Quebec.

²⁵ *Victims of Crime Act*, RSA 2000, c V-3, s 2, 4; *Victims of Crime Act*, RSBC 1996, c 478, ss 2-4, 6 [British Columbia, *Victims of Crime Act*]; *The Victims of Crime Act*, 1995, SS 1995, c V-6.011, s 2.1; *Victims Services Act*, SNB 1987, c V-2.1, s 2-7; *Victims of Crime Services Act*, RSNL 1990, c V-5, ss 5-7; *Nunavut, Victims of Crime Act*, *supra* note 25, s 5; *Victims’ Bill of Rights*, 1995, SO 1995, c 6, s 2 [Ontario, *Victims’ Bill of Rights*]; *Victims of Crime Act*, RSPEI 1988, c V-3.1, s 2; Quebec, *An Act Respecting Assistance for Victims of Crime*, *supra* note 25, arts 4-6; Manitoba, *The Victims’ Bill of Rights*, *supra* note 25, ss 3-5, 7, 11-14; Northwest Territory, *Victims of Crime Act*, *supra* note 25, s 5.

If there is no victim until the guilt of an accused is proven, so-called “victims’ rights” should not appear in pre-conviction stages given that the subject of such rights does not exist at all in these stages. These legislatures nevertheless indiscriminately describe the holder of these rights as the “victim”. If applying the “non-victim” theory, the existence of these rights as “victims’ rights” and their implementation will sound absurd. For these reasons, it seems that, in practice, Canada is inclined to treat “alleged victims” as “victims” in order to ensure their exercise of rights in the criminal justice system.

1.2 Structure of the thesis

This thesis will be constructed as follows. In Chapter 2, I will start with demonstrating the charging process in the Canadian criminal justice system and show why decisions not to prosecute made by Crown prosecutors and the Attorney General are of particular interest to me. Then I will continue to reveal several current problems in the Canadian legal system concerning victims receiving effective remedies for improper decisions not to prosecute. I will firstly demonstrate the potential misconduct of Crown prosecutors during the charging decision-making process. Because of the comparative lack of studies about prosecutorial behaviours of Crown prosecutors in Canada, the conclusion largely relies on American resources and several Canadian resources concerning other related areas, such as juries’ judgements on cases and racial profiling occurring in police operation. Then, I will show victims’ lack of sufficient effective remedies to protect their interests in four aspects: (1) in charging stages, in most situations, victims are no more than information receivers and have no procedural rights; (2) civil proceedings are not always sufficient to satisfy victims’ psychological needs; (3) complaining about decisions not to prosecute through informal channels seems less effective than formal channels such as internal

review and judicial review; and (4) judicial review is not easily accessible to victims for challenging decisions not to prosecute.

In Chapter 3, I will justify my proposal of providing victims opportunities to challenge decisions not to prosecute with two reasons. First, victims are personally affected by decisions not to prosecute. The decision not to prosecute is one of the important links for victims to enjoy their interests and rights at the trial and post-trial stage. Therefore, a state should recognize these interests in the charging stage. Moreover, in Canada, victims enjoy equal protection in section 15 of the Canadian Charter of Rights and Freedoms.²⁶ Second, victims can obtain satisfaction and closure through challenging a decision not to prosecute. Because victims' participation in the charging stage is not commonly discussed, there is a dearth of resources directly linked to victims' interests and rights in the stage. Some conclusions drawn in this chapter are inferred from the resources that are not directly linked to this topic.

In Chapter 4, I will draw attention to foreign examples of victims' challenges to decisions not to prosecute made by public prosecutors. This will include the practices in the EU, the UK and the US. The practices in these areas are important for forming the proposed reform in the next chapter. The research in this section is mainly doctrinal.

Finally, in Chapter 5, I will explain the proposed reform in detail based on the research I explored in previous chapters. I propose a two level review process, internal review and judicial review, for victims to complain about improper decisions not to prosecute. A special unit should be set up for the internal review process in the Crown prosecutor's

²⁶ *Charter of human rights and freedoms*, RSQ c C-12 s 15 [*Charter*].

office in each city. Victims could receive full explanations of decisions not to prosecute in writing after the request for a reversal of the original decision is denied. In this case, Crown prosecutor's re-institution of a prosecution resulting from an internal review should not be considered an abuse of process challengeable by the accused. The proposed review process only reviews the decision not to prosecute if a prosecution is stopped completely and permanently. Termination of a prosecution resulting from a deal made between the Crown prosecutor and the accused would not be reviewable in this system. Then, judicial review would remain available to victims, but only after the complaint fails in the internal review. Victims should start a review proceeding within a limited period of time after they are notified of the decisions not to prosecute. In order to provide victims more opportunities to make successful challenges to decisions not to prosecute, the originally limited standard of review should be extended to include all "flagrant impropriety", "reasonableness", and "correctness" standards. In addition, Crown prosecutor's discretionary power to terminate a prosecution should be set out in a statute. A reviewing court could compel a prosecution, direct a reconsideration or quash a decision not to prosecute based on different standards of review. Finally, considering the possible negative impact on the accused caused by this proposed reform, certain remedies to reduce the impact are also suggested at the end of Chapter 5.

CHAPTER II

2 Problems in the Current System

2.1 Charging process and Charging Decision

In Canada, Crown prosecutions start at the laying of charges. The document listing the charges is known as an “Information” which is a written document sworn by an informant before a Justice. According to section 504 of the Criminal Code, “*anyone* who, on reasonable grounds, believes that a person has committed an indictable offence may lay an Information in writing and under oath before a justice”.²⁷ The term “anyone” allows civilians to act as informants according to the requirements that are set out in section 504. Once the information is filed, a Justice will hear and consider the allegation made by an informant and other relevant evidence, and subsequently issue process if he or she considers that a case for so doing has been made out according to sections 507 and 507.1.²⁸ According to section 2, anyone, including victims and their counsel, can be qualified as prosecutors to proceed with a prosecution in accordance with this Code.²⁹

As a crime is considered an act against the state, in most situations, the Crown prosecutor will conduct a public prosecution against a suspect on behalf of the public it represents. A public prosecution normally starts from the laying of charges by the police. Before the accused’s first appearance in court, the Crown prosecutor will take over the case from the police and commence the prosecution. It is rare that the police assume a role as

²⁷ *Criminal Code*, *supra* note 23, s 507.

²⁸ *Ibid*, s 507

²⁹ *Ibid*, s 2:

“Prosecutor” means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them

prosecutors to proceed with the case, especially in indictable cases.³⁰ In most Canadian jurisdictions, it is standard procedure for the Crown prosecutor to review the investigative files pertinent to the charges made by the police, after the charges have been laid but before the accused's first appearance, in a timely fashion for a post-charge screening.³¹ The post-charge screening is used to make sure that the laid charges meet the minimum criteria for a case to go forward. In British Columbia, Quebec, and New Brunswick, the police must obtain the approval of the Crown prosecutor before laying charges.³²

In cases where Crown prosecutors or the police fail to act on a case, private prosecution is an option for victims to initiate a prosecution against their violators. Initiation of a private prosecution is not normally conditional on the Attorney General's consent.³³ Such a right has been referred to as "a valuable constitutional safeguard against inertia or partiality on

³⁰ In some jurisdiction, like Newfoundland, the police still carry a number of summary cases.

³¹ Frater, *supra* note 15 at 18; See also Steven Penny, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham: LexisNexis, 2011) at 447- 448; Province of Ontario Ministry of Attorney General, "Crown Policy Manual" (21 March 2005), online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ChargeScreening.pdf>>; Criminal Justice Branch, Ministry of Attorney General, "BC Crown Counsel Policy Manual (Charge Assessment Guidelines)" (2 October 2009), online: British Columbia <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1-ChargeAssessmentGuidelines-2Oct2009.pdf>>.

³² Frater, *supra* note 15 at 18; Penny, Rondinelli & Stribopoulos, *supra* note 31 at 446, n 53. See also, Law Reform Commission of Canada, *Controlling Criminal Prosecutions: the Attorney General and the Crown Prosecutor* (Ottawa: Law Reform Commission of Canada, 1990) at 69-71 [Law Reform Commission of Canada, *Controlling Criminal Prosecution*]; Criminal Justice Branch, Ministry of Attorney General, "BC Crown Counsel Policy Manual (Charge Assessment Decision -Police Appeal)" (18 November 2005), online: British Columbia <<http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1.1-ChargeAssessmentPoliceAppeal-18Nov2005.pdf>> ("It is expected that the police will lay an Information only after the approval of charges by Crown Counsel, or, if charges are not approved, upon exhaustion of an appeal of that decision by the police"); New Brunswick Attorney General, "Attorney General's Policy - Public Prosecutions", online: New Nouveau Brunswick Canada <<http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/PublicProsecutionOperationalManual/AttorneyGeneralsPolicy.pdf>> ("On completion of the investigation, if the police are satisfied that there is sufficient evidence to lay an information, they will formulate a charge, or charges, based on their assessment of the case and then forward a full report or court brief to the appropriate Crown Prosecutor's office for pre-charge review").

³³ *MacLissac v Motor Coach Ind Ltd*, [1982] 5 WWR 391, 70 CCC (2d) 226 (Man CA) (The court held that a private prosecution could take place even without the consent of the Crown prosecutor); See also *R v Dowson* (1983), 7 CCC (3d) 527, [1983] 2 SCR 144 [*Dowson*] (The Attorney General can intervene into a private prosecution and stop it only after the initial review of an Information by a Justice is completed).

the part of authority”.³⁴ However, like most common law countries, private prosecution is secondary to public prosecution, and the right to private prosecution needs to give way to the interests of justice, if necessary.³⁵ For this reason, the Attorney General is granted a broad supervisory power over a private prosecution and the exercise of this power is recognized as a fundamental part of the Canadian justice system.³⁶ The Attorney General may attend the hearings concerning the allegations and the evidence presented by the informant under section 507.1.³⁷ Then he or she can withdraw the charges³⁸ or can stay the proceeding based on its discretion according to section 579.³⁹ Since 2002, the Crown must be given notice of, and an opportunity to participate in, a pre-inquiry to determine if a private prosecution should proceed.⁴⁰ However, it is also important to maintain the autonomy of the private informant in conducting a private prosecution. For this reason, the Attorney General only intervenes in a private prosecution when it is necessary, and the

³⁴ *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 477, [1977] 3 ALL ER 70 (HL) [*Gouriet*].

³⁵ *R v Bradley* (1975), 9 OR (2d) 161 at paras 27, 24 CCC (2d) 482 (Ont CA) [*Bradley*]:

The Attorney-General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. The role of the private prosecutor, permitted by statute in this country, is parallel to but not in substitution for the role of the Attorney-General, and where the two roles come into conflict, the role of the Crown's persecutor is paramount, where in his opinion the interest of justice require that he intervene and take over the private prosecution.

³⁶ *Dowson*, supra note 33 at 535-6 (The court held that “[t]he right of a private citizen to lay an information, and the right and duty of the Attorney General to supervise criminal prosecutions are both fundamental parts of our criminal justice system”).

³⁷ *Criminal Code*, supra note 23, s 507.1

³⁸ Law Reform Commission, *Private prosecutions* (Ottawa: Law Reform Commission of Canada, 1986) at 15-16

³⁹ *Criminal Code*, supra note 23, s 579; *R v Osiowy* (1989), 50 CCC (3d) 189, 77Sack RI sub nom, *Osiowy v Linn*, PCJ (CA) [*Osiowy*] (The Attorney General has authority to intervene and stay a private prosecution); *Bradley*, supra note 35 at para 27 (“Where the interests of justice require, the Attorney General may intervene and take over a private prosecution of a summary conviction offence”); *Hamilton v British Columbia (Attorney General)* (1986), 30 CCC (3d) 65, [1986] BCJ no756(BCSC) [*Hamilton*] (An intervention by the Attorney General in a private prosecution is not a violation of s 7 of the Charter); *R v Faber* (1987), 38 CCC (3d) 49, [1987] RJQ 1763 (Que SC) [*Faber*] (A decision to stay does not infringe s 7 or s 15 of the Charter).

⁴⁰ Joan Brockman & Rose V Gordon, *An Introduction to Canadian Criminal Procedure and Evidence*, 4th ed (Toronto: Nelson Education, 2011) at 80

intervention strictly follows the policy guideline.⁴¹

2.1.1 Discontinuance of the prosecution

A public prosecution will not take place if a criminal investigation is terminated. As it is extremely rare for public prosecutors to conduct investigations and lay charges, decisions to stop a criminal investigation are mainly made by the police based on their discretion. Termination can happen at any stage of the investigation, prior to the laying of charges.

Normally, discontinuance made by the police during an investigation is not considered final for victims. As mentioned above, in most situations one remedy is that victims can institute a private prosecution if they so desire. In order to proceed with a private prosecution, victims can hire private investigators and counsel, submit information to a justice by themselves and play a role as prosecutors at trial. Therefore, even though the right to a private prosecution is limited and private prosecution might be very expensive, when a case ends during an investigatory stage, the Canadian system indeed gives a remedy to victims unless and until the Attorney General or the Crown prosecutors decide to intervene and stop it.

Since the Criminal Code permits anyone to lay charges if he or she has reasonable grounds to believe that a crime has been committed by an accused person, legally, everyone is supposed to have discretionary power equally to lay charges regardless of social status or position.⁴² That is to say, theoretically, even in British Columbia, Quebec

⁴¹ Department of Justice Canada, *The Federal Prosecution Service Deskbook* (Ottawa: Department of Justice Canada, 2002), Part VI, c 26, online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/toc.html>> [Deskbook].

⁴² Only for a limited number of offences are the Attorney General's consent required before charges are laid. *Criminal Code*, *supra* note 23, s 7 (prosecuting a non-national), s 83.24 (terrorism offences), 136 (3)

and New Brunswick,⁴³ the police or other individuals can lay a charge, bypassing the Crown prosecutor. Therefore, only after a charge has been laid does the discretionary and supervisory power of the Crown prosecutor and Attorney General become powerful and dominant in a charging decision in a legal sense.⁴⁴

The Crown prosecutor's power to withdraw charges is a power derived from the common law. The Crown prosecutor has absolute and exclusive control over the withdrawal of charges prior to a plea or a preliminary inquiry.⁴⁵ However, after a plea has been taken at trial or evidence heard at a preliminary inquiry, previous consent from a presiding judge is required before a charge can be withdrawn. Furthermore, it is comparatively rare that the Crown prosecutor would seek to withdraw a charge after plea.⁴⁶ The same charge often cannot be laid if that charge is withdrawn.⁴⁷

Through another procedure, the Crown has the statutory power to direct a stay of proceedings, if deemed necessary, based on section 579 of the Criminal Code.⁴⁸ Unlike a withdrawal of charges, a proceeding can be re-commenced within a maximum one year

(giving contrary evidence), 174 (3) (public nudity), 283 (2) (parental abduction of child), 318 (3) (advocating genocide), 319 (6) (public incitement of hatred), 347 (7) (criminal interest rate).

⁴³ In these three provinces, as a procedural rule, the police needs to acquire a Crown prosecutor's approval before he or she could lay a charge.

⁴⁴ Charging standards and charging discretion will be discussed in detailed in the later charters.

⁴⁵ Law Reform Commission of Canada, *Controlling Criminal Prosecution*, *supra* note 32 at 99-100; Judith A Osborne, "The Prosecutor's Discretion to Withdraw Criminal Cases in the Lower Courts" (1983) 25 Can J Crim 55 at 58; David Vanek, "Prosecutorial Discretion" (1987-1988) 30 Crim LQ 219 at 224, n 7.

⁴⁶ Vanek, *supra* note 45 at 225.

⁴⁷ *R v Karpinski*, [1957] SCR 343; *R v Leonard*, *Ex parte Graham* (1962), 133 CCC 230, 38 WWR 300 (Alta SCTD); Brockman & Gordon, *supra* note 40 at 76.

⁴⁸ *Criminal Code*, *supra* note 23, s 579 (1):

The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

without laying new charges⁴⁹ and a defendant cannot invoke a plea of *autrefois acquit*.⁵⁰ A stay can happen in any stage of the proceeding, before judgement, in the absence of the permission from a presiding judge. After a period of one year, if the Crown prosecutor does not re-commence the proceeding, the prosecution will be deemed to have never commenced. In practice, most stays are permanent and it is difficult to determine whether the Crown prosecutor intended to stay a proceeding permanently or just temporarily.

The Attorney General has the authority to stay a private prosecution in order to protect public interests. It might assess the Information laid by the private prosecutor based on its own charging guidelines and decide whether to stay a proceeding or not.⁵¹ It should be noted that most private prosecutions are stopped because the Attorney General concludes that there is “no reasonable prospect of conviction” or “no evidence”.⁵² The Attorney General believes that a prosecution, without a reasonable prospect of conviction or sufficient evidence, is not carried out in the public interest.

⁴⁹ *Ibid*, s 579 (2):

Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

⁵⁰ *R v Tateham* (1982), 70 CCC (2d) 565, 9 WCB 22 (BCCA). See also: Law Reform Commission of Canada, *Controlling Criminal Prosecution*, *supra* note 32 at 100. A plea of *autrefois acquit* (Law French for “previously acquitted”) means the defendant claims to have been previously acquitted of the same offence, and that he or she therefore cannot be tried for it again.

⁵¹ *Deskbook*, *supra* note 41, Part VI, c 26.

⁵² See e.g. *Chen v Alberta (Attorney General)*, 2007 ABQB 267, [2007] AJ no 458 [*Chen*]; *Ahmadoun v. Ontario (Attorney General)* (2012), 281 CCC (3d) 270, [2012] OJ no 639 [*Ahmadoun*]; *Kostuch v Alberta (Attorney General)*, (1995), 101 CCC (3d) 321, 43 CR (4th) 81 (Alta CA), leave to appeal to SCC refused 105 CCC (3d) vi, 133 DLR (4th) vii [*Kostuch*]; *Mitchell v Canada (Attorney General)* (1999), 15 Admin LR (3d) 70, 175 Nfld & PEIR 181 (Nfld SCTD) [*Mitchell*]; *R v Parsons*, 2000 BCSC 1408, 78 CRR (2d) 254; *R v Laforme* (2003), 57 WCB (2d) 40, [2003] OJ no 845 (Ont SCJ) [*Laforme*]; *McHale v Ontario (Attorney General)*, 2011 CarswellOnt 5984, 239 CRR (2d) 73 [*HcHale*].

2.2 Charging Decision-making is Sometimes Problematic

Decades ago, when the accused's interests were put in danger due to unavoidable uncertainties in charge decision-making, strong prosecutorial discretionary power was diminished, making it easier for the accused to fight against state power. The doctrine of "abuse of process" was introduced into the context of criminal law after the 1964 decision in *Connelly v Director of Public Prosecution*, in which Lord Devlin suggested that a court should have the authority to stay a prosecution when the use of the prosecutorial power by a prosecutor caused grave injustice to the accused.⁵³ The Supreme Court of Canada affirmed this doctrine in the 1985 decision of *R v Jewitt*.⁵⁴

Nowadays, this doctrine is frequently invoked by the accused to fight against the Crown prosecutor's charging decisions, such as use of the criminal process to collect a debt, pre-charge delay, multiple trials, the use of direct indictment, improper relationship with other branches of government, improperly-motivated proceedings, a lack of independence in the charging decision, splitting the Crown's case, improper re-institution of proceedings, and other misconduct that amounts to "abuse of process." Other doctrines also emerged to deal with those situations where Crown prosecutors maliciously deviated from the legal rules to bring a charge against a suspect arbitrarily. To react to maliciously selective prosecution, as early as 1951, the Canadian justice system recognized that prosecutorial discretion could be interfered with if some oblique motive, which influenced decision-

⁵³ *Connelly v Director of Public Prosecution*, [1964] AC 1254, [1963] 3 WLR 839 (HL).

⁵⁴ *R v Jewitt* (1985), 21 CCC (3d) 7 at 13-14 [1985] 2 SCR 128 (SCC) [*Jewitt*]:

[T]here is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.

making, could be shown.⁵⁵ In recent decades, charging decisions made by Crown prosecutors can be subjected to the scrutiny of courts or law societies where they breach their statutory or common law duties, or where there is misconduct amounting to an “abuse of process” on the part of Crown prosecutors in charging decision-making. These doctrines can show that Crown prosecutor’s misconduct in charging decisions have raised concerns to the Canadian criminal system to some degree.

Charging guidelines might have some effects on preventing Crown prosecutors from acting outside the boundary of their duty. However, sometimes, personal feelings and motives concerning an alleged crime, alleged defendant, and victims might prevail when Crown prosecutors making charging decision even though the guidelines try to rule out such feelings.⁵⁶ Many empirical studies have been undertaken to understand public prosecutors’ patterns in charging decision-making, with studies in the US having been especially well developed. After referring to a vast number of research studies on public prosecutors’ behaviours in charging decision-making in the US, Bradley Joseph Michelsen gave a brief summary of the way in which evidentiary sufficiency and public interest criteria might affect the public prosecutor’s decision-making.⁵⁷ According to his summary, even though public prosecutors should not attempt to win a case at any cost, they are indeed driven by increasing conviction rates. The quote that follows indirectly indicates that public prosecutors might be reluctant to take a case in which the evidence is comparatively weak but still meets the charging guideline.

⁵⁵ *R v Lemay* (1951), 102 CCC 1 at 6, [1952] 1 SCR 232.

⁵⁶ The sentence “Crown counsel's personal feelings about the accused or the victim” has been included as “irrelevant criteria” in every charging guideline.

⁵⁷ Bradley Joseph Michelsen, *Elected Texas District and County Attorneys’ Perceptions of Victim Involvement in Criminal Prosecutions* (MA Criminology and Criminal Justice, The University of Texas at Arlington, 2007) [unpublished] at 12-14.

... prosecutors are more likely to file charges when a serious offense was committed. In addition, there is an increased probability that a prosecutor will decide to charge a suspect with a crime when strong evidence exists in a case. Prosecutors are also more likely to pursue a case when the suspect is a repeat offender and the culpability of the defendant is evident⁵⁸

This phenomenon becomes worse when it is combined with the following non-legal factors summarised by Michelsen:

With regards to suspect characteristics, prosecutors are more likely to file charges against non-white suspects. Additionally, studies have shown that prosecutors are more likely to pursue a case when a black suspect commits an offense against a white victim ... Studies have shown that prosecutors are more likely to charge a male suspect than a female suspect... Schmidt and Steury found that prosecutors are more likely to charge suspects who are unemployed. Victim characteristics could affect prosecutors charging decision. According to Stanko, prosecutors use victim characteristics, not legal factors, to determine if conviction is likely to occur in a particular case. Furthermore, prosecutors usually devote limited resources to cases that have victims who will be perceived by the judge and jury to be “stand-up” witnesses. In assessing a victim’s credibility, prosecutors rely on society’s perception of who is credible and not deserving of victimization. For instance, Myers and Hagan found that prosecutors more often file criminal charges when the victim is older, white, male, and employed. Female victims who deviate from traditional society norms of female behavior, or engage in “precipatory” behavior, are deemed less credible. Another important factor that has shown to influence prosecutors’ charging decisions is the relationship between the victim and the suspect. Several studies have shown that prosecutors are less likely to file charges when the victim and the offender knew each other. Myers and Hagan suggested that

⁵⁸ Ibid at 12 [footnote omitted].

a victim's prior relationship with the offender may raise some questions about the truthfulness of the victim's story and may lead the victim to refuse to cooperate as the case moves through the criminal process ... [In rape and sexual assault cases], [s]tudies indicated that prosecutors are less likely to file criminal charges when a rape victim has a non-traditional work history, such as exotic dancer, masseuse, or prostitute. Similarly, research has shown that prosecutors are less likely to peruse sexual assault case when victims have a history of risk taking behavior, such as hitchhiking, drinking, or drug use. Studies also have revealed that prosecutors are less likely to pursue a sexual assault case when the victim has a questionable reputation or moral character.⁵⁹

In this case, the public prosecutors are likely to assess the prospect of conviction and allocate prosecutorial resources partly based on the characteristics of the suspect, victims, and their relationship. One of the concerns in the criminal justice system is that people might not always apply the law objectively and impartially. Of course, as a part of the prosecutorial strategy, these factors are frequently used by public prosecutors to predict the credibility of witnesses before a judge or juries in order to determine the evidential sufficiency of a case. However, Michelsen categorizes these factors as a non-legal influence on public prosecutors when deciding whether to continue a case. This is because public prosecutors are more likely to have personal judgements and biases against victims and the nature of an alleged offense due to these factors and, as a result, are reluctant to continue a case regardless of other available evidence.⁶⁰ This indeed risks the possibility that public prosecutors might draw an unfair or wrong conclusion in deciding whether to prosecute.

⁵⁹ Ibid at 13-14 [footnotes omitted].

⁶⁰ Michelsen, *supra* note 57.

Even though this research was conducted in the US, it reflects a common social phenomenon and human characteristic that, although public prosecutors have been trained to be legal professionals, they are not able to avoid personal feelings in charging decision-making. Charging guidelines exist in order to regulate the charging decision-making process so that charging decisions can be made as objectively and fairly as possible. Nevertheless, they are not capable of making public prosecutors abandon completely their personal feelings and attitudes towards the cases when making charging decisions because thoughts and feelings cannot be regulated. Therefore, Michelsen's research, as well as other American research, is valuable in indicating and inferring the prosecutorial behavior in charging decision-making in Canada.

There is a dearth of comprehensive and methodologically sophisticated empirical research directly dealing with prosecutors' behavioral patterns in charging decision-making in Canada, but the existing documents show that non-legal factors might play a role in Crown prosecutor's charging decision-making when combined with other factors. The nature of a crime and the character of the accused can have an impact on Crown prosecutors' judgements on whether to prosecute or not. B A Grosman found that Crown prosecutors were likely to withdraw charges in minor sexual offences if "the notoriety of the offence and the social status of the accused will likely result in suffering greatly out of proportion of the seriousness of the offence" and the withdrawal was not a result of the prosecutors' evaluation of the cases' merits, but moral consideration of the potential damage to the accused's future if convicted of a notorious offence.⁶¹ In supporting Grosman's research, Judith A Osborne found that, when a complainant failed to appear in

⁶¹ B A Grosman, *The prosecutor; an inquiry into the exercise of discretion* (Toronto: University of Toronto Press. 1969) at 37-39.

court as scheduled, the nature of a crime and the character of the accused would play significant roles in Crown prosecutors withdrawing charges. In one of his collected cases, which was about the indecent exposure, the complainant did not appear in court.⁶² Consequently, the Crown prosecutor withdrew the charge instead of requesting an adjournment to give him more time to subpoena the complainant. It was revealed that such a withdrawal was made solely based on the Crown prosecutor's belief that the accused did not commit the offence on purpose based on his family background.⁶³

The Crown prosecutor might be influenced by other external circumstances, such as political trends and increasing criminal complaints in the country. Through studying the prosecution of criminal conspiracy, Wes Wilson expressed his concerns about politically motivated prosecutions of criminal conspiracy.⁶⁴ He pointed out that, because of the vague and broad definition of "conspiracy" and loose rules of evidence, there is an increasing threat that Crown prosecutors might utilize criminal charges to suppress

⁶² Osborne, *supra* note 45 at 67-68.

⁶³ *Ibid.*

⁶⁴ Wes Wilson, "The Political Use of Criminal Conspiracy" (1984) 42 UT Fac L Rev 60 at 68:

In State security legislation and criminal offences such as sedition, it is characteristically the case that wide discretion is afforded the State in prosecuting perceived threats. When this is compounded by the vagueness, uncertainty, and prosecutorial discretion embodied in criminal conspiracy, the potential threat to civil liberties and the possibility of utilizing the charge to suppress political dissent is increased. This is of particular concern in that the government is the sole determiner of what constitutes the interests of the State and what is a threat to its security ... Reliance on the good faith of the State and the just exercise of prosecutorial discretion is frequently put forward as an apology not only for conspiracy law in relation to "security" legislation, but in defence of conspiracy doctrine as a whole - a rationalization of its most flagrantly unfair flaws, and a response to anyone who would suggest anything in the way of reform beyond tinkering with isolated problem areas. Yet an unjust law is always an unjust law, and it does not become any less so from infrequent application. In times of social upheaval, or in cases of panicked over-reaction to perceived threats, the State has not hesitated to apply the most powerful coercive instruments at its disposal. If a law is unjust, or has the potential for indiscriminate application to deprive citizens of their civil rights in times of social unrest, that law should itself be attacked (footnote omitted).

political dissent.⁶⁵ David Vanek worried that the pressure caused by heavy caseloads can push Crown prosecutors to take advantage of their discretionary power to dispose of cases on their daily calendars by using short cuts.⁶⁶ In fact, according to the report of the Canadian Federal-Provincial Task Force on Victims of Crime, in plea-bargaining processes, there were many instances where charges were withdrawn without proper consideration of the available evidence.⁶⁷ Crown prosecutors' subjective opinions towards a case are also a factor. Lucinda Vandervort found that, in Canada, Crown prosecutor's personal attitudes played a significant role in charging decision-making in sexual assault cases.⁶⁸

In Canada, it appears that sometimes Crown prosecutors prosecute someone for a particular act, but do not prosecute others who have done the very same thing. When talking about possible selective prosecution in Canada, Rober W Hubbard, Peter M Brauti and Candice Welsch believe that selective prosecutions indeed have been launched in the country. However, because the challenges on the grounds of selective prosecution experienced a low success rate, most of the challenges were disguised by other grounds of "abuse of process".⁶⁹ Even though there is a lack of actual cases, some scholars, such as Frater, Welling, and Mackinnon, believe that malicious and selective non-prosecution does exist.⁷⁰

⁶⁵ Ibid.

⁶⁶ Vanek, *supra* note 45 at 220.

⁶⁷ *Report of Canadian Federal-Provincial Task Force on Justice for Victims of Crime* (Ottawa: Minister of Supply and Services, 1983) at 43.

⁶⁸ Lucinda Vandervort, "Sexual consent as voluntary agreement: tales of "seduction" or questions of law?" (2013) 16 *New Crim L Rev* 143 at 160-162, 169.

⁶⁹ Robert W Hubbard, Peter M Brauti & Candice Welsch, "Selective Prosecutions and the Stinchcombe Model for Disclosure" (1999) 42 *Crim LQ* 338 at 352.

⁷⁰ Frater, *supra* note 15 at 20 -22, 254; Welling, *supra* note 11; *Paquette v Desrochers* (2000), 52 OR (3d) 742, 5 CCLT (3d) 24 (SCJ).

It also can be inferred from some studies in similar fields such as the behaviours of the police and judge/juror that decisions made by Canadian Crown prosecutors may also be influenced by personal bias or discrimination, and therefore they are not always as square and fair as we expect. Personal biases and discrimination against certain groups of people do exist in Canada as a part of the culture.

In a study of mock juror ratings of guilt in Canada, Jeffrey E Pfeifer and James R P Ogloff concluded that prejudicial attitudes, based on ethnicity, do indeed exist in Canada today.⁷¹ They found that bias against English Canadians and good impressions of French Canadian women could affect juror's subjective perception of victims at trial.⁷² As well, the study also shows that the determination of guilt could be influenced by the ethnic background of the victims.⁷³ In another study, Pfeifer discovered that accused persons with high social status are less likely to be found guilty than their counterparts with low social status, regardless of their race. However, when the accused have the same social status, the Black individual is more likely to be found guilty than the White individual.⁷⁴ Evelyn M Maeder, Annik Mossière and Liann Cheung found that the judgments of the mock jury in domestic violence cases might be influenced by the race and gender of the jury, which cause attitudinal and perceptual differences towards to the nature of the

⁷¹ Jeffrey E Pfeifer & James R P Ogloff, "Mock juror ratings of guilt in Canada: Modern Racism and Ethnic Heritage" (2003) 31 (3) Soc Behav Personal 301 at 309. Selective prosecution means a prosecution against one person but not others who were doing the very same thing. It is originally an American concept, which the court defined as a prosecution was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification". This concept is later adapted in Canadian system. A malicious prosecution is a prosecution motivated by "improper purpose" or purpose "inconsistent with the status of 'minister of justice'" (Proulx v Quebec (Attorney General), [2001] 3 SCR 9, 159 CCC (3d) 22 at para 55).

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Jeffrey E Pfeifer, "Expressions of Modern Racism in Judgments of Others: The Role of Task and Target Specificity on Attributions of Guilt" (2003) 31 (8) Soc Behav Personal 749 at 761.

defendant and the alleged crime at issue.⁷⁵

In a research study on whether Toronto police officials engage in “Racial Profiling”, similarly, Ron Melchers found that “it was highly plausible that, once all legally relevant factors have been accounted for, differences in the treatment of groups according to race will remain”, and concluded that “the possibility of discrimination cannot be excluded”.⁷⁶

In addition, police who have racial biases are more likely to stop an investigation solely based on their bias without carefully assessing all available relevant evidence, according to Oscar H Gandy and Lemi Baruh.⁷⁷ Ray Kuszelewski and Dianne L Martin considered that some of the police misconduct is caused by biases and assumptions about race, class and gender.⁷⁸ For example, complaints made by vulnerable and low status victims are easy to be set aside.

Similar to the above-mentioned two fields, some scholars doubt the existence of the “complete impartiality” of judges in actuality even though so many rules have been set to require judges to act impartially. R Abella argued that judges’ own values, assumptions, and experiences can significantly affect their judgements on an issue.⁷⁹ A similar argument was also made by Lord Justice Scrutton.⁸⁰ These studies suggest that some non-

⁷⁵ Evelyn M Maeder, Annik Mossière & Liann Cheung, “Canadian Mock Juror Attitudes and Decisions in Domestic Violence Cases Involving Asian and White Interracial and Intraracial Couples” (2012) 28 (4) JIV 667.

⁷⁶ Ron Melchers, “Do Toronto Police Engage in Racial Profiling” (2003) 45 (3) Can J Criminol Crim 347 at 362-363.

⁷⁷ Oscar H Gandy & Lemi Baruh, “Racial Profiling: They Said It Was Against the Law!” (2006) 3(1) UOLTJ 297 at 303-304.

⁷⁸ Ray Kuszelewski & Dianne L Martin, “The Perils of Poverty: Prostitutes’ Rights, Police Misconduct, and Poverty Law” (1997) 35 Osgoode Hall LJ 835 at 847-848.

⁷⁹ R Abella, “The Dynamic Nature of Equality” in S L Martin & K E Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 3 at 8-9.

⁸⁰ T E Scrutton, “The Work of the Commercial Courts” (1921) 1 Cambridge LJ 6 at 8:

This is rather difficult to achieve in any system. I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to

legal factors, such as personal bias, values, assumptions, cultural backgrounds, and experiences, could play significant roles in Crown prosecutors' charging decision-making.

It is impossible to regulate subjective perceptions with legal rules just as the law cannot control what people think. Studies about social science suggest that general belief or stereotypes associated with the characteristics of the stranger's group have an essential influence on people's decision-making and judgment on a person unknown to them.⁸¹

This is supported by the observation of the Ontario Human Rights Commission, which states "practical experience and psychology both confirm that anyone can stereotype, even people who are well meaning and not overtly biased."⁸² People may strongly believe in such stereotypes if they have similar previous experiences or constantly receive such information through prevailing pop-culture or media.⁸³ Studies suggest that decision-makers are likely to rely on group stereotypes if they have to make a vast number of decisions in a timely fashion, especially in cases where potential criminal or terrorist activities are concerned.⁸⁴

your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish...It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.

⁸¹ David M Tanovich, "E-racing racial profiling ("Stop in the Name of the Law": What Law? Racial Profiling and Police Practice in Canada)" (2004) 41 Alta L Rev 905 at 916. See also Alan W Mewett, "Secondary Gacts, Prejudice and Stereotyping" (1999) 42 Crim LQ 319; Marilyn MacCrimmon, "Developments in the Law of Evidence: The 1995-1996 Term: Regulating Fact Determination and Commonsense Reasoning" (1997) 8 (2) Sup Cl L Rev 367 at 368-374.

⁸² Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Queen's Printer for Ontario, 2003) at 6, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf>.

⁸³ Tanovich, *supra* note 81 at 913.

⁸⁴ *Ibid* at 913; see also Chris Sorensen, "Ottawa police, deputy chief at odds over racial profiling", *Toronto Star* (2 March), online: <www.operationblakkout.com/Ottawa%20policeRP.doc>.

Non-legal factors might lead to an irrational and unjust decision not to prosecute that will, in turn, cause great injustice and unfairness to victims. Traditionally, in the Canadian criminal legal system, victims' interests are subsumed in the state's interests. I believe that, even though the Crown prosecutor is not acting on behalf of victims, in most occasions, they will not deliberately inflict harm on those victims. However, in a case where Crown prosecutors appear to commit misconduct when deciding not to prosecute a case or to stop a private prosecution, victims' interests will be put in danger and victims will be unjustifiably deprived of the state protection they deserve.

2.3 Insufficient remedies and rights

When a prosecutor wrongs victims, victims have limited power to redress these wrongs because of the lack of sufficient and effective remedies and procedural rights in criminal proceedings.

2.3.1 Information Receiver

In current system, victims are merely information receivers. Not only cannot victims receive full information regarding their cases, but they also have no power to respond to the information. As stated in the preamble to the Ontario Victims' Bill of Rights, "the justice system should operate in a manner that does not increase the suffering of victims of crime and that does not discourage victims of crime from participating in the justice process".⁸⁵ However, many scholars have commented on the fact that victims' rights in Canada are comparatively passive and vague than they should be, and the rights do little

⁸⁵ Ontario, *Victims' Bill of Rights*, *supra* note 26, Preamble.

to alter the victim's traditional power position.⁸⁶ This is so in charging decisions. The principle of giving victims information about the status of an investigation, the scheduling, progress and outcome of the proceedings is almost duplicated word by word from the Canadian Statement in most provincial victims' bills of rights without elaboration. Legislation concerning victims' rights should provide detailed information about how this principle is to be put into force. It should at least give the reader a sense that such a principle is genuinely enforceable in the current framework of the criminal justice system. For example, if victims should be able to access the information about the progress of a particular criminal proceeding pertinent to the alleged crime, should corresponding agents provide the information to victims automatically or only upon their requests? Not every victim knows where and how to ask for the information. What type of information related to the progress of criminal proceedings should be available to the victims? The corresponding agents can reply to the victim simply by saying "we decide not to proceed with your case because of insufficient evidence." It seems that the agent has complied with the principle, but in fact, victims might feel the information insufficient. If the agent fails to comply with the principle, what are the remedies for the victims and should that agent be disciplined? If there is no sanction for the violation, the enforcement of such a principle could be highly ineffective.

Only in Ontario and British Columbia do the statutes mention that victims can receive information on the reasons behind charging decisions. Section 6 of the Victims of Crime

⁸⁶ J Scott Kenney, *Canadian Victims of Crime: Critical Insights* (Toronto: Canadian Scholars' Press, 2010) at 140-141; See Young, *supra* note 2 at 28-29. Traditionally, victims have no, or extremely limited, power and position in criminal proceedings.

Act of British Columbia⁸⁷ lays down in a mandatory tone that “the reasons why a decision was made respecting charges must” be given to victims at their request,⁸⁸ and section 2 (1) of Ontario’s Victims’ Bill of Rights also states that “[v]ictims should have access to information about: ... the charges laid with respect to the crime and, if no charges are laid, the reasons why no charges are laid...”⁸⁹ However, even these two provisions do not provide any comprehensive information about how detailed reasoning should be given to victims. In Ontario, the “right” that is put in the name of the “right of victims”, together with others put down in its Victims’ Bill of Rights, is considered a “principle” rather than an enforceable “statutory right”. It was held in *Vanscoy v Ontario* that “[t]he Act is a statement of principle and social policy, beguilingly clothed in the language of legislation. It does not establish any statutory rights for the victims of crime.”⁹⁰

It seems that the criminal justice system has attempted to treat victims of crime with due respect by informing them of decisions not to prosecute without undue delay. In fact, the decisions not to prosecute themselves and the lack of acceptable explanation might afflict victims with emotional distress when victims (at least for most victims who want a criminal prosecution) are struck by such unexpected bad news. The victims will be upset if Crown prosecutors refuse to give them acceptable explanations for decisions not to prosecute. The situation will get worse if the victims realise that no sufficient and effective remedies can be sought if the decisions are unjust and unfair.

As a development, Manitoba incorporates victims’ consultative roles in charging

⁸⁷ British Columbia, *Victims of Crime Act*, *supra* note 26.

⁸⁸ *Ibid.*

⁸⁹ Ontario, *Victims’ Bill of Rights*, *supra* note 26.

⁹⁰ *Vanscoy v Ontario*, [1999] OJ 1661 at para 20-22, 99 OTC 70 (Ont SCJ).

decision-making. Section 14 of its Victims' Bill of Rights generally encourages Crown prosecutors to consult victims when making a decision on whether to lay a charge.⁹¹ The effect of the consultation sometimes is not so significant. Sometimes, conflicting opinions between victims and Crown prosecutors might be buffered through sufficient communication, in which victims may be convinced by Crown prosecutors that prosecutions are not in their best interests before the actual decisions not to prosecute is delivered. However, where the conflict cannot be solved and victims have reasonable grounds to believe that a decision not to prosecute is improper, the consultative power does not give victims much help. In other words, it might give them help, but it leaves them without any available recourse or control. In conclusion, the Manitoba system is trying to incorporate victims' input in charging decision-making, but the result is not as helpful as it should be for victims. As a result, victims are still mere information receivers. Kent Roach described this phenomenon as the following:

[P]olice and prosecutors could treat the new consumer [victims] politely and give them information about what was happening. Nevertheless, victims would likely remain frustrated by the lack of control over the end product and by their involuntary status as consumers of criminal justice.⁹²

Of course, a criminal justice system is not a department store that might accept every little petty complaint from its consumers. However, where there is a patent miscarriage of justice on the part of the Crown prosecutor in deciding whether not to prosecute, the

⁹¹ Manitoba, *The Victims' Bill of Rights*, *supra* note 25, s 14:

[A]t the victim's request, the Director of Prosecutions must ensure that the victim is consulted on the following, if reasonably possible to do so without unreasonably delaying or prejudicing an investigation or prosecution: a. decision on whether to lay a charge...

⁹² Kent Roach, *Due Process and Victim's Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 287.

system should provide a forum to its consumers ---- victims ---- to complain about it and give appropriate remedies.

2.3.2 Civil Proceedings

If victims are denied access to the criminal justice system because of the prosecutors' refusal to initiate a prosecution, they can still theoretically initiate a tort proceeding through which they can claim monetary compensation and injunctive reliefs. However, tort proceedings are not always accessible to victims and, when they are accessible, their outcomes and effects are not always sufficient to replace the criminal ones. Indigent victims cannot afford a tort proceeding, so they can only rely on the public prosecution. As well, in situations where the defendant is much richer than the victim, the defendant has rich resources and power to help him defend the civil suit. Sometimes public prosecution can be used to even the scale between the rich and the poor. By contrast, in some situations, victims may walk away empty handed after a tort suit when the defendant is impecunious, which will be a Pyrrhic victory for victims.

According to one theory, the criminal prosecution can better protect the victims' personal safety. It is true that many scholars propose deterrent effect is just what tort law is for primarily. However, in reality, as commented by s Kenneth L Wainstein, tort remedies lack deterrent force, which makes them less effective in preventing the offender from repeating his or her acts against victims.⁹³ This is supported by other studies that show the ineffectiveness of civil injunctive reliefs, such as restraining orders.⁹⁴ Furthermore,

⁹³ Kenneth L Wainstein, "Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction" (1988) 76 (3) Cal L Rev 727 at 735-742.

⁹⁴ Brian H Spitzberg, "The Tactical Topography of Stalking Victimization and Management", (2002) 3 (4) Trauma Violence Abus 261 (It is concluded in an analysis of a vast number of American studies that

regarding pecuniary sanctions,⁹⁵ the rich defendant will choose to commit the tort if benefits of the tort outweigh the potential monetary loss if he or she loses in a tort suit. For the poor, they might attempt to commit the tort if they can be better off through such action, and they would not worry about the possible tort claim because they are not able to pay for the pecuniary remedy anyway. In that case, they might choose to take opportunities. From another perspective, a potential civil claim brought by victims could be a trigger for an offender to threaten victims or to commit other violent acts against them during or before a civil proceeding. Even though the same could happen as a result of criminal proceedings, victims enjoy less protection during civil proceedings than during criminal proceedings. This is because, as a general principle, victims of crime are entitled to basic protection at all stages of a criminal proceeding.⁹⁶

More importantly, in some cases, tort proceedings are insufficient to meet victims'

restraining orders are not effective and may have potential danger based on the high violation rate and people's negative perception of the restraining orders); T K Logan & Robert Walker, "Civil protective orders effective in stopping or reducing partner violence: challenges remain in rural areas with access and enforcement", online: University of New Hampshire: Scholars' Repository <<http://www.carseyinstitute.unh.edu/publications/IB-Logan-Civil-Protective-Order.pdf>> (Half of interviewed women reported violations of restraining order); Carolyn N Ko, "Civil Restraining Orders for Domestic Violence: the Undersolved Question of 'Efficacy'" (2002) 11 S Cal Interdisc LJ 361 (Restraining orders have limited deterrent effect on preventing offenders from re-committing offences, especially those who have criminal records, do not have a job, have drugs and alcohol histories, or have temporary relationship with the victim); Susan L Keilitz et al, "Civil Protection Orders: Victim's Views on Effectiveness", online: National Institute of Justice <<http://www.nij.gov/pubs-sum/000191.htm>>; Molly Chaudhuri & Kathleen Daly, "Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process" in Eve S Buzawa & Carl G Buzawa, eds, *Domestic Violence: The Changing Criminal Justice* (Westport: Auburn House, 1992) 227 at 230-231, 239-40; Andrew R Klein, "Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work" in Eve S Buzawa & Carl G Buzawa, eds, *Do arrests and restraining orders work?* (Thousand Oaks: Sage Publications, 1996) 192 at 192, 202.

⁹⁵ It is hard to categorize pecuniary remedies for plaintiffs as a legal section imposed on the defendant. The aim of such remedies is to recover plaintiffs' loss rather than to punish the defendant for the tort.

⁹⁶ *Basic Principles for Victims*, *supra* note 1:

4. The safety and security of victims should be considered at all stages of the criminal justice process and appropriate measures should be taken when necessary to protect victims from intimidation and retaliation." This principle is enhanced in almost every Victims' Bill of Rights.

psychological needs. It cannot be denied that some victims might care more about monetary compensation. For these victims, monetary remedies in tort proceedings are indeed more tempting. Victims' preference for monetary remedies could always be a case, no matter in commercial crimes or non-commercial crimes. However, that does not diminish the significance and necessity of the criminal prosecution for other victims. Damages caused by some types of acts, such as rape, murder, torture, cannot be recovered merely by monetary relief, and not every victim prefers monetary compensation.

Victims who prefer criminal prosecution might want retribution on their violator(s) and social acknowledgement of their suffering. Retribution is still one of the main goals of criminal law that is used to "balance the scale" by punishing criminals when a victim is improperly taken advantage.⁹⁷ It is true that sometimes victims might feel let down by the sanctions imposed on offenders because they never receive the retribution they want. However, in order to better include victims in the judicial process, which would provide victims with a greater possibility of satisfaction in sentencing and its outcome, the Canadian criminal justice system has granted victims' rights to submit an impact statement to a sentencing judge. Most judges consider that victim impact statements are helpful and relevant in determining proper sentences.⁹⁸ Furthermore, in some situations, the feeling of catharsis might appear as early as at the time that the accused is charged.⁹⁹

As well, as many have argued, the guilt and criminal accountability of the offender can

⁹⁷ Gabriel Hallevy, *The Right to Be Punished: Modern Doctrinal Sentencing* (Berlin: Springer, 2013) at 16-22; Daniel E. Hall, *Criminal Law and Procedure*, 6th ed (NY: Cengage Learning, 2011) at 26-27.

⁹⁸ *Use of Victim Impact Statements*, *supra* note 6; Department of Justice Canada, Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions : A Survey of Three Jurisdictions by Allen Edgar & Julian V Roberts (Canada: Depart of Justice Canada, 2006) at 18-21, online: Department of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr06_vic3/p5.html>.

⁹⁹ Welling, *supra* note 11 at 86.

only be legally proven by a criminal judgement,¹⁰⁰ and according to Jamie O'Connell, "[i]f [criminal] trials symbolize society's acknowledgement and condemnation of what survivors suffered, those who participate in them... may feel especially acknowledged and validated."¹⁰¹ In this sentence, O'Connell might specifically refer to victims' participation at trial, but victims' involvement in criminal proceedings is not limited to the trial stage. The victims' right to submit a victim impact statement can also have the same effect, and the realization of this benefit depends on the institution of criminal proceedings.

Tort law is built on the corrective justice theory, which is concerned about wrongful loss and wrongful gain and is to protect a distribution of holdings (or entitlements) from distortions that arise from those unjust enrichments and wrongful loss.¹⁰² It is true that "right" and "wrong" fit within corrective justice theory naturally. The issuance of the tort remedies establishes the fact that defendant's acts against victims are a violation of a norm governing people's interaction in a society.¹⁰³ That is the justification why the victims are entitled such remedies.¹⁰⁴ Even though the outcomes of tort proceedings, admittedly, are dependent on the finding of wrongdoing, it is argued that they still comparatively lack social condemnation of the accused and acknowledgement of victims' suffering.¹⁰⁵ The tort proceeding is aimed at restoration for victims, and the establishment

¹⁰⁰ Andrew Sidman, "The Outmoded Concept of Private Prosecution" (1975-1976) 25 Am U L Rev 754 at 789, n 182; Erin Ann O'Hara, "Victim Participation in the Criminal Process" (2005) 13 J L & Pol'y 229 at 234.

¹⁰¹ Jamie O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?" (2005) 46 Harv Int'l L J 295 at 328.

¹⁰² Jules Coleman, "Corrective Justice and Wrongful Gain" (1982) 11 JLS 421, 423

¹⁰³ Ibid. Ernest J Weinrib, "The Gains and Losses of Corrective Justice" (1994) 44 Duck LJ 277.

¹⁰⁴ Ibid.

¹⁰⁵ The Harvard Law Review Association, "Developments in the Law: Legal Responses to Domestic Violence", (1993) 106 Harv L Rev 1498 at 1532-33 (stating that tort suits "lack the social condemnation that accompanies criminal sanctions"); O'Hara, *supra* note 100 at 234; John C P Goldberg & Benjamin C Zipursky, "Tort Law and Moral Luck" (2007) 92 Cornell L Rev 1123 at 1142. (Through conducting a tort proceeding, the victim should have reasonably felt that the law has taken her grievance seriously).

of fault is to justify victims' entitlement to compensation. This reflects the fact that, even though a victim succeeds in a tort claim, the remedies can hardly be legally categorized as a sanction imposed on the defendant for his fault. Even though the tort outcome might sometimes show the act is committed intentionally and with the sort of moral wrongdoing, the level of its condemnation of the defendants' wrongful act is lower than a criminal conviction. For this reason, some victims might feel tort proceedings cannot completely replace the significance of criminal proceedings.¹⁰⁶

2.3.3 Informal Complaint

In Canada, there is an informal procedure through which victims can write a letter to the Attorney General requesting a reconsideration of the decisions not to prosecute. For example, in *Labrador Métis Nation v Canada*¹⁰⁷ and *Gentles v Ontario*,¹⁰⁸ both applicants made a written submission to the Attorney General after they were informed of the decision not to prosecute, hoping the Attorney General would change his mind. In both cases, the Attorney General insisted on dropping the case after victims' counsel represented the case to him. They only filed an application for judicial review when their attempt failed. In an informal complaint, the Attorney General and Crown prosecutor still monopolize the decision-making power and they are not obliged to reconsider the complained decisions. When a decision not to prosecute is maintained, victims cannot tell whether their complaints have been carefully considered without a formal procedure, given that there is no legal consequence if it is not an obligation of the Crown prosecutor

¹⁰⁶ O'Hara, *supra* note 100 at 234; Wayne A Logan, "A Proposed Check on the Charging Discretion of Wisconsin Prosecutors" (1990) 1990 Wis L Rev 1695 at 1720; John W Gillis & Douglas E Beloof, "The Next Step for a Maturing Victims' Rights Movement: Enforcing Crime Victims' Rights in the Courts" (2002) 33 McGeorge L Rev 689.

¹⁰⁷ *Labrador Métis Nation v Canada* (2006), 277 DLR (4th) 60, 358 NR 381 (FCA) [*Labrador Métis Nation*].

¹⁰⁸ *Gentles v Ontario (Attorney General)* (1996), 39 CRR (2d) 319, 1996 CarswellOnt 4247 (QL) [*Gentles*].

to review its decision based on the complaint made by victims.

2.3.4 Difficulties of Access to Current Judicial Review

In theory, victims can seek judicial review of the decision not to prosecute from a competent court.¹⁰⁹ In this manner, victims might have a decision not to prosecute made by the Crown prosecutors or the Attorney General reversed. Even though nowadays prerogative discretion is theoretically reviewable under certain circumstances, the judiciary is extremely reluctant to interfere with the Crown prosecutor's exercise of discretion in charging decisions. In fact, in recent decades, the Crown prosecutors' discretion to decide whether to prosecute has been subject to challenge. However, permissible grounds and standards of evidential proof have been too rigorous for victims to ever achieve success in judicial review proceedings.¹¹⁰ Even though the standard of review for other discretionary administrative decisions has been lowered in the context of administrative law, the change does not extend to judicial review of the decision not to prosecute. In past applications, victims have attempted either to seek an order in a nature of *certiorari* to quash a decision to stay a private prosecution¹¹¹ or to seek an order in a nature of *mandamus* to compel the Crown prosecutor to prosecute.¹¹² However, these applications ended up with no finding of abuse of discretion.

¹⁰⁹ Frater, *supra* note 15, at 40-48.

¹¹⁰ *Ibid* at 20-22, 48-51.

¹¹¹ *Mitchell*, *supra* note 52; *Laforme*, *supra* note 52; *Kostuch*, *supra* note 52; *Osiowy*, *supra* note 39; *R v Thiessen* [2004] 3 WWR 421, 310 WAC 30 (Man CA), affg [2002] 8 WWR 558, 165 Man R (2d) 93 (QB), leave to appeal to SCC refused [2004] 1 SCR xiv, 328 NR 393 *sub nom Thiessen v Manitoba, Quebec (Attorney General) v Chartrand* (1987), 40 CCC (3d) 270, 59 CR (3d) 388 (Que CA) [*Thiessen*].

¹¹² *R v Reed* (1998), 186 WAC 156, 39 WCB (2d) 537 (BCCA), leave to appeal to SCC. refused 239 NR 200n, 211 WAC 31N [*Reed*]; *Gervasoni v British Columbia (Attorney General)* (1994), 24 WCB (2d) 402, [1994] BCJ no 1878 (SC); *Faber*, *supra* note 39; *Ochapowace First Nation v Canada (Attorney General)* (2007), 73 Admin LR (4th) 182, 316 FTR 19 (FC). *Meyer v British Columbia (Regional Crown Counsel)*, 2002 BCSC 257, 53 WCB (2d) 151; *Canadian Union of Public Employees, Air Canada Component v Canada (Minister of Labour)*, 2012 FC 1484, [2012] ACF no 1629 [*Canadian Union of Public Employees*].

The judicial review for charging decisions has not caught up with the development of that for other administrative discretionary decisions. Victims are unlikely to succeed in the application for judicial review of the decision not to prosecute for several reasons. First, the judiciary is extremely reluctant to interfere with the Crown prosecutor's exercise of discretion in deciding whether to prosecute. Second, the standard of review and proof are very rigorous. Third, victims can rarely find conclusive evidence in order to support their arguments.

In order to guarantee that the Attorney General and the Crown prosecutor can function effectively and efficiently in charging decision-making, some discretionary powers are given to them in situations where there is a need to discontinue a case. The nature of the charging decisions was described in *Krieger v Law Society of Alberta*:

In making independent decisions on prosecutions, the Attorney General and his agents exercise what is known as prosecutorial discretion. This discretion is generally exercised directly by agents, the Crown attorneys, as it is uncommon for a single prosecution to attract the Attorney General's personal attention.

"Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

...

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the

prosecution of a charge laid by police; (b) *the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1...* (d) *the discretion to withdraw from criminal proceedings altogether...*¹¹³

2.3.4.1 Judicial Reluctance to Interfere

Judges appear to believe that the court is not in a position to deal with prosecutorial charging decisions for several reasons. First, the interference with the exercise of prosecutorial discretion in deciding whether to prosecute can raise the issue of separation of powers.¹¹⁴ In *R v Balderstone et al*, Monnin CJM stated as follows:

The judicial and executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney General – barring flagrant impropriety - he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney General or his officers. That a judge must not do.¹¹⁵

¹¹³ *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 42-43, 46, [2002] 3 SCR 372 [*Krieger*] [emphasis added].

¹¹⁴ *R v Power* (1994), 89 CCC (3d) 1at para 16, [1994] 1 SCR 601 (SCC) [*Power*]:

That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case law. They have been so as a matter of principle founded on the doctrine of separation of powers, as well as a matter of policy founded on the efficiency of the system of criminal justice, and the fact that prosecutorial discretion is especially ill-suited to judicial review.

¹¹⁵ *R v Balderstone et al* (1983), 8 CCC (3d) 532 at para 28, [1983] MJ no 207 (Man CA). See also: *R v Moore* (1986) 26 CCC (3d) 474, [1986] MJ no 56 (Man CA); *Campbell v Attorney General of Ontario* (1987) 31 CCC (3d) 289, [1987] OJ no 68(Ont HCJ), (1988) 35 CCC (3d) 480 (Ont CA), leave to appeal refused, 35 CCC (3d) 480 (SCC) [*Campbell*].

Relatedly, courts do not want to be responsible for the institution of the prosecution.¹¹⁶ Once the court opens the door for the judicial review of charging decisions, increasing applications to seek judicial review of such decisions will be brought to the court and the court will become the ultimate place to decide whether to prosecute.

Second, it is also a concern that judges might lose their independence and impartiality if they are given overly broad judicial power over the exercise of discretion by Crown prosecutors and the Attorney General.¹¹⁷ Once judges get the power to control the institution of a prosecution, they are likely to become “supervising prosecutors” and start considering administrative issues, which may or may not include many non-legal considerations. Some of these issues might not be appropriate for a court to consider. Allowing judges to consider these issues will undermine the court’s objective independence and impartiality in deciding the merits of a case that is brought to it merely based on legal considerations.

Third, many scholars and judges consider that discretion is necessary for a criminal justice system to function efficiently. A court second-guessing the Crown prosecutors’ exercise of prosecutorial discretion will narrow the discretionary power of Crown prosecutors in making charging decisions:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the

¹¹⁶ *Perks v Ontario (Attorney General)*, [1998] OJ no. 421 at paras 10,11, 57 OTC 21 (Ont. CJ (GD)) [*Perks*].

¹¹⁷ *R v Nixon* (2011), 271 CCC (3d) 36 at paras 52, 64, [2011] 2 SCR 566 (SCC) [*Nixon*];

kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.¹¹⁸

Crown prosecutors and Attorney General are considered the most competent and experienced authorities in making charging decisions because they have mastered the complexity of charge decision-making through day-to-day practice.¹¹⁹ The assessment of the same set of existing factual and legal materials by two equally reasonable persons could result in both a decision to prosecute and a decision not to. Both decisions might be equally reasonable or reasonable within a range of possibility. In this case, the court should respect and uphold the choice made by the Crown prosecutor who is specialized in the field.

Finally, the system always has numerous legitimate reasons to reject a check on the prosecutorial discretion, but it seems to me it just wants to protect the prerogative position and power of the Crown prosecutor. It can be attributed to people's inertia to change their traditional practice - unfettered discretionary power of the Crown prosecutor to institute a prosecution.

¹¹⁸ *Power*, *supra* note 114 at para 37; See also *R v Beare*, [1988] 2 SCR 387 at para 51, [1987] SCJ no 92; *Smythe v The Queen*, [1971] SCR 680 at 686, 3 CCC (2d) 366; *R v T (V)*, [1992] 1 SCR 749, [1992] SCJ no 29; *R v Lyons*, [1987] 2 SCR 309 at para 64, [1987] SCJ no 62.

¹¹⁹ D J Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 CJALP 59 at 93 (A policy of deference recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have developed or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime).

2.3.4.2 High Standard of Review

In principle, decisions not to prosecute are reviewable by the court, but for the aforementioned reasons, courts give the highest order of deference to the judgment of the Crown prosecutor or the Attorney General in making those charging decisions, and “flagrant impropriety” must be proven by an applicant for judicial review to succeed. Looking into behavioural problems of the Crown prosecutor is not equal to probing into the reason behind a decision. Courts examine only conduct amounting to “flagrant impropriety” of the Crown prosecutor in the charging decision-making process, which make a charging decision look suspicious and questionable immediately. It will not probe into the deeper cause or consider different factors attributing to the decision not prosecute. Misconduct on the part of Crown prosecutors and the Attorney General that constitutes “flagrant impropriety” has been described in *Kostuch v Alberta (Attorney General)*:

We agree with the statement of Miller A.C.J. in *Re W.A. Stephenson Construction (Western) Ltd.* (1991) 81 Alta L.R. (2) 214, 121 A.R. 219 (Q.B.), 66 C.C.C. 201 that flagrant impropriety can only be established by *proof of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence.*¹²⁰

The definition has been quoted and followed by subsequent cases repetitively. In *Perks v Ontario*, the Court defined “flagrant impropriety” as “misconduct bordering on corruption, violation of the law, bias or improper motive”.¹²¹ In *Gentles v Ontario*, judicial intervention is permissible if “it is shown that the Attorney General's actions were flagrantly improper, or prompted by improper motives or bad faith, or were so wrong as

¹²⁰ *Kostuch*, *supra* note 52 at para 34 [emphasis added].

¹²¹ *Perks*, *supra* note 116 at para 8.

to violate the conscience of the community”.¹²² In spite of the different wording, “flagrant impropriety” refers generally to those behaviors and actions committed by the Crown prosecutor and Attorney General that were summarised in *Kostuch* during the charging decision-making process. Currently, grounds amounting to “flagrant impropriety” are strictly limited to the above-mentioned situations, and “flagrant impropriety” is the sole standard automatically applied in judicial review applications for decisions not to prosecute in most Canadian courts, including the Supreme Court of Canada.¹²³ This standard of judicial review is indistinctively employed for compelling a prosecution and quashing a decision to stop a private prosecution.

Various arguments have been raised to expand the definition of “flagrant impropriety” on the part of the Crown prosecutor and Attorney General, but none of them has ever succeeded. Courts have always ruled in favor of the Crown prosecutor and Attorney General.

The court rejected Charter rights violations as permissible grounds to review charging decisions. In *Kostuch v Alberta (Attorney General)*,¹²⁴ the counsel of the applicant argued that the stay of the private prosecution deprived the applicant of his liberty of access to a court of law and justice, and created a state-imposed psychological stress for him, which was a violation of section 7 of the Charter (Charter s 7). The court rejected the argument on the grounds that Charter s 7 did not give the citizen unlimited rights to conduct a private prosecution and that the rights of the accused should be taken into consideration.

¹²² *Gentles*, *supra* note 108 at para 54.

¹²³ *Chen*, *supra* note 52 at para 14.

¹²⁴ *Kostuch*, *supra* note 52 at paras 27-28.

A similar argument was made in *Gentles v Ontario*¹²⁵ where the court referred to the reasoning in *Kostuch* and found no violation of Charter s 7. The court dismissed the application for review because the applicant did not raise any issues concerning “flagrant impropriety”, which would allow the court to intervene, and Charter s 7 violations do not constitute “flagrant impropriety”. In *McHale v Ontario (Attorney General)*,¹²⁶ the applicant filed an Information alleging the putative accused had committed common nuisance contrary to section 180 of Criminal Code by failing to deploy police whose job it was to prevent the riot, and the prosecution was later stayed by the Crown prosecutor. The applicant claimed that, by staying the prosecution, the Crown prosecutor had showed bias in favor of the police, which breached the Criminal Code as the obstruction of justice and a violation of section 15 of the Charter. The court followed the ruling in *R v Power*¹²⁷ and held that Charter rights violations did not constitute grounds to allow the court power to review a prosecutorial decision and grant extraordinary remedies.

Allegations of violations of aboriginal rights were also made to challenge decisions not to prosecute, but never succeeded. In *Labrador Metis Nation v Canada (Attorney General)*,¹²⁸ the applicant alleged that a stay of a private prosecution against the Province of Newfoundland and Labrador impaired aboriginal rights and interests because the Attorney General failed to consult aboriginal people. The prosecution was about potential violations of the Fisheries Act¹²⁹ because of the Province’s construction of a bridge and a causeway over river that was claimed under the aboriginal right or title. The court found

¹²⁵ *Gentles*, *supra* note 108 at paras 23-24.

¹²⁶ *HcHale*, *supra* note 52.

¹²⁷ *Power*, *supra* note 114.

¹²⁸ *Labrador Métis Nation*, *supra* note 107.

¹²⁹ *Fisheries Act*, RSC 1985.

the argument unsustainable on several grounds: First, unlike the decision to construct the bridge and causeway, the stay of the private prosecution would not directly affect or impair aboriginal right or title. As well, the duty of consultation is aimed at promoting an aboriginal right, but the nullification of a stay would not have promoted the aboriginal right at issue. Second, a duty to consult would improperly influence the Attorney General exercising discretionary power in terminating a prosecution. Third, the Crown prosecutor's manual only required the Crown prosecutor to recognize the duty of consultation, which was different from imposing an obligation to consult.¹³⁰ Other allegations such as a simple "error of law" were also dismissed. In *Zhang v. Canada (Attorney General)*, the Federal Court of Appeal held that a simple "error of law" did not constitute "flagrant impropriety" on the part of the Crown prosecutor in charging decision-making.¹³¹ The aforementioned cases show that the court allows only those limited instances of "flagrant impropriety" mentioned at the beginning of this section, a highly deferential and limited standard of review.

By contrast, courts in Quebec seem to be applying a broader definition of "flagrant impropriety". The scope of review extends to the decision *per se*. If a decision is patently

¹³⁰ *Labrador Métis Nation*, supra note 107 at paras 31, 32:

The appellants rely on the Federal Prosecution Service Deskbook (Ottawa: Department of Justice Canada, March 2005), Part V, chapter 15.3.2.1, which states that, in determining whether the public interest warrants prosecution under, for example, the Fisheries Act, Crown counsel should consider the views of the investigative agency "where the offence provisions serve important regulatory goals." It continues:

The need to understand the particular regulatory context underscores the obligation of Crown counsel to consult in carrying out counsel's duties under this policy.

However, there is a big difference between a manual's recognition that counsel has a "duty to consult" and the imposition by the Court of a legal obligation to consult. Nor, in my view, is there a legitimate expectation on the part of the appellants that they would be consulted before the stay was issued: the only "duty to consult" referred to in the Deskbook is with other governmental actors, not private individuals.

¹³¹ *Zhang v Canada (Attorney General)* (2007), 61 Admin LR (4th) 99 at para 14, 155 CRR (2d) 332, leave to appeal to SCC refused 164 CRR (2d) 375n.

unreasonable, it amounts to “flagrant impropriety” on the part of the Crown prosecutor in decision-making, which allows the court to interfere with discretionary decisions. In *Bérubé c Québec (Procureur général)*, the Court held:

The stay of proceedings ordered by the chief deputy, in accordance with his discretionary power, was not subject to judiciary review save in cases of abuse of process, of "flagrant impropriety" or *if the decision proved "carrément déraisonnable"* ... However, a decision labelled "carrément déraisonnable" was equivalent to a "flagrant impropriety". In other words, the applicant bore the burden of proving that staying the proceedings was a decision "carrément déraisonnable", to the point that it constituted a flagrant impropriety equivalent to an abuse of process likely to blemish the image of justice.¹³²

Under this definition, some unsuccessful applications might have succeeded. For example, in *Mitchell v Canada (Attorney General)*,¹³³ the court found that the existing evidence only showed the lack of diligence on the part of the prosecuting authority, which was not sufficient to form *prima facie* flagrantly improper behaviour. However, the lack of diligence on the part of a prosecuting authority might have established a reasonable ground to believe that the resulting decision was patently unreasonable, which would have permitted the court's intervention. In my opinion, it would be very strange that a decision resulting from prosecutors' flagrantly improper actions constitutes miscarriage

¹³² *Bérubé c Québec (Procureur général)*, 1996 CarswellQue 1183, [1997] RJQ 86 [emphasis added]. See also: *Chartrand v Quebec (Attorney General)* (1987), 40 CCC (3d) 270 (Que CA), 59 CR (3d) 388 at 389-390, leave to appeal refused (1988) 41 CCC (3d) vi (SSS) [*Chartrand*]:

Although there is a thin separation between the competence of the court and those of the attorney general (the court decides on the trials and the attorney general decides to pursue a prosecution), I agree that the court has a right to cancel a *nolle prosequi* if one demonstrates that, in an application, the attorney general violated or abused the law, by (1) corrupting, (2) having bias in favor of the accused or against the victims 3) violating the law, and finally (4) making an obviously unreasonable decision.[translated by author]

¹³³ *Mitchell*, *supra* note 52.

of justice, but wrong or patently unreasonable decisions resulting from other reasons do not.

However, the definition used in Quebec is not accepted in other jurisdictions in Canada. In *Kostuch v Alberta*, the court doubted whether “patent unreasonableness” was appropriate to be categorized as “flagrant impropriety”.¹³⁴ In *Johnson v Saskatchewan (Attorney General)*, the court dismissed the applicant’s argument because manifestly unreasonable stay of the private prosecution did not constitute permissible grounds for a court to intervene into prosecutorial discretion.¹³⁵ Similarly, in *R v Laforme*, the court found that not all wrong or incorrect decisions made by the Crown not to prosecute resulting from flagrant impropriety can justify the court’s intervention into prosecutorial discretion.¹³⁶ In sum, in most regions of Canada, the standard for judicial review for a decision not to prosecute is still very high, and other standards of review used in the context of administrative law, such as “patent unreasonableness”, “reasonableness”, and “correctness”, are ruled unsuitable for a court to interfere with the exercise of prosecutorial discretion.¹³⁷

2.3.4.3 Lack of Supporting Documents and Jurisprudence

High evidential standards and the lack of existing successful claims are also major hurdles for victims to succeed in an application for a judicial review. Most applications result in a judicial declaration that there is “no evidence of flagrant impropriety”.

¹³⁴ *Kostuch*, *supra* note 52 at paras 37, 39.

¹³⁵ *Johnson v Saskatchewan (Attorney General)* (1998), 156 Sask R 233, [1998] 2 WWR 573 [*Johnson*].

¹³⁶ *Laforme*, *supra* note 52 at para 6.

¹³⁷ *Bradley*, *supra* note 35; *Campbell*, *supra* note 115; *Osiowy*, *supra* note 39; *Chartrand*, *supra* note 132; *Kostuch*, *supra* note 52; *Baker v British Columbia (Attorney General)* (1986), 26 CCC (3d) 123, [1986] BCJ no 3280(BCSC); *Hamilton*, *supra* note 39.

Just as stated by JA Finlayson in *R v Durette*, the applicant had a burden to provide sufficient and clear evidence to support his allegation against the Crown prosecutor before the court was willing to look into the exercise of the discretionary power of the latter, otherwise the court would assume that the Crown prosecutor had properly carried out their duties.¹³⁸ Finlayson further laid out the evidential standard for this type of judicial review:

Such an allegation must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of proof. Without such an allegation ... [T]he allegation of improper or arbitrary motives cannot be an irresponsible allegation made solely for the purpose of initiating a "fishing expedition" in the hope that something of value will accrue to the defence. The mere fact that the Crown made a decision does not, without more, form a basis for an allegation of bad faith. Nor does it require a trial judge to allow an evidentiary hearing to inquire into why the discretion was not exercised differently.¹³⁹

This evidential standard is cross-referred to and accepted in the judicial review of decisions not to prosecute.¹⁴⁰ In any case, speculation or mere conjecture is not sufficient to establish "flagrant impropriety".¹⁴¹

However, it is very difficult for the applicant to find direct and conclusive evidence for the application for judicial review to succeed. For one reason, this is due to the nature of

¹³⁸ *R v Durette* (1992), 72 CCC (3d) 421 at 437 - 439, [1992] OJ no 1044 (Ont CA) [*Durette*].

¹³⁹ *Ibid* at 437 - 439.

¹⁴⁰ *R v Larosa*, [2002] OJ no 3219 at para 79, [2002] CCC (3d) 449 (Ont CA); *Laforme*, *supra* note 52; *Reed*, *supra* note 112 ("Flagrant impropriety" has to be demonstrated by the material).

¹⁴¹ *Laforme*, *supra* note 52 (The court dismissed the application because the allegation made by the applicant was solely based on suspicion and speculation); *Johnson*, *supra* note 135 (Mere speculation or conjecture does not suffice to prove "flagrant impropriety" on the part of the Crown prosecutor in charging decision-making).

those permissible grounds for judicial review mentioned in the previous section, which makes the permissible grounds difficult to prove. For example, in some other cases, applicants argued that Crown prosecutors were acting in favor of the accused, where the accused persons were police officers, because of their close and ongoing working relationship with the latter.¹⁴² In *McHale v Ontario (Attorney General)*,¹⁴³ the court could not find a pattern of Crown prosecutors having bias favoring the police in past cases that involved police as the accused, and stated that such an allegation could not be solely based on speculation. Of course, the court could not find the bias in the past cases. This is because, even though similar arguments had been laid before courts, no court had ever ruled in favor of the applicants. In addition, if such “bias” has turned into day-to-day practice and an unwritten rule of cooperation between the police and the office of the prosecutor, it leaves no tangible evidence to establish such “bias”. As well, this practice might seem normal and acceptable in the eyes of judges. This leaves victims no choice but to rely on speculation: when I see it, I know it.

No applicant has ever applied for judicial review of decisions not to prosecute on the grounds of corruption, which requires the applicant to establish a clear case of corruption on the part of the Crown prosecutor when he or she made such charging decisions. That would be no different than asking the applicant to prove that the Crown prosecutor is guilty for corruption before the court is willing to examine the decision not to prosecute. That would be a very high standard of proof. As well, by reviewing cases concerning decisions not to prosecute, I have an impression that the courts, in their judgements, are more willing to put emphasis on their reluctance and unsuitability to review a charging

¹⁴² *Thiessen, supra* note 111; *Laforme, supra* note 52; *HcHale, supra* note 52; *Ahmadoun, supra* note 52.

¹⁴³ *HcHale, supra* note 52.

decision made by the Crown prosecutor than to seriously consider whether or not the evidentiary standard for the applicant to seek a judicial review is realistic and enforceable.

For another reason, the Crown prosecutor is not even obliged to provide reasons for charging decisions to the accused person who has a right to discovery as a part of his or her fair trial rights.¹⁴⁴ As Frater noted, “where the Crown does choose to give reasons, sometimes it gives a fair amount of detail in its explanation, and sometimes it gives a more perfunctory response”.¹⁴⁵ It is even harder for the victims to find solid evidence because they do not even have procedural rights at the charging stage and their rights to information, in most provinces, do not cover the reasons behind the decision not to prosecute. To make things worse, the court in *Johnson v Saskatchewan (Attorney General)* clearly stated that “the applicant was not an accused therefore any allegation as to a lack of disclosure is not a factor to be taken into account” in the application of judicial review for the decision not to prosecute.¹⁴⁶

2.3.4.4 Limited Ground to Review

The accused has more grounds to challenge a charging decision. Apart from “flagrant impropriety” and “malicious prosecution”, the accused can request a court to stay a proceeding based on other grounds of “abuse of process”, which has the same effect as quashing a discretionary decision to prosecute made by the Crown prosecutor.¹⁴⁷ In fact, most successful challenges were brought based on these grounds because the court had extraordinary judicial power to control the court process in order to protect the accused

¹⁴⁴ *R v Light* (1993), 78 CCC (3d) 221 at 252, 37 WAC 241 (BCCA); *R v N (D)* (2004), 188 CCC (3d) 89, 122 CRR (2d) 250 (Nfld & Lab CA). In these two cases, the Crown prosecution did not give reasons for charging decisions.

¹⁴⁵ Frater, *supra* note 15 at 48-49

¹⁴⁶ *Johnson*, *supra* note 135.

¹⁴⁷ *Krieger*, *supra* note 113; *Nixon*, *supra* note 117; *Campbell*, *supra* note 115.

from the misconduct of the prosecutor and uphold the principle of justice. This power is upheld in a root case *R v Young*:¹⁴⁸

I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.¹⁴⁹

“Flagrant impropriety” can be a basis for finding both breaches of statutory or common law power in the context of administrative law and abuse of process in the context of criminal law. In most cases, applicants of judicial review of decisions not to prosecute allege that the Crown prosecutors breached their statutory or common-law power by acting flagrantly improperly when dropping a case. Recently, smart applicants have attempted to rely on the doctrine of abuse of process to seek *certiorari* against the Crown prosecutor’s stop of a private prosecution because the court has more power to intervene on these grounds. However, the attempt failed in *Ahmadoun v Ontario*,¹⁵⁰ in which the court denied the applicant’s formal standing to seek a *certiorari* to stop the Crown prosecutor from entering a stay of a private prosecution on the grounds of “abuse of process”. The court reasoned that, because the Crown prosecutor had intervened into a private prosecution, the applicant was no longer a “prosecutor”, but a mere “victim” or “witness” that was not a party to the proceedings. As a non-party, he had no standing to accuse the conduct of the prosecutor based on the “abuse of process” doctrine. It quoted

¹⁴⁸ *R v Young* (1984), 13 CCC (3d) 1, 40 CR (3d) 289 (Ont CA).

¹⁴⁹ *Ibid* at para 88.

¹⁵⁰ *Ahmadoun*, *supra* note 52.

the statement in *R v Jewitt*¹⁵¹ and stressed that the doctrine was “a judicial discretion to enter a stay of proceedings *to control prosecutorial behaviour prejudicial to accused person*”. In other words, the doctrine is to prevent the Crown from overpowering the accused in the criminal proceeding. As the private prosecutor is no longer a party of the criminal proceeding after the Attorney General intervenes, the private prosecutor cannot claim to be a victim of the Crown prosecutors’ abuse of the court’s process. Therefore, there is no victim in such an allegation unless the accused is willing to join the private prosecutor’s allegation. This is nonetheless highly unlikely. Hence, the grounds for the victims to challenge a charging decision are further limited.

¹⁵¹ *Jewitt*, *supra* note 54 at 13-14.

CHAPTER III

3 Victims should have the opportunity to challenge a decision not to prosecute

3.1 Victims' Interests in Criminal Process are at Stake

If there is a social value in allowing victims the right to make impact statements at the post-conviction stage, that value is lost when the Crown prosecutor improperly decides not to prosecute. This means that the social value is at stake at the “discretionary decision-making stage”. Undoubtedly, victims have real interests after a guilty verdict is entered. Sarah Welling, as one of a few scholars who advocate victims' participation in charging decision, identified victims' indirect interests in charging decisions when she tried to evaluate the victims' interests versus the interests of the accused and the public prosecutor in charging decisions:

[V]ictims do have an indirect interest in the charging decision because the conviction and sentence are dependent upon the charging decision, and victims have significant interests in the conviction and sentence. With regard to sentencing, the victim has a financial interest because restitution is usually a possibility. Another interest in the sentence is psychological. The victim may desire retribution in the form of a severe sentence. The victim may also wish to incapacitate the defendant: if the sentence includes incarceration, the defendant will no longer be a threat to the victim. With regard to the conviction, the victim's interests are twofold. First, the conviction sets limits on the potential sentence and therefore implicates the victim's sentencing interests. Second, the conviction decision itself carries a symbolic significance for the victim because it is society's judgment that the person who harmed the victim is criminal. Thus the victim has an indirect interest in the substance of the charging

decision because it affects both the conviction and sentencing decisions.¹⁵²

In recognition of victims' interests in the post-conviction stage, victims have been granted a right to participate, in several ways, in criminal proceedings. The most symbolic and formal participatory role granted in Canada concerning victims' rights is to allow them to fill out an impact statement and present it before a court, narrating the nature of the harm that they have suffered as a result of the accused acts.¹⁵³ Currently, victim impact statements can be provided during sentencing,¹⁵⁴ section 745.6 hearings,¹⁵⁵ a "not criminally responsible" or "unfit to stand trial" disposition hearing,¹⁵⁶ and a parole hearing.¹⁵⁷ Empirical study shows that a majority of victims will be dissatisfied with the disposal of their cases if they are not given an opportunity to present an oral victim impact statement in court proceedings.¹⁵⁸ In addition, in most provinces, victims are eligible to receive criminal compensation. Even though a criminal conviction is not always necessary, such a conviction is a conclusive proof of the commission of a crime.¹⁵⁹ If the Crown prosecutor drops a criminal prosecution, it might also negatively affect the

¹⁵² Welling, *supra* note 11 at 77.

¹⁵³ *Criminal Code*, *supra* note 23, s 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.

¹⁵⁴ *Ibid*, s 722 (4)

¹⁵⁵ *Ibid*, s 745.63 (1)

¹⁵⁶ *Ibid*, s 672.5 (13.2)

¹⁵⁷ The Canadian Resource Centre for Victims of Crime, "Victim Impact Statements", online: Canadian Resource Centre for Victims of Crime <<http://crcvc.ca/docs/VictimImpactStatements.pdf>>.

¹⁵⁸ Department of Justice Canada, *Victim Participation in the Plea Negotiation Process in Canada* by Simon N Verdun-Jones & Adamira A Tijerino (Ottawa: Policy Centre for Victims Issues, Canada Department of Justice, 2001) at 49-50, online: Depart of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr02_5/rr02_5.pdf>.

¹⁵⁹ Office of the Attorney General and Public Safety, *Victims of Crime Act 2009-2010 Annual Report* (Prince Edward Island: Office of the Attorney General, 2010), online: The Government of Prince Edward Island <http://www.gov.pe.ca/photos/original/JPS_victimact10.pdf>; Milena Celap, "Victim Compensation: Closure & Cash", online: CELAP LAW <<http://www.celap.com/lawarticles/artcle-victim-comp-rev.pdf>>.

assessments for the eligibility of governmental compensation during the hearings.¹⁶⁰

Furthermore, the trial process itself is also meaningful to victims. In some cases, an open court trial may contribute to the restoration of victims' dignity. As noted by Carlos Nino during the military junta trials in Argentina,

What contributes to re-establishing [the victims'] self-respect is the fact that their suffering is listened to in the trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators acts' [sic] are officially condemned.¹⁶¹

Even though Carlos Nino's original purpose of making this comment was to support victims' participatory roles at the trial stage, the comment explains why an open court trial is meaningful for victims. In a trial, the Crown prosecutor is not victims' counsel who should represent the interests of the victims. However, when conducting a prosecution, he or she does present victims' side of story to a trial judge (or trial judges). The public can feel and hear victims' stories in open court. By testifying in a court and following the trial, even in the absence of a formal standing in the trial process, victims may "find meaning in being heard, in having a witness who affirms that [their abuse] did happen, that it was terrible, [and] that it was not their fault".¹⁶² The reason behind citing this statement here is not to try to argue for victims' formal participatory roles at trial, but to show that an open court trial can be meaningful to victims. Of course, defense lawyers may attack victims during the trial and an acquittal might be finally entered. However, if

¹⁶⁰ Ibid.

¹⁶¹ Emily Haslam, "Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience" in Dominic McGoldrick, Peter Rowe & Eric Donnelly, eds, *The permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publication, 2004) 315 at 316.

¹⁶² O'Connell, *supra* note 101 at 330.

an accused is convicted, the trial proceeding can contribute a level of healing to victims.

It is true that the healing effect of trial process is largely conditional on the conviction of the accused. Of all criminal prosecutions, there is never a hundred per cent conviction rate, nor a hundred per cent acquittal rate. That means victims have *a chance* to receive this healing effect through a criminal prosecution. This chance should not be taken away improperly merely based on the supposition that the victims might not have benefited from the trial process because the accused might not have been convicted at the end.

It is not meaningless to emphasize the existence and importance of victims' interests at the trial and post-trial stage. Just because these interests are not directly affected in the charging stage,¹⁶³ it does not mean a charging decision will not affect the victim's interests. In fact, these interests are so significant that a decision that can determine whether or not a victim might pursue the interests in the future should be made with due prudence. If a decision not to prosecute is entered, a criminal process is considered closed, which means that no trial and sentence will follow. In cases of the permanent termination of the prosecution, although the decision not to prosecute is not legally or factually synonymous with acquittal, the decision may be perceived as a "not guilty" verdict by those victims or the general public who are not trained as legal professionals. Therefore, it cannot be said that victims' interests will not be significantly and personally affected by

¹⁶³ Some authors such as Welling believe that victims do not have direct interests at the charging stage. Welling, *supra* note 11 at 86-87:

The victim's only direct interest in the substance of the charging decision is a feeling of catharsis or vindication when the defendant is charged with a crime. Although victims may feel some vindication when the defendant is charged, from the system's perspective, this feeling is unjustified because, until conviction, the defendant is presumed to be innocent. Aside from this feeling of vindication, the victim has no interest in the charging decision, *per se*; whether an action is filed and selection of the charges are decisions with no direct impact on the victim.

a decision not to prosecute. Of course, there are other considerations that can be weighed against victims' interests in the Canadian justice system, such as public interests, national security, etc. However, if these considerations cannot be justified, victims' interests can be considered unreasonably impaired by prosecutorial inaction.

3.2 The state should not ignore victims' interests in criminal proceedings

Professor William McDonald criticized the fact that victims were losing protection in the modern criminal justice system:

The age-old struggle of civilization has been to persuade people not to take justice into their own hands but rather to let their vengeance and righteous indignation be wrought by the law. Western civilization had by the Middle Ages succeeded in substituting private prosecutions for blood feuds. The next step was to replace private prosecution with public prosecution, while asking the victim to forego whatever satisfaction he might derive from personally prosecuting his transgressor and settling for the more intangible satisfaction of knowing that justice would be done. *Now, the modern criminal justice system operates in an age of computers and instant telecommunications, disposing of large numbers of cases without trial and without bothering to give the victim even the minimal satisfaction of knowing what happened to his case and why.*¹⁶⁴

So should a state ignore victims' interests? Some scholars have attempted to use social contract theory to drive an assertion that victims enjoy state's protection.¹⁶⁵ The basic

¹⁶⁴ William F McDonald, "Towards a bicentennial revolution in criminal justice: The return of the victim" (1976) 13 (4) Am Crim L Rev 649 at 663-664 [emphasis added].

¹⁶⁵ Logan, *supra* note 106 at 1720 ("Citizens have surrendered to the state their natural right to protect themselves, the government must fulfill its obligation to protect its citizens"); See Paul S Hudson, "Crime Victim and the Criminal Justice System: Time for a Change, The Symposium: Victims' Rights" (1983-1984) 11 (5) Pepp L Rev 23 at 32; Steven J Heyman, "The First Duty of Government: Protection, Liberty and the

idea of social contract theory is that citizens surrender certain natural rights to a state in exchange for certain protections from that state. According to Hobbes, individuals in a state of nature are free to take any action, in their own judgement and reason, to protect themselves and their property, and this is an attribute of the nature of humankind.¹⁶⁶ In general, Hobbes's social contract theory describes a situation where individuals are forced to submit some of their natural rights to an armed authority in order to promote co-existence and security. Locke argued that individuals are not forced, but consent to surrender their natural rights to a trustful and neutral authority in exchange for neutral and equal protection.¹⁶⁷ If this authority fails to protect people who confer that authority and power, its exercise of power is not legitimate.¹⁶⁸ If a state merely deprives its citizens of their interests and rights without returning anything or without justification, it is a dictatorship.¹⁶⁹

Wainstein contends that, based on this theory, a state should be responsible for shielding citizens from crime because it monopolizes prosecutorial resources.¹⁷⁰ For a state, merely criminalizing any action that might harm individuals' interests and rights is not enough to protect individuals. Effective implementation of the law is necessary, which means, when there is an allegation of violations of rights and interests, effective investigation, prosecution, and punishment should be carried out either by the individual or state. The

Fourteenth Amendment" (1991) 41 (3) Duke LJ 507 at 514; Wainstein, *supra* note 93 at 730; Richard L Aynes, "Constitutional Considerations: Government Responsibility and the Right Not to be a Victim" (1984) 11 Pepp L Rev 5 (1984) 63 at 75-77.

¹⁶⁶ Thomas Hobbes, *Leviathan* ed by Edwin Curley (Indianapolis: Hackett Pub Co, 1994) at Chapters XIII–XIV; James A Donald, "Natural Law and Natural Rights", online: James's Liberty file collection index <<http://jim.com/rights.html>>.

¹⁶⁷ John Locke, *Two treatises of government*, student ed by Peter Laslett (New York: Cambridge University Press, 1988), arts 129, 130, 135.

¹⁶⁸ *Ibid.*

¹⁶⁹ Donald, *supra* note 166.

¹⁷⁰ Wainstein, *supra* note 93 at 730.

law is a dead letter without government to enforce them effectively. Effective investigation, prosecution, and punishment can deter potential lawbreakers by sending a message that they will take consequences for their breaches of the law.

Several scholars such as Josephine Gittler, Richard L Aynes and Wayne A Logan have contended that victims of crime should not be re-victimized by the justice system for the latter's improper inaction.¹⁷¹ According to Wainstein, if a state fails to fulfil its duty to protect its citizens from victimization, it can no longer monopolize law enforcement and prosecution.¹⁷² Of course, when a public prosecutor makes a decision whether to prosecute, he or she must consider the big picture, namely, whether a prosecution promotes public interests at large. However, if the prosecution is dropped without a legitimate reason, this is equal to the state's failure to protect victims from crime and, as a result, victims' interests will be completely ignored. In this case, as Wainstein said, the state loses its exclusive right to determine whether or not to prosecute and victims should therefore be allowed to invoke judicial power to reverse the decision not to prosecute in order to defend for their interests.

In Canada, the criminal justice system is a government-paid public service. After all, its budget partly comes from taxpayers, the citizens. If victims are unreasonably blocked from accessing the criminal justice system, it is no different from being unable to enjoy the benefits of insurance for which they have paid premiums, which might further

¹⁷¹ Logan, *supra* note 106 at 1720; Josephine Gittler, "Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems" (1984) 11 (5) *Pepp L Rev* 117 at 117; Aynes, *supra* note 165.

¹⁷² Wainstein, *supra* note 93 at 730.

frustrate the victims and increase their suffering. This is also contrary to the objectives of promoting victims' rights in Canada.¹⁷³

Even though the courts have emphasized that “the criminal process is not the preserve of the private individual”,¹⁷⁴ they never state that the interests of private individuals should be completely ignored. In *Kostuch v Alberta (Attorney General)*,¹⁷⁵ the Attorney General stepped in and terminated a private prosecution based on the lack of evidentiary proof. The termination resulted in an application of judicial review, and the court dismissed the application: “[i]n deciding whether to prosecute, the Attorney General *must have regard not only to the interests of the person laying the charges*, but also to the rights of the person charged with an offence, and to the public interest.”¹⁷⁶ This sentence has been cited in many subsequent cases to emphasize the duty of the Attorney General to maintain fundamental justice for the public. However, if it is read from another perspective, the court has recognized that private persons have interests in a criminal prosecution. The Attorney General and its agents are supposed to try their best to balance the various interests arising out of a decision whether or not to prosecute. In any cases, victims' interests should be an important factor for the Crown prosecutor to decide whether to prosecute or not.

In conclusion, Canada should protect victims from re-victimization by instituting a criminal prosecution in good faith, or by allowing a private prosecution, if possible,

¹⁷³ Ontario, *Victims' Bill of Rights*, *supra* note 26, preamble

[T]he justice system should operate in a manner that does not increase the suffering of victims of crime and that does not discourage victims of crime from participating in the justice process.

¹⁷⁴ *Kostuch*, *supra* note 52.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid* [emphasis added].

against alleged lawbreakers unless there are legitimate reasons not to do that. Victims' interests should be taken into account in charging stages. This not only means that the Crown prosecutor should try their best to consider victims' interests when deciding whether to prosecute, but also means that the system should provide remedies to victims when their interests are impaired because of improper prosecutorial action.

3.2.1 The Attorney General, Crown Prosecutors and Charging Guidelines

3.2.1.1 Role of the Attorney General and the Crown prosecutors

The power of the Attorney General and Crown prosecutors in Canada are entrusted by the Crown. The Attorney General traditionally acted as a legal adviser to the Crown, as well as the government. His or her principal function has been, and still remains, to prosecute alleged criminals. The proper role of the Attorney General in the prosecution of an offense is well described in J L'Heureux-Dubé's comment in *R v Power*:

As will be developed in more detail further in these reasons, the Attorney-General is a member of the executive and as such *reflects*, through his or her prosecutorial function, *the interest of the community to see that justice is properly done. The Attorney-General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice.*¹⁷⁷

In order to share the increasing workload of the Attorney General in other fields, Crown prosecutors are appointed as agents of the Attorney General to proceed with criminal prosecutions. The role of the Crown prosecutor was summarised in *R. v. Boucher*:

It cannot be overemphasized that the purpose of a criminal prosecution is

¹⁷⁷ *Power*, *supra* note 114 at para 12 [emphasis added].

not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings.¹⁷⁸

For decades, the phrases “the community’s sense of justice” and “reflects the interest of the community to see that justice is properly done” have been specifically referred to the necessity of convicting an accused person through an *impartial and fair* trial. While hoping prosecutors keep the community safe by putting away criminals, the public also expects a fair procedure in the criminal justice system.

However, “the community’s sense of justice” should be broader than that. In particular, in recent decades, the public has gradually paid increasing attention to victims’ interests in criminal proceedings. It is appropriate to contemplate the broader interpretation of “the community’s sense of justice” of including whether or not victims’ interests have been properly considered through making a decision pertinent to the prosecution. As well, the phrase also suggests that a decision should not be contrary to victims’ interests unless reasons behind such a decision are reasonably acceptable by the public. For the public, not having their interests represented in the prosecution of a crime is almost as horrible as being accused of a crime they did not commit. For most average citizens, there are more chances to become a victim than to be prosecuted by the state in their whole lifetime. If

¹⁷⁸ *R v Boucher* (1954), 110 CCC 263, [1955] SCR 16 (SCC).

the public cares about victims' interests and rights in criminal proceedings, once victims' interests are disregarded improperly or mistakenly by the Crown prosecutor, the public would not consider that they have seen justice properly done through such a decision. The comment has been put down in the charging guidelines of some provinces, which states that, in order to strengthen public confidence in the criminal justice system, Crown prosecutors should act as "a minister of justice with duty to make sure that the criminal justice system operates fairly to all: the accused, victims of crime, and the public".¹⁷⁹

3.2.1.2 Charging Guideline

In the 1980s, prosecution policy was summarized, put into writing, and published. As James Vorenberg has suggested, "the lack of general rules or a record of action taken in individual cases has made it extremely difficult to show clearly deviations from the norms."¹⁸⁰ Not until the mid-1980s did a description of charging guidelines exist in Canada.¹⁸¹ In 1990, recognizing that "[a]n equitable justice system requires a reasonable degree of consistency in the circumstances in which prosecutions take place", the Law Reform Commissioner of Canada made a recommendation of publishing charging guidelines.¹⁸² Based on the studies of prosecutor's repetitive practices in making charging decisions, two core factors were identified significant to a legitimate charging decision and should be included in the guideline: "reasonable prospect of conviction" and "public

¹⁷⁹ Province of Ontario Ministry of Attorney General, "Role of the Crown: Preamble to the Crown Policy Manual", online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/CPMPreamble.pdf>>.

¹⁸⁰ James Vorenberg, "Decent Restraint of Prosecutorial Power" (1984) 94 Harv L Rev 1521 at 1555 [Vorenberg, "Decent Restraint of Prosecutorial Power"].

¹⁸¹ J LL J Edwards, "The Attorney General and the Charter of Rights" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 45 at 66; Kent Roach, "The Attorney General and the Charter Revisited" (2000) 50 (1) UTLJ 1 at 17.

¹⁸² Law Reform Commission of Canada, *Controlling Criminal Prosecution*, *supra* note 32 at 76-77, 80.

interest”.¹⁸³ Currently, in order to promote fairness, transparency, and accountability in charge decision-making, most provinces and the federal prosecution service have created detailed guidelines for charging decision-making and have made the guidelines public. The crown prosecutor can drop a case, if (1) there is no reasonable prospect of conviction based on the existing evidence, (2) it is not in public interest to pursue the case, or (3) both (1) and (2) are met.

According to David Layton, the interpretation and implementation of the charging guidelines should be consistent with the following basic principles:

...To begin with, charging guidelines must strive to prevent the conviction of the innocent and the unjustifiable trammelling of individual rights. Nonetheless, in proper cases Crown counsel should be resolute in conducting prosecutions with an eye to bringing offenders to justice. As well, charging decision standards should avoid illegitimately usurping the function of the trier of fact and overriding the legitimate community interest in seeing justice done in a public forum. Prosecutorial guidelines must also avoid inflexibility that, despite best intentions, can cause injustice by failing to accommodate the particular circumstances of each case. Ultimately, the fundamental concern is to encourage prosecutors to act fairly, impartially and consistently in making charging decision.¹⁸⁴

¹⁸³ *Report of the Commission on Proceedings Involving Guy Paul Morin* by Fred Kaufman & Guy Paul Morin (Toronto: Ministry of the Attorney General, 1998); *Report to the Attorney General of Ontario on certain Matters Relating to Karla Homolka* by Patrick T Galligan (Toronto: ADR Chambers, 1996); *The inquiry regarding Thomas Sophonow : the investigation, prosecution and consideration of entitlement to compensation* by Thomas Sophonow & Peter de C Cory (Winnipeg: Manitoba Justice, 2001); *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussion* by G Arthur Martin (Toronto: Ontario Ministry of the Attorney General, 1993) at 65-66; *The Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints*, vol 1 (St John's: The Commission, 1992) at 430; *Independence in the prosecution of offences in the Canadian Forces : military policing and prosecutorial discretion* by James W O'Reilly & Patrick Healy (Ottawa: Canadian Government Publishing, 1997) at 48-55.

¹⁸⁴ David Layton, "The Prosecutorial Charging Decision" (2002) 46 Crim LQ 447 at 465.

A fixed charging guideline is important to give the public basic information about how a charging decision is made. It also tells the public that the Crown prosecutor will not apply one charging policy today and another tomorrow. As well, it sends a message to the accused that their cases are handled in the same manner as others. Meanwhile, the guideline should also leave sufficient room for Crown prosecutors to make a charging decision based on their discretion in a particular case. Without flexibility, the Crown prosecutor may not perform his duty efficiently and handle the uniqueness or special needs raised in each single case properly.¹⁸⁵ However, the Crown prosecutor is supposed to comply with the basic norms that govern whether or not to initiate a prosecution. The credibility of the Crown prosecutor and the confidence of the public in the criminal justice system will be undermined if the Crown prosecutor ignores or wrongfully implements the published charging guideline. This is partly because the public will live within a state of fear of not knowing when and how they may be charged.

When Crown prosecutors discharge their charging functions following these guidelines, the abovementioned principles should be accommodated and promoted by their decisions. When a Crown prosecutor assesses evidentiary sufficiency, he or she should not attempt to determine whether an accused is innocent or guilty. As well, the Crown prosecutors' objective is not to win a case at any cost. Instead, he is responsible to present all

¹⁸⁵ Logan, *supra* note 106 at 1722. Logan noted that certain level of discretion was necessary because overly strict enforcement of rules of law would make criminal law ordered but intolerable:

Discretion is also necessary to individualize justice and to mitigate criminal sanctions that under certain circumstances may be unduly harsh. If discretion were not present and violations administered in "strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable." Such individualization arises in instances when an accused cooperates in the apprehension or conviction of others; when strict enforcement would cause harm to the offender in undue proportion to the harm of the crime; when not prosecuting the offender would assist in achievement of other enforcement goals; or when there is the possibility of prosecution by another jurisdiction.

available, relevant, and admissible evidence necessary to judges so that the latter are able to determine the guilt or innocence of the accused.¹⁸⁶ In other words, the Crown prosecutor cannot wrongfully replace a standard of “likelihood of conviction” to “substantial prospect of conviction” or “conviction without reasonable doubt” in order to pursue a high conviction rate or for any other reason. It is inappropriate to drop a charge by employing a higher standard. How to determine whether a case has “reasonable prospect of conviction” is still quite subjective. Correctly assessing the admissibility, reliability, and credibility of evidence relies on working experiences, a level of expertise concerning charging decision-making, a degree of impartiality to the case and the judgement of the Crown prosecutor. For example, a new prosecutor might draw an immature conclusion due to the lack of experience. As well, bias and personal attitude to the case can also influence the judgement. In addition, if a Crown prosecutor has reasonable doubt about the guilt of the accused, but still believes there is a realistic prospect of conviction, the prosecution is likely to be dropped.

Victims’ interests are also relevant to the charging decision nowadays, which should also be properly taken into account. When Layton mentioned, “the unjustifiable trammelling of individual rights” in his statement above, he specifically referred to a defendants’ constitutional rights. However, times have changed and defendants’ rights and interests are not the sole concern in the criminal process. The interpretation of “individual rights” should not fall behind. Nowadays, the importance and relevance of victims to the criminal process have been generally recognized in Canada. It is also true that the interests of justice and the public are still paramount in criminal proceedings. This requires the

¹⁸⁶ Public Prosecution Service of Canada, “About the Public Prosecution Service of Canada” (25 July 2013), online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/bas/index.html>>.

Crown prosecutors to make a decision not to prosecute carefully balancing all relevant factors. When dropping a case, they should carefully consider whether the interests of justice and the public are so significant in the case that they are willing to set aside the interests and rights of the potential victims.¹⁸⁷ In fact, this principle is specifically included in the charging guidelines of a few provinces:

According to the Decision to Prosecute (Charge Screening) in Nova Scotia:

The decision to prosecute or to discontinue a prosecution is the most important decision that a prosecutor makes in the criminal justice process. Such decisions must reflect sound knowledge of the law and careful consideration of the interests of victims, the accused and the public at large.¹⁸⁸

According to Withdrawing a Charge or Stopping the Prosecution of an Offence in Saskatchewan:

Crown Prosecutors always consider the impact that a criminal prosecution may have on the victim when deciding whether it is in the public interest to prosecute.¹⁸⁹

According to the Deciding to Prosecute in Manitoba:

Crown attorneys have a responsibility to treat victims of crime with compassion and respect. As much as is practicable, Crown attorneys strive

¹⁸⁷ The interests and rights of the victims will be demonstrated in the next chapter.

¹⁸⁸ Nova Scotia Public Prosecution Service, "The Decision to Prosecute (Charge Screening)" (1 February 2011), online: Nova Scotia Canada <http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/DecisionToProsecute.pdf> [Nova Scotia, "The Decision to Prosecute"].

¹⁸⁹ "Withdrawing a charge or stopping the prosecution of an offence", online: Ministry of Justice <<http://www.justice.gov.sk.ca/Withdrawing-a-charge>>.

to be mindful and sensitive to the needs and wishes of victims.¹⁹⁰

There is the lack of empirical research reflecting on how Crown prosecutors' ways of thinking and behaving have been improved in the charging decision-making process in these three provinces. Victims' interests and entitlements has been ignored or suppressed for hundreds of years in Canada. It is always hard for a developed system to accept new changes, in particular the ones that are contradicted to its original value, principles and practice, within a short period of time. The adaption of charging guidelines in these provinces shows a positive sign that victims' interests and entitlement at the charging stage start gaining weight in some areas in the country.

Finally, the most important thing is that Crown prosecutors have to interpret and implement these guidelines in charging decision-making in good faith. Theoretically, public prosecutors should be presumed to act consistently with the principles of justice by discharging their duties with fairness, objectivity, and integrity, the public.

3.3 Victims have right to equal protection

The Canadian Charter of Rights and Freedoms recognizes citizens' most fundamental rights, entrenched in the Constitution of Canada, which is the supreme law in Canada. It protects these important rights and freedoms by requiring governments to legislate and operate in a manner of not violating the rights listed in the Charter.¹⁹¹ In most situations, violations are likely to render impugned legislation and operations invalid.¹⁹² It ensures

¹⁹⁰ "Prosecutions Role of the Manitoba Prosecution Service", online: Manitoba <<http://www.gov.mb.ca/justice/prosecutions/mbprosecutionservice.html>>.

¹⁹¹ "The Canadian Charter of Rights and Freedoms", online: Office of the Commissioner of Official Languages <http://www.ocol-clo.gc.ca/html/charter_section_1_charte_e.php>.

¹⁹² "An Overview of the Canadian Charter of Rights and Freedoms", online: Canadian Heritage <<http://www.pch.gc.ca/eng/1355760105725/1355760725223>>.

that the government is not above the rights and freedoms guaranteed by the Charter. In a criminal law dimension, the Canadian Charter of Rights and Freedoms was traditionally understood as a constitutional guarantee for citizens to fight against the state's arbitrary criminal prosecutions.

Section 15 of the Charter provides citizens the right to equal protection. According to this section, an individual should not be singled out as a target for a prosecution or any other things based on impermissibly discriminatory grounds, such as race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.¹⁹³ A court is allowed to intervene if a violation of section 15 is proven in a clear case. In *R. v. O'Connor*, the court stated that it could stay a proceeding for the accused as an appropriate remedy when his rights under the Charter suffer irreparable damage.¹⁹⁴ In cases of this type, the courts generally accepted selective prosecution based on above-mentioned grounds as valid grounds that constitute an abuse of court's process on the part of the Crown prosecutor. However, most cases were ultimately dismissed due to the applicants' failure to provide evidentiary proof.

Victims are also entitled to protection under the Charter. Concerning a decision not to prosecute, victims have "equality rights" under Section 15 of the Charter:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic

¹⁹³ *R v Miles of Music Ltd* (1989), 48 CCC (3d) 96, 69 CR (3d) 361(Ont CA); *R v Paul Magder Furs Ltd* (1989), 49 CCC (3d) 267, [1989] OJ no 531 (CA); *R v Smith* (1993), 84 CCC (3d) 221, [1993] NSJ no 289 (NSCA); *R v Black* (2003), 2003 NSSC 54, 213 NSR (2d) 60.

¹⁹⁴ (1995), 103 CCC (3d) 1 at para 43, [1995] 4 SCR 411; See also *R v Carosella* (1997), 112 CCC (3d) 289 at 311, [1997] 1 SCR 80.

origin, colour, religion, sex, age or mental or physical disability.¹⁹⁵

The right to equal protection is not exclusive to the accused. Individuals are equally protected by law, and therefore, they are supposed to have the equal right to access to the criminal justice system when they are harmed by lawbreakers. It is true that the Crown prosecutor, as a “minister of justice”, can deny individual’s access to criminal proceedings in order to preserve other higher-valued interests, such as the rights of the accused and public interests. However, under no circumstance can the Crown prosecutor refuse to commence a prosecution, either by himself or by the victim, based on the discriminatory grounds listed in Section 15.

3.4 Victims can obtain satisfaction and closure

3.4.1 Satisfaction

In the studies about victims’ satisfaction with justice when participating in sentencing, scholars split “satisfaction with justice” into two parts: outcome satisfaction (satisfaction with the sentence) and process satisfaction (or satisfaction with the criminal justice system as a whole).¹⁹⁶ Restitution and punishment can correct an inequitable relationship between victims and offenders, in which the victims’ dissatisfaction of disadvantages caused by the crime committed by the offenders, can be alleviated.¹⁹⁷ Meanwhile, victims’ participation in sentencing may increase their feelings of control over the sentencing process and receiving opportunities to raise their voices before an authority

¹⁹⁵ *Charter*, *supra* note 20 [emphasis added].

¹⁹⁶ Edna Erez, “Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland” (1993) 21 J Crim J 47at 51.

¹⁹⁷ Dean G Kilpatrick & Randy K Otto, “Constitutionally guaranteed participation in criminal proceedings for victims: Potential effects on psychological functioning” (1987) 34 (1) Wayne L Rev 7.

before the decisions are made, can promote a sense of procedural justice.¹⁹⁸ The studies reach the conclusion that victims' participation in criminal justice processes can enhance their satisfaction with justice.¹⁹⁹

Because victims have not been granted a formal role in charging decision-making, there are few scientific studies directly about their satisfaction in participating in charging decisions. However, some research, as showed in the following paragraphs, suggests that allowing victims to complain about charging decisions can increase their satisfaction with charging decisions made by Crown prosecutors. Usually, citizens should have confidence in Crown prosecutors and believe that they are performing their duties with due diligence. Once they are involved in an event where their interests are in danger, people are likely to become cautious. The right to challenge the decision not to prosecute might make victims feel secure because they know they can appeal if the Crown prosecutor makes unreasonable decisions. In addition, such a right might promote communication between the Crown prosecutor and victims, and as a result, victims may feel validated, respected, considered, and consulted by the criminal justice system and find themselves being treated fairly by the system.

A key feature of procedural justice is that it provides a cushion of support when people feel fairly treated, making unfavourable decisions more palatable.²⁰⁰ In other words, if a Crown prosecutor treats a victim with dignity and respect and is able to gain victim's

¹⁹⁸ Tom R Tyler, "What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures" (1988) 22 (1) *Law & Soc'y Rev* 103.

¹⁹⁹ Anne M Heinz & Wayne A Kerstetter, "Pretrial settlement conference: Evaluation of reform plea bargaining" (1979) 13 (2) *Law & Soc'y Rev* 349; John Hagan, "Victims before the law: A study of victims' involvement in the criminal justice process" (1982) 73 (1) *J Crim L* 317-319; Edna Erez and Pamela Tonotodonato, "Victim participation in sentencing and satisfaction with justice" (1992) 9 *Just Q* 393.

²⁰⁰ Allan E Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988); Tom R Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

confidence, most victims might still have the feeling of being treated fairly, even when the prosecutor makes an unpopular decision. This is particularly important in the criminal justice system where the participation of victims cannot always guarantee favourable outcomes.²⁰¹ As a result, non-prosecution should be more easily accepted by the victims who have participated in the non-prosecution decision-making. In contrast, as shown in other research, victims who are excluded from the criminal justice process may overemphasize the outcome of the criminal procedure²⁰² because the outcome is all that the victims have through the whole prosecution. Once unfavorable results come out, victims are likely to be more disappointed and frustrated at the criminal justice system. Hence, victims who are merely notified about the non-prosecution of their cases and receive questionable decisions not to prosecute are likely to overemphasize the fact that the system fails to do justice for them. An unreasonable refusal to charge a suspect may lead the victims to feel strongly that there has been no official acknowledgement of their suffering.

3.4.2 Closure

The term “closure” has come to connote several different and poorly differentiated concepts. It is partly associated with death penalty cases in which victims can speak out about the harm caused by their offenders in an open courtroom. Currently, it is also used to support the use of victim impact statements, claiming that speaking publicly about

²⁰¹ Jo-Anne Wemmers, “Victim Participation and Therapeutic Jurisprudence: A Canadian Perspective” (Paper delivered at the International Institute for the Sociology of Law, Onati, Spain, 8-9 March 2007), [unpublished] at 28 [Wemmers, “victim Participation and Therapeutic Jurisprudence”].

²⁰² Jo-Anne Wemmers, “Victim Notification and Public Support for the Criminal Justice System” (1999) 6 (3) IRV 167; Wemmers, “victim Participation and Therapeutic Jurisprudence”, *supra* note 192 at 29.

one's loss can promote a sense of catharsis, which can constitute a feeling of closure.²⁰³ More generally, closure has also come to stand for the constellation of feelings—peace, relief, a sense of justice, the ability to move on—that come with finality.²⁰⁴

Allowing victims to challenge decisions not to prosecute helps them achieve closure psychologically, so they can move on with their lives, especially when the decisions are finally upheld in court proceedings. Non-prosecution is not always roundly rejected by victims. However, some victims might want to activate prosecutions against their violators when the prosecutions are discontinued by Crown prosecutors or other relevant authorities, especially in a situation where victims have reasonable grounds to question the discontinuance but they are not able to make any effort to change it. They do so because they are unlikely to otherwise alleviate the trauma of the accused's alleged act from their minds.

When substituting private prosecution with public prosecution, some activists made an effort to persuade average citizens to believe that justice will be done for them by their state and therefore it is not necessary to have justice done by themselves.²⁰⁵ That is to say, they no longer need to seek justice and closure by their own because the state would provide this for them. However, in such situations, a sense of distrusting Crown prosecutors might stem from a refusal to prosecute, especially if the refusal is flagrantly improper, and a belief of "justice will be done" will fall apart. For example, when commenting on whether broadening self-defence laws might encourage vigilantism in

²⁰³ See e.g. Edna Erez, "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice" (1999) *Crim L Rev* 545 at 550-553.

²⁰⁴ Susan A Bandes, "Victims, "Closure", and the Sociology of Emotion" (2009) 72 (2) *Law & Contemp Probs* 1 at 3.

²⁰⁵ McDonald, *supra* note 161 at 663-664.

Canada, Prime Minister Stephen Harper considered that vigilantism should not be condoned, but that the public felt a need to protect itself because the law does more to protect criminals than to protect victims:

It has become increasingly unclear what we can legally do to protect ourselves and our property. In the view of many Canadians, the scales of justice have tipped too far away from the right of self-defence, and toward the protection of criminals.²⁰⁶

As a negative result of the public's losing confidence in the criminal justice system, even though the decision not to prosecute is the actual finality for victims in a criminal law dimension, they might not feel closure psychologically from such a decision and, in extreme cases, might choose to seek closure in their own way.²⁰⁷

Closure can be the result of both putting in effort and having a chance to have their concerns heard and considered by a neutral third party. When a dispute occurs, the conflicting party, which is in an disadvantageous position, in this case, victims, are likely to entrust adjudicatory power to a third authority to determine the facts and are prone to accept findings delivered by such a third authority. It also can be said that a second opinion is more acceptable to victims. When the second opinion is the same as the first one, it can corroborate with the first opinion, which can create a psychological effect that

²⁰⁶ Colin Perkel, "New citizen's arrest law may spark vigilantism: lawyer" (18 February 2011), online: Winnipeg Free Press <<http://www.winnipegfreepress.com/canada/new-citizens-arrest-law-may-spark-vigilantism-lawyer-116459618.html>>.

²⁰⁷ "Rehtaeh Parsons' mom calls for vigilantes to stop: No grounds to reopen alleged sex assault case, says Crown" *CBC News* (10 April 2013), online: CBC <<http://www.cbc.ca/news/canada/nova-scotia/story/2013/04/10/ns-rehtaeh-suicide-reaction-todd.html>>. In April 2013, a teenager committed suicide after alleging being raped and photographed by four boys. These four boys were not charged. The mother of the victim spread the story of her daughter and shamed the unnamed accused in order to push a police investigation, which caused public outrages about the alleged rape. Even though the mother reiterated she did not want the boys physically harmed, her posting story on website in fact incited vigilante justice in public.

the result is more trustworthy. As well, regardless of how the decision is resolved, victims may feel less offended for having put effort into preventing a decision that is against their will.²⁰⁸ Allowing victims to seek redress in a courtroom as a last resort, on one hand, can symbolize “ending the case in their own hand”, and on the other hand, promote fairness and acceptability of the decision not to prosecute. Either can contribute to a sense of closure that is helpful for victims to move on and rebuild the credibility of the criminal justice system in victims’ minds, which can reduce the risk of victims taking justice into their own hands.²⁰⁹ It may also prevent victims from victimizing others besides the offender. For example, mental health issues are also significantly related to violence in the family.

²⁰⁸ *Welling, supra* note 11 at 88 (If a victim has a role in charging decision-making process, they will feel involved).

²⁰⁹ Karen L Kennard, “The Victim’s Veto: A Way to Increase Victim Impact on Criminal Case Dispositions” (1989) 77 Cal L Rev 417 at 417:

The victims themselves have become increasingly dissatisfied with a process that denies them a prominent role in bringing an accused offender to justice. They show their dissatisfaction by removing themselves from the system: They fail to report crimes; they fail to appear in court; and at times they resort to vigilantism.

See also: Stuart P Green, “Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute” (1988) 97 (3) Yale L J 488 at 192, n 22:

[A] victim who feels that the criminal justice system is entirely unresponsive to his needs might in some extreme cases resort to “vigilante justice.” Even worse, a widespread perception that the system is unresponsive might lead to public sentiment that such acts are justified... A legally sanctioned recognition of victims’ interest in the initiation of criminal proceedings could help deter such antisocial behavior.

Stephen L Carter, “When Victims Happen to Be Black” (1988) 97 Yale LJ 420 at 424.

CHAPTER IV

4 Private Challenge of the Decision not to Prosecute in Other Jurisdictions

Private challenges to decisions not to prosecute made by public prosecutors have been exercised in different jurisdictions in a variety of ways, either to protect victims' interests by giving them the right to review such a decision (such as in European countries) or to promote an equitable criminal justice system by limiting wide discretionary power of the public prosecutors (such as the US). In different jurisdictions, the challenges can take place internally in the office of the public prosecution, in front of the judiciary, or both.

4.1 European Protection

4.2 Regional Protection

European countries have an established history of recognizing the necessity of victims having a role in charging decision-making. Beginning in the late 20th century, European intergovernmental organizations started advocating that and requiring their Member States to implement the victims' rights legislation in their jurisdictions. In 1985, the Committee of Ministers of the Member States of the Council of Europe adopted a Recommendation No. R (85) 11(the Recommendation) pertinent to victims' role in the framework of criminal law and procedure.²¹⁰ In this Recommendation, the Committee raised three points about how to protect victims' interests in charging decisions:

- 1) issues involving victims' financial restitution should be considered when the decision whether or not to prosecute is made;²¹¹

²¹⁰ *Victim's Rights Recommendation*, *supra* note 14.

²¹¹ *Ibid* art B5.

- 2) the final decision about whether or not to prosecute should be automatically provided to victims unless they indicate that they do not require such information;²¹² and
- 3) as an alternative right to a private prosecution, victims should have the right to seek a review of a decision not to prosecute by a competent authority.²¹³

The right to seek a review of the decisions not to prosecute was first proposed in the Recommendation in 1985 as an alternative method for victims to deal with prosecutorial inaction. However, over the next 26 years, this right was not formally included in subsequent European binding instruments regarding victims' rights in criminal proceedings. Before 2009, only 21 out of the 27 Member States of the European Union (EU) had formal procedures, or at least general frameworks, in their domestic systems that allowed victims to review decisions not to prosecute made by public prosecutors.²¹⁴

In 2011, the right to review a decision not to prosecute was brought up again regionally when the EU intended to replace its old directive with a new one in order to include more comprehensive and viable victims' rights. In article 10 of the draft of a new Directive, it was proposed that "Member States shall ensure that victims have the right to have any decision not to prosecute reviewed",²¹⁵ accompanying with a corresponding rationale in its Explanatory Memorandum:

The purpose of [Article 10] is to enable the victim to verify that

²¹² Ibid art B6.

²¹³ Ibid art B7.

²¹⁴ *Implementation of the EU Framework Decision, supra* note 13 at 44.

²¹⁵ EC, *A Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*, [2011] OJ C 264/2, art 10.

established procedures and rules have been complied with and that a correct decision has been made to end a prosecution in relation to a specific person.²¹⁶

The proposed right was finally adopted and included in Directive 2012/29/EU, dated 25 October 2012.²¹⁷ The new Directive was a new instrument, which formally established minimum standards on the rights, support and protection of victims of crime. Article 11 highlights the obligation of Member States to ensure victims' right to review the decision not to prosecute:

“1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

.....

3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.”²¹⁸

Unfortunately, there is still no common standard pertaining to when victims can exercise

²¹⁶ EC, *Explanatory Memorandum concerning Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*, [2011] OJ C 264/2, online: EUR-Lex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0275:EN:NOT>>.

²¹⁷ *Victims' Rights Directive*, *supra* note 14 at 69.

²¹⁸ *Ibid.*

this right, and to what degree a competent authority is able to interfere with the decision not to prosecute. For example, the Directive does not expressly indicate what types of review should be granted, be it a judicial review or an internal one. Paragraph 4 of the Directive seems to restrict the potential review to the internal investigation within the prosecutor's office. "The review *may* be carried out by the same authority" nonetheless seems to suggest that a decision not to prosecute taken by the highest prosecuting authority *may* also be reviewed by a different authority, such as a reviewing judge. However, the EU recognizes that many of its Member States have different national mechanisms for implementing victim's right to review, and is willing to allow those Member States to continue to use their mechanisms provided they do not contravene the EU's framework for such a right. In addition, to supplement this right, the Directive further strengthens victim's right to seek an explanation related to a decision not to prosecute in its article 6:

1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information:

(a) any decision not to proceed with or to end an investigation or not to prosecute the offender...

3. Information provided for under paragraph 1(a) ... shall include reasons or a brief summary of reasons for the decision concerned ...²¹⁹

Even without the Directive, to provide reasons for a decision not to prosecute seems to be

²¹⁹ Ibid at 67.

a general policy or practice in most European countries. For instance, in Sweden even though it is not a written policy, reasons behind decisions not to prosecute are generally provided and, in practice, public prosecutors are encouraged to provide detailed reasons if possible, especially in felony cases.²²⁰ Dutch policy is in favor of giving details to victims and, under some circumstances, a decision not to prosecute and relevant reasons will be released to the public via various media sources.²²¹ In Norway, explanations are provided to both victims and their families.²²² Even countries with common law traditions, such as Northern Ireland, England and Wales, and Scotland, have developed the tendency to provide victims with reasons for a decision not to prosecute. In Northern Ireland, there is a propensity to make detailed reasons available to victims.²²³

4.2.1 Practice in Civil Law Countries

Victims in European countries are more active due to the existence of various means in their national schemes. Matti Joutsen, a director of the Helsinki Institute for Crime Prevention and Control, summarized several methods that victims can use to deal with non-prosecution decisions made by prosecuting authorities in European countries.²²⁴ According to him, the most basic way is to communicate in some way with the corresponding prosecutor, such as writing a letter, asking the prosecutor to reconsider and reverse the original decision not to prosecute. This method is commonly accepted in most European jurisdictions.²²⁵ Secondly, a few jurisdictions provide standard procedures for

²²⁰ Office of the Director of Public Prosecutions, "Discussion Paper on Prosecution Policy on The Giving of Reasons for Decisions" at 73-77, online: Office of the Director of Public Prosecutions <<http://www.dppireland.ie/filestore/documents/DISCUSSION%20PAPER%20-%20Jan%2008.pdf>>.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ Joutsen, *supra* note 13 at 109 -114.

²²⁵ *Ibid.*

victims to request a superior prosecuting authority to direct a reconsideration or compel a prosecution, and allow the victims to challenge the decision not to prosecute in a competent court as a last resort. Finally, in a few jurisdictions, the right to seek review of a decision not to prosecute is not necessary because victims have an absolute right to institute a private prosecution.²²⁶

In the Netherlands, as a judicial control over prosecutorial discretion, a request for *mandamus* can be filed to a court of appeal by anyone that has an interest in the prosecution, including victims.²²⁷ A Dutch court is authorized to examine decisions not to prosecute on the grounds of legal considerations, such as the application and interpretation of applicable law, and the correctness and proportionality during the exercise of discretion.²²⁸ As a part of administrative control in the prosecution office concerning the charging decision-making process, victims can write to a higher prosecutorial authority requesting a review of the decision not to prosecute made by the subordinate.²²⁹

In Germany, a procedure known as “*Klageerzwingungsverfahren*” is enacted²³⁰ through which victims may first appeal to the supervisor of the prosecuting authority on the grounds limited to technical issues, such as evidentiary sufficiency that is essential for prosecution to take place. Then, if the supervisor still refuses to compel prosecution, the legal representative of the victims may appeal to a court on their behalf. The victim is

²²⁶ Ibid.

²²⁷ Ibid at 112; Peter J P Tak, *The Dutch criminal justice system: Organization and operation*, 2d ed (The Hague: WODC, 2003) at 67 [Tak, “Dutch Criminal Code”].

²²⁸ Tak, “Dutch Criminal Code”, *supra* note 227 at 67.

²²⁹ Ibid at 67; Joutsen, *supra* note 13 at 109.

²³⁰ Joutsen, *supra* note 13. See also Fazsi Laszlo, “The Right Of The Injured Parties To Represent Themselves Instead Of Being Represented By A Prosecutor In The Criminal Procedure Code Of Hungary” (2011) 45 *Curentul Juridic* 132.

considered a subsidiary prosecutor if the court compels prosecution.²³¹ A similar court proceeding is used in Belgium, France, Luxembourg, Spain, and Turkey to allow victims to seek a court's adjudication and compel a prosecution.²³²

In Austria, victims are also entitled to appeal a decision to a court, but the court can only direct a prosecutor to review the original decision. The court does not have the power to compel a prosecution.²³³ Nevertheless, in Austria, like in a few of the European countries, an appeal to a court is not necessary because victims can initiate a private prosecution that a public prosecutor cannot object to or intervene in.²³⁴ One deficiency is that victims have to bear all the costs, including their own costs, court costs and defense costs in the event that the prosecution fails.²³⁵ Similarly, in Finland, victims' right to prosecute overrides prosecutorial actions carried out by the public prosecutors, where victims may initiate a prosecution regardless of the public prosecutor's decisions.²³⁶

4.3 United Kingdom (UK)

Both the Canadian legal system and UK legal system were developed from the English common law in terms of both substance and procedure, although it is important to keep in mind that substantial changes occurred later on. The development of the English law should accordingly be of interest to the Canadian legal system. The legal system in the UK is different from the Canadian one primarily because it has been influenced by

²³¹ Joutsen, *supra* note 13; See also Laszlo, *supra* note 230; Peter J P Tak, *The Legal Scope of Non-prosecution in Europe* (The Hague: Helsinki Institute for Crime Prevention and Control, 1986) at 23.

²³² Joutsen, *supra* note 13.

²³³ Law Commission, "Austrian Criminal Procedure" at 9, online: Law Commission <http://www.lawcom.govt.nz/sites/default/files/austrian_criminal_procedure_0.pdf>.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ Joutsen, *supra* note 13 at 110-111. In Finland, the victim is not bound by the prosecutor's decision. The victim may bring the case to court without waiting for the prosecutor's decision, or may bring charges different than those brought by the prosecutor.

various EU legal practices. For instance, the UK has incorporated some civil law elements into its domestic law, which makes it significantly increase victims' rights in criminal proceedings. In the UK, victims of crime have a number of ways to appeal and challenge the decision not to prosecute. Unlike most common law countries, three interests, namely the interests of the State, the accused and the victims, have to be taken into account and carefully balanced when deciding whether or not to pursue a case,²³⁷ although on some occasions the interest of the state may outweigh the others. The decision not to prosecute made by the public prosecutor can be subject to internal review conducted by the relevant office of prosecution service and to judicial review by an administrative court. Both procedures are discussed in the sections that follow.

4.3.1 Internal Review

A recent case entitled *R v Killick*²³⁸ is a milestone case that put forward the implementation of victims' right to seek a review of the decision not to prosecute internally. In June 2007, the Crown Prosecution Service (CPS) had decided not to prosecute Mr. Killick. Later, counsel for the victims filed a series of complaints seeking both internal and judicial review, which finally led to the review of the original decision within the CPS. The review process took more than two years in part because the CPS was reluctant to conduct a review based on an informal "complaint" made by the victims. The court in this case pointed out some defects of the prosecution system concerning the implementation of victims' right to seek review:

²³⁷ *R v B* [2003] EWCA Crim 319 at para 27; *R v Christopher Killick* [2011] EWCA Crim 1608 at para 48 [*Killick*]; Public Prosecution Service, *Victims & Witnesses Policy* (Belfast: Public Prosecution Service, 2007) at 10.

²³⁸ *Killick*, *supra* note 237.

Although in form the request was made as "a complaint", what was sought was a reconsideration by an interested person of the decision. Far from the CPS being able to refuse to do this, it was bound to do it. In the first place, the CPS has made clear that it will review if a "complaint" is made. Second, it has for some time been established that there is a right by an interested person to seek judicial review of the decision not to prosecute; it would therefore be disproportionate for a public authority not to have a system of review without recourse to court proceedings. Third, it is clear that in considering whether to prosecute the prosecutor has to take into account the interests of the State, the defendant and the victim – the three interests in a criminal proceeding as identified for example by Lord Woolf CJ in *R v B* [2003] 2 Cr App R 197 at paragraph 27. As a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance.²³⁹

This paragraph reveals several important points that were affirmed by this court:

- 1) The CPS has an obligation to consider victims' request for the reconsideration of the decision not to prosecute;
- 2) An internal review scheme is necessary so that victims do not always have to seek recourse from the court in the form of judicial review;
- 3) Victims' interests should be carefully considered when evaluating a decision whether or not to charge; and
- 4) It is essential to recognize the significance of the decision not to prosecute as an end of criminal prosecution for the victims.

²³⁹ Ibid at pare 48.

In June 2013, a new Victims' Right to Review Scheme was initiated in England and Wales to institute victims' right to internal review similar to what was proposed in the EU Directive and the case of *Killick* in 2011.²⁴⁰ The scheme establishes a formal complaint procedure for victims to request an internal review in the event that victims are unsatisfied with a decision not to prosecute. A fresh review of evidential sufficiency and public interests concerning the cases will be conducted using the internal review process. The scheme includes three instances of complaint. In the first instance, the decision not to prosecute will be reviewed by the CPS or Central Casework Division, and full explanations will be provided if the decision is not reversed. Then, victims can appeal the decision to the Appeals and Review Unit and to the relevant Chief Crown Prosecutor or Head of a Casework Division if it fails again. The decision not to prosecute made by the relevant Chief Crown Prosecutor or Head of a Casework Division will be considered final for the internal review process. If the Crown prosecutor has called no evidence in court or the case has passed the statutory time limitation, only an apology can be issued to the complaining victims. This is because in the UK the Crown prosecutor is not allowed to re-institute a prosecution in these two situations. The information about this scheme is automatically provided to victims by relevant authorities. Northern Ireland also has a similar internal review system in their prosecution service, even though the structure is not as comprehensive as those in England and Wales are.²⁴¹

²⁴⁰ *Review Scheme, supra* note 16.

²⁴¹ Public Prosecution Service for North Ireland, "Making a Complaint about the Public Prosecution Service for Northern Ireland Draft for Consultation" (January 2012) at p 11, online: Public Prosecution Service <[http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Complaints/Making%20A%20Complaint%20about%20the%20PPS%20\(Consultation%20Jan%202012\).pdf](http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/Complaints/Making%20A%20Complaint%20about%20the%20PPS%20(Consultation%20Jan%202012).pdf)>.

4.3.2 Judicial Review

Even though an internal review scheme has been established in the United Kingdom, a judicial review in *administrative court* as the last resort for victims is still in effect. In the UK, the discretionary power of the public prosecutors can be compromised when the court finds a need to maintain the rules of law and justice by directing Crown prosecutors to reconsider the decisions on whether to prosecute a complaint. In fact, the court feels responsible to do that. In *R. (on the application of Corner House Research and Others) v Director of the Serious Fraud Office*, the Director of the Serious Fraud Office (SFO, an investigatory and prosecutorial authority) stopped an investigation against BAE Systems (a company) for its questionable military aircraft contracts with the Saudi government. The SFO decided to discontinue the investigation because of Saudi government's threat to terminate all contractual relationships with the UK. A counter-bribery non-profit organization Corner House Research requested the court to intervene and review the decision, and the court held as follows:

The courts protect the rule of law by upholding the principle that when making decisions in the exercise of his statutory power an independent prosecutor is not entitled to surrender to the threat of a third party, even when that third party is a foreign state. The courts are entitled to exercise their own judgment as to how best they may protect the rule of law, even in cases where it is threatened from abroad. In the exercise of that judgment we are of the view that a resolute refusal to buckle to such a threat is the only way the law can resist.²⁴²

²⁴² *R (on the application of Corner House Research and Others) v Director of the Serious Fraud Office*, 2008 EWHC 714 (Admin) (QB) at paras 78-79.

4.3.2.1 Standard of Review

In England and Wales, administrative courts employ different standards in reviewing decisions to prosecute and not to prosecute. The courts apply a strict standard of review to the decision *to* prosecute. In *R v Panel on Takeovers and Mergers*, the court held that the decision to prosecute could only be judicially reviewed by a competent court in the presence of *demonstrable fraud, corruption, and mala fides*.²⁴³ “Fraud, corruption, and mala fides” on the part of the Director of Public Prosecutor (DPP) in deciding to pursue a prosecution could significantly increase the risk of forcing an innocent person to go through a criminal proceeding, and a court has the responsibility to prevent the criminal justice system from being arbitrarily used against individuals. It would be better to quash the decision to prosecute before the court proceedings commence so that the unnecessary suffering of the accused caused by the improper prosecution can be minimized. Even though several courts agreed to expand the permissible standard theoretically to “acting perversely or contrary to the Code for Crown Prosecutors”, the courts in practice are attitudinally reluctant to intervene for these expanded grounds.

The existence of subsequent criminal trials as an alternative remedy is a critical reason for the court to refuse to probe into the deeper cause of the decision to prosecute without first demonstrating fraud, corruption, and mala fides in the DPP’s decision-making process. The accused could file a motion to stay a prosecution in light of the abuse of process doctrine during the prosecution.²⁴⁴ In *Sharma v Antonine*, judicial review was sought to

²⁴³ *R v Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524. See also: *R v DPP, ex parte Kebilene and others*, [1999] UKHL 43 [*Kebilene*].

²⁴⁴ *Kebilene*, *supra* note 243 (The House stated that, once the Human Rights Act came into force, arguments that domestic legislation is incompatible with the Convention should be brought during the trial or appeal process). See also *R (on the application of Pepushi) v CPS*, [2004] EWHC 798 (Admin):

prevent an allegedly politically motivated prosecution against the Chief Justice of Trinidad and Tobago who was charged with attempting to pervert the course of justice. The request was rejected for the reason that the criminal process should be the right forum in which to address the decision to prosecute and the criminal court has jurisdiction over it:

It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court: *cf R v Horseferry Road Magistrates' Court, ex p Bennett [1993] 3 LRC 94 at 108* where Lord Griffiths explained the rationale in the following passage:

If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law.²⁴⁵

Unlike “Fraud, corruption, and mala fides”, procedural mistakes are not serious enough to constitute an arbitrary prosecution that would be patently unreasonable and unjust, or significantly inconsistent with the principle of justice. Counsel for the accused can make an effective defence for his or her client in court.

We stress that the Legal Services Commission and those advising prospective applicants for judicial review should always realise that judicial review is very rarely appropriate where an alternative remedy is available. If such a remedy is available, a judicial review application should not be pursued.

²⁴⁵ *Cf R v Horseferry Road Magistrates' Court, ex parte Bennett*, [1993] 3 LRC 94 at 108 cited in *Sharma v. Antoine* [2006] UKPC 57 at para 31.

As well, the administrative court also considers that the process to seek judicial review will cause a delay for a criminal trial, which might put the accused into a worse position, especially when such an application is dismissed or leave to appeal is granted.²⁴⁶ Therefore, the court is very harsh when dealing with applications for a review of the decision to prosecute.

The grounds permissible for judicial review for decisions *to* prosecute are still applicable for judicial review for decisions *to discontinue* one. However, courts are willing to apply a comparatively lower threshold when considering a review for a decision *not to* prosecute. This is because a high standard of review for decision not to prosecute will leave victims with no effective remedies to deal with flawed decisions. The decision not to prosecute will not be followed by a criminal trial or other proceedings that can check the legitimacy of such a decision. In *R v DPP, ex parte Manning*, Lord Bingham CJ supplied a comprehensive reasoning:

In most cases the [decision not to prosecute] will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this)

²⁴⁶ *R v Inland Revenue Commissioners, ex parte Allen*, [1997] STC 1141:

...It is obvious that if leave to move is granted, especially after proceedings have actually been commenced in the Magistrates' Court, those proceedings will be delayed and this court is unlikely to be able to adjudicate before the issue of abuse of process could have been heard and determined by the Crown Court. Furthermore, if the applicant does not succeed in this court there will then be a substantial further delay before the case can reach the Crown Court. *So by choosing to seek judicial review the applicant will have significantly slowed down the criminal process and increased the costs. In the present case there is evidence to suggest that slowing down the process is in fact one of the applicant's objectives.* If unwarranted applications are made we would expect them to be peremptorily refused at the leave stage with appropriate sanctions in relation to costs.

See also: *Kebilene*, *supra* note 243 (“The effect of the judgment of the Divisional Court [judgment of judicial review] was to open the door too widely to delay in the conduct of criminal proceedings”).

a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. *It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting an effective remedy would be denied.*²⁴⁷

This reasoning and principle was upheld in subsequent cases.²⁴⁸ While “fraud, corruption, and mala fides” remain valid grounds for judicial review of the decision not to prosecute,²⁴⁹ the court frequently uses a lower standard in assessing whether the exercise of discretion by the DPP is lawful. For this reason, this type of application has experienced some degree of success in the country. The basic principles that should be considered when determining whether to overturn a decision not to prosecute were established in *R. v. DPP Ex parte Chaudhary*:

[Judicial review can occur] if and only if it is demonstrated to us that the Director of Public Prosecution acting through the Crown Prosecution Service arrived at the decision not to prosecute:

- 1) Because of some unlawful policy...
- 2) Because the Director of Public Prosecutions failed to act in accordance with his or her own settled policy as set out in the Code; or

²⁴⁷ *Manning*, supra note 9 at para 23[emphasis added].

²⁴⁸ *R (on the application of F) v DPP*, [2013] EWHC 945 (Admin) (Even though the court finally dismissed the application, in its judgment, it upheld Manning’s standards of review for decisions not to prosecute).

²⁴⁹ *Kebilene*, supra note 243.

3) Because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.²⁵⁰

4.3.2.1.1 Error in Law

The court can examine the application and interpretation of the law by the CPS to guide itself in determining whether or not to prosecute. In *R v DPP, ex parte Chaudhary*,²⁵¹ the applicant C reported that her husband, who was a police officer, sodomised her repeatedly without her consent, but the CPS dropped the case because it found lack of evidence pertaining to consent and that consensual buggery between two males over 21 in private is not an offence. In the CPS's affidavit, it claimed that it had satisfied the evidentiary criteria for the alleged offence, but prosecuting the alleged offender on the ground of consensual buggery in private, which is not an offence based on the age of the applicant and the accused and is insufficient proof of not giving consent, is contrary to public consideration. When examining the explanation given by the CPS, the court found the CPS had either confused or conflated consensual buggery and non-consensual buggery, which were two different and separate offenses, when assessing the evidentiary sufficiency criterion. According to the court, the CPS should bear in mind that the evidentiary sufficiency criterion should be satisfied in relation to non-consensual buggery, which was alleged by the applicant. In contrast, it assessed the evidence merely based on consensual buggery, which made it look as if consensual buggery and non-consensual buggery were the same offenses. As a result, the CPS's decision to discontinue this case was irrational.

²⁵⁰ *R v DPP ex parte Chaudhary*, [1995] 1 Cr App R 136 [*Chaudhary*].

²⁵¹ *Ibid.*

Similarly, in *R v DPP, ex parte Jones*,²⁵² the DPP dropped the case because it considered “gross negligence manslaughter” not dangerous enough to constitute a crime and the evidence was insufficient to support “subjective recklessness”. The court rejected the DPP’s justification because it considered the DPP was wrong when it reasoned that “gross negligence manslaughter” did not constitute an indictable criminal act. In these cases, the administrative court allows itself to assess whether the DPP and the CPS has correctly applied the law.

When making charging decisions, the DPP might have doubts about the interpretation of the relevant law when the law is ambiguous and/or confusing. In these situations, he or she might interpret the law in favour of victims to avoid freeing a potential criminal, and therefore choose to prosecute the accused for cautions. When the DPP takes such cautions, his defense lawyer can, at worst, make arguments towards an effective defense concerning whether there are errors in interpreting the law at trial. However, when the DPP’s discretion to interpret the law is mistakenly used or abused to drop a case, it might cause injustice to victims because of the victim’s lack of means to bring the issue before a criminal court. In addition, judges, who indeed have common law power to interpret the law, might be better suited to determine whether a law has been interpreted within a range of possibility. That is why victims should at least have a chance to have such discretion reviewed in a reviewing court as the last remedy to make an argument about the DPP’s misinterpretation of the law, and have that error corrected.

The question is what type of the interpretation of the law can be considered incorrect, which makes a decision not to prosecute unreasonable and allows the court to set it aside.

²⁵² *R v DPP, ex parte Jones (Timothy)*, [2000] Crim LR 858 [Jones].

The UK jurisprudence does not clarify this issue. Should a reviewing judge overturn a decision not to prosecute just because he or she has a different interpretation of the law? I believe the answer is no. It is the job of a trial judge to determine what the law is, and the job of a reviewing judge is to see whether the interpretation of the law by the DPP is plausible when making a decision to continue or drop charges.

Surely, the DPP should have discretion in interpreting the law that is going to apply in his or her case if only the interpretation is not obviously unreasonable. This would mean that the DPP should have legitimate bases, such as case law, legal commentary or other documents and supports, to make them believe that the accusation against the accused is not well-supported or/and the judge will likely interpret the law in the same way in court. When the law is unclear on the alleged act, the DPP may choose to act cautiously by prosecuting the person who performs this act and leave to the court to make the final decision on whether an act falls under the scope of the law. One might argue that, even though the accused can be exonerated of all responsibilities for the alleged act through effective defense, the prosecution might still damage the reputation of the accused, which might have huge negative impact on the accused's life and career. However, in my opinion, once the prosecuting authority's bases to initiate a prosecution are supported by some documents, it is hard to say that the interests of the accused are improperly or arbitrarily impaired. In fact, in most cases, the accused is himself or herself responsible for the investigation and prosecution against him or her because of he or she deliberately taking opportunities by exploring profits from the gray area of the law in the first place. In addition, it would be very inefficient if the DPP has to consult the court regarding how to interpret the law in every case in which the law is vague. If the DPP does that, the

consultation would be meaningless when a judge makes a different interpretation concerning the law after hearing the accused's arguments. However, if the interpretation of the law is ascertained during the consultation, the defense of this issue will become meaningless. In this way, the accused will lose the opportunity to make an argument about the interpretation of the law in court. Therefore, in my opinion, the prosecuting authority should have a workable margin for their errors in interpreting the law when deciding whether or not to prosecute. A decision not to prosecute can only be considered perverse on the ground of erring in law when the prosecuting authority's interpretation appears to be clearly unreasonable, perverse or completely ungrounded.

4.3.2.1.2 Evidential Insufficiency

In the *Manning* case,²⁵³ the court examined the reasonableness of the prosecutor in applying an "evidential sufficiency" criterion when deciding not to pursue a case.²⁵⁴ In order to deal with this issue, the court summarized five points for charging decision-making in the current case.²⁵⁵ The court considered these points were so obvious that any

²⁵³ The victim was remanded in prison custody awaiting trial for an offence of violence, and later died of asphyxia while under restraint following an altercation with two officers. His death was investigated by the police and the papers were referred to the Crown Prosecution Service. Upon examination, a specialist senior caseworker concluded that there was a *prima facie* case against that officer but no realistic prospect of the prosecution being able to establish that excessive force had been used deliberately, rather than as the result of an attempt to effect proper restraint, which had been frustrated by the struggle with the deceased.

²⁵⁴ *Manning*, *supra* note 9.

²⁵⁵ *Ibid* at para 41-42:

...In the end we are, however, satisfied that there are five points which Mr N as defendant would have to overcome if he were to defeat the *prima facie* case which in Mr Western's judgment lay against him and these were points which Mr Western did not address and resolve. Put in their simplest terms these points are:

- (1) If Mr N's account were accepted, there would be no explanation of how the injury to the throat of the deceased and the interruption of his breathing occurred. It was on this basis that Mr Western concluded that Ms T could not be taken as a truthful witness and was therefore a witness whom the Crown need not call.

reasonable person would have taken them as an objective appraisal of the prospect of conviction. It considered that the failure to carefully consider these five points would make the decision not to prosecute unreasonable because it makes the evidentiary threshold for this case higher than “realistic prospect of conviction” laid down in the Code for Crown Prosecutors. The court emphasized that it would defer to the judgment of the experienced prosecutors on whether a jury is likely to convict. In fact, it is difficult to say, when listing these five points, whether the court had incorporated its wisdom in determining a reasonable way to assess “evidentiary sufficiency”.

Again, in another case of *R. (on the application of B) v DPP*,²⁵⁶ the victim’s left ear was bitten off by the alleged offender during an incident that took place in a coffee house, and was later personally assaulted by him. The victim reported the incident to the relevant authority and, as a result, a prosecution was instituted. However, the prosecution was stopped the night before the trial because the CPS received a negative opinion from an expert about the victim’s mental history, which made the CPS consider the victim an

(2) If Mr N's account were rejected it is very difficult to see how it could be regarded as simply mistaken, particularly having regard to his evidence of constantly talking into the ear of the deceased during the journey to the servery and of the deceased himself on occasion speaking.

(3) If Mr N's account were rejected as untruthful, as Mr Western judged Ms T's account to be, there was no evidence to contradict the evidence of the prisoners who said they saw the head of the deceased held in a headlock.

(4) There was no evidence to suggest that contact was accidental or non-continuous, and that possibility was directly contradicted by Mr N's own evidence.

(5) There was no medical evidence to suggest that accidental, non-continuous contact between Mr N's forearm and the neck of the deceased could have caused or contributed significantly to the death of the deceased.

In our judgment these are matters which should have been taken into account on an objective appraisal of the prospects of success of a prosecution if brought, and the failure to take them into account vitiates the Director's decision. It also appears to us that Mr Western (inadvertently, we feel sure) applied a test higher than that laid down in the code. We accordingly quash the decision.

²⁵⁶ *R (on the application of B) v Director of Public Prosecutions, Equality and Human Rights Commission intervening*, [2009] EWHC 106 (Admin) [*R (on the application of B) v DPP*].

unreliable witness that might not survive in front of the jury at trial. The court considered that the CPS magnified the expert's negative opinion regarding victim's mental history and tended to believe in the unfounded stereotyped concept that a complainant could not be regarded as a credible witness on any matter if he or she had a history of mental problems. It concluded that, if a case were originally well founded enough to be brought to a court, it would be irrational if it was dismissed merely based on the fact that the credibility of one witness was in question. In this case, the court had in fact had a second opinion on how the DPP should have weighed the evidence in assessing whether a case should be continued or not. However, it is inappropriate for the court to judge how the CPS assesses and balances relevant factors and evidence at its own discretion and then develop an alternative viewpoint on the outcome (decision not to prosecute). However, this type of approach has been widely accepted in dealing with evidentiary insufficiency for decisions not to prosecute in the UK.²⁵⁷

The DPP is restricted from using "evidentiary sufficiency" to intervene in a private prosecution. The court can review a decision to discontinue a private prosecution even when the DPP takes over and stops the prosecution because it does not meet the evidentiary sufficiency threshold laid down in the Code for the Crown Prosecutor. In the case of *R v Director of Public Prosecutions, ex parte Duckenfield*,²⁵⁸ the court determined what standard the DPP or the CPS should apply when taking over and stopping a private prosecution. In this case, the representative of victims' families charged two retired senior police officers with manslaughter and wilful neglect of duty in the 1989 Hillsborough

²⁵⁷ *R (on the application of Joseph) v DPP*, [2001] Crim LR 489 [*Joseph*]; *R (on the application of Peter Dennis) v DPP*, [2006] EWHC 3211 [*Dennis*]; *Jones*, *supra* note 252; *Chaudhary*, *supra* note 250; *Manning*, *supra* note 9; *R v DPP, ex parte B (1991)*, 93 Cr App R 416 [*ex parte B*].

²⁵⁸ *R v DPP, ex parte Duckenfield*, [2000] 1 WLR 55 [*Duckenfield*].

disasters²⁵⁹ in which many people were killed. The two police officers requested the CPS to take over the prosecution and stop it, but the request was refused by the CPS. The court upheld the CPS's "clearly no case to answer" approach, which means that "the DPP only intends to stop private prosecutions on this ground where no reasonable decision maker could conclude that there was sufficient evidence for the case to go forward"²⁶⁰. The court reasoned that to "stop a private prosecution merely on the ground that the case is not one which he would himself proceed with ... would amount to an emasculation of [right to private prosecution] and itself be an unlawful policy",²⁶¹ and a private prosecutor did not need to follow the Code for the Crown Prosecutor when deciding to institute a case. The DPP should not apply its own evidentiary sufficiency criterion to a private prosecution. This point was established in *R (on the application of Charlson) v Guildford Magistrates' Court and The South Western Magistrates' Court And Walsh (Interested Party)*.²⁶² This rule for the DPP's intervention into a private prosecution had not been changed for years.

Recently, in *R (Gujra) v CPS*,²⁶³ the question of whether the DPP can impose its own evidentiary sufficiency criterion in making charging decisions on a private prosecutor was re-examined. The majority of the court agreed that judicial review should not be granted if the CPS or the DPP complied with its Code when deciding to halt a private prosecution. However, Baroness Hale of Richmond and Lord Mance JJSC dissented. They considered private prosecution a safeguard for individuals to activate a prosecution against their

²⁵⁹ The Hillsborough disaster was an incident that occurred on 15 April 1989 at the Hillsborough Stadium in Sheffield, England, during the FA Cup semi-final match between Liverpool and Nottingham Forest football clubs. The crush resulted in the deaths of 96 people and injuries to 766 others. The incident has since been blamed primarily on the police. The incident remains the worst stadium-related disaster in British history and one of the world's worst football disasters.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² [2006] EWHC 2318 (Admin).

²⁶³ [2012] UKSC 52.

violators when a public prosecutor had some evidence but dropped a case out of caution or for other reasons. According to these two judges, allowing the CPS to have a final word on evidentiary sufficiency of a case will diminish the effectiveness of the private prosecution and violate individuals' rights. Just as Baroness Hale of Richmond explained in the case:

The possibility of judicial review of the prosecutor's decision is not a good enough safeguard [to protect individual rights], as this case demonstrates only too clearly. Just as a reasonable prosecutor could take the view that the case should proceed, a reasonable prosecutor could take the view that it should not. The possibility of bringing a private prosecution, however remote to most people, is a much more effective safeguard. Now that the new policy has effectively removed it, the victims of crime will have little prospect of challenging the prosecutor's decisions... That obligation [to provide positive protection laid down in the ECHR] is not fulfilled if a private prosecution, which a reasonable prosecutor could consider more likely than not to succeed before a reasonable court, can be prevented because another prosecutor takes a different view.²⁶⁴

4.3.2.1.3 Procedural Fairness

English courts allow judicial review for the decision not to prosecute on the grounds of procedural unfairness in certain circumstances. One of the prominent aspects of the *Manning* decision is that the court stressed that not giving clear explanations for a decision not to prosecute an unlawful killing case was a violation of article 2 of the European Convention on Human Rights (ECHR):

...the right to life is the most fundamental of all human rights. It is put at the forefront of [the ECHR]. The power to derogate from it is very

²⁶⁴ Ibid at paras 132-133.

limited ... Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given.²⁶⁵

Later in 2006 in *R (on the application of Peter Dennis) v DPP*, the court upheld the *Manning* reasoning and ruled that a court was allowed to review a decision not to prosecute “where an inquest jury has found unlawful killing, the reasons why a prosecution did not follow have not been clearly expressed”.²⁶⁶

4.3.2.2 Relief sought

In the UK, while there is a relatively lower standard for the judiciary to review a decision not to prosecute than Canadian counterpart, this remedy is limited. It seems that the court cannot compel a prosecutor to perform an affirmative action, such as compelling a prosecution. In *R v DPP, ex parte Kebilene*,²⁶⁷ where the DPP refused to give consent to a private prosecution against terrorists, Lord Hope argued that judicial review should not be granted in this type of case because the court cannot order the DPP to give consent, which

²⁶⁵ *Manning*, *supra* note 9.

²⁶⁶ *Dennis*, *supra* note 257.

²⁶⁷ *Kebilene*, *supra* note 243; Alisdair A Gillespie, *The English Legal System*, 3d ed (Oxford: Oxford University Press, 2011) at 353.

was the sole possible remedy that could be sought in this type of case. However, in judicial review of the decision to discontinue a public prosecution, the court cannot only nullify a decision not to prosecute, but also direct the prosecutor to reconsider such decision. Of course, it cannot control the outcome of the reconsideration.²⁶⁸ The decision not to prosecute still depends on the prosecutor's discretion, and it is possible that a prosecutor can maintain his or her original decision after the reconsideration.

Two points are worth discussing in this situation. First, if the court can direct a prosecution to review a decision, does it mean that the court has some power to force a prosecutor to perform an action? If the court has such power, in cases where it can be certain that the decision not to prosecute is incorrect,²⁶⁹ why can it not just compel a prosecution in order to prevent the prosecutor from insisting upon maintaining his or her incorrect decision after reconsideration? Even though it will be very rare, if the prosecutor maintains the original decision, victims might repeatedly make an application for judicial review if they continue believing that the new result is still incorrect or unreasonable. In this case, it is possible that the review proceeding becomes endless. Of course, it is unrealistic for average victims to spend so much money and time on one case. Moreover, in some cases, even though a non-prosecution decision is in dispute because some mistakes or improper acts on the part of the Crown prosecutor are found in the decision-making process, the decision might be unreasonable but *correct* because the Crown prosecutor may accidentally reach a *correct* conclusion of not prosecuting through the problematical decision-making process. This can result in the maintenance of the decision

²⁶⁸ Manning, *supra* note 9.

²⁶⁹ An incorrect decision not to prosecute refers to the decisions to which any reasonable person would have made an opposite conclusion.

not to prosecute after a reconsideration because the conclusion of not prosecuting a case appears to be an correct answer although the original decision not to prosecute is concluded based on questionable reasons.

In addition, in most situations, it is less likely that the maintenance of the decision not to prosecute would result from the DPP or the CPS persisting in his or her incorrect or irrational reasoning through which no proper reconsideration actually took place when making the second decision not to prosecute. However, it is still possible that, in cases where the DPP is corrupt, acts in bad faith or discontinues the prosecution for improper purposes, he or she would deliberately ignore the instructions from the reviewing judge. In these situations, if a court cannot compel the DPP to prosecute, the result of its order to direct a reconsideration is no different than the request of the victims sent to the CPS for a reconsideration of their case through an internal review. Therefore, extraordinary responses such as compelling a prosecution are necessary under exceptional circumstances. Compelling a prosecution could be more effective than directing a reconsideration for the court to deal with the abovementioned situations at its discretion.

Second, it makes little sense if a prosecutor still does not prosecute a case after a court nullifies a decision not to prosecute. Does this not mean that the decision not to prosecute is still in effect? It can be argued that the decision not to prosecute challenged by victims in court has been quashed, but the non-prosecution actually results from the CPS's second decision not to prosecute, which is still in effect. This is not a violation of the court's order. However, it is difficult to tell whether a prosecutor has made a second decision or has just insisted on not prosecuting. If it is the second situation, the court's order is violated. If the order were violated, it would seem that a court is not able to impose any

sanction on the DPP or the CPS other than to re-direct a consideration of a decision not to prosecute. This goes back to the first question pertaining to whether the court can force a public prosecutor to prosecute. Although this remains problematic, the English court seems reluctant to address this issue.

Furthermore, in UK, if the Crown prosecutor has called no evidence in court, such a decision not to prosecute is not reversible in court. In *R. (on the application of B) v. DPP*, even though the court found that the decision not to prosecute was not reasonable, it had no power to reverse the decision because the prosecution had offered no evidence.²⁷⁰ Instead, in order to provide satisfaction to the victim through its judgement, the court provided the victim with monetary compensation to account for the deprivation of an opportunity to initiate criminal proceedings.²⁷¹ This is problematic. First, what if a victim is not seeking monetary compensation but would only be satisfied with a criminal proceeding? In this situation monetary compensation does not provide adequate satisfaction. Secondly, it risks the possibility that “offer no evidence” can be a means for the DPP to block the victim from seeking reversal of his decision not to prosecute.

4.4 American Experience

American practices and jurisprudence have an undeniable impact on the development of Canadian legal system. The District Attorney (DA, prosecuting authority in the US) in the US traditionally has exclusive jurisdiction in deciding whether to initiate a prosecution and this role has not changed for over 200 years. The DA’s discretionary power to make

²⁷⁰ *R (on the application of B) v DPP*, *supra* note 256 at para 56.

²⁷¹ *Ibid* at para 71.

charging decisions was originally absolute and unreviewable by courts.²⁷² Courts in the US are reluctant to review the DA's decision to decline a prosecution for three main reasons: 1) the constitutional principle of separation of powers prohibits the judiciary from intervening in the administration of executive power, including prosecutorial decisions;²⁷³ 2) prosecutorial discretion is necessary for the prosecuting attorney to effectively distribute limited prosecutorial resources for public good through decision-making,²⁷⁴ and 3) prosecutorial discretion helps to allocate limited budgetary resources effectively and reduce the workload for the expensive and over-burden criminal justice system.²⁷⁵

However, at the end of the 1980s and the beginning of the 1990s, concerns about unfettered prosecutorial discretion were studied and a number of old criticisms reappeared. Some scholars have expressed their worries regarding the DA's absolute power to determine the fate of private individuals by discharging its duty to decide whether to prosecute might lead to potential abuse or arbitrariness against them.²⁷⁶ Others have argued that, rather than performing the executive function of determining who should be charged, the DAs might in fact replace the court's function by interpreting the applicable

²⁷² Welling, *supra* note 11 at 95, n 50.

²⁷³ *Wayte v United States*, 470 US 598 at 608 (1985) [*Wayte*] (The federal courts is "hesitant to examine the decision whether to prosecute"); *US v Torquato*, 602 F (2d) 564 at 569 (3d Cir 1979) (The concept of separation of powers underlies the courts' concern that the prosecutorial function be relatively untrammelled).

²⁷⁴ *Spillman v United States*, 413 F (2d) 527 at 530 (9th Cir 1969) ("The United States Attorney must be given wide latitude in order to effectively enforce the federal criminal laws").

²⁷⁵ *Wayte*, *supra* note 273 at 607.

²⁷⁶ See also Vorenberg, "Decent Restraint of Prosecutorial Power", *supra* note 180 at 1555:

Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community racial and ethnic minorities, social outcasts, the poor will be treated most harshly.

law or judging whether an alleged offender was guilty or not before a trial takes place.²⁷⁷

In addition, as others have also argued, prosecutorial discretion might conceal malfunction in the criminal justice system, which exacerbates the above-mentioned situation. The public prosecutor might try to avoid complicated judgements and reasoning for charging decisions, and therefore frame discretionary power as a necessary means to speed up the system and promote public good.²⁷⁸ This can easily create secrecy within the charging decision-making process because it is hard to trace the legitimacy and rationality behind the decisions even though such decisions look suspicious. Secrecy makes public prosecutors feel safe to act in whatever way suits their own purposes. The lack of fear of the consequence of misconduct in charging decision-making increases the possibility that charging decisions are rendered unjust and unfair.

Later in the 1980s, these criticisms provided a proper justification to those who advocated for victims' participation in the charging stage. For example, Wainstein claimed that improper discontinuance of a criminal prosecution could re-victimize victims of crime.²⁷⁹

As a result, efforts were concentrated towards reviewing jurisprudence and legislation with regards to the possibility of checking on charging decisions by private parties in the

²⁷⁷ Roger P Joseph, "Note, Reviewability of Prosecutorial Discretion: Failure to Prosecute" (1975) 75 Colum L Rev 130 at 130:

Refusal to prosecute... may minimize the effect of or negate altogether duly enacted statutes and regulations, thus infringing upon or qualifying the lawmaking power of legislatures. Similarly, in deciding when to prosecute ... [prosecutors] applicability to particular cases, thus performing functions traditionally exercised by courts...

²⁷⁸ James Vorenberg, "Narrowing the Discretion of Criminal Justice Officials", 1976 Duke LJ 651, at 652:

[Discretion] hides malfunctions in the criminal justice system and avoids difficult policy judgments by giving the appearance that they do not have to be made. It obscures the need for additional resources and makes misapplication of available resources more likely.... Discretionary decision-making has helped keep cases moving through the system without too many embarrassing questions, while promoting the impression that compassion and wisdom are at work. The result has been some compassion (often matched or exceeded by unfairness) and very little wisdom.

²⁷⁹ Wainstein, *supra* note 93 at 730-731.

US.²⁸⁰

Currently in the US, even though courts are still prone to refrain from interfering with the DA's decisions concerning whether or not to prosecute and give high deference to the DA's exercise of discretion, prosecutorial discretion is in principle reviewable in exceptional circumstances.²⁸¹ In some states, judges are granted power to address an unjustified decision not to prosecute challenged by the person who is directly affected or aggrieved, including victims. No matter what is the real cause of these changes, it signifies that victim's private challenges to unjust and unfair charging decisions are gradually increasing in the US.²⁸²

4.4.1 Compelling a prosecution

When a DA refuses to file a charge, a *mandamus* can be sought as a remedy in court to compel a prosecution. Stuart P. Green found that several states in the US have clearly granted the court power to force a DA to commence a prosecution in exceptional circumstances in the corresponding legislation.²⁸³ For example, in Michigan, Colorado, Nebraska and Pennsylvania, a judge has the power to compel a prosecution if necessary. According to section 767.41 of Michigan Compiled Laws,

The court may examine the [statement of reasons for not filing information], together with the evidence filed in the case and if, upon examination, the court is not satisfied with the statement, the prosecuting

²⁸⁰ See Logan, *supra* note 106; Wainstein, *supra* note 93; Green, *supra* note 206; Hudson, *supra* note 162 at 58.

²⁸¹ *Armstrong v. United States*, 517 US 456 (1996) [*Armstrong*].

²⁸² Hereinafter when I refer to the practice in US, I mean the states in the US where a judicial review for decision not to prosecute is allowed.

²⁸³ Green, *supra* note 206 at 488 (The author pointed out that, in some American states, individual could lodge a private action against prosecutorial inaction, which is implicitly laid down in the relevant legislations).

attorney shall be directed by the court to file the proper information and bring the case to trial.²⁸⁴

This provision is duplicated in the legislation of Nebraska and Colorado.²⁸⁵

Owing to the significance of prosecutorial discretion in charging decision-making, a high standard of review is employed for a private citizen to challenge a decision not to prosecute and seek a *mandamus* to compel a prosecution. A private person needs to provide clear and convincing evidence to prove that a refusal to initiate a prosecution is an abuse of discretion. A *mandamus* is considered an extraordinary remedy to compel a public officer to perform his duty laid down in the law. When making a charging decision, the DA's duty is to use his or her discretionary power to decide what case to be brought to the court. Usually, it is inappropriate to use a *mandamus* to force a public officer to act in a situation where he has a legal option of refusing to act based on his discretion.²⁸⁶ That will amount to the court using discretionary power to make a decision for the public official. Therefore, it is commonly agreed that the legitimate grounds to compel a prosecution is limited to "abuse of discretion". In *Tanenbaum v D'Ascenzo*, the court explained that, "where ... by an arbitrary exercise of authority there has been in fact no

²⁸⁴ *Mich Comp Laws Ann*, s 767.41 (West 2006).

²⁸⁵ *Neb Rev Stat*, c 29-1606 (1998); *Colo Rev Stat*, s 16-5-209 (West 2008).

²⁸⁶ *Nader v Hughes*, 643 A (2d) 747 at 753 (Pa Cmwlt 1994) ("We observed that mandamus is appropriate to 'compel the public official to perform acts which are required or obliged to be performed and which do not involve an exercise of discretion or judgment'"); *Maxwell v Board of School Directors of School District of Farrell*, 112 A (2d) 192 at 195 (Pa 1955) ("A Court cannot compel such official to exercise his discretion in a manner which will produce a result which the Court may deem wise or desirable"); *Pennsylvania Dental Association v Insurance Department*, 512 Pa 217 at 227-28 (1986):

In short, mandamus is chiefly employed to compel the performance (when refused) of a ministerial duty, or to compel action (when refused) in matters involving judgment and discretion. It is not used to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of an action already taken. Mandamus is a device that is available in our system to compel a tribunal or administrative agency to act when that tribunal or agency has been "sitting on its hands".

actual exercise of discretion”,²⁸⁷ a *mandamus* is actually used to urge a decision-maker to exercise his discretion, which is different than exercising the discretionary power for the decision-maker or having a “second thought” about the decision-maker’s original decision. In these cases, the court can compel the DA to bring a case against the suspect. An “objective reasonableness” test is not appropriate in a proceeding where a *mandamus* is sought as a remedy.²⁸⁸ A reviewing judge’s responsibility is not to find whether or not he will reach a different conclusion based on the same evidence than the DA might do.²⁸⁹ This is because two equally reasonable people might reach two opposite conclusions based on the same facts and the judge should not take over the DA’s duty to decide who should be prosecuted.²⁹⁰ It has been well established that “abuse of discretion” can be reflected in the disputed decision *per se* and the intent of the DA. If a decision appears to be so manifestly arbitrary, unreasonable, or unfair that a reasonable person would have had reached a completely opposite conclusion or would have had never adopted the course of action in the first place, the decision-maker is abusing his discretion.²⁹¹ As well,

²⁸⁷ *Tanenbaum v D’Ascenzo*, 356 Pa 260 at 263 (1947) [*Tanenbaum*].

²⁸⁸ *Sandoval v Farish*, 675 P 2d 300 at 303 (Colo 1984) [*Sandoval*]. See also *Salt Lake Tribune Publ’g Co v AT&T Corp*, 320 F (3d) 1081 at 1092 (10th Cir 2003) (“By providing specific examples of common types of share transfer restrictions that are certainly permissible, the statute saves courts- and corporations and shareholders - the trouble of conducting the reasonableness inquiry that would otherwise be necessary”); *Cf People v Ellison*, 14 P (3d) 1034 at 1039 (Colo 2000) (Statute offers example of methods “that would cause a reasonable person to be aware that his license was under restraint”).

²⁸⁹ *E-470 Pub Highway Authority v Revenig*, 140 P (3d) 227 at 230 -231 (Colo App 2006) [*Revenig*] (A reviewing court asked “not whether we would have reached a different result,” but rather whether the “decision fell within a range of reasonable options”).

²⁹⁰ *Landis v Farish*, 674 P (2d) 957, 959 (Colo 1984). See also *Tooley v District Court*, 190 Colo 468 at 471 (1976).

²⁹¹ *Lawley v Dep’t of Higher Educ*, 36 P (3d) 1239 at 1252 (Colo 2001):

[T]o constitute arbitrary or capricious exercise of discretion it must appear that ‘By exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

See also: *Revenig*, *supra* note 289; *Geer v Susman*, 134 Colo 6 at 8-9 (1956); *Van De Vegt v Board of Comm’rs*, 98 Colo 161 at 166-67 (1936); *People v Hoover*, 165 P (3d) 784 at 802 (Colo App 2006); *State v*

a DA's refusal to press a charge cannot be "motivated by bad faith, malice, or personal vindictiveness".²⁹²

Supposedly, non-prosecution resulting from impermissibly discriminatory grounds might also be used to challenge a decision not to prosecute. However, this remains inconclusive in the absence of an actual case. Non-prosecution based on impermissibly discriminatory grounds, such as race, religion, or any other arbitrary classification, could constitute abuse of discretion. Arbitrarily selective prosecution is impermissible in the US. This has been pointed out in *Wayte v. United States*:

[A]lthough prosecutorial discretion is broad, it is not "unfettered". Selectivity in the enforcement of criminal laws is... subject to constitutional constraints." ... In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification...²⁹³

In *Wayte*, the court went on to explain that, because "even if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result", a prosecution that caused the discriminatory effect but was made out of a non-discriminatory policy did not violate equality protection.²⁹⁴ The reason seems questionable. The Constitution does not only regulate the laws of a country, but is also

Heywood, 783 P (2d) 890 at 894 (Kan 1989) ([D]iscretion is abused only where no reasonable person would take the view adopted); *Freedom Colo Info, Inc v El Paso County Sheriff's Dep't*, 196 P (3d) 892 at 899-900 (Colo 2008) (Agency abuses its discretion if "decision under review is not reasonably supported by competent evidence in the record).

²⁹² *Sandoval*, *supra* note 288 at 302; *Genesee County Prosecutor v Genesee Circuit Judge*, 391 Mich 115 at 121 (1974):

Judge "may not properly substitute his judgment for that of the . . . prosecuting attorney. He may reverse or revise [the prosecutor's] decision only if it appears on the record that [he] ha[s] abused the power confided to [him]." (footnote omitted), appeal after remand sub nom. *People v. Hoskins*, 403 Mich. 95, 267 N.W.2d 417 (1978).

²⁹³ *Wayte*, *supra* note 273 at 608.

²⁹⁴ *Ibid* 610.

supposed to protect individuals from unconstitutional violations. Of course, if the law or a policy is discriminatory, the resulting decision is inherently unlawful. However, if a legitimate law is implemented in a way that causes discriminatory effects on an individual, the relevant decision should be equally unjust and unfair to the individual who is aggrieved or affected. Unfortunately, the decision in *Wayte* was followed in subsequent cases²⁹⁵.

The burden of proof lies on the complainant. In order to understand reasons behind the DA dropping a case, a judge might order the DA to provide a justification for his or her decision. Nevertheless, this does not mean the DA has to provide clear and convincing evidence to support his reasoning.²⁹⁶ The aforementioned does not shift the burden of proof to the DA.²⁹⁷ Furthermore, the standard of proof is very high. In *DiLeo v Koltnow* and *Metro Moving & Storage*, the judge emphasized that “[c]lear and convincing evidence is that evidence which is stronger than a preponderance of the evidence and which is unmistakable and free from serious or substantial doubt.”²⁹⁸ This is because, in general, even though the DA’s decisions not to prosecute can be examined by the court upon the victims’ request, before the abuse of discretion is proven by solid evidence, the DA should be presumed to be performing their duty correctly and in good faith.²⁹⁹ As a result, in situations where a combination of factors, some favoring prosecution and others favoring the DA’s decision to drop a charge, are presented, evidence that supports the

²⁹⁵ *Armstrong*, *supra* note 281; *US v Hasting*, 126 F (3d) 310 (4th Cir 1997); *US v Turner*, 104 F (3d) 1180 (9th Cir 1997).

²⁹⁶ *Sandoval*, *supra* note 288 at 303.

²⁹⁷ *Ibid*.

²⁹⁸ *DiLeo v Koltnow*, 200 Colo 119 at 125-126 (1980). See also: *Metro Moving & Storage Co v Gussert*, 914 P (2d) 411 at 414 (Colo App 1995).

²⁹⁹ *Ibid*. See also *Commonwealth v Heckman*, 928 A (2d) 1077 at 1079 (Pa Super 2007) [*Heckman*]; *In re Private Criminal Complaint of Wilson*, 879 A (2d) 199 at 215 (Pa Super 2005) [*In re Wilson*].

DA's decision to terminate prosecution usually proves to be enough to justify non-prosecutions.³⁰⁰ Only in the case where evidence supporting prosecution clearly outweighs evidence against does the court side with the victims.

4.4.2 Disapproval of private prosecution

4.4.2.1 Legal Considerations

Unlike a request for a *mandamus*, the standard to allow a *de novo* review of a district attorney's disapproval of private prosecution is comparatively lower.³⁰¹ In the US, a private prosecution might be conditional on the consent of the DA. The DA can exercise its discretion to refuse or to approve a private prosecution on the grounds of evidentiary insufficiency, public policy or both. However, in some states' practice, if a DA rejects a private prosecution based on solely legal considerations, which falls in legal interpretation, a *de novo* review is permissible.³⁰²

4.4.2.1.1 Evidential Insufficiency

It is established that the evidential sufficiency to sustain a criminal charge is a legal issue, which makes a decision based on that a legal conclusion.³⁰³ Therefore, the court has jurisdiction to review the decision to prosecute that has been disapproved by the public

³⁰⁰ *JS v Carol Chambers*, 226 P (3d) 1193 (Colo 2009) affirmed in *Stene v Chambers*, 2010 Colo LEXIS 220 (Colo 2010).

³⁰¹ When requesting for an order in the nature of *mandamus*, victims expect a court to force a public prosecutor to commence a prosecution as a result of the successful judicial review. An "abuse of discretion" standard of review is applied in this type of judicial review, which, as demonstrated in the previous section, shows a very high level of deference to public prosecutors' discretionary decisions. If a victim wants a court to nullify a public prosecutor's disapproval of his or her private prosecution, a court can have a fresh review of such disapproval if issues concerned are legal considerations. No deference to the public prosecutor is expected.

³⁰² *In re Wilson*, *supra* note 299 at 214-215.

³⁰³ *Commonwealth v Malloy*, 450 A (2d) 689 at 692 (Pa Super 1982); *Commonwealth ex rel Guarrasi v Carroll*, 979 A (2d) 383 at 385 (Pa Super 2009) [*Carroll*].

prosecutor and does not need to give special deference to the public prosecutor.³⁰⁴ If the court found that the evidence submitted by the private complainant could sustain a *prima facie* case, it can undo the disapproval. In *Commonwealth ex rel Guarrasi v Carroll*, the court clearly stated:

If a prosecutor's decision to disapprove a private criminal complaint was based on a legal evaluation of the sufficiency of the complaint, then the trial court must undertake a *de novo* review of the complaint to ascertain whether it establishes a *prima facie* cause of action.³⁰⁵

In the context of American law, a *prima facie* case means a case in which “the amount of evidence which would be sufficient to counterbalance the general presumption of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove facts inconsistent with it; that which is received or continues until the contrary is shown.”³⁰⁶ This is a primary requirement for a case to go to a jury.³⁰⁷ In spite of disregarding possible contradictory evidence and arguments against the accusation or existing evidence, judges still somehow exercise some personal thoughts concerning the value, admissibility, reliability, and relevance of the evidence submitted by the private complainant in order to determine whether the evidence has made a *prima facie* case. It is a judgmental call on the judges’ part on how to weigh the evidence. It is possible that, in some less obvious cases, the same set of evidence leads to a different conclusion if put in front of a different judge.

³⁰⁴ *Commonwealth v. Benz*, 523 Pa 203 at 208 (1989).

³⁰⁵ *Carroll*, *supra* note 303 (This citation is upheld and quoted by the appeal court).

³⁰⁶ *Doherty v Hazelwood Co*, 90 Ore 475 (Ore SC 1919). See also: *Millar v Semler*, 137 Ore 610 (Ore SC 1931); *Schallert v Boggs*, 204 SW 1061 at 1062 (Tex 1918); *In re Hoaglands’ Estate*, 253 NW 416 (Neb 1919).

³⁰⁷ *Ibid.*

This standard of *de novo* review seems appropriate in the case where a disapproval of private prosecution occurs. In a private prosecution, it is the private prosecutor's power to exercise the prosecutorial discretion as a prosecutor in deciding whether to prosecute after assessing the possibility of conviction. When considering whether or not to disapprove a private prosecution based on the minimum evidentiary threshold, a DA is to assess whether a case should be put forward according to the existing evidence at his or her discretion as if he or she were the prosecutor who would conduct the private prosecution. This means that they will probably disapprove a case because they would have never initiated such a prosecution if they were the prosecutor in the case. However, the private prosecutor and the DA could have reached two opposite but equally reasonable conclusions concerning the establishment of a *prima facie* case based on the same set of evidence. Holding an opposite opinion about whether or not to prosecute than the DA does not necessarily mean that the decision made by the private prosecutor is incorrect. If the private prosecution does not err in filing a charge against a lawbreaker, a district attorney's intervention based on his own judgment of no *prima facie* case will amount to unjustifiably disrupting the individual's exercise of his right to file a private complaint granted by the law.

However, another issue I am concerned about is whether a judge should give certain deference to private prosecutors. In fact, American jurisprudence seems to hold that a judge is the best person to have the final say on whether a *prima facie* case has been made because such determination falls within a judge's expertise. In an application of judicial review of the disapproval of a private prosecution based on evidentiary insufficiency, judges do not review the decision of disapproval made by the DA, but rather determine

whether or not the private prosecutor has provided enough evidence to sustain a *prima facie* case. However, I believe a private prosecutor could reach an equally reasonable counter-conclusion on the matter. It would be unfair to deny a particular conclusion because one judge does not agree with it. Therefore, it would be better if the reviewing judge assesses only the possibility of whether a *prima facie* case can be sustained based on the existing evidence.

4.4.2.1.2 Decision made based on error of law

If the exercise of discretion is based on error of law, is a decision made from such discretion reviewable by American courts? If the disapproval of a private prosecution is based on the DA's misinterpretation of law, a reviewing court can undo the disapproval because such an issue is a legal consideration rather than the exercise of discretion. In contrast, a court cannot compel a DA to prosecute if her or his refusal to prosecute is caused by that reason because the issue has not reached the level of abuse of discretion. A court can only issue a *mandamus* when a DA abuses charging discretion. This limitation reflects one of the main differences between a *mandamus* and a *certiorari* proceeding. In *Seeton v Adams*,³⁰⁸ the appellant sought a *mandamus* to compel the DA to prosecute an association accused of needless and cruel treatment of pigeons after several private complaints filed by two individuals against the potential suspects were struck down by the DA. The DA disapproved the private prosecution because she believed that the "live pigeon shoots" activity did not break the law. The court found that "live pigeon shoots" was prohibited based on the criminal code and the DA indeed misinterpreted the law. However, the court still refused to issue a *mandamus* to compel a prosecution because no

³⁰⁸ *Seeton v Adams*, 50 A (3d) 268 (Pa Commw 2012) [*Seeton*].

abuse of discretion was found, and the court emphasized that the mistaken use of discretion was not enough to compel a DA to act.

However, in his dissenting opinion, Judge Bernard L McGinley considered that legal considerations include whether the DA had applied the correct law when making a decision not to prosecute, which would make the decision in the current case reviewable. He relied on *Commonwealth v Jury*,³⁰⁹ in which the DA disapproved a private prosecution because he considered that the allegations against the alleged offender could not be proved beyond a reasonable doubt based on the existing evidence. The judge in that case allowed a *de novo* review because the district attorney applied an incorrect standard when assessing the prospect of conviction. Even though the majority did not agree with that, in my opinion, Judge Bernard L McGinley did not err in his categorization of the DA's misinterpretation of law as legal considerations, which allows a court to review. However, the main difference in *Jury* and the *Seeton* case is that, in the latter, the complainant wanted the court to order the DA to prosecute the case, not to quash the disapproval of a prosecution, which would allow the appellant to re-file a private complaint. Because a *mandamus* imposes a higher burden on the DA, the standard of review should be comparatively higher. The superior court was correct to employ a higher standard to assess the merit of the application and finally decline to issue a *mandamus*.

4.4.2.2 Public policy

In contrast, if the refusal to prosecute is on the grounds of public policy over which the DA has exclusive prosecutorial discretionary power, courts are generally reluctant to become involved unless a clear abuse of discretion is proven. The standard and burden of

³⁰⁹ *Commonwealth v Jury*, 636 A (2d) 164 (Pa Super 1993).

proof are the same as to seek a *mandamus*. This tendency has been upheld in many cases.³¹⁰ In comparison to legal-consideration-based refusal, policy-based refusal is subject to a higher standard of review. It is vital for the judge to carefully examine the rationale behind the decision to disapprove a private prosecution.

In the case where the DA submits that the decision to stop a private prosecution is based on public policy, a court can require the district attorney to present evidence to show the existence of “an established policy” in order to determine whether they are following an actual public policy.³¹¹ It has been pointed out that the “lack of sufficient evidence” cannot be categorized as a part of public policy, which the district attorney might use to object the court’s *de novo* review. In *Commonwealth ex rel Guarrasi v Carroll*, the court explained:

...the D.A. in this case has a policy of not accepting private criminal complaints that lack legal merit does not transform the law-based rejection of such a complaint into a public policy decision or a hybrid of legal and public policy reasons. The significance of this point is simply this: *If the D.A. were permitted to characterize all law-based rejections of criminal complaints as policy decisions, then every rejection would be subject to the deferential abuse-of-discretion standard upon review by the Common Pleas Court.* Thus, the D.A.'s decisions to reject private complaints would never be subject to *de novo* review even though the law requires that standard of review for rejections based on lack of legal merit.³¹²

³¹⁰ *Commonwealth v Brown*, 669 A (2d) 984 at 990 (Pa Super 1995) [*Brown*]; *Commonwealth v McGinley*, 673 A (2d) 343 at 345-46 (Pa Super 1996); *Michaels v Barrasse*, 452 Pa Super 325 at 330-31 (1996); *In re Wilson*, *supra* note 299 at 215, 218; *Carroll*, *supra* note 303 at 385 (District Attorney's disapproval of the private criminal complaint due to lack of evidence to prove elements of crimes charged constitutes legal conclusion, which is subject to *de novo* review).

³¹¹ *Brown*, *supra* note 310 at 990 (1995).

³¹² *Carroll*, *supra* note 303 at 386 [emphasis added].

Another issue is whether the “existence of adequate civil remedies” constitutes a policy-based reason. In *Commonwealth v Michaliga*,³¹³ the complainant requested a nullification of the DA’s decision not to prosecute, which was made based on an assumption that the complaint would be better addressed in a civil suit. The appellate court overturned the trial court’s decision to review and emphasized that adequate civil remedies was a policy-based reason for the disapproval of charges, which was unreviewable in the absence of abuse of discretion.³¹⁴ However, I find the conclusion of the trial court concerning the issues about available civil remedies more convincing:

...this court cannot agree with the definition provided by the learned Justice Cappy [in *Commonwealth v. Brown*, 550 Pa 580 (1998)]: "bad faith is shown where the action under review was undertaken with a dishonest or corrupt purpose." ...However, his definition would provide a judge no opportunity to check a District Attorney's exercise of power under the present facts; namely, a decision not to prosecute because of available civil remedies. *There are civil remedies available in this and like cases, there are always civil remedies available, but Justice Cappy would deny this court the needed latitude to determine their adequacy.*

Take for example an aggravated assault. The District Attorney could deny prosecution claiming a civil action for battery would be an "adequate" civil remedy. Then on appeal, how could a Petitioner prove that the District Attorney denied [the complaint] out of "a dishonest or corrupt purpose"? Under Justice Cappy's definition, how could a court possibly find an abuse of discretion when it must first find corruption and dishonesty? Under

³¹³ *Commonwealth v Michaliga*, 947 A (2d) 786 (Pa Super 2008) [*Michaliga*].

³¹⁴ *Ibid.* See also *Commonwealth v Cooper*, 710 A (2d) 76 at 81 (Pa Super 1998) (District attorney's assertion that the complainant had an adequate civil remedy "sufficiently sets forth a clear statement as to the particular policy that dictates withholding prosecution."); *Hearn v Myers*, 699 A (2d) 1265 at 1268 (Pa Super 1997) (Trial court's determination that district attorney's policy disapproving charges where an adequate civil remedy existed was appropriate "[i]f a private prosecutor feels individually harmed his remedy is a civil suit for damages").

facts similar to this case, he would provide the judiciary no checks or balances on the District Attorney's use of discretion.³¹⁵

In my opinion, the trial court was correct to reverse the DA's decision not to prosecute, but it was wrong to conclude that the court should have the power to determine the adequacy of civil remedy. Its argument is partially problematic. First, the reasoning is illogical. When the court made this conclusion, it agreed with the fact that the discontinuance of a prosecution based on the existence of civil remedies was a non-prosecution policy. If such a policy was lawful, whether the civil remedy was adequate was supposed to be a part of the DA's exercise of his or her discretion in determining whether a case should be dropped based on the availability of civil remedy. The court reiterated that it should give high deference to the DA's exercise of discretion in charging decision-making, so how can it determine "adequacy of civil remedy" for the DA? Therefore, it is incorrect to say that a court, which has limited judicial power over prosecutorial discretion, should have the power to determine the "adequacy" of the existence of civil remedy without proving the DA abused discretion when making decisions based on this ground. For another reason, no one should have the right to determine whether a remedy is sufficient other than the one who is suffering and needs the remedy. Using "existence of civil remedy" as a non-prosecution policy deprives victims of liberty and the opportunity to choose the suitable remedy they desire.

In my opinion, the discontinuance of a prosecution based on the existence of civil remedy should not be considered as a valid policy. As the trial court pointed out, there is always a civil remedy present. The DA can therefore frequently use "existence of civil remedy" as

³¹⁵ *Michaliga, supra* note 313 at 792-793 [emphasis added].

an excuse to stop a private prosecution and effectively block the court from reviewing the decision because the standards of judicial review for policy-based non-prosecution are extremely high. Furthermore, the policy is unconstitutional. If a victim fails in his criminal complaint, he can always apply a civil suit or other civil remedies. If one case were dropped because the complainant had sufficient civil channels to recover his damages, other cases that involve the same or similar alleged criminal acts would also be eligible for exemption from prosecution based on the same policy. For example, A loses \$2,000 from an insurance fraud, and the DA determines not to prosecute claiming that A can file a civil suit to recover that damage. Then, if B also loses \$ 2,000 from similar insurance fraud when the policy is still in effect, the DA should drop that case as well if other factors are similar, for otherwise, his actions will lack consistency. It can be inferred that, if the DA keeps consistency in his decision-making, the other subsequent similar insurance fraud should not be prosecuted due to the existence of adequate civil remedy, unless there are other distinctive factors that come into play. However, such insurance fraud is still an indictable offence listed in criminal law, but in practice the DA's policy and practice instead takes it off the list of indictable offences. Therefore, by posting this policy, the DA's actions have the same effect as assuming the legislative function to amend the criminal statute, which is unconstitutional based on the separation of power. The court is allowed to interfere with a policy-based decision not to prosecute in the presence of unconstitutionality.³¹⁶ In sum, the "existence of adequate civil remedies" as policy *per se* is not valid.

³¹⁶ *Heckman, supra* note 299 at 1079; *In re Wilson, supra* note 299 at 215; *Michaliga, supra* note 313 (If the DA based the disapproval on policy reasons, the court applies an abuse of discretion standard, deferring to the D.A.'s decision, Unless the DA was proved to acts in bad faith, fraudulently or unconstitutionally).

4.5 Conclusion

In conclusion, in the EU, there is an increasing emphasis on victims' interests at the charging stage of a criminal proceeding in recent decades. Most EU countries have granted victims either the right to review decisions not to prosecute or the strong right to private prosecution to respond to public prosecutors' inaction. The adoption of the Victims' Rights Directive,³¹⁷ which grants victims the right to review decisions not to prosecute, further strengthens victims' power to confront public prosecutors' improper refusal to commence a prosecution throughout the EU. Influenced by the EU practices and legislation, the UK has made progress on the reform of its review system for decisions not to prosecute. The UK has lowered standards of review of decisions not to prosecute, and it recently set up a formal internal review scheme in its prosecution office in 2013. In addition, English courts restrict public prosecutors to discontinue a case based on "evidentiary sufficiency" grounds. In the US, even though courts still apply comparatively high standards of review of public prosecutors withdrawing or staying public prosecution, they have absolute power to review the disapproval of the private prosecution based on legal considerations such as the lack of sufficient evidence. The practice in these areas demonstrates that victims' interests at the charging stage of a criminal proceeding have gained increasing attention worldwide.

With the combination between the information about Canadian system given in section 2.3.4 in Chapter 2 and the information set out above in this chapter, a brief comparison is made in the following chart.

³¹⁷ Victims' Rights Directive, *supra* note 14.

Figure 1. Comparison of practice in the EU, US, UK and Canada concerning victims' possibility to review a decision not to prosecute

	Right to review	Formal Internal Review System	Judicial Review System
European Union	<p>Yes</p> <p>(Victims' Rights Directive 2012/29/EU)</p> <p>In practice, some EU countries substitute a right to review a decision not to prosecute with a strong right to a private prosecution. In a few jurisdictions, such as Finland and Austria, a private prosecution is out of public prosecutors' control.</p>	<p>Some countries</p> <p>After the adoption of Victims' Rights Directive 2012/29/EU, EU countries have an obligation to adapt their corresponding national legislation in order to comply with the Directive within a period of time, which means all EU countries will have at least an internal review system eventually.)</p>	<p>Some countries</p>
United Kingdom	<p>Yes</p>	<p>Yes</p> <p>Newly established in 2013</p>	<p>Yes.</p> <p>Termination of Public Prosecution:</p> <ul style="list-style-type: none"> ➤ Reasonableness standard of review <p>Termination of Private Prosecution:</p> <ul style="list-style-type: none"> ➤ <i>Evidentiary Sufficiency</i>: "clearly

			<p>no case to answer”</p> <ul style="list-style-type: none"> ➤ <i>Public Policy:</i> Reasonableness standard of review <p>Available Relief:</p> <ul style="list-style-type: none"> ➤ Direct Reconsideration ➤ Nullify a Decision not to Prosecute
United States	No	No	<p>Yes</p> <p>Termination of Public Prosecution:</p> <ul style="list-style-type: none"> ➤ “Abuse of Discretion” Standard of Review <p>Disapproval of Private Prosecution:</p> <ul style="list-style-type: none"> ➤ <i>Legal Considerations:</i> Automatic <i>de novo</i> review ➤ <i>Public Policy:</i> “Abuse of discretion” standard of review <p>Available Relief:</p> <ul style="list-style-type: none"> ➤ Compelling a Prosecution

			<ul style="list-style-type: none"> ➤ Nullify a Decision to Disapprove the Private Prosecution
Canada	No	No	<p>Yes</p> <p>Termination of Public Prosecution:</p> <ul style="list-style-type: none"> ➤ “Flagrant impropriety” standard of review <p>Termination of Private Prosecution:</p> <ul style="list-style-type: none"> ➤ “Flagrant impropriety” standard of review <p>Available Relief:</p> <ul style="list-style-type: none"> ➤ Compelling a Prosecution ➤ Nullify a Decision not to Prosecute ➤ Direct a Reconsideration (Possible)

CHAPTER V

5 Proposed Reforms

5.1 General Overview

Drawing on the experiences of the practice in the EU, UK and US, this chapter proposes a series of reforms to ensure that victims in Canada have effective opportunities to challenge unreasonable and incorrect decisions not to prosecute made by Crown prosecutors. The recommended reform includes a two-level process, Internal Review and Judicial Review. In section 6.1, I will provide an introduction regarding the application and limitations of the Internal Review and Judicial Review respectively, including their process, scope of application, eligible and potential participants, and statutory limitations.

5.1.1 Definition of Victims: “who may seek review”

The definition of “victim” commonly used in the Canadian legal system is also applicable in this review system. A direct victim is the person to whom harm was done, or who suffered personal physical, emotional, or economic loss as a direct result of the commission of the alleged offence. A person can claim to be a victim eligible for this review system based only on emotional loss only when such mental suffering caused by the alleged offence is so severe that this person is not able to have a normal life. The reason behind this narrow definition of “mental suffering” is to prevent a huge number of applications for review merely based on their trivial emotional distress. A person who finds himself or herself falling into this definition is eligible to seek review of decisions not to prosecute through this review system. Meanwhile, an eligible victim can give up his or her opportunity to use this system. Therefore, it is not the system that should

automatically identify victims in alleged crimes, but the “victims” who should claim and prove that they are victims who are eligible for the system.

“Indirect victims” are the spouse, common-law partner, dependent, or any relative of the direct victim, or anyone who has, in law or fact, the custody of the direct victim or is responsible for the care or support of the direct victim who suffers emotional or economic loss as a result of the alleged offence against the direct victim. In most situations, indirect victims alone should have no legal standing to complain about a decision not to prosecute because their harm is not directly caused by the alleged offender. However, in cases where the direct victim is dead or otherwise incapable of filing a complaint, an indirect victim should be able to file a complaint on his or her behalf. In John Doe murder cases where the identity of direct victims cannot be confirmed, anyone can file a complaint anonymously on behalf of the victims. I consider this situation to be rare and the case is likely to be high-profile. At the internal review level, even though it is possible multiple complaints are filed given that anyone can act on behalf of the victims in these cases, a prosecutor would only conduct one internal review for all complaints, and issue a public explanation for his or her decision not to prosecute. At the judicial review level, I assume that few people will want to bear the cost of the judicial review process for strangers. Therefore, to allow citizens to file review applications for John Does in murder cases will not improperly increase the burden on Crown prosecutors because of the increasing, sometimes frivolous, complaints.

Under my proposed reform, a direct victim can block an indirect victim from filing a complaint. If the direct victim is a minor or a person who is intellectually disabled, his or her express refusal to pursue a case can block an indirect victim from filing a complaint

on his or her behalf. This system is a method by which direct victims can assert their wishes to have a criminal trial for alleged crimes. If direct victims do not have such wishes, indirect victims have no right to force them to go through a trial (if the decision is reversed), which can re-victimize the direct victims. As well, it is possible that the indirect victims explore the direct victims' grievance for their own benefits, for example, using potential criminal prosecution or the review of decisions not to prosecute to reach a settlement with the accused. However, the effect of this refusal will not expand to barring the Crown prosecutor from conducting a prosecution if he or she deems it necessary because the Crown prosecutor's job is to protect public interests and security by instituting a prosecution, and this should not be compromised by the victims' wishes.

I recognize that it is possible that conflicting ideas concerning whether or not to pursue a criminal proceeding appear in cases where multiple victims are involved. However, the opportunity to review is given to any eligible individual victim, not victims of an alleged offense as a group, so the refusal of others should not hinder one particular eligible victim from accessing the system. Once the decision is found flawed and the prosecution is recommended following the review, the willingness of the victims of the alleged offense is not relevant to whether or not a Crown prosecutor should commence a prosecution against the will of the majority of the victims. This is because the Crown prosecutor is acting on behalf of the state, not victims, to prosecute the accused.

In cases where a large number of victims are involved the court can join the applications pertinent to the same prosecution and direct the applicants to integrate all arguments and elect one representative to present the common interests of the applicants in the judicial

review process. For internal review, the Crown prosecutor can conduct only one review and send the result and full explanation to all complainants.

5.1.2 Internal Review System

In reference to the practice in the UK and the reasoning in the English court in *Killick*, it is necessary that Canada should have an internal review system to protect victims' potential interests in criminal proceedings. The English court in *Killick* correctly pointed out that the implementation of the victims'³¹⁸ right to review should not rest merely with his or her seeking judicial review in court.³¹⁹ Victims could not effectively exercise their rights to review in the *Killick* case partially because of the lack of a formal internal review system in the Crown Prosecutor's Office.³²⁰ If victims had a right to review in the UK, the Crown Prosecutor's Office should have had a systematic, efficient review mechanism to receive and re-examine the complaint about its service. Otherwise, the affected victims in

³¹⁸ Ministry of Justice, "The Code of Practice for Victims of Crime" (1 October 2005), online: The Crown Prosecution Service <http://www.cps.gov.uk/victims_witnesses/victims_code.pdf>. People who are eligible for Review Scheme *in the UK* are defined as follows:

3.2 The person who has made the allegation (or on whose behalf the allegation has been made) must be the direct victim of the criminal conduct. This Code does not require services to be provided to third parties or indirect victims such as witnesses of violent crime.

.....

3.4 Where a person has died as a result of criminal conduct, or is unable to receive services as a result of a disability, the victim's family spokesperson is entitled to receive services under this Code.

3.5 A family spokesperson should be nominated by the close relatives of the person who has died. If the close relatives cannot nominate a family spokesperson, the Senior Investigating Officer (SIO) working on the criminal investigation must nominate a family spokesperson. If the person who has died has no identified close relatives, the SIO may nominate someone who appears suitable to receive assistance under the Code in respect of the death.

3.5 Where a person entitled to receive services under this Code is under the age of 17, then that person's parent or guardian is entitled to receive services under this Code as well as the young person.

³¹⁹ *Killick*, *supra* note 237 at para 48.

³²⁰ *Ibid.*

the country exercising their rights to review will be undermined.³²¹ As a result, the UK government recently implemented an internal review system to promote the victims' right to review a decision not to prosecute. Even though the situation in Canada is different given that, in this country, victims have not been formally granted the right to review, they have sufficient interests to request the Crown prosecutor to review decisions not to prosecute. In this case, it will be more efficient or convenient for victims to protect their interests if the Canadian Crown Prosecutor's Office provides internal review for them.

The Internal Review System is necessary. First, it can reduce the incidents wherein victims seek judicial review in court because most complaints can be addressed internally faster and with less expense for both victims and the justice system. Second, it can promote prosecutor-victim interaction in charging decision-making and encourage the Crown prosecutor to consider victims' interests while following the requirements laid down in charging guidelines. In most situations, sufficient communication might effectively reduce the immediate tension between the Crown prosecutor and victims caused by the decision not to prosecute. By operating the internal review system, the Crown prosecutor may realize most complaints can be addressed with sufficient communication during the decision-making process. Third, the possibility of heightened scrutiny through a review process might promote Crown diligence and caution, and reduce prosecutorial misconduct. A Crown prosecutors' integrity and ability might be questioned by the public and people working in the field if his or her decisions are constantly complained and reviewed. Realizing the possibility of review and its consequences, Crown prosecutors are likely to be more diligent and careful when making

³²¹ *Ibid*

decisions to discontinue a case.

5.1.2.1 Process

The proposed internal review system should work in the following way. In general, after a Crown prosecutor withdraws charges or stays a proceeding, victims should be informed in person on the same day about the decision not to prosecute and about the opportunity to request a review for such a decision. The notification and basic information about the decision not to prosecute should be put into writing and given to the victim. In the case of a stay of a proceeding, unless the Crown prosecutor clearly declares the stay permanent, victims are only allowed to challenge the corresponding decision not to prosecute beginning one year from the stay of the proceeding. This is because it is unclear whether a stay of a proceeding is permanent or temporary. However, after a year, a proceeding that was stayed will be deemed never commenced.³²² In this case, victims can be sure that no prosecution is ongoing for their cases, unless the police re-lay the same charges again.

It is incorrect to think that this one-year period further prolongs the review process, which might have a negative impact on the accused. The accused and his or her representative should have known of the Crown prosecutor's power to re-commence a prosecution within one year even without a review system. Therefore, this one-year period should not be counted into the period that the review system would use. This means the negative effect on the accused caused by the review system concerning time limitation in the situation of staying a prosecution would be no different than in the situation of withdrawing charges.

³²² *Criminal Code*, *supra* note 23, s 579 (2).

If victims decide to make a complaint, they should file an application within fourteen days either of receiving notification of non-prosecution or the day the proceeding is deemed never commenced. During those fourteen days, the victims can approach the local Crown prosecutor's office through informal channels to address the issues concerning the decision not to prosecute. For an internal review, a victim does not need to show any flaws in the Crown prosecutor's decision not to prosecute. Instead, they should prove that he or she is the "victim" eligible to ask for a review for a decision not to prosecute for a particular alleged offense. The Crown prosecutor is obliged to conduct an internal review once the application is filed and the eligibility of the applicant is confirmed.

Once victims file an application for reviewing the decision not to prosecute, an internal review will take place. Just as many courts have maintained, an administrative decision is best handled by people with expertise in the relevant area.³²³ A special review unit should be set up in the Crown Prosecutor's Office in every city to review victims' complaints in that city. In addition, the review unit should provide full explanations of the decision not to prosecute if the Crown prosecutor did not do so previously. The unit should be made up of two to three experienced prosecutors who can identify potential flaws in the reasoning, criteria, standards, etc. behind the decision not to prosecute and decide whether to reverse the decision. The unit should only accept complaints pertinent to the Crown prosecutor's decision to terminate a prosecution permanently after charges have been laid. Meanwhile, the Crown prosecutor should inform the accused of the status of the review process and the possibility of reversal of the decision not to prosecute. In most situations, the whole

³²³ *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para 27, [2008] 1 SCR 190[Dunsmuir].

process should be completed in no more than two months from the day the complaint is filed. An extra month could be given to the unit to reassess the decision not to prosecute if the case is exceptionally complicated.

5.1.2.2 Scope

Victims can only apply to the internal review system when a case is discontinued permanently and completely. Victims cannot apply in the following situations: (1) the Crown prosecutor withdraws one or several charges or alters the charges substantially, but the prosecution continues; (2) the Crown prosecutor clearly indicates, when staying a prosecution, that the stay will last for only a short period; and (3) the Crown prosecutor withdraws charges or stays a private prosecution as a result of a deal with the accused.³²⁴

In the first situation, victims do not have a right to a specific prosecution and cannot decide how the Crown prosecutor should conduct a prosecution. Even though victims' satisfaction with the prosecution might be comparatively reduced, if the prosecution continues, victims still have opportunities to uphold their interests and exercise their rights in the trial and post-trial stages at the least. Furthermore, if the prosecution is commenced, the Crown prosecutor is in a better position than victims to know how to conduct a prosecution effectively and how to get a conviction. In the second situation, victims can file a complaint for internal review a year from the day the proceeding was stayed because the prosecution is deemed never commenced if a stay is more than a year old.

³²⁴ This will include diversion and alternative measures.

The type of non-prosecution in the third situation, in which the Crown prosecutor stops prosecution as *quid pro quo* for receiving something from the accused, comes from the Crown prosecutor's power to make a deal with the accused and is not discussed in this thesis. Allowing victims to review this type of decision will open a Pandora's Box of victims' power to interfere with the Crown prosecutor's power to make deals. Furthermore, it has been held in *R v S (N)* that a just and proportionate balance should always be maintained between the victims' rights in criminal proceedings and the accused's right to a fair trial.³²⁵ A review in this type of situation, more than others, risks the possibility of significant damage to the right of the accused.

In some cases, the Crown prosecutor's need for the accused's information is urgent, and making a deal for such information cannot wait for the victim to exhaust appeals for review of the deal. The accused feels secure in disclosing possibly damaging information because of the belief that the Crown prosecutor will not renege on their deal. Just as Berger J stated in *R v Smith*, "the ordinary man is entitled to expect that the Crown will keep its word".³²⁶ A review and subsequent reinstatement of the prosecution would be unfair to the accused given that the incriminatory information may have been disclosed in the deal, which could be used against the accused in court. This risks the possibility that the Crown prosecutor uses the internal review and victims to trap the accused into self-

³²⁵ 2012 SCC 72, [2012] 3 SCR 726; Department of Justice Canada, "Victims Rights: Enhancing Criminal Law Responses to Better Meet the Needs of Victims of Crime in Canada" (2 May 2013), online: Department of Justice Canada <<http://www.justice.gc.ca/eng/cj-jp/victims-victimes/vrights-droitsv/discuss-consult.html>>; *Basic Principles for Victims*, *supra* note 1.

³²⁶ *R v Smith* (1974), 22 CCC (2d) 268 at para 21, [1975] 3 WWR 454 (BCSC).

incrimination: a blatant violation of the accused's right to be silent and avoid self-incrimination.³²⁷

For example, in the case of *R v Talon*,³²⁸ Talon entered into an immunity agreement with the Crown prosecutor in exchange for the former's testimony against two accomplices in a double murder. Two years later, while promoting his book about his criminal career, he admitted, to third parties, to having committed the murders. As a result, he was charged with murder, but the prosecution was stayed because it was prejudicial and unfair to Talon, who would never have admitted committing the crime without the immunity agreement.

This example also reveals another issue. Incriminatory evidence obtained in an unconstitutional way might be ruled inadmissible in court, which would be detrimental to the prosecution. As well, the court might stop prosecution if the repudiation of a non-prosecution agreement is deemed to cause irreparable damage to a fair trial. Repudiation of non-prosecution amounts to the abuse of power by the Crown prosecutor if he unfairly reneges on expectations he has generated in the accused.³²⁹ This would make a victim's application for review of a deal meaningless, because the prosecution ends up stopped anyway.

If internal review happens, and is successful, a Crown prosecutor will re-commence the prosecution. If internal review upholds the original decision not to prosecute, victims have an option to bring their complaints to a competent court for judicial review.

³²⁷ *Charter*, supra note 20, ss 11, 13.

³²⁸ (2006), 39 CR (6th) 239, [2006] RJQ 1618 (SC).

³²⁹ See *R v Crneck* (1980), 55 CCC (2d) 1, 17 CR (3d) 171 (HCJ); *R v Betesh* (1975), 30 CCC (2d) 233, 35 CRNS 238 (Ont Co Ct); *R v D (E)* (1990), 57 CCC (3d) 151, 78 CR (3d) 112 (Ont CA).

5.1.3 Judicial Review in Competent Court

In general, I do not recommend victims be overly dependent on the court's adjudication. The superior court is supposed to be the last resort for victims to seek a remedy. The court considers itself the least viable option to challenge decisions not to prosecute because judicial interference with prosecutorial discretion does not prevail in most circumstances. In such a situation, the court takes action only when victims have run out of options and a court feels a need to uphold the rule of law and the integrity of the criminal justice system. For this reason, the application for judicial review can be easily rejected if there are other available remedies.

5.1.3.1 Process

If victims are still dissatisfied with a decision not to prosecute after an internal review, they should be able to apply for a judicial review to the superior court in the corresponding province within fourteen days after receiving the internal review process result. The superior court has "inherent jurisdiction" which, in principle, makes no matter beyond its jurisdiction.³³⁰ It should have jurisdiction over an application for reviewing a decision not to prosecute.³³¹ Therefore, the superior court is the best place for victims to apply for judicial review of decisions not to prosecute. In fact, many previous applications of this type were brought before the superior court. In cases where the subject matter is authorized to be heard before the Federal Court in accordance with the Federal Courts Act³³² or other federal statutes,³³³ the judicial review of decisions not to

³³⁰ Patriek Fitzgerald, Barry Wright & Vincent Kazmierski, *Looking at law: Canada's legal system*, 6th ed (Markham: LexisNexis, 2010) at 110.

³³¹ Gerald L Gall, *The Canadian Legal System*, 5th ed (Scarborough: Thomson Carswell, 2004.) at 235.

³³² *Federal Courts Act*, RSC 1985, c F-7.

prosecute can be brought before the Federal Courts. A court's proceeding should start no more than twenty-eight days after victims file an application. The length of time it takes to complete a judicial review should not be longer than nine months.

Victims can challenge decisions not to prosecute on the ground of "flagrant impropriety" of the Crown prosecutors' behavior and "reasonableness" and "correctness" of the decisions. These standards of review will be further elaborated in later sections. Before accepting the application, a court needs to be satisfied that the victim has established a *prima facie* case of those grounds.³³⁴ Although, in this proposed judicial review system, the standard of review is lowered from the existing one,³³⁵ the burden of proof and persuasion still lies with the victims. In most situations, the Crown prosecutor performs his or her role as a minister of justice independently and effectively and should not be influenced by external duress or be unduly called into question. Therefore, during the judicial review, he or she should be presumed to be acting in good faith and in a correct manner unless someone can prove otherwise.³³⁶

In the application, victims should specify a particular remedy they are seeking. However, in the end, deciding when and how to use a prerogative remedy is at the court's discretion.³³⁷ The court should be able to compel a prosecution, direct reconsideration, quash a stay of private prosecution, or combine any two of them on a case-by-case basis. For example, in cases where the applicant originally seeks to compel a prosecution but

³³³ See e.g. *Fisheries Act*, *supra* note 129, c F-14; *Food and Drugs Act*, RSC 1985, c F-27; *Federal Real Property and Federal Immovables Act*, SC 1991, c 50; *Tobacco Act*, SC 1997, c 13.

³³⁴ This will be explained in the later sections of this chapter.

³³⁵ This will be elaborated in the later sections of this chapter.

³³⁶ *R v Regan* (1999), 137 CCC (3d) 449 at para 84, 179 NSR (2d) 45 (NSCA).

³³⁷ William Wade & Christopher Forsyth, *Administrative Law*, 9th ed (Oxford: Oxford University, 2004) at 700; Guy Régimbald, *Canadian Administrative Law*, 1st ed (Markham: LexisNexis, 2008) at 481.

fails to establish “flagrant impropriety” on the part of Crown prosecutors, the court can refuse to grant such a remedy. However, if after the judicial review of the original claim, a court instead finds the decision is irrational based on the “reasonableness” standard, it has the power to quash the decision not to prosecute and direct the Crown prosecutor to reconsider his or her decision. The applicant does not need to file a new application.

5.1.3.2 Statutory Power of the Crown Prosecutor to Discontinue a Prosecution

Crown prosecutor’s prerogative power to decide not to prosecute a case should be replaced by a statutory power. The scope of a Crown prosecutor exercising discretionary power to stop a prosecution should be laid down in the relevant legislation. Unlike the existing Crown charging guideline or manuals, the statute is binding, which can impose upon Crown prosecutors legal obligations to comply with it. As well, the statute can provide courts with legal guidance when examining whether the Crown prosecutors’ decisions not to prosecute are legitimate and valid. This point will be further discussed in the later section 6.3.1.

5.1.3.3 Participation of the accused

In the judicial review process, the only parties are victims and the Crown prosecutor. The prospective accused should not be a party to the judicial review process, but he or she should be allowed to have limited participatory role in such a process provided the prospective accused would be significantly harmed by some particular outcomes from the judicial review, such as compelling a prosecution or nullifying a stay of private prosecution.

The prospective accused should only be allowed to raise arguments concerning

procedural issues of the judicial review process. Conducting a judicial review in a particular way might have caused significant or irreversible damage to the prospective accused's possibility of receiving a fair trial if the judicial review resulted in a prosecution. The accused is in a better position than the Crown prosecutor to demonstrate how the procedure would affect him. For example, if a victim demands an adjournment in order to collect more evidence, arguments of the accused should be relevant and important for the court to determine whether or not to grant an adjournment and the proper length of the adjournment if granted. The adjournment might further extend the judicial review process, which can harm the accused if important evidence goes missing, mental suffering prolongs or other unexpected and detrimental incidents happen in the period of the adjournment.

However, the prospective accused should not be allowed to make a submission concerning the merits of the judicial review. To allow the prospective accused to make an argument for the merits of the judicial review will improperly delay the judicial review process, which would have negative impact on both the prospective accused and the efficiency of the judicial review system. First, because the Crown prosecutor is the one who is actually accused by the victims, he or she might have raised all possible arguments for his or her position. The accused would probably raise the same arguments as the Crown prosecutor did, which would be useless.

Second, the reviewing court is not a trial court. The reviewing court's job is to determine whether or not a reason behind a decision not to prosecute is reasonable or whether or not the decision is correct. I do not believe that the accused would have better knowledge of the charging decision-making process and reasons behind such a decision than the Crown

prosecutor would have, which makes the accused not in a better position to justify the decision not to prosecute. This is especially the case when the issues in dispute are about how the Crown prosecutor weighs the evidence, considers possible defense of the accused at trial, or determines a policy concerning non-prosecutions.

In addition, the participation of the prospective accused might have a negative impact, as the prospective accused may try to inappropriately influence the judges to deliver a favorable outcome by providing arguments that are supposed to be addressed in a trial court and are irrelevant to determination for a judicial review. If a reviewing judge does not take the irrelevant factors into account when deciding whether or not a decision is flawed and what remedy is going to be issued, then introducing such irrelevant factors would be merely a waste of time. If a reviewing judge might be influenced by such irrelevant factors and unconsciously consider those factors in his or her judgement, it is improper and unfair to the participants to bring them up.

Third, the prospective accused has limited interests in the result of a judicial review in most situations. The accused will be significantly affected by the judicial review only when the review results in the reinstatement of the criminal proceeding. However, only on limited grounds will the court compel a prosecution or quash a stay of private prosecution.³³⁸ In most situations, the court will only re-direct a reconsideration. An order to re-consider a decision is not an order to reinstate a prosecution, nor will it definitely result in a reinstatement of a prosecution. This means, in such situations, the reinstatement of the criminal proceeding, if any, does not directly result from the judicial review. In addition, the limited grounds that might finally lead to the reinstatement of the prosecution

³³⁸ The details of sentence are demonstrated in section 6.3.3.

directly from the judicial review are related to the integrity of the Crown prosecutor, which makes the Crown prosecutor be more motivated to argue with due diligence. In conclusion, in order to promote the efficiency and fairness of the judicial review, the participation of the accused should be limited.

5.1.4 Issue on limitation periods for summary conviction offences

There is a limitation period of six months for summary conviction offences to be pursued.³³⁹ It makes no sense for the reviewing court to reverse a decision not to prosecute if the limitation periods of the alleged offence have expired. For some hybrid cases, even if the time limitation for a summary conviction proceeding has passed, the Crown prosecutor can still proceed with the case by indictment. It is possible that a judicial review could turn a summary conviction case into a case that proceeds by indictment. The latter affords the accused all sorts of expensive procedural rights and is comparatively lengthy, which could be detrimental to the victim. For example, in sexual assault cases, the accused can require a jury trial. In this case, attacking the character of the victim and his or her sexual history might be a strategy to discredit the victim before the jury.

To prevent the time limitation from running out, an amendment to section 786 of the Criminal Code³⁴⁰ is necessary. The clock should stop running the day the charges are filed against a suspect. The limitation period was created to urge the investigating and prosecuting authorities to perform their duties with reasonable diligence and to reduce the

³³⁹ *Criminal Code*, supra note 23, s 786 (2):

No proceedings [for summary conviction offenses] shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.

³⁴⁰ *Ibid.*

possibility that the accused loses evidence for his or her effective defense. In order to balance these interests, the statute of limitations should continue running fourteen days after the day the judgement is delivered by the court of last appeal. A fourteen-day period is also given to the Crown prosecutor for reconsideration of the original decision not to prosecute. In cases where victims do not apply for judicial review or miss the deadline for the application, the statute of limitations starts running fourteen days after the day the outcome of the internal review is delivered.

5.2 Internal Review Scheme

5.2.1 The victims should receive full explanation through an Internal Review Scheme

Victims should only receive a full explanation of the decision not to prosecute after they file a request for an internal review. Before that, victims should receive only the notification of the decision and brief reasons at the Crown prosecutor's discretion. In my opinion, it is not necessary for the Crown prosecutor to provide detailed reasons for every decision not to prosecute. For one reason, as explained by Robert J Frater, the prosecution system would be unworkable if the Crown prosecutor had to give a full explanation for every decision because countless cases need to be dropped every year.³⁴¹

For another reason, not all victims are obsessed with a criminal prosecution and are anxious to receive a full explanation of the termination of a prosecution. For various reasons, some victims might be satisfied with brief reasons behind decisions not to prosecute. Perhaps they do not want to spend more time questioning the decision, or the Crown prosecutor has successfully explained the reason behind the termination of the

³⁴¹ Frater, *supra* note 15 at 49.

prosecution. Alternatively, civil recourse might be more tempting for some victims, and therefore they do not care about criminal prosecution at all. In some cases, such as sexual assault or domestic violence cases, some victims do not want to go through a complete criminal proceeding.³⁴² For them, a notification of the termination of a case is, instead, good news. Therefore, in the aforementioned cases, it would be a waste of time for the Crown prosecutor to prepare a lengthy and detailed explanation because victims do not need one.

For some victims, a basic reason is enough. In most situations, in Canada, brief explanations of the termination of a prosecution will be provided to victims. In many provinces, it is recommended in the Crown prosecutor manuals that the Crown prosecutor provide some explanations of stopping a prosecution. At federal level, according to the Federal Prosecution Service Deskbook, the federal government attempts to balance transparency, in the interests of victims and the public, and privacy, in the interests of suspects and justice:

Where a decision is made not to institute proceedings, it is recommended that a record be kept of the reasons for that decision. Furthermore, counsel should be conscious of the need in appropriate cases to explain a decision not to prosecute to, for example, the investigative agency. Ensuring that *affected parties* understand the reason for the decision not to prosecute, and that those reasons reflect sensitivity to the investigative agency's mandate will foster better working relationships.³⁴³

³⁴² Cathy Hutchison, *Victims in the Criminal Process: Perceptions and Experiences of Criminal Justice Professionals: increasing the effectiveness of community-based sanctions and promoting the interests of victims* (Toronto: Probation Officers Association of Ontario, 2006) at 20, online: Probation Officers Association of Ontario <<http://www.pao.org/assets/files/pdf/positionpapers/Victims-in-the-Criminal-Process.pdf>>.

³⁴³ *Deskbook*, *supra* note 41 at Part V, c 15.

It is true that this paragraph actually emphasizes providing reasons to the police, not so much to victims. However, it somehow implies that victims should be given some explanations of the non-prosecution given that they are affected parties as well. This rule is applied in several provinces. For example, similar text is put into the guidebook of policies and procedures for the Conduct of Criminal Prosecutions in Prince Edward Island and Newfoundland.³⁴⁴ In Nova Scotia, Crown prosecutors have the duty to release reasons behind decisions not to prosecute to both victims and the public.³⁴⁵ The Crown prosecutors in this province are encouraged to ensure victims understand the reason behind a non-prosecution decision in order to maintain confidence in the administration of justice. In other provinces, such as British Columbia and Ontario, victims have the right to receive reasons behind decisions not to prosecute according to relevant victims' bill of rights.³⁴⁶ Therefore, at this stage, I believe that, in general, victims are more or less expected to receive the basic information about decisions not to prosecute.

5.2.1.1 After the application for internal review

In my opinion, if a victim applies for an internal review, this means that this victim is firm about instituting a criminal prosecution and that the basic information on the decision not to prosecute is not acceptable to him or her. In this case, the Crown prosecutor should provide a full explanation to this victim if the decision not to prosecute is maintained after

³⁴⁴ Crown Attorneys' Office, "Guide Book of Policies and Procedure for the Conduct of Criminal Prosecutions in Prince Edward Island" at p 5-7, online: The Government of Prince Edward Island <http://www.gov.pe.ca/photos/original/jps_crownconduc.pdf>; Department of Justice, "Decision to prosecute" at p 9, online: Newfoundland & Labrador Canada <<http://www.justice.gov.nl.ca/just/prosect/guidebook/005.pdf>>.

³⁴⁵ Nova Scotia, "The Decision to Prosecute", *supra* note 188 at 14.

³⁴⁶ Ontario, *Victims' Bill of Rights*, *supra* note 26; British Columbia, *Victims of Crime Act*, *supra* note 26.

an internal review. The full explanation must be given to victims after the internal review. The explanation can help the victim understand the reasons behind the termination of the case, possibly agree with the Crown prosecutor's judgement, and forgo pursuit of the case in the criminal dimension.

If the victim is not satisfied with the Crown prosecutor's reasons, he or she can use those reasons to challenge in court the decision not to prosecute. Apart from judges' reluctance to intervene in prosecutorial discretionary decisions, the low success rate in judicial review for a decision not to prosecute is attributable to the lack of conclusive evidence for the victim to make a strong claim. This is partially because, in most situations, victims do not receive full explanations of the decision not to prosecute. In most provinces, the law allows the Crown prosecutor to withhold information for security reasons. In Canada, the Crown prosecutor is not obligated to give reasons for decisions not to prosecute.³⁴⁷

For example, in Nova Scotia, while the Freedom of Information and Protection of Privacy Act requires the public body to disclose reasons behind decisions not to prosecute if a person demanding the information is aware of the investigation, it also includes a list of information that a Crown prosecutor is allowed to withhold.³⁴⁸ Empirical research is lacking on Crown prosecutors' practice of giving victims reasons for decisions not to prosecute. However, in the case of decisions to institute a prosecution, the Crown prosecutor either refuses to give any reasons or merely gives a perfunctory response.³⁴⁹ It is not a bad prediction that victims can hardly receive a full explanation of decisions not

³⁴⁷ Even though, in order to promote reasoned decision-making, it has been encouraged that Crown prosecutors should provide explanations for the decision not to prosecute to victims in appropriate cases, Crown prosecutors can withhold information when they deem necessary. This has been demonstrated in Section 3.2.4.3.

³⁴⁸ *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s 15.

³⁴⁹ Frater, *supra* note 15 at 48.

to prosecute given that they do not even have a solid “right” to disclosure as do the accused. Without the full explanation of the termination of a prosecution, victims would have difficulties in finding flaws in the decision not to prosecute. This makes it difficult for victims to convince a judge to review a decision not to prosecute without strong arguments and sufficient evidentiary support. In most cases of judicial review of charging decisions, both decisions to prosecute and decisions not to prosecute, the applicants can only contest from the decision itself, and there is seldom any “smoking gun” evidence.³⁵⁰

In an administrative law context, the duty of an administrative decision maker to give reasons for a decision is generally recommended to ensure a rational and transparent decision-making process.³⁵¹ For example, in *Canada v Baker*, the Court recognized that:

Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.³⁵²

Written reasons for decisions can promote transparency. Once the decision is questioned by citizens, written records can clearly show what happened in the decision-making process, which can prevent secrecy. Transparency in decision-making is necessary to promote the accountability of the decision-maker to the person affected and to the public.³⁵³ Even though giving reasons for a decision is not necessary in common law tradition, under some circumstances, the Supreme Court has recognized that the duty to

³⁵⁰ Frater, *supra* note 15 at 48.

³⁵¹ *Baker v Canada*, [1999] 2 SCR 817 at para 43, 174 DLR (4th) 193 [*Baker*].

³⁵² See also *Williams v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 646 at para 38, 147 DLR (4th) 93 (CA); R A Macdonald and D Lametti, “Reasons for Decision in Administrative Law” (1990) 3 CJALP 123 at 146.

³⁵³ *Baker*, *supra* note 351.

provide reasons is appropriate and necessary:

In certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this, where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.³⁵⁴

In *Baker*, the court also affirmed that “reasons are invaluable if a decision is to be appealed, questioned, or considered on judicial review”.³⁵⁵ Victims have significant interest affected by the decision not to prosecute. In this proposal, I recommend that victims’ ability to access judicial review should be further strengthened. With this change, victims should receive a full explanation of the decision not to prosecute when they deem judicial review is necessary. Normally, reasons behind a decision are important for the reviewing authority to determine whether the decision is correct or rational. Not knowing the reasons behind a decision not to prosecute would put victims at a disadvantage in exercising their power to protect their interests through applying for judicial review. Even if victims’ suspicions about the decision not to prosecute are correct, they will not have enough ammunition to make a successful claim. In this case, the operation of the review system will be extremely unfair to victims. Victims are not given a reasonable opportunity

³⁵⁴ *Ibid* at para 43. See also: *Northwestern Utilities Ltd v City of Edmonton*, [1979] 1 SCR 684 at 706, 89 DLR ((3d) 161, J Estey:

[R]eferring to the desirability of a common law reasons requirement: This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal. . . . The importance of reasons was recently reemphasized by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 180-81.

³⁵⁵ *Baker*, *supra* note 351 at para 39.

to present their claims because the system puts them at a substantial disadvantage *vis-à-vis* the Crown prosecutor. This significantly reduces procedural fairness in the legal system.

5.2.2 The Crown prosecutor should be allowed to overturn his original decision not to prosecute without introducing new evidence

In order to ensure the effective operation of an internal review system when victims request a review, the Crown prosecutor should be allowed to reverse his or her original decision not to prosecute *without referring to new evidence*. The accused should not be able to claim that the Crown prosecutor abuses the court's process merely based on the fact that the latter reverses a decision not to prosecute after an internal review process. First, from a practical perspective, for an internal review, victims will often complain that the judgement of the Crown prosecutor is incorrect or irrational. In such a situation, victims will not bring in new evidence, but merely request a reassessment of the existing evidence or reconsideration of public interest policy. The system will be unworkable if the Crown prosecutor is not allowed to reverse the original decision without introducing new evidence.

Secondly, the power to reverse a decision not to prosecute is fundamentally connected to the Crown prosecutor's discretionary power to determine whether to continue a criminal prosecution. A Crown prosecutor can decide to drop a case at this moment, but find it wrong or improper in the next moment. When people make complex decisions, there might be conflicting ideas in their mind, and they might want to change their decisions through thinking and evaluating the relevant elements. All these constitute a basic part of discretion. If a Crown prosecutor cannot effectively reverse his or her own decision, the

exercise of discretion to decide whether to continue a case is subject to improper limitation. This is also to maintain a good quality of the outcome resulting from the discretionary decision-making. In *R v Papaioannou*, the court found that re-laying charges is appropriate and permissible if flaws were found in dropping charges.³⁵⁶ The reversal is forbidden only when such a reversal is motivated by bad faith or influenced by improper motive or policy.³⁵⁷

5.2.2.1 Limitations and Notification

One important issue is how much negative impact will be imposed on the accused if the Crown prosecutor has unlimited power to reinstitute a prosecution without referring to fresh evidence after a charge is withdrawn or permanently stayed. The jurisprudence in Ireland and the UK can assist in analyzing the use of the reversal by public prosecutors in the absence of fresh evidence.

5.2.2.1.1 Ireland

In Ireland, as an informal procedure, victims can write a letter to the Director of Public Prosecutor (DPP) and request a review for the original decision not to prosecute. If the DPP considers it is appropriate, an internal review will be conducted by an official who is not the one who made the original decision.³⁵⁸ The DPP can stop a case in both pre-charge and post-charge stage, but it is his or her general right to re-commence the case at both stages.³⁵⁹

³⁵⁶ *R v Papaioannou* (2000), 46 WCB (2d) 427, 2000 CanLII 4236 (Ont CA). See also Frater, *supra* note 15 at 105, n 122; *R v McArthur* (1995), 102 CCC (3d) 84, 101 WAC 221 (Sask CA).

³⁵⁷ *Ibid*; *State (McCormack) v Curran*, [1987] ILRM 225.

³⁵⁸ Office of the Director of Public Prosecutions, "Guidelines for Prosecutors" (revised November 2010) at 54, online: Office of the Director of Public Prosecutions <http://www.dppireland.ie/filestore/documents/GUIDELINES_-_Revised_NOV_2010_eng.pdf>.

³⁵⁹ *Ibid* at 15, 22.

In general, the DPP is allowed to have second thoughts on the decision not to prosecute without introducing new materials. This does not amount to arbitrariness or perversion if the DPP's exercise of this function does not impair the accused's fair procedure right. The most famous case dealing with this issue is *Eviston v DPP*³⁶⁰ in 2002. Mrs. Eviston was involved in a car accident that resulted in the death of the victim, and later her lawyers were informed that the DPP had decided not to file a charge against her based on the lack of necessary *mens rea* for the crime. Six days later, the father of the victim wrote to the DPP and requested reconsideration of the decision not to prosecute. Even though he had not received any new evidence, the DPP still decided to review the decision, and because of that, the original decision not to prosecute was reversed. Mrs. Eviston filed a complaint to the High Court in order to seek an injunction against the prosecution. The High Court granted the motion by finding that the reversal was not consistent with the DPP's official charging guideline, which amounted to the DPP acting "arbitrarily" and "perversely". The Supreme Court affirmed the injunctive relief granted by the High Court but rejected its reasoning. It emphasized that the DPP's change of mind in the charging decision is a part of his discretion, and the mere disobedience of the guideline did not constitute valid grounds to review a decision to prosecute. It continued pointing out that the essential issue in this case was whether the fair procedure right was infringed, concluding as follows:

In thus holding, I am bearing in mind all the facts of the case as they have emerged during the course of the proceedings. *I also bear in mind the level of stress and anxiety which has been borne over a considerable period by the Applicant.* On these particular facts it seems to me that once the DPP

³⁶⁰ *Eviston v DPP*, [2002] IESC 62(SC) [*Eviston*].

had unequivocally and *without any caveat informed the Applicant that no prosecution would issue against her in connection with this road traffic accident*, it was a breach of her right to fair procedures for him to reverse his decision and to initiate a prosecution by the issuing of the summons on the 23rd December 1998.³⁶¹

Eviston did not define what level of stress and anxiety generated by the reversal would make it a violation of procedural fairness. Later in the same type of case, *Carlin v DPP*,³⁶² the Supreme Court partly followed *Eviston*'s reasoning. It agreed that a sort of exacerbating anxiety and stress caused by the reversal of a decision not to prosecute without the proper warning of the possible future review could amount to the denial of a fair procedure. However, it stressed that “[t]he appellant would have to have shown that *the level of anxiety or stress suffered was raised beyond that normal level* by reason of the failure of the Director to observe fair procedures.”³⁶³

In *Carlin*, the Chief Justice only emphasized the degree of the anxiety and stress Mr. Carlin suffered at the moment when he received the notification of prosecution against him a year after the original decision not to prosecute was delivered. In *Eviston*, by contrast, the Chief Justice based the denial of fair procedure on the hypothesis that if a notification of the decision not to prosecute was not a final one, Mrs. Eviston might have lived in the fear of not knowing when she would be prosecuted on the same grounds again. In his dissenting judgement in *Eviston*, Justice Francis D. Murphy expressed his disagreement on the point that the exercise of discretion by the DPP is reviewable for *Eviston* types of violation of fair procedure. In *Eviston*, the violation of fair procedure

³⁶¹ Ibid.

³⁶² *Carlin v DPP*, [2010] IESC 14.

³⁶³ Ibid [emphasis added].

means the violation of “a right to peace of mind”, which means that a person is entitled to be free from a sense of stress and anxiety caused by the uncertainty of being prosecuted. Justice Murphy stressed the point that “there is no suggestion that she altered her position for the worse as a result of being informed in the first instance that she would not be prosecuted”³⁶⁴. Furthermore, he also considered that, even if the DPP had warned Mrs. Eviston of the possible reversal of the decision not to prosecute, she would not have received peace. Rather, she would have been more disrupted by knowing the decision was not final.

In this case, should we suggest that in no circumstances could the DPP change his or her decision after informing the suspect? Justice Murphy clearly has a point on this issue. However, he, as well as the majority in *Eviston*, failed to consider the stress that might be imposed on an accused at the moment when he or she is informed about the reinstatement of the proceedings. The accused might recently have located a new job after unemployment caused by the previous investigation and prosecution and might be stressed and scared about losing a job again for the same reason. He or she might have disposed of materials valuable to the defence prepared for the dropped prosecution. Important witnesses may not be available anymore for various reasons. He or she may also have ceased investigations for the defence, and a new investigation may turn negative because exculpatory physical evidence could be long gone after a period of time since the alleged crime was committed. This could be detrimental to the accused’s defence. All of these could cause stress to the accused.

The length of delay for the reversal is also an important factor influencing the

³⁶⁴ *Eviston*, *supra* note 360, Francis D Murphy, dissenting opinion.

determination of whether the accused is denied fair procedure. In *LON v DPP*,³⁶⁵ the interval of time between the two decisions was thirteen years. In *MQ v Judges*,³⁶⁶ the interval was four and a half years. In both cases, the court found that the accused's fair procedure right was impaired due to the great time gap between the original decision not to prosecute and the reinstatement of the proceeding.³⁶⁷

Justice J Pearts suggested, from another perspective, that official notification is not necessary because everyone should know the decision not to prosecute might be reversed after *Eviston* case has been made public:

...since the *Eviston* case it has become public knowledge that the respondent may review decisions made by him, and that the applicant cannot successfully complain that the respondent failed to indicate when he made his first decision that he was entitled to review and alter that decision.³⁶⁸

It is true that a suspect or an accused is normally accompanied by a lawyer who should know this case. However, if he or she chooses self-representation and refuses legal representation, should the suspect or accused still be expected to know the case? Should the accused blame himself or herself for the failure of warning after rejecting legal representation to which he or she is entitled?

³⁶⁵ Unreported, High Court (J McKechnie J), 14 November 2003, cited in Micheál O'Higgins, "Reviewing the Decision to Prosecute" (Paper delivered at 9th Annual National Prosecutors' Conference, 24 May 2008), [unpublished] at 21, online: <http://www.dppireland.ie/filestore/documents/PAPER_-_Micheal_O'Higgins_BL.pdf>.

³⁶⁶ Unreported, High Court (McMenamin J), 1 March 2006 cited in cited in O'Higgins, *supra* note 365 at 21.

³⁶⁷ O'Higgins, *supra* note 365 at 21.

³⁶⁸ *Hobson v DPP*, [1997] EWCA Crim 1317.

5.2.2.1.2 United Kingdom

The courts in Wales and England affirm the DPP's discretionary power to reverse a decision not to prosecute as the Irish courts do. However, they do not consider that the failure to inform the accused about this possibility will invalidate such a reversal. In the case of *R v DPP, ex parte Burke*,³⁶⁹ the victim claimed to be sexually assaulted by the applicant B when she was thirteen years old, but the case was originally dropped due to evidential insufficiency at that time. The decision was sent by mail to notify the applicant. The mother of the victim was dissatisfied with the decision and made an informal complaint to the DPP, which resulted in the reinstatement of the case. The DPP concluded that the original decision not to prosecute was wrong. The applicant objected to the reversal of the decision, claiming that the notification of the decision not to prosecute had given him a legitimate expectation of non-prosecution. The court refused to review the decision to prosecute:

[D]ismissing the application, that (1) the DPP had discretion to form her own view on the facts before her, for which it was necessary to consider what was in the public interest...It was not necessary for there to be special circumstances in addition to the fact that the decision was clearly wrong before the DPP could exercise her discretion to reinstate and (2) ... It could not be said that the standard letter sent to B that the prosecution was to be discontinued would justifiably have led B to believe he was free of jeopardy...³⁷⁰

The reasoning was affirmed and put forward in the recent *Killick* case. In June 2007, the Crown Prosecution Service (CPS) decided not to prosecute Mr. Killick and sent an e-mail

³⁶⁹ *R v DPP, ex parte Burke*, [1997] COD 169.

³⁷⁰ *Ibid.*

to his counsel to notify him of the decision. A prosecution re-commenced two years later, after the decision not to prosecute was reversed through the internal review process. Mr. Killick and his counsel contended that the reversal of the CPS's decision not to prosecute was an abuse of process. The court re-affirmed that the CPS had a general right to review its original decision not to prosecute and recommence the case. In addition, it held that a notification of such decision sent to the counsel of a suspect or a defendant could not be deemed as legally binding promises and reasoned that counsel would have known such a decision would be subject to review. However, it also considered that the repercussions of such reversal to the accused should not be completely ignored and should be assessed on a case-by-case basis.³⁷¹

5.2.2.1.3 Solutions

Considering the jurisprudence in Ireland and the UK, I think that the negative impact of the reversal of a decision not to prosecute should be taken into account and reduced as much as possible. After a charge has been withdrawn or permanently stayed, the power of the Crown prosecutor to reverse a decision not to prosecute without introducing new evidence should be limited. This power can only be used through victims' application for an internal review process. If the Crown prosecutor is allowed to reverse his or her decision not to prosecute without introducing fresh evidence, it might risk the possibility that the Crown prosecutor keeps bothering the accused with the same case. This can prevent the Crown prosecutor from prosecuting the accused suddenly or threatening the accused with the possible prosecution in order to obtain some information years later without having any new evidence about that prosecution.

³⁷¹ *Killick, supra* note 237 at paras 44-45.

As well, when a decision not to prosecute is made, the Crown prosecutor should inform the accused that the decision might be reversed within a maximum of three months through an internal review process and that there is a possibility that the victims will apply for judicial review afterwards. Although the failure to notify the accused of the possibility of the reversal of the decision not to prosecute is not always detrimental to the reinstatement of the prosecution, a proper notification can be helpful to promote procedural fairness. With a proper notification, the accused can be well prepared, both physically and psychologically, for a future reversal of the decision not to prosecute. It does no significant harm to the Crown prosecutor or victims to provide such information to the accused and to impose time limits on the internal review process to maintain procedural fairness.

5.3 Judicial Review

As previously mentioned, limited grounds to challenge, rigorous standards of proof, and the judicial reluctance to intervene into the prerogative power have all caused difficulties for victims in seeking judicial review of decisions not to prosecute. However, judicial review is the last and sole recourse for victims when they find their interests and individual rights jeopardised due to such decisions. In my opinion, the following reforms should be carried out:

1. The prerogative power of the Crown prosecutor to decide whether to prosecute should be replaced by a statutory one.
2. Broader standards of review for administrative discretionary decisions should be employed in judicial review of decisions not to prosecute.

3. Various standards of review should be employed in judicial review for the decision not to prosecute based on the nature of available remedies and the nature of the issues at dispute.

5.3.1 Prerogative power of the Crown prosecutor to decide whether to prosecute should be replaced by statutory power

The scope and exercise of the Crown prosecutor's prerogative power is derived from the long-term common law practice, which is not yet codified. This makes the power different from those statutory powers that have clear regulation and limitations put down in the corresponding statutes. The statutes assist the court in determining whether an administrative power is exercised within the statute's limitations. The court's role in administrative law is to ensure that the governmental decision-maker's action is not contrary to what is expressly put down in legislation and to protect individuals' legal rights from invalid administrative decisions.³⁷² If duties and powers are not clearly laid out in legal instruments, it is difficult for the court to determine whether a prerogative power is properly exercised. This is the case for judicial review of decisions not to prosecute.

The common law tradition and the Crown empower the Attorney General and his counsel to discontinue a case based on their discretion, which leaves unlimited room to Crown prosecutors to determine and interpret when, where and how to exercise such power. Even though in recent decades Crown prosecutors in most provinces have made public the detailed charging guidelines or manuals to average citizens, they are not legally bound to these guidelines or manuals. Even if the judiciary applies a "reasonableness" standard

³⁷² Gus Van Harten, Gerald Heckman & David J Mullan, *Administrative Law: Cases Text and Materials*, 6th ed (Toronto: Emond Montgomery, 2010) at 987- 988.

of review, it is not clear that the noncompliance with the guidelines or manuals could render the decision not to prosecute unreasonable given that the Crown prosecutors might not intend to be bound by them in all circumstances.

Even though the prerogative power is ultimately subject to judicial review on the grounds of “flagrant impropriety”, after years of debate, the judiciary is still extremely reluctant to touch upon this type of power, partially because of the abovementioned nature of the prerogative power. It is true that the Crown prosecutor’s discretion in making charging decisions is a necessary evil.³⁷³ While realizing the undue disposal of cases at the Crown prosecutor’s discretion has a negative impact on the system - such as creating secrecy in administration - legislators still preserve the discretionary power because it also plays an indispensable role in enforcing criminal law effectively. However, the exercise of such discretion ought to be confined to limited situations. These situations should be clearly specified to guide not only the Crown prosecutors but also the judiciary when they are called upon to determine whether a decision is valid.

A statute providing the Crown prosecutor power to prosecute and not to prosecute should codify the standards for whether to institute a prosecution used in the existing charging guidelines, commentaries on charging standards, and Crown manuals. The statute should not use unduly vague language, which would undermine the courts’ ability to review the decisions not to prosecute.

³⁷³ Logan, *supra* note 106 at 1721-1722.

5.3.2 The broader standard of review for other discretionary decisions should be used in judicial review for the decision not to prosecute

After exhausting all available remedies, victims may consider applying for judicial review of the decision not to prosecute. However, as mentioned in section 3.2.4.2, the only existing standard of review is “flagrant impropriety” on the part of the Crown prosecutor in charging decision-making, which is very difficult for victims to prove with conclusive evidence and therefore limits victims’ effective access to the judicial review system. For this reason, I recommend loosening the standard of review for the decision not to prosecute.

In the context of administrative law, a court’s power to review administrative action or decisions in order to uphold and preserve the rule of law in the country is considered essential and is provided in the Constitution.³⁷⁴ As well, it is a court’s inherent power to ensure the legality, reasonableness, and fairness of the administrative process and its outcomes through judicial review so that public authorities will not abuse their power.³⁷⁵ Therefore, the Canadian system has developed comparatively flexible and low standards to review the public authorities’ exercise of discretion in making decisions, and those standards are still evolving.

In my opinion, the use of those standards should be extended to the judicial review of the decision not to prosecute. Peter Finkle and Duncan Cameron considered that problems and outcomes resulting from uncontrolled prosecutorial discretion are similar to those

³⁷⁴ *Union des employés de service, local 298 v Bibeault*, [1988] 2 SCR 1048 at para 127, [1988] SCJ no 101 (SCC) (“The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection”).

³⁷⁵ *Crevier v Quebec (Attorney General)*, [1981] 2 SCR 220 at 234, 127 DLR (3d) 1 (SCC). See also *Dr Q v College of Physicians and Surgeons (British Columbia)*, [2003] 1 SCR 226 at para 21, 2003 SCC 19 (SCC).

caused by uncontrolled administrative discretion to pass and enforce regulations or legislation.³⁷⁶ Uncontrolled discretion may lead to the abuse of discretion, which will cause unequal and unfair treatment to those subject to the law,³⁷⁷ including victims. They also considered that a judicial standard of review should be consistent with the need to prevent the authorities' abuse of such power.³⁷⁸

Traditionally, the court is not allowed to second-guess discretionary decisions through judicial review by weighing contextual elements differently, making a decision for public authorities at its own discretion, or coming up with a more reasonable decision than the original one.³⁷⁹ Historically, the traditional grounds to challenge a discretionary decision were limited to bad faith, consideration of irrelevant grounds or improper purpose, failure to consider a relevant ground, patent unreasonableness, fettering discretion,³⁸⁰ and discrimination.³⁸¹

Currently, only two standards of review existed: correctness and reasonableness. A review for correctness is similar to examining the jurisdiction of the public officials to exercise discretionary power in making corresponding decisions, including whether such exercise of discretion is *ultra vires* and whether it is consistent with the objective and purpose of the governing law. When a court reviews a discretionary decision for correctness, it does not need to give deference to the decision makers and the way they

³⁷⁶ Peter Finkle & Duncan Cameron, "Equal Protection in Enforcement Towards More Structured Discretion" (1989-1990) 12 Dalhousie LJ 34 at 39-41.

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid* at 42.

³⁷⁹ Régimbald, *supra* note 337 at 179.

³⁸⁰ *Ibid* at 193 ("Fettering discretion" means Crown prosecutors do not exercise their discretion on an individual basis but mechanically or blindly apply the rules to every case without analysing the particulars of the case).

³⁸¹ *Ibid* at 179.

make such decisions, which allows the court to make a judicial review decision based totally on its own analysis.

The court in *Dunsmuir* defined the “reasonableness” standard as follows:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, *referring both to the process of articulating the reasons and to outcomes*. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.³⁸²

The court agreed that, when applying the “reasonableness” standard of review, due deference should be given to judgments and choices made by the decision-maker because of his or her expertise on making such decisions. Therefore, the court should not object to a decision that falls with a range of possible, acceptable outcomes merely because it believes a better decision is available. However, the court emphasized that to give deference does not mean that “the courts are subservient to the determinations of decision-makers, or that courts must show blind reverence to their interpretations”.³⁸³ This requires the court to draw a conclusion independently, without being unduly influenced by the judgement of the decision-maker.

A “pragmatic and functional approach” was introduced to determine what level of deference should be given to discretionary decisions in *Pushpanathan v Canada (Minister*

³⁸² *Dunsmuir*, *supra* note 323 at para 47 [emphasis added].

³⁸³ *Ibid* at para 48.

of Citizenship and Immigration).³⁸⁴ The court in this case pointed out that the judiciary should carefully determine whether the question at issue is about the law or the fact. If it is a matter of the law, low deference will be given when the court is reviewing the decision that is questioned.

5.3.3 Application of Various Standards of Review for Decisions not to Prosecute

The standards of review used to examine administrative discretionary decisions, together with the existing standard of review for the decision not to prosecute, should be used in this proposed judicial review system. Different prerogative remedies impose different levels of burden on the Crown prosecutor to act. The use of different standards of review should match this level of burden. An order in the nature of a *mandamus* (a *mandamus*) to compel a prosecution forces the Crown prosecutor to act in a particular way, which is more intrusive to the prosecutorial discretion. The “flagrant impropriety” standard of review for this remedy should be applied. A *mandamus* to direct the Crown prosecutor to reconsider its decision not to prosecute requests a Crown prosecutor to take, or to not take, additional factors into account when making charging decisions. It gives the Crown prosecutor leeway to re-exercise his discretionary power in making charging decisions, which makes the remedy less intrusive. In this case, the “correctness” and “reasonableness” standards of review should be applied.

Similarly, an order in the nature of a *certiorari* (a *certiorari*) to quash a decision to stop a private prosecution is used simply to stop the Crown prosecutor from interfering in a case. In order to promote the effectiveness of individual exercising his or her right to a private

³⁸⁴ *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, [1998] SCJ no 46 [Pushpanathan].

prosecution, the Crown prosecutor cannot intervene into the private prosecution based on the grounds of “evidentiary sufficiency”. When the intervention is based on the public interest test, it should be subject to “correctness” and “reasonableness” standards of review. The level of deference to the judgement of the Crown prosecution will be determined by the nature of the issues in dispute.

5.3.3.1 Definition of different standards of review

The standards of review used in this proposed judicial review system should be defined as follows:

Flagrant Impropriety: I adopt the definition of “flagrant impropriety” used in *Kostuch v Alberta (Attorney General)*. “Flagrant impropriety” here refers to “misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence” on the part of Crown prosecutor.³⁸⁵ In addition, the grounds must be directly linked to the Crown prosecutors’ state of mind or actions when dropping cases instead of the consequences of such a decision. Under the “flagrant impropriety” standard of review, the court can only review and reverse decisions not to prosecute when one or more of the grounds has clearly been proven. In fact, what a court reviews under this standard is not the reasonableness and correctness of the decision not to prosecute *per se*, but the behavior of the Crown prosecutor during the decision-making process. This standard of review will be used only in cases where compelling a prosecution is sought.

Reasonableness: A court can review and reverse a decision not to prosecute when the decision only appears to be unreasonable. Under this standard of review, the court focuses

³⁸⁵ *Kostuch, supra* note 52.

on the reasons and rationality behind the decision *per se*. The “patent unreasonableness” standard of review should be subsumed under this standard of review. A decision is unreasonable no matter whether it is patently unreasonable or simply unreasonable, and unreasonable decisions should be reversed. “Flagrant impropriety” on the part of the Crown prosecutor can be one of factors that make a decision unreasonable, but the unreasonableness of the decision can be attributable to other factors, such as misinterpretation of law, failure to consider some essential elements, application of an unlawful policy, and so on. Those flaws might not amount to illegal planning or manipulation by the Crown prosecutor. The level of deference to the original decision should depend on the nature of the issue in dispute. If the issue is a matter of fact, such as re-evaluating existing evidence or re-identifying public interests in the case, the court should not consider whether the institution of the prosecution could be more reasonable, but whether the non-prosecution falls into the acceptable range of reasonableness. If the issue is about legal considerations, such as interpretation of applicable law or legality of a policy concerning public interests, the court can make a conclusion based on its own judgement and analysis without deferring to the original decision. This type of review will be used when directing reconsideration or quashing a decision to stop a private prosecution is sought.

Correctness: This type of judicial review is limited to the Crown prosecutors’ jurisdiction over a case. For example, a Crown prosecutor could stop a prosecution claiming he or she has no jurisdiction to prosecute certain types of crime, such as a crime taking place abroad, or over certain groups of people, such as foreign diplomats. Under this standard of review, a court does not need to give deference to the judgement of the

Crown prosecutor. This type of review will be used in such cases where directing a reconsideration or quashing a decision to stop a private prosecution is sought.

5.3.3.2 Compelling a prosecution

Victims may specifically ask for the extraordinary remedy of compelling a prosecution when a Crown prosecutor stops a prosecution, either public or private. If a Crown prosecutor withdraws or stays a charge, a *mandamus* to compel a prosecution should remain available for victims to challenge the decision. The court should decide whether to issue such remedy or whether other remedies are more appropriate, after conducting judicial review of the decision not to prosecute. In the application for compelling a prosecution, a comparatively stricter standard of review is necessary, and therefore “flagrant impropriety” should be the sole ground for victims to seek compelling a prosecution. As an extraordinary remedy, the compelling of a prosecution will not be granted if directing a reconsideration is workable.

Compelling a prosecution can force a Crown prosecutor to perform his legal duty to the public, including victims, to institute a prosecution against an alleged lawbreaker. However, in theory, in the current Canadian system, even though the issuance of a *mandamus* relies on the discretion of the reviewing judge, a *mandamus* is not used to compel an exercise of discretionary power or to force a governmental official to act in a particular way,³⁸⁶ such as compelling a prosecution. This is because compelling the performance of public officials by a court in a particular way is equivalent to depriving

³⁸⁶ Wade & Forsyth, *supra* note 337 at 620; Régimbald, *supra* note 337 at 486; *Canadian Union of Public Employees*, *supra* note 112 at paras 35-36, 44.

these officials of discretionary power to decide how an act should be performed, which is too intrusive to the executive power, as well as to prerogative power.

However, in practice, it seems that Canadian courts are capable of compelling a prosecution if the Crown prosecutor is proven to act flagrantly improperly. In most recent cases where the decision not to prosecute was in dispute and the applicant sought a compelling of prosecution, the court refused to issue an order of *mandamus* on the ground of no finding of “flagrant impropriety” on the part of Crown prosecutors.³⁸⁷ The courts did not address the issue concerning the availability of a *mandamus* to compel a prosecution or reject the application because of the unavailability of such a remedy.

In my opinion, compelling a prosecution is necessary in certain exceptional cases. For example, in the US, a *mandamus* to compel a prosecution will be issued when the termination of a public prosecution is so arbitrary or abusive that it cannot amount to the actual exercise of prosecutorial discretion.³⁸⁸ The reason behind this, as explained in *Tanenbaum v D'Ascenzo*, is that compelling a prosecution under the abovementioned conditions cannot be considered an unreasonable intervention into the public prosecutor's exercise of discretion.³⁸⁹ Indeed, in the situation described above, the Crown prosecutors are considered unable, or they just did not in the case at bar, to make just, fair, and reasoned charging decisions at their discretion because their minds are contaminated.

Meanwhile, if the Crown prosecutors' decisions not to prosecute are motivated by bad faith, bias, or arbitrariness or result from a violation of law, which amounts to a breach of rule

³⁸⁷ All cases concerning decisions not to prosecute cited in Section 3.2.4 ended up with “no finding” of “flagrant impropriety”.

³⁸⁸ *Tanenbaum*, *supra* note 287 at 263.

³⁸⁹ *Ibid.*

of law, the court has the responsibility to uphold the rule of law by granting effective remedies.³⁹⁰ In that case, if the court finds flagrant impropriety and determines that the ultimate decision was wrong, the court can make a decision for the Crown prosecutor. Crown prosecutors exercising discretion in the abovementioned ways is equivalent to acting *ultra vires* because exercising such power is not consistent with the duties of the Crown prosecutor. In the Canadian administrative law context, no deference from the judiciaries will be given to reviewing this type of decision not to prosecute because the Crown prosecutor is not considered exercising discretion in determining the disputed decision.

If a Crown prosecutor acts flagrantly improperly under the definition in section 6.3.3.1, his or her state of mind or actions during the decision-making process is questionable. If the Crown prosecutor's state of mind or the decision-making process is corrupt, malicious, or biased, there is no expectation for the court to believe that the Crown prosecutor can make a just and fair decision, even if the court directs reconsideration. In this case, the court must force the Crown prosecutor to prosecute if it deems a prosecution necessary to maintain the integrity of criminal justice system and uphold the rule of law.

A case where violation of the law and bias appear only *as a result* of non-prosecution has not reached a level where a court has to compel a prosecution. The court in *Wayte v United States* pointed out that a decision with discriminatory effect could come from a non-discriminatory policy or decision-making process.³⁹¹ The decision not to prosecute, with negative impact on individuals' legal rights or the application of law, might merely

³⁹⁰ *Dunsmuir*, *supra* note 323 at para 27 (The court should uphold the rule of law).

³⁹¹ *Wayte*, *supra* note 273 at 608.

come from one or more simple mistakes or negligence when the Crown prosecutor decides to withdraw charges. In this situation, it is more appropriate for a court to point out the mistakes or negligence and direct the Crown prosecutor to re-think the original decision not to prosecute. For a similar reason, “patent unreasonableness” of the decision is not suitable grounds for a court to compel a prosecution. Not all factors that make a decision patently unreasonable amount to “flagrant impropriety”. In cases other than “flagrant impropriety” cases, directing reconsideration is more appropriate. The standards of review applied in the issuance of directing reconsideration will be further explained in the next section.

5.3.3.3 Quashing a decision not to prosecute and directing reconsideration

In most cases concerning public prosecutions, a court should be allowed to review a decision not to prosecute with lower standards than the existing one. However, the remedy it can issue based on those lower standards of review should be less powerful than the compelling of a prosecution. In those cases, a court should be able to quash a decision not to prosecute and direct the Crown prosecutor to reconsider his original decision if it finds the original decision was rendered in an incorrect or unreasonable way.

In the UK, the common method for the court to deal with incorrect or irrational decisions not to prosecute is to quash such decisions not to prosecute and at the same time direct the DPP or CPS to reconsider the decisions.³⁹² A comparatively low standard of review is employed. The court in the *Manning* case reasoned that, compared to decisions to prosecute, it was difficult to find that “a decision not to prosecute is bad in law on which

³⁹² *Manning*, supra note 9 at para 42.

basis alone the court is entitled to interfere”.³⁹³ It continued to point out that a citizen’s access to an effective remedy against a decision not to prosecute is denied if the standard is too high, because judicial review is the sole remedy in such a situation.³⁹⁴ Such an approach is generally accepted in the UK courts.

The same approach could also be used in Canada because a *mandamus* to compel a prosecution is not always necessary and the corresponding standard of review is too exacting. The current standard leaves several types of problematic decisions not to prosecute uncovered, which limits victims’ ability to protect their interests. For example, if a decision not to prosecute is unreasonable and caused by factors that are not categorized as “flagrant impropriety”, victims’ interests and recognized rights in a criminal prosecution are at stake. It is similar if a violation of individual rights and discrimination result from exercise of discretion in good faith. However, the court cannot remedy such decisions because they do not meet the requirement for compelling a prosecution. At the same time, it has no other available remedies, and as a result, such a decision becomes non-justiciable.

Apart from compelling a prosecution, a *mandamus* can also be used to force the Crown prosecutor to have additional factors properly considered.³⁹⁵ In Canada, a court should be capable of quashing an original decision not to prosecute and directing the Crown prosecutor to reconsider his original decision. This way is less intrusive to the exercise of prosecutorial discretion compared to compelling a prosecution, because the court has no final say in the outcome of the Crown prosecutor’s reconsideration. Even though the

³⁹³ Ibid at para 23.

³⁹⁴ Ibid.

³⁹⁵ Régimbald, *supra* note 337 at 484.

Crown prosecutor must follow the court's order to reconsider a decision not to prosecute, he or she could decide to maintain the decision after re-assessing the relevant factors and taking into account the court's recommendations. This remedy is aimed at reducing the mistakes or negligence that might take place in charging decision-making. As well, it is appropriate because the flaw in the original decision did not result from a corrupted state of mind that would make it unlikely for a prosecutor to engage in an honest and fair reconsideration.

As in the UK, the standard of review in this type of application is comparatively lower, and therefore the "reasonableness" standard of review in an administrative law context should be made available for this type of review in this proposed system. For one reason, the corresponding remedy is comparatively less intrusive into the exercise of prosecutorial discretion, and therefore "flagrant impropriety" imposes an overly high burden of proof for this type of remedy. A rigorous standard of review highlights the extraordinary nature of compelling a prosecution as a remedy, and reminds victims that the court will be extremely cautious in using it.

Furthermore, using the same standard of review for two different levels of remedies will diminish the significance of the separation of this remedy and compelling a prosecution. When applying for judicial review of the decision not to prosecute, victims will always seek compelling a prosecution if only one standard of review is available. The outcome of compelling a prosecution is more secure than directing reconsideration, which may or may not end in prosecution. If a same standard of review equally applies to both remedies, the court will have difficulty justifying its choice of different remedies. In addition, the

overly broad power of the court to compel a prosecution also risks the possibility of the court manipulating the institution of prosecution.

For another reason, a lower standard of review allows more possibility to review, and to find mistakes and negligence in making the decision not to prosecute. If the reviewing court is not allowed to probe into the deeper cause of the decision not to prosecute, it can hardly find any flaw in the decisions that was simply caused by procedural mistakes or negligence. At the same time, a lower standard of review makes judicial review easier and more effective for victims who wish to file complaints about a questionable decision not to prosecute, which better guarantees their interests and individual rights.

Under the “reasonableness” standard of review in the context of administrative law, the court can examine whether the decision itself and reasons behind it are defensible and fall into the range of possible outcomes that might result from the proper exercise of discretion. More specifically, the court can examine whether the Crown prosecutor has complied with the charging decision guidelines, whether a public policy is lawful, and whether an international obligation has been fulfilled. Under this lower standard of review, the court should first determine whether the issue is about an issue of fact or an issue of law based on the approach adopted in *Pushpanathan v Canada*.³⁹⁶ Based on the result, the court can decide how much deference should be given to a challenged decision not to prosecute. If the issue is an issue of fact, high deference should be given. For example, is it reasonable for a Crown prosecutor to weigh one factor over another when deciding whether a prosecution should be instituted? Another example could be whether

³⁹⁶ *Pushpanathan, supra* note 381.

or not a prosecutor is correct in determining the credibility of a critical witness for a case to go forward.

5.3.3.3.1 Deviance from published guideline

I have recommended in section 6.3.1 that the discretionary power should become a statutory power. Standards for the Crown prosecutor to decide whether or not to prosecute should be codified in the corresponding statutes and made publicly available. Deviation from those statutory provisions will impair the legitimacy and correctness of decisions not to prosecute because the exercise of discretionary power by the Crown prosecutors is not consistent with the power the statute confers on them. In the UK, charging decisions inconsistent with charging guidelines are considered unreasonable.³⁹⁷

In general, the issues are related to public interests and the reasonable prospect of conviction. Different levels of deference apply in two different types of situations. In cases concerning issues of fact, such as reasonableness of the application of public interests by the Crown prosecutor, or evaluation of the existing evidence, a court can review the decisions when they appear to be unreasonable. However, the court should only interfere with the decision not to prosecute when the decision is so abnormal that no reasonable Crown prosecutor would have reached such a conclusion. This allows deference to the judgement of the Crown prosecutors. It would be inappropriate for the court to second-guess how certain public interests criteria should be applied or whether the available evidence creates a reasonable prospect of conviction.

³⁹⁷ See e.g. *Chaudhary*, *supra* note 250; *Jones*, *supra* note 252; *R (on the application of B) v DPP*, *supra* note 256; *Manning*, *supra* note 9; *ex parte B*, *supra* note 257; *Joseph*, *supra* note 257.

Factors that could make a decision patently unreasonable might include the failure to take into account one or several critical elements in decision-making or technically applying public policy to every case regardless of case diversity. For example, in an English case of *R v DPP, ex parte Chaudhary*,³⁹⁸ the policy was deemed flawed because it had either confused or conflated two separate and different offences listed in the Criminal Law Act. A decision made based on this flawed policy would be unreasonable. In the *Manning* case,³⁹⁹ additional critical factors concerning whether to prosecute were identified by the court, and the decision would be patently unreasonable if those factors were not taken into consideration in decision-making.

In contrast, when the court considers the issues in dispute are about legal considerations, it can review the decision not to prosecute and base its conclusion on its analysis without deferring to the judgement of the Crown prosecutor. These issues can be whether a claimed policy concerning public interest is legally valid, or whether the standard of evidential proof applied by the Crown prosecutor is appropriate according to the guidelines. The policy itself, used by the Crown prosecutor, can be unlawful, unconstitutional, or a violation of international law. For example, in the case of *R v Catagas*,⁴⁰⁰ an Indian violated the terms of the *Migratory Birds Convention Act 1994*⁴⁰¹ and was thereby charged. The charging decision was subsequently questioned in court because it was inconsistent with the established policy not to prosecute Indians.⁴⁰² The

³⁹⁸ *Chaudhary*, *supra* note 250.

³⁹⁹ *Manning*, *supra* note 9.

⁴⁰⁰ (1997), 38 CCC (2d) 296, 2 CR (3d) 328 (Man CA) [*Catagas*].

⁴⁰¹ SC 1994, c 22.

⁴⁰² *Catagas*, *supra* note 400.

court found the policy was unlawful given that the Crown had no authority to exempt a particular group from following the law.

It is also possible that the standard of evidentiary sufficiency the Crown prosecutor relies on to withdraw charges could be overly high. In this case, the issue in dispute is whether a Crown prosecutor's interpretation of the term "realistic prospect of conviction" is appropriate rather than whether there are contestable opinions regarding the value of pieces of evidence. In the US, this issue has been categorised as a legal issue that allows the court to review a DA's disapproval of private prosecution.⁴⁰³ Consequently, a decision that results from those legal considerations will not be one of the reasonable alternatives made by the Crown prosecutor's correct exercise of discretion.

5.3.3.3.2 Misinterpretation of law

If a Crown prosecutor decides to drop a charge based on his misinterpretation of law, the decision not to prosecute is irrational. In the US case of *Seeton v Adams*,⁴⁰⁴ the DA dropped the charge against the accused because it considered that the accused's act was not a violation of the corresponding laws. The applicant sought to compel prosecution claiming that the DA did not interpret the law correctly. The court agreed that the DA's interpretation of the law was in error but regretted that it could not compel a prosecution because the claim did not reach a level that permitted the court to compel a prosecutor to press charges against the suspects. As explained in the section concerning compelling a prosecution, it is true that if a Crown prosecutor does not deliberately misinterpret the law in order to drop a case, a *mandamus* to compel a prosecution is inappropriate. However, a

⁴⁰³ *Carroll, supra* note 303 (The citation is upheld and quoted by the appeal court).

⁴⁰⁴ *Seeton, supra* note 308.

decision not to prosecute based on misinterpretation of law also causes a miscarriage of justice and unjustifiably impairs the interests of the victims who suffered because of the accused's acts. Furthermore, the court has jurisdiction and is more specialized in interpreting the law than the Crown prosecutor. Therefore, it is proper for the court to remind the Crown Prosecutor of his or her mistakes in the decision not to prosecute and direct reconsideration.

5.3.3.3.3 Maintaining a decision not to prosecute after reconsideration

In the situation where a prosecutor maintains a decision not to prosecute after reconsideration, no second internal review will take place and the court will accept an application for a second judicial review only on the grounds of "flagrant impropriety". In addition, the court should not be allowed to direct reconsideration in the second judicial review process. First, if a decision not to prosecute in a case has been subject to a judicial review once and has subsequently been quashed, any reasonable prosecutor will be more cautious in reconsidering such a decision in the same case. If the reasonableness and correctness of non-prosecution has been called into question once, any issues concerning non-prosecution should be put under a microscope by any reasonable and responsible Crown prosecutor reviewing the original decision. In addition, the flaws in the original decision-making will have been identified and pointed out by the court, facilitating the Crown prosecutor in making a correct and reasoned charging decision.

All of the abovementioned can minimize the possibility that the Crown prosecutor will make the same mistakes again if he or she has carefully contemplated the flaws identified by the court. Therefore, disallowing second internal review and employing a higher

standard respects the principle of presuming that Crown prosecutors act in good faith and function well. Concerning second judicial review, by redirecting reconsideration without finding “flagrant impropriety” on the part of the Crown prosecutor, the court disrespects the judgement and capability of the Crown prosecutor to make a proper charging decision, which is an inappropriate intervention into administrative decision-making.

Second, if victims prove that the Crown prosecutor acts flagrantly improperly in reconsidering the original decision not to prosecute, the court can issue a *mandamus* to force him or her to prosecute. If the Crown prosecutor deliberately disregards the concerns pointed out by the reviewing court when reconsidering the decision not to prosecute or refuses to re-assess such a decision, he or she is considered acting in bad faith and in contempt of a court’s order. These actions should be categorized as “flagrant impropriety”. As explained in Section 6.3.3.2, if a Crown prosecutor acts flagrantly improperly during the charging decision-making process, directing reconsideration is less effective. In this case, a second judicial review would be more efficacious than a second internal review given that the accused flagrantly improper acts involve the whole Crown prosecutor’s office. As a result, a second internal review seems to be redundant.

Third, this approach can avoid a victim’s endless applications for reconsideration, or internal review, of a decision not to prosecute. It is true that there might be situations where a victim can identify a flaw in the second decision not to prosecute that is different than the flaw that affected the first decision, which would not demonstrate flagrant impropriety and would leave the victim without a remedy. However, as mentioned above, the chance that the prosecutor will err twice, and differently, in a single case is very rare, and such error is even harder for victims to prove than the first time. It increases the

possibility that victims file unsustainable applications for either internal or judicial review, which will definitely further prolong the review process and increase the anxiety and stress of the accused. This would put the accused in a worse situation if the multiple applications finally result in the re-institution of the prosecution. In addition, endless applications may significantly increase the possibility of the Crown prosecutor finally commencing a prosecution because he or she is tired of responding to the court concerning a case. In this case, the decision to prosecute will be made under undue influence from the court and victims, which will significantly impair the Crown prosecutor's ability to act independently in charging decision-making. In addition, this provides the accused ammunition to attack the decision to prosecute and seek a stay of prosecution.⁴⁰⁵

If the trial judge stays the proceedings, victim's endless applications will not make the situation better than the situation I proposed here. The costs of endless applications clearly outweigh the benefits. Hence, no second internal review is allowed, and the acceptable grounds to review a second decision not to prosecute in court are that the Crown prosecutor deliberately maintains the decision not to prosecute by acting flagrantly improperly, namely in bad faith, corruption, violation of the law, or bias against or for a particular individual or offence.

⁴⁰⁵ Lack of Independence in the charging decision can constitute an abuse of process on the part of the Crown prosecutor. See *R v Regan*, [2002] 1 SCR 297, 161 CCC (3d) 97; *R v Oliver* (1995), 143 NSR (2d) 134, 28 WCB (2d) 83 (SC); *R v Liakas* (2000), 144 CCC (3d) 359, [2000] JQ no 498 (Que CA); *R v Stone* (1997), 143 WAC 153, 33 WCB (2d) 488 (BCCA).

5.3.3.4 Termination of a private prosecution: quash a decision to stay a private prosecution

In both the UK and the US, extremely low standards of review are employed to review the termination of a private prosecution based on evidential sufficiency as compared to a public one. It seems that these two countries give high levels of respect to the individuals' exercise of the right to prosecute an alleged lawbreaker, and therefore strictly limit the intervention of the public prosecutor into a private prosecution. In both countries, different standards of review are applied when a public prosecutor bases his stay of private prosecution on the reasonable prospect of conviction and on public interest.

In reference to these two countries, in this proposed judicial review system, the same approach should be employed for reviewing the termination of private prosecution. The Crown Prosecutor should not be allowed to stop a private prosecutor because of the lack of a reasonable prospect of conviction. In contrast, if the Crown prosecutor stays a private prosecution, claiming that such a prosecution is against public interest, the court should apply the "flagrant impropriety" standard of review used in section 6.3.3.2.

5.3.3.4.1 Evidential Sufficiency

The Crown prosecutor should not stop a private prosecution because it does not have a realistic prospect of conviction, which is required for the institution of a public prosecution. As well, failure to meet the evidentiary standard set in Crown prosecutor's charging guidelines should not fall under the public interests test.⁴⁰⁶

Like in Canada, public prosecutors in the US and the UK have the power and responsibility to stop a private prosecution in public interests. However, contrary to

⁴⁰⁶ This will be explained in next section.

Canadian courts,⁴⁰⁷ courts in these two countries are inclined to restrain the power in order to protect an individual's right to institute a private prosecution when a public prosecutor fails to act. In the UK, the prosecutor can only take over a private prosecution and stop it on the grounds of evidential insufficiency when there is "clearly no case to answer".⁴⁰⁸ In the US, if the public prosecutor disapproves a private prosecution on these grounds, the court can decide, once a complaint is lodged, to review and assess whether the private prosecutor has established a *prima facie* case.⁴⁰⁹ The basic principle is that the public prosecutor should not prevent an individual from bringing charges against the potential lawbreaker merely on the grounds that, based on the same set of evidence, he or she would not have prosecuted. A public prosecutor who does so is inappropriately encroaching on and impairing citizens' right to institute a private prosecution.

Similarly, in Canada, both the individual's right to a private prosecution and the Attorney General's power to supervise a private prosecution are fundamental parts of the criminal justice system.⁴¹⁰ As well, the right to a private prosecution is also recognized as "a valuable constitutional safeguard against inertia or partiality on the part of authority".⁴¹¹ In other words, individuals can take actions to get justice done in situations where public prosecutors fail or are reluctant to initiate a prosecution. However, the legislation does not require private prosecutors to make charging decisions consistent with the charging

⁴⁰⁷ *Bradley, supra* note 35 at para 27. Arnup J A speaking for a unanimous court stated:

The Attorney-General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. The role of the private prosecutor, permitted by statute in this country, is parallel to but not in substitution for the role of the Attorney-General, and where the two roles come into conflict, the role of the Crown's persecutor is paramount, where in his opinion the interest of justice require that he intervene and take over the private prosecution.

⁴⁰⁸ *Duckenfield, supra* note 258.

⁴⁰⁹ *Carroll, supra* note 303.

⁴¹⁰ *Dowson, supra* note 33 at 535-536.

⁴¹¹ *Gouriet, supra* note 34.

standards used by the Crown prosecutor. In addition, “realistic prospect of conviction” is too high of an evidential standard with which a private prosecutor can comply. This standard is mainly used to facilitate the Crown prosecutor’s effective distribution of the available prosecutorial resources. However, an average citizen is not a trained Crown prosecutor. It is not fair to expect him or her to behave and think exactly like a Crown prosecutor. As well, he or she has no duty to consider the procedural and economic efficiency of the administration of justice when making a charging decision. Therefore, a “*prima facie* case” is enough to avoid the situation where an accused is forced to stand trial when there is clearly no case to answer. Plus, in the current Canadian system, the existence of an initial review of a privately laid Information can avoid such situations. According to the Criminal Code, any private citizen is eligible to submit an Information to a justice if he or she has reasonable grounds to believe that a crime has been committed by the accused person.⁴¹² The Code then leaves it to a Justice to decide whether to issue process.⁴¹³

While citizens have a right to institute a private prosecution, the Attorney General has a duty to protect the public and honour and express the community’s sense of justice.⁴¹⁴ However, this duty does not permit the Crown prosecutor to force a private prosecutor to comply strictly with the evidentiary sufficiency standard applied by the Crown prosecutor. It is even inappropriate to draw a conclusion that a private prosecution is against public interests merely because, after re-examining the available evidence, the Crown prosecutor believes such a prosecution does not meet his or her criteria of prospect of conviction.

⁴¹² *Criminal Code*, *supra* note 23, s 504.

⁴¹³ *Ibid*, s 507.1.

⁴¹⁴ *Power*, *supra* note 114 at para 12.

First, the initial review of the Information by the Justice can make sure that an allegation is at least supported by some evidence. According to the Crown prosecutor, if the case does not meet his or her “reasonable prospect of conviction” standard, putting an individual on the stand would be outrageous or arbitrary, which is inconsistent with public interests. However, in order to commence a private prosecution, the private prosecutor needs to have some evidence for each element of an alleged crime.⁴¹⁵ After that, a Justice is obliged to determine whether there is admissible evidence of all the elements of the alleged offence and make a determination whether a process should be issued.⁴¹⁶ Even though this process is very different from assessing the likelihood of conviction, the Justice at least establishes the fact that there is some evidence for the accused to answer. The Crown prosecutor cannot be one hundred percent sure that the informant raises the allegation falsely or arbitrarily against the accused merely because the information does not meet the requirement in the charging guidelines.

Second, if the Crown prosecutor can stop a private prosecution because the Information does not meet the standards in his or her charging guidelines, this is equivalent to asking the private prosecutor to comply with the charging guidelines. This is because the Information may be taken over and stopped by the Crown prosecutor if the private informant does not do that. This is similar to asking a private informant to think and act like a Crown prosecutor when instituting a private prosecution, which further limits an individual’s right to a private prosecution.

⁴¹⁵ *Criminal Code*, *supra* note 23, s 504.

⁴¹⁶ *Ibid*, s 507.1.

Third, if the Crown prosecutor can always stop a private prosecution based on the evidential sufficiency test laid down in the charging guideline, the initial review of the Information by the Justice will be meaningless. The Justice assesses the Information based on a comparatively lower standard than the charging guidelines of the Crown prosecutor, which means the Crown prosecutor can always use evidentiary sufficiency as a legitimate reason to stop a private prosecution. An initial review by the Justice, in fact, cannot determine whether a case can finally go on without the acquiescence of the Crown prosecutor.

What, then, is the point of the initial review by the Justice? In that case, would it not be better if the Justice of Peace applied the Crown prosecutor's evidentiary sufficiency standard when determining whether to issue process? Or would it not be better if every private information should receive consent from the Crown prosecutor before it was laid? In addition, it is possible that, in cases where there are multiple cases that cannot meet the evidentiary sufficiency standard applied by the Crown prosecutor, the Crown prosecutor stays only the case that is particularly interesting to him or her. Would this selection be unfair to the private prosecutor of that particular case? In conclusion, in my opinion, the Crown prosecutor's unlimited power to intervene does not make the operation of private prosecution system more coherent and fair, but turns some functions such as the existence of Justice of Peace redundant.

Fourth, a private prosecutor normally acts when the Crown prosecutor or the police fail to act. In this way, the interests of a private prosecutor can be well protected from the inertia

or partiality of the Crown prosecutor.⁴¹⁷ If the Crown prosecutor can stop a private prosecution merely because he or she would never have prosecuted the case based on the same set of evidence, the effect of giving individual rights to a private prosecution is undermined.

The current set up for an individual to commence a private prosecution is an appropriate standard to provide a real guarantee against prosecutorial inaction caused by inertia or partiality on the part of the Crown prosecutor. The Crown prosecutor should not always have a final say on whether a case should be brought to trial based on the available evidence. Otherwise, a private prosecutor may not exercise the right to bring charges against lawbreakers effectively. Instead, he or she proceeds with a prosecution as if he or she is an agent or subordinate of the Crown prosecutor. This makes the distinction between private prosecution and public prosecution completely meaningless.

It would be, however, different if the Crown prosecutor could prove to the court that there is “clearly no case to answer”. In this situation, the private life and reputation of the accused person would be inappropriately impaired because of the ungrounded accusation. Meanwhile, allowing an ungrounded accusation would compromise the integrity of the criminal justice system. Citizens would live in fear of not knowing when and where they might be put on a stand in court by others for no reason. Therefore, this type of private prosecution is clearly against public interests. Nonetheless, this situation is not likely to happen in the current Canadian system because an initial review made by a Justice can guarantee that there is a case to answer.

⁴¹⁷ *Gouriet, supra* note 34 at 477.

In the case where the stay of a private prosecution is based on evidentiary insufficiency, should a court directly quash a decision to stop a private prosecution, or have a fresh review of an Information laid by the informant to determine whether it meets the Crown prosecutor's charging guideline? In both the UK and the US, the court limits the public prosecutor to the use of "evidential insufficiency" as grounds to strike down a private prosecution to some extent. In contrast to the UK practice, a court in the US can conduct a *de novo* review if the DA claims that the disapproval of a private prosecution is based on evidential insufficiency, which I do not recommend.

First, as previously mentioned, it is overly rigorous to require a private informant to comply with the charging guidelines of the Crown prosecutor. Second, when legislators give average citizens the right to a private prosecution, they also allow them to exercise that right at their discretion. Similar to public prosecution, the court should not instill its own wisdom into the original charging decision made by the private prosecutor by conducting a *de novo* review. A court can also easily reach an equally reasonable but different conclusion contrary to that of the private prosecutor and a Justice of Peace. Since both the court and the private prosecutor can reach equally reasonable decisions, there is no reason for the court to override the decision. In addition, it is unfair to private prosecutor if the court denies the possibility of a criminal prosecution because it believes that the private prosecutor's decision is less reasonable than its own, not that the decision is incorrect or unreasonable. As a result, a *de novo* review would undermine individuals' right and ability to institute a private prosecution.

In conclusion, the Crown prosecutor should not be allowed to strike down a private prosecution based on evidentiary insufficiency. In the proposed review system, the court

can only directly nullify a decision to stay a private prosecution if it finds that the nature of the reasons behind such a stay is related to evidentiary insufficiency.

5.3.3.4.2 Public Interests

The “reasonableness” standard is available for the applicant to seek quashing the decision to stay a private prosecution. The “public interests” threshold is more closely linked to the Crown prosecutor’s expertise and duty to protect the public. The Crown prosecutor has better knowledge of the interests of the public. As a result, in general, the court should respect the Crown prosecutors’ judgement on whether a private prosecution takes place in the interest of the public. Therefore, a corresponding level of deference to the original decision not to prosecute should be back on the table in this case.

In general, the court should not interfere with the Crown prosecutor’s exercise of discretion in deciding when, how, and in which case a policy concerning public interests should be applied. As well, the court needs to refrain from determining for the Crown prosecutor what is to be public interest. If the stay of a private prosecution is so irregular that no reasonable person will consider the institution of such a prosecution as against public interests or relevant policies for public interests, the court can quash a decision to stay based on the “reasonableness” standard of review. An unreasonable decision to stay a prosecution inappropriately impairs individuals’ right to private prosecution rather than protecting the interest of the public.

However, in cases where the issue in dispute is a matter of law, such as whether a policy used in the public interests test is constitutional or lawful, lower deference should be applied. The court can quash a decision to stay a private prosecution if the claimed policy

with regards to public interests itself is not legally valid, such as when it is violations of international obligations, constitutional rights, or legislation. This type of issue belongs to legal issues rather than the exercise of prosecutorial discretion, and the court has full jurisdiction to decide on the matter in order to maintain the integrity of the criminal justice system and uphold the rule of law.

Finally, lack of sufficient evidence and existence of adequate civil remedies cannot be considered as a valid reason to justify a stay of private prosecution on the grounds of public interests. Obviously, in this proposal, a rejection of a private prosecution based on lack of sufficient evidence is impermissible. For one reason, if such grounds are categorized as a part of the public interest test, the Crown prosecutor can always stop a private prosecution based on the issue of evidential sufficiency and block the court from effectively reviewing such a decision by disguising it with the public interests test.⁴¹⁸ For another reason, the distinction between these two grounds will be eliminated.

For the issue concerning the existence of civil remedies, they cannot always replace the significance of criminal prosecution to the victims. In addition, the Crown prosecutors are not in a position to determine whether civil remedies are adequate for the victims because they are not the ones who suffer from the accused's act. Moreover, in most cases, civil remedies are always available to the victims, and there is no fixed definition to determine when and how such remedies are considered adequate. Does this mean a criminal prosecution is in fact supplementary to the civil recourses? Does this mean a criminal prosecution should only be instituted when civil recourses are not adequate? To allow the Crown prosecutor to stay a private prosecution based on these grounds amounts to giving

⁴¹⁸ *Carroll, supra* note 303 at 386.

him or her unlimited power to stop a private prosecution concerning most types of offences.

5.3.4 Potential Impact on the Accused

The proposed reform has a negative impact on the prospective accused but tries to minimize the degree of possible negative impact. Notification about the possibility of the reversal of a decision not to prosecute should be given to the accused. This can prevent the accused from stopping the investigation or disposing his defence strategy and valuable evidence. In most situations, the whole review process, including internal review and judicial review, will not exceed a maximum of one year. This can shorten the period the prospective accused would suffer from not knowing whether a prosecution will restart and from other inconveniences in his or her normal life. In addition, this can reduce the chance of losing evidence critical for the prospective accused's defence as the result of time passing. If the delays in the judicial review process are caused by victims, as a part of his participatory rights laid down in section 6.1.3.3, the accused can raise these issues in court, both reviewing court and trial court, asking for corresponding remedies.

However, it is impossible to eliminate all negative impact. Some negative impact cannot be avoided due to *force majeure*, some of which might be detrimental to the defence of the prospective accused. In those cases, some remedies should be given to the accused. For example, a critical witness may be not available because he or she dies, is in a coma, or becomes unavailable for other reasons. As well, in some cases, the memory of the critical witness may be called into question given that it has been a while since the alleged crime was committed. A witness cannot always be expected to make an effort to memorize an event merely for the defence of the prospective accused. In these cases, if

the testimony of such witness is so critical to proving the innocence of the prospective accused, a sworn and signed document, voice record, or video tape can be accepted as evidence without being corroborated through cross-examination in court.

In other situations, a lawyer who originally handled the case may not be available or is not willing to take the case anymore. It will take time for the accused to locate a new lawyer and re-build his defence. In these cases, the court should grant an extra time for the accused to prepare his defence. In any case, if the damage is irreparable and is so detrimental that the accused is not able to receive a fair trial, the court can stay the proceeding because continuing the case will cause fundamental injustice to the accused.

Of course, one year of review is not a short period, which, as previously mentioned, can cause inconveniency to the prospective accused's daily life. For instance, the qualification for a profession of the prospective accused might be kept on hold until the resolution of the criminal charge, which makes him or her difficult to be employed, or maybe he or she is not able to access his or her children or family because of the pending criminal charges, or maybe the prospective accused suffers from extraordinary stress as a result of the pending charges. In these situations, the court should be allowed, at its discretion based on the severity of the suffering of the accused due to the judicial review, to order the victim to pay the accused a certain amount of money in order to compensate his loss if the court finds the victim does not have enough evidence to support his or her allegation. In addition, this can prevent the victim from filing applications for judicial review that have no prospect of success.

With regards to the full disclosure of reasons behind the decision not to prosecute, something in the disclosed reasons may place the accused's safety in danger. Therefore, during the judicial review, in cases where it is necessary to verify information through an oral hearing, a closed session should be held in order to keep the information classified. In addition, in any case, victims should sign a confidentiality agreement to promise not to release the relevant documents to third parties. If victims fail to keep the agreement, the court can refuse to review the decision not to prosecute. I assume that, in normal situations, victims would choose to keep the confidentiality agreement given that they do not want to ruin the prospective criminal prosecution or to be sued in a civil suit.

CHAPTER VI

6 Conclusion

The proposed reform of the review system for decisions not to prosecute can effectively protect victims' interests in criminal prosecutions from unjust and unfair decisions not to prosecute made by Crown prosecutors. In Canada, victims of crime are often in vulnerable positions because they must passively wait in the charging decision-making process. In principle, we all presume that Crown prosecutors make decisions of whether or not to prosecute with due diligence, objectivity, integrity, and good motive. If the Crown prosecutor is not trusted by the public, generally, he or she is unlikely to function efficiently and effectively. However, in actuality, decisions not to prosecute are not always just, fair, and rational due to the motives, attitudes, experience, or other factors behind the Crown prosecutor's charging decisions.

For example, even though charging guidelines encourage the Crown prosecutor to consider victims' interests in making charging decisions, the character or other features of victims might still affect the degree of impartiality and dedication of the Crown prosecutor on a case, which means he is not able to judge on a case in the professional way he is supposed to. In cases where the decision is unjust and unfair to victims, they can currently only accept the decision without protest. This is because they do not have effective means to have such a decision overturned.

Judicial review is an available option for victims to overturn the problematic decision not to prosecute in the competent court. However, judicial review was not originally designed for victims to challenge decisions not to prosecute, and so the system does not adequately

meet the victims' needs were they to challenge the decision. First of all, the court is usually extremely reluctant to judge a discretionary decision not to prosecute made by the Crown prosecutor. "Flagrant impropriety" is still the sole ground for victims to challenge such decisions. In addition, this term is strictly limited to three instances, corruption, violation of the law, and bias against or for a particular individual or offence.⁴¹⁹ Second, majority of the strongest jurisprudence concerning judicial review of charging decisions centres around the challenges to the decision to prosecute.⁴²⁰ It seems that, in comparison to the accused making cases against decisions to prosecute, victims are less likely to make a strong case against a decision not to prosecute. Finally, it is difficult for victims to prove misconduct on the part of the Crown prosecutor in the decision-making process given that they only receive notification of non-prosecution and basic information about the decision in most situations.

Legislators and scholars usually take less notice of the fact that victims will be personally affected by the decision not to prosecute. For one reason, they believe that victims' main interests and the significance of a trial proceeding for them are conditional on the conviction of the accused. For another reason, they consider that the accused's right to be presumed innocent and the independence of the Crown prosecutor to make charging decisions should be primary concerns, which distracts attention from the interests of the victims in charging decisions. However, it is also possible that the accused is convicted through a criminal prosecution. In this case, victims are able to maintain these interests and benefit from other emotional healing that is a part of the criminal proceedings. It is important to emphasize that this chance is conditional on whether a criminal prosecution

⁴¹⁹ *Kostuch, supra* note 52 at para 34.

⁴²⁰ *Perks, supra* note 116 at paras 10, 11.

will be instituted in the first place. Therefore, an unjust and unfair decision not to prosecute will improperly take away victims' chances to receive potential benefits from criminal proceedings.

As well, some Crown prosecutors and scholars consider that civil recourses are enough for the victims to get over decisions not to prosecute. They underestimate the importance of, and several irreplaceable features of, the criminal prosecution for some victims and some offences. For example, in some situations, a criminal prosecution better serves the victims' psychological needs and healing. At some point, a public prosecution might comfort victims because they feel that the state is protecting them by prosecuting their violators.

Therefore, I suggest that the victims should have an effective remedy to overturn unjust and unfair decisions not to prosecute. Apart from the abovementioned reasons, I also believe that this remedy can give victims a certain level of control over the decision not to prosecute, which might increase victims' satisfaction concerning the charging decision-making regardless of the outcome. Even if the decision not to prosecute remains, victims are able to move on because they have made every effort to see justice done. As well, it is also one method to protect victims' equal protections right from discriminatory decisions not to prosecute.

The practices of reviewing decisions not to prosecute in the UK and in the US in recent years have informed the proposed reform. The reform mainly includes three parts. The first change is that an internal review system should be provided in Crown prosecutor's office as it is in the UK. An internal review is effective and convenient for victims to

challenge decisions not to prosecute. Through internal review, the reviewing unit will identify the flaws, if any, in the decision not to prosecute, which is similar to what a court does in a judicial review. However, the reviewing unit has fewer limitations than the court when examining the decision that was complained about. A reviewing unit can conduct a fresh review of a decision not to prosecute without giving any deference to the original decision. Moreover, for victims, internal review is simpler in procedure, easily accessible and less time-consuming. The most important thing is that it is free, which means indigent victims can afford such a review. Furthermore, it will reduce the incidents of victims applying a judicial review to a court, which can ease the workload of the court.

Then, some changes should also be made for judicial review of the decision not to prosecute. First, the discretionary power of the Crown prosecutor and Attorney General concerning whether to institute a prosecution should become statutory. If the scope of the discretionary power is clearly written down, it will be easier for the court to determine whether a decision is made consistent with the law. Then, the standards of review for reviewing administrative discretionary decision-making should be extended to judicial review of decisions not to prosecute. This reform does not apply to challenges to decisions to prosecute.

For a “compelling prosecution” type of review, I agree with the US’s approach that the highest standard of review should be employed. In Canada, “flagrant impropriety” should be the sole ground to allow the court to compel a prosecution. This is because, on these grounds, it is probable that the Crown prosecutor is not genuinely willing to reconsider the decision not to prosecute when a court directs reconsideration. Therefore, a court has to compel the Crown prosecutor to act in that case.

For a “direct reconsideration” type of review, “reasonableness” and “correctness” as standards of review should be allowed, which means that the court can dig up the deeper reasons behind the decision not to prosecute. This follows the practice in the UK, which upholds a position that lower standards of review for decisions should be employed because it is the last remedy for victims to have such a decision reviewed and it is always hard to find that a decision not to prosecute is flawed.⁴²¹

For quashing a termination of private prosecution, a Crown prosecutor cannot use “no realistic prospect of conviction” or “existence of civil remedies” as reasons to stop a private prosecution. These two grounds cannot be categorised as reasons to reject a private prosecution for public interests. I believe that, while it is the duty of the Attorney General and its agent to protect the public, it is also important to respect the individual’s right to a private prosecution. Even though they employ different methods, courts in the US and the UK also try to limit the power of the public prosecutor to stop a private prosecution on the grounds of the lack of evidence. If the Crown prosecutor claims that a stop of private prosecution is because such a prosecution is against public interests, the decision can be subject to a “reasonableness” standard of review. Whether or not a court should give a level of deference to the Crown prosecutor’s judgment on the original decision depends on the nature of issue in dispute.

Finally, I recognize that the proposed reform might negatively affect the prospective accused in many ways. Certain remedies, such as accepting exceptional evidential rules, extra time for the accused preparing a defence, termination of a judicial review process and signing confidentiality agreement by victims, should be given to the accused if the

⁴²¹ *Manning, supra* note 9.

damage is critical. In extreme cases where the principles of justice cannot be upheld if the prosecution is continued, a court can stop a proceeding.

6.1 Limitation of the study

I did not address several issues in this study:

- ✚ any evidentiary issues (e.g., what sort of evidence would be admissible/used at a review hearing) and the precise burden of proof by victims in challenging decisions not to prosecute
- ✚ issues concerning whether the reasons behind victims' opportunities to challenge decisions not to prosecute will provide legitimate grounds for them to challenge decisions to prosecute
- ✚ issues about whether a government should pay the indigent victims, or at least provide a free lawyer

6.2 Significance

In conclusion, even though currently victims' interests and rights in the charging stage have not been fully recognized and given weight in Canada, they are receiving attention gradually following the global victims' rights movement. The fact that victims will be personally affected by decisions not to prosecute is already formally recognized in the EU and some other countries. In order to protect victims' interests, the EU officially granted victims a right to review a decision not to prosecute.⁴²² EU Member States more or less have provided a workable framework for victims to challenge decisions not to prosecute. Eventually, the check on decisions not to prosecute will be a major concern to ensure

⁴²² *Victims' Rights Directive*, *supra* note 14 at 69.

victims' interests in the charging stage. The proposal I make in this thesis can provide a direction or framework for future reform in this area in Canada.

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