

# Introduction to the Prosecution of Indigenous Community Bylaws to deal with COVID-19

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# Origin Story of the ODPP and PPSC

- The *Director of Public Prosecutions Act* came into force Dec. 12, 2006, creating the Office of the Director of Public Prosecutions (ODPP), known as the Public Prosecution Service of Canada (PPSC). Prior to then, federal prosecutions were conducted by the Federal Prosecution Service, a section of the Department of Justice.
- In creating the ODPP, the government wished to enshrine in legislation “the principle of independence of the prosecution function from the Attorney General of Canada and the political process” and to ensure integrity and transparency.
- The DPP acts “under and on behalf of the Attorney General of Canada”, in initiating and conducting prosecutions, advising law enforcement agencies, issuing guidelines to prosecutors on the conduct of prosecutions (s. 3)

- Effectively, the DPP has been delegated all the criminal prosecution functions of the AGC and makes decisions regarding those functions independently.
- There are channels of communication between the DPP and the AGC established in the Act: s. 13 requires the DPP to advise the AGC of any prosecution that raises important question of general interest. AGC may issue directives to the DPP about specific cases or prosecutions generally (s.10). To ensure transparency, the directives must be published in the *Gazette*.

# From Sea to Sea to Sea

- PPSC has regional offices in all major cities in Canada and in the three Territories.
- Each is headed by a Chief Federal Prosecutor with assistant CFPs.
- Website: <https://www.ppsc-sppc.gc.ca/eng/bas/index.html>

# PPSC “Services”

- Provide advice to investigators during the course of an investigation.
- Provide training to enforcement agencies.
- Prosecute the case once charges are laid.

# Referral for Charge Approval

- Where an officer believes on reasonable grounds that an offence has been committed, and other enforcement options are not suitable, the officer may choose to refer matters to Crown Counsel for their decision on whether to initiate a prosecution.
- A referral for PPSC prosecution is generally in the format of the PPSC "Report to Crown Counsel" and contains information and evidence outlined in the Report.

# PPSC Deskbook

- PPSC Deskbook - contains the directives and guidelines that instruct and guide federal prosecutors, whether employees or agents of the PPSC, in the exercise of their discretion.
- The Deskbook covers a wide range of issues that prosecutors address, from when to lay charges to, what position to take on bail, when diversion or alternative measures may be appropriate, to plea negotiations for sentence.

# Decision to Prosecute

- When to lay charges is a two-part test:
  1. Is there is a reasonable prospect of conviction based on evidence that is likely to be available at trial?
  2. Even if there is sufficient evidence, the Crown must still consider: would a prosecution best serve the public interest?
- Chapter 2.3 of the Deskbook covers the Decision to Prosecute including the Public Interest criteria:
- <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch03.html>



# The Public Interest

- To determine if a prosecution would best serve the public interest, examples of relevant considerations include:
  - Nature of the offence (seriousness, prevalence in the community);
  - Harm and consequences;
  - Level of culpability and circumstances of the accused;
  - Circumstances, consequences to and attitude of the victims; and
  - Confidence in the administration of justice (consider alternatives).

# The Public Interest

- The relevance and the weight of public interest factors vary from case to case. In addition, considerations may also arise in specific types of cases, such as when the accused is Indigenous.
- Where the accused is Indigenous, recognized Indigenous laws, norms, traditions and values may provide guidance regarding appropriate alternatives to prosecution for the offender.
- Such alternatives will be particularly appropriate where mechanisms and resources exist in communities so that offenders can be referred to alternative processes such as those involving Indigenous elders, Justice committees or specialized courts, or the use of alternative measures, referral to a Restorative Justice program or other diversionary responses.

# JURISDICTION:

## What is a “Federal Prosecution”?

- S. 2 of the *Criminal Code* defines Attorney General for proceedings to which the Code applies and makes the AG of the Province the default prosecutor. However, the AG of Canada has jurisdiction to prosecute where the proceedings are commenced at the instance of the Government of Canada and all offences in the Northwest Territories, Yukon, and Nunavut.
- Unless there is provision to the contrary, s. 34(2) *Interpretation Act* imports the *Code* definition of AG into other federal statutes.
- *To ensure jurisdiction for Indian Act bylaws created or enforced to respond to the pandemic, the PPSC will enter into enforcement and prosecution protocols with indigenous communities upon their request.*

# Indigenous Communities Bylaw Enforcement and Prosecution Protocol

Upon request by the indigenous community, the PPSC will enter into a written agreement. The protocol will provide a framework and clarify to the roles and jurisdiction of all parties. There are three essential parties with distinct roles and responsibilities:

1. the Indigenous Community – enact bylaws
2. RCMP (or other police agency) – enforce
3. PPSC – prosecute

The bylaws to enforce and prosecute must be:

- related to the pandemic,
- validly enacted pursuant to the Indian Act s.81 and 85.1, and
- enforceable.

# PPSC prosecution role

- For the PPSC, signing the protocol confirms that the indigenous community wants us to consider the prosecution of violators upon referrals by the police.
- The protocol will also reflect that the parties recognize that the PPSC will be responsible for deciding whether to initiate and conduct a prosecution, to end or stay proceedings in court.
- Prosecutors dealing with Indigenous Community Bylaws continue to exercise their discretion independently throughout the prosecution following the guidelines in the PPSC Deskbook.

# Restorative Justice and Alternative Measures

- The PPSC fully supports and encourages alternative resolution processes be considered by indigenous communities and the RCMP before a report to Crown is submitted to PPSC for charge review.
- The PPSC Deskbook encourages Crown Counsel use of Restorative Justice and Alternative Measures whenever appropriate. Thus, even after a report is submitted, and even if there is sufficient evidence to prove an offence, the prosecutor might decided to use alternative measures rather than approve charges to court.
- For example, based on the assessment of the public interest as a result of a careful consideration of the factors, Crown counsel may conclude in certain cases that there are more effective ways to address the offending conduct and to reduce the likelihood of recidivism, such as referral to a Restorative Justice program or other diversionary responses.

# B.C. Protocol contact

- In order to request the PPSC in British Columbia enter into an Indigenous Communities Bylaw Prosecution Protocol, contact the BC representative for PPSC:

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