

Role of the Crown in the Alberta Courts' Restorative Justice Pilot Project

Alberta Restorative Justice Association
2023 Provincial RJ Conference

Matthew Hinshaw, Senior Counsel, Policy
Alberta Crown Prosecution Service



Alberta



WHO ARE YOU?

Restorative Justice is respect. Respect for all, even those who are different from us; even those who seem to be our enemies. Respect reminds us of our interconnectedness, but also of our differences. Respect insists we balance concerns for all parties. If we pursue justice as respect, we will do justice restoratively.

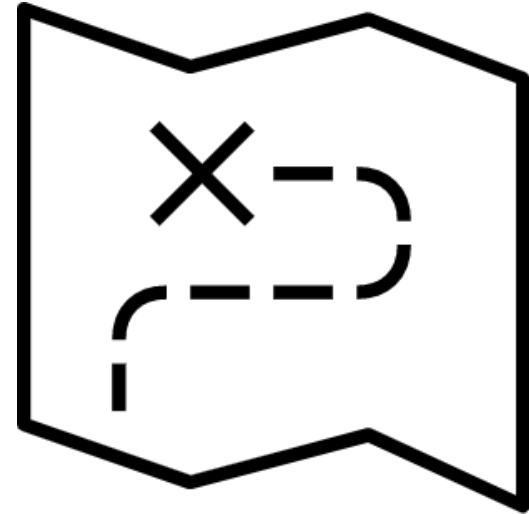
~ Howard Zehr

What brings us together today?

- What kinds of things do prosecutors want to see to be reassured about referring to RJ?
- What is the Crown's perspective on the RJ referral process?
- What does it take to gain the trust of the Crown?

Where are we going?

- Alberta Courts' RJ Pilot Project
 - Brief overview
- Role of the Crown
 - In the Criminal Justice System
 - In the RJ Pilot Project
- Going forward/next steps



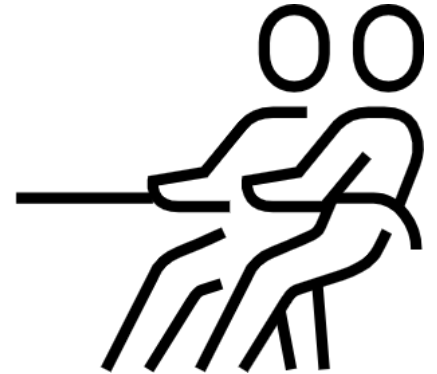
Wîyasôw Iskweêw

Woman standing with the law...

The Power of Partnership

Sub Committees

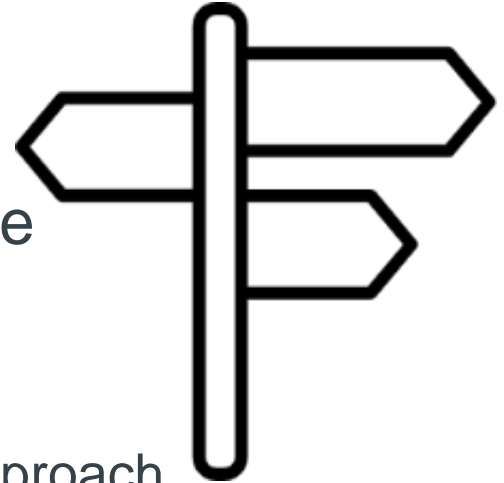
- 12 subcommittees, including
 - Indigenous Interests
 - Roster, Qualifications and Training
 - Education and Communication
 - Research, Evaluation and Statistics
 - Policies and Procedures



Policies and Procedures

Referral Guidelines

- rjalbertacourts.ca
- Developed to ensure a principled/flexible framework for decision making
- Two main goals
 - Consistency – support uniform provincial approach
 - Transparency – clarity for all parties regarding exercise of prosecutorial discretion



Policies and Procedures

Minimum Requirements

- Accused must provide a written acknowledgement of responsibility
- Accused must clearly accept the facts of the offence being referred
- All participating parties must provide voluntary informed consent to engage in the RJ process



2 Distinct Referral Streams

Diversionsary referrals – lead to charges being withdrawn

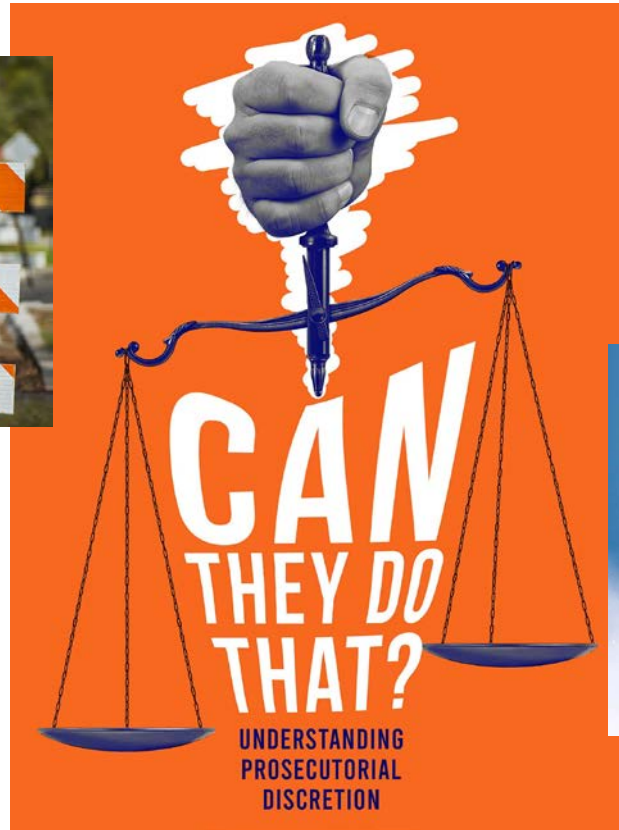


Pre-sentence referrals – lead to the production of information used to inform sentencing

Prosecutorial Discretion

Decisions, decisions...

Diversionsary Referrals – Prosecutorial Discretion



Alberta

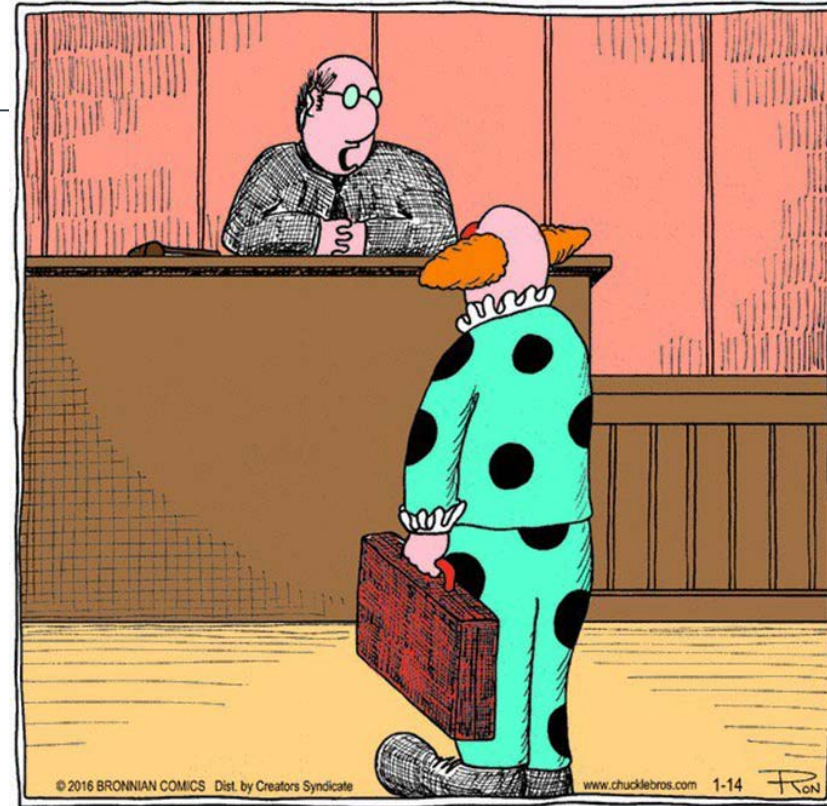
Prosecutorial Mindset



Prosecutorial Discretion 101

“It cannot be over-emphasized that the purpose of a criminal prosecution is 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...

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 personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings...” (*Boucher v The Queen*)

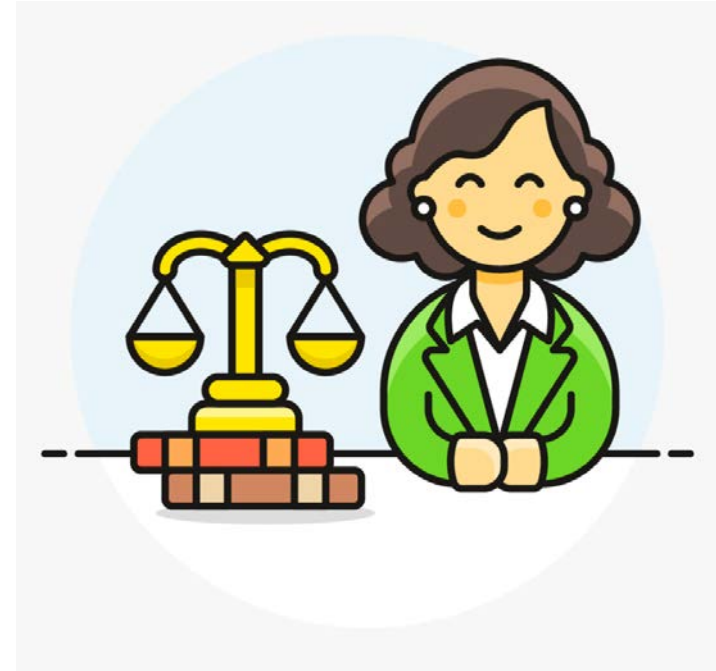


“I specifically requested a crown prosecutor.”

Alberta

Prosecutorial Discretion 101

“The Attorney General and the Attorney General's prosecutors are the guardians of the public interest, and assume a general responsibility for the efficient and proper functioning of the criminal justice system. Their role is not limited to that of private counsel who is responsible for an individual case...”
(Proulx v Quebec (AG))



Decisions, decisions...

- Whether to:
 - Proceed with a prosecution
 - Enter a stay of proceedings
 - Accept a guilty plea to a lesser charge
 - Agree to diversion away from the formal justice system
 - Withdraw a charge
 - Etc...



Sources of Guidance

The more that you read, the more things you will know.
The more that you learn, the more places you'll go.

Law Society of Alberta – Code of Conduct

- Chapter 5 – Relationship to the Administration of Justice
- 5.1-4 – Duty as Prosecutor
 - When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.



LAW SOCIETY
of ALBERTA

Alberta 

ACPS Crown Prosecutors' Manual

- Code of Conduct for Crown Prosecutors
 - Prosecutors are:
 - Empowered to make decisions;
 - Independent of political or other external influences;
 - Able to exercise prosecutorial discretion; and
 - Accountable to the Attorney General for decisions..

ACPS Crown Prosecutors' Manual

- Code of Conduct for Crown Prosecutors (cont...)

Serve the public interest

Avoid conflicts of interest

Be consistent, objective,
impartial and independent

Uphold the rule of law

Follow policy guidance/Code of Conduct

Demonstrate honesty and fairness

Uninfluenced by personal feelings
or interests, public pressure,
personal characteristics of any
party, political considerations,
personal advantage or any other
improper influence

STANDARDS

Respect and support rights
of victims and witnesses



Alberta

ACPS Crown Prosecutors' Manual

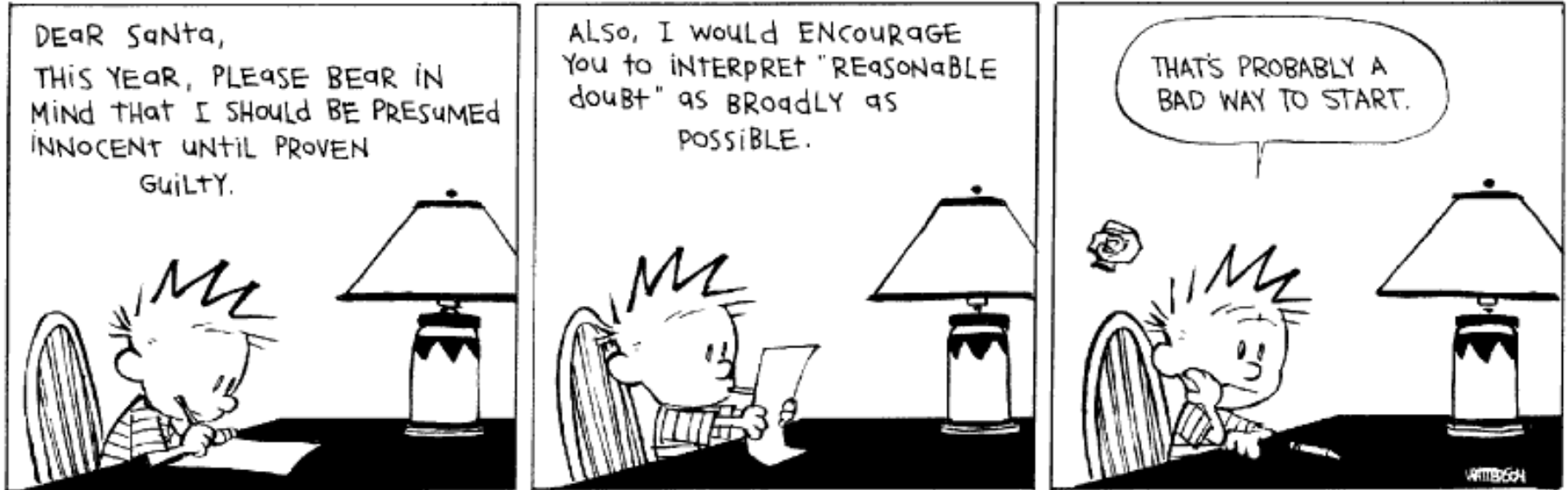
- Decision to Prosecute Guideline
- The decision to prosecute or to discontinue a prosecution is among the most significant of the decisions that will be made by a Crown prosecutor.

Decision to Prosecute

- Reasonable Likelihood of Conviction
- Public Interest



Reasonable Likelihood of Conviction



Public Interest

Significant harm, loss or injury to the complainant or the community

Use of weapons

Use of violence

Vulnerable victim

Offence motivated by discrimination

**PUBLIC
INTEREST
FACTORS**



Offence directed at administration of justice

Abuse of position of trust

Repeat offender

Planned or premeditated conduct

Public Interest

Consequences of prosecution would be unduly harsh

Minor offence

Likely insignificant penalty

Accused has remedied loss or harm

Demonstration of remorse

**PUBLIC
INTEREST
FACTORS**

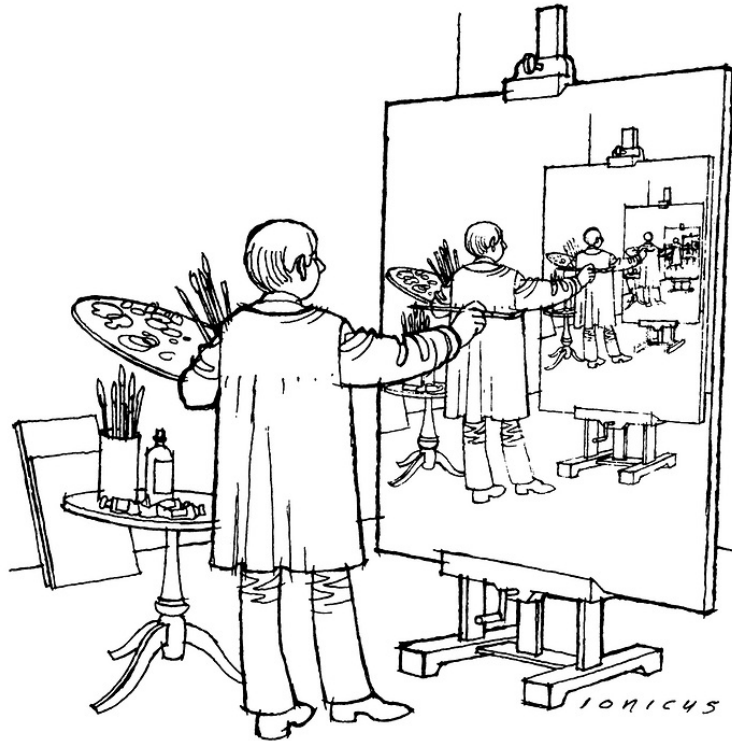


Alternatives to prosecution exist (e.g. diversion)

Circumstances of accused

Steps taken toward rehabilitation

Ongoing Process of Review



Restorative Justice Diversion

Meanwhile, back at the ranch...

2 Distinct Referral Streams

Diversionsary referrals – lead to charges being withdrawn



Pre-sentence referrals – lead to the production of information used to inform sentencing

Diversiónary Referrals

Prosecutors are encouraged to make diversionary referrals wherever:

- An approved RJ program exists; and
- Diversion would be consistent with the protection of society and in the public interest

Diversivonary Referrals

Prosecutors are **encouraged** to make diversionary referrals wherever:

- An approved RJ program exists; and
- Diversion would be consistent with the protection of society and in the public interest

Diversionary Referrals

Prosecutors are encouraged to make diversionary referrals wherever:

- An approved RJ program exists; and
- Diversion would be consistent with the protection of society and in the public interest

Diversionary Referrals

Prosecutors are encouraged to make diversionary referrals wherever:

- An approved RJ program exists; and
- Diversion would be consistent with the protection of society and in the public interest

Diversionsary Referrals – General Restrictions

Generally inconsistent with the protection of society or the public interest where:

1) Separation of the offender is necessary to protect the public

- 718(c) Criminal Code – one of the fundamental purposes of sentencing – maintenance of a just, peaceful and safe society
- “...to separate offenders from society, where necessary...”



Diversionsary Referrals – General Restrictions

Generally inconsistent with the protection of society or the public interest where:

2) Long-term supervision, treatment or no-contact orders are necessary

- e.g. Part XXIV Criminal Code – Dangerous Offenders and Long-term Offenders
- e.g. probation order, peace bond, etc...



Diversionsary Referrals – General Restrictions

Generally inconsistent with the protection of society or the public interest where:

3) Ancillary orders are required such as DNA, SOIRA, firearms or driving prohibitions, or stand-alone compensation orders, **particularly where such orders are mandatory upon conviction**



Diversionary Referrals – General Restrictions

Generally inconsistent with the protection of society or the public interest where:

4) A specialized court may be better suited to address the offending behaviour

- e.g. Indigenous Court, Mental Health Court, Drug Treatment Court, etc...



Diversionary Referrals – General Restrictions

Generally inconsistent with the protection of society or the public interest where:

5) Recording of a conviction is an important objective in the circumstances of the offence and the offender

- e.g. repeat offender, nature of offending behaviour, etc...



Diversionsary Referrals – General Restrictions

Generally inconsistent with the protection of society or the public interest where:

6) Any power imbalance between the victim and the offender that would preclude meaningful victim participation

- e.g. threats, intimidation, harassment, etc...



Diversionsary Referrals – Specific Restrictions

Chief Prosecutor approval required for offences involving:

- Death
- Violence resulting in harm more than transient or trifling in nature or use of a weapon
- Impact on the sexual integrity of a victim
- Serious physical, psychological or financial impact on victim

Diversionary Referrals – Specific Restrictions

Chief Prosecutor approval required for offences involving:

- Violence against victim under 18 committed by person in trust or authority
- Use of violence against intimate partner
- Infliction of pain, suffering or injury to an animal
- Vulnerable victims (children, the elderly, etc...)

Diversionsary Referrals – Specific Restrictions

Chief Prosecutor approval required for offences involving:

- Sophisticated planning
- Driving offences under the Criminal Code
- Mandatory minimum sentence of imprisonment

Diversionary Referrals – Specific Restrictions

Chief Prosecutor can provide approval in cases involving Exceptional Circumstances



Diversionsary Referrals – Exceptional Circumstances

Considerations:

- Indigenous identity of accused or victim
- Personal circumstances of accused
- Personal circumstances of victim
 - Victim's desire to engage in an RJ process
 - Degree of harm done
- Circumstances of offending behaviour
- Existence of suitable RJ process in the local community

Diversiónary Referrals

Particular attention must be paid to the cases of Indigenous accused and victims to ensure that no systemic barriers preclude appropriate diversionary referrals to RJ processes. The individual circumstances of an Indigenous accused or victim should be considered in the context of the distinct situation of Indigenous persons in Canada.

2 Distinct Referral Streams

Diversionary referrals – lead to charges being withdrawn



Pre-sentence referrals – lead to the production of information used to inform sentencing

Pre-Sentence Referrals

Pre-sentence referrals can be considered in a wide range of cases

- Following guilty plea
- Following finding of guilt
- Following an understanding being reached between counsel regarding anticipated guilty pleas



Pre-Sentence Referrals

Pre-sentence referrals can be suggested by any party

- Judge
- Accused
- Victim
- Defence counsel



Pre-Sentence Referrals

Minimum requirements still apply:

- Written acknowledgement of responsibility
- Acceptance of facts
- Voluntary informed consent of all participants

Requirements



Pre-Sentence Referrals

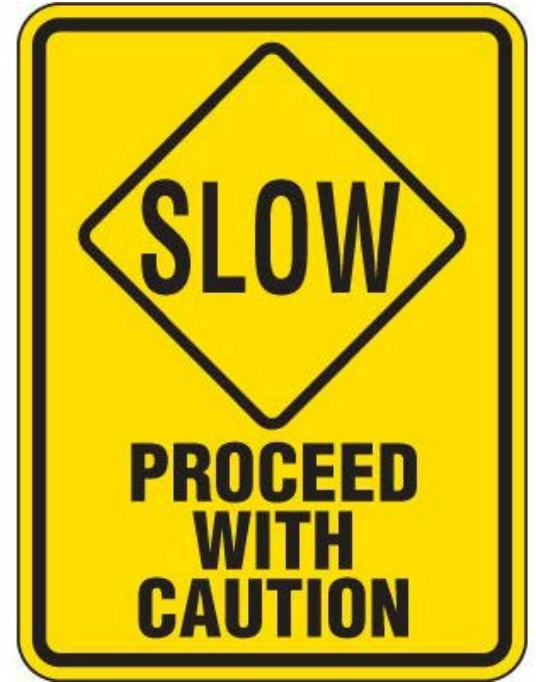
- Outcome of RJ process provides information that may influence the sentence imposed
- Any agreements reached are not binding on the sentencing court due to judicial independence



Sexual Violence, Intimate Partner Violence and Gender Based Violence

Cautionary approach:

- Greater complexity
- Require specialized approaches
- Limited capacity
- Not to be used routinely



What brings us together today?

- What kinds of things do prosecutors want to see to be reassured about referring to RJ?
- What is the Crown's perspective on the RJ referral process?
- What does it take to gain the trust of the Crown?

4 Keys

- Responsibility
- Communication
- Education
- Trust



Responsibility

- Function of a prosecutor is a matter of public duty...
- Great personal responsibility...
- Ingrained sense of the dignity, the seriousness and the justness of judicial proceedings...
- Guardians of the public interest...
- General responsibility for the efficient and proper functioning of the criminal justice system...

Responsibility - Just Outcomes

- Victim safety
- Victim needs
- Public interest
- Public confidence in the administration of justice
- Community needs
- Offender accountability
- Offender responsibility
- Offender acknowledgement of harm done
- Meaningful consequences

Shared Responsibility



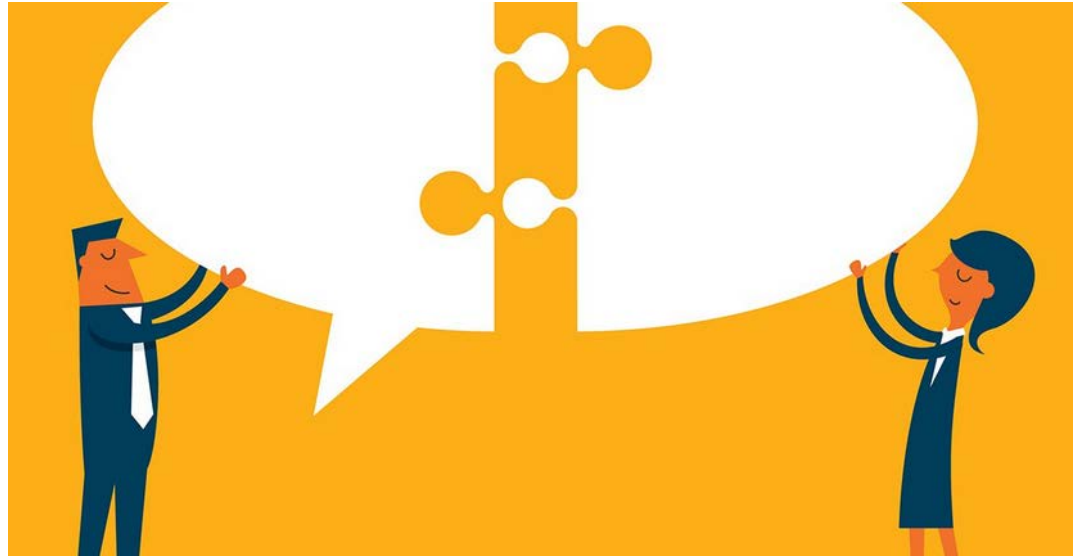
Communication

- Information sharing
- Open lines
- Relationship building
- Proactively reaching out



Two-Way Communication

- Ask questions
- Provide feedback
- Invite feedback
- Follow up



Education

- Start early
- Look for opportunities
- Attend court
- Be ready/elevator speech
- Invite prosecutors to attend



Trust

- Set expectations clearly
- Follow through on commitments
- Take the necessary time
- Consistency
- Admit mistakes



Mutual Trust

- Reciprocal trust
- Collaboration
- Mutual respect
- Patience



Restorative Justice is respect. Respect for all, even those who are different from us; even those who seem to be our enemies. Respect reminds us of our interconnectedness, but also of our differences. Respect insists we balance concerns for all parties. If we pursue justice as respect, we will do justice restoratively.

~ Howard Zehr

Questions?

matthew.hinshaw@gov.ab.ca
(403) 605-8658

