OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

5.9 PRIVATE PROSECUTIONS

GUIDELINE OF THE DIRECTOR ISSUED UNDER SECTION 3(3)(c) OF THE *DIRECTOR OF PUBLIC PROSECUTIONS ACT*

March 1, 2014

TABLE OF CONTENTS

1. INTRODUCTION

A private prosecution is a prosecution started by a private individual who is not acting on behalf of a law enforcement agency or prosecution service.

The right of a citizen to institute a prosecution for a breach of the law has been called "a valuable constitutional safeguard against inertia or partiality on the part of authority".[1] The private citizen, as prosecutor, and the Attorney General, who has exclusive authority to represent the public in court and to supervise criminal prosecutions, are both fundamental parts of our criminal justice system.[2] As a result, where the two roles conflict, the role of the Attorney General is paramount as the Attorney General may intervene and take over a private prosecution where in his or her opinion the interests of justice so require.

---

[1] *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 477 (HL) [*Gouriet*]. For commentary on the inherent value of private prosecutions, see also Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 28. Except where the Attorney General's consent is required, s. 504 of the *Code* permits anyone to lay an information. The definitions of "prosecutor" in ss. 2 and 785 make it clear that someone other than the Attorney General may institute proceedings. The 2002 addition to the *Code* of s. 507.1 providing for a "pre-enquete" is the most explicit recognition of the ability of persons not involved in law enforcement to commence criminal proceedings.

[2] *Gouriet*, *supra* note 1 at 481; *Re Dowson and The Queen* (1981), 62 CCC (2d) 286 (Ont CA), approved unanimously by the Supreme Court of Canada: [1983] 2 SCR 144, (1983), 7 CCC (3d) 527 at 535-6.

This guideline explains when the Director of Public Prosecutions (DPP) should intervene either to stay a private prosecution or to take over conduct of such a prosecution.

2. AUTHORITY OF THE ATTORNEY GENERAL OF CANADA TO INTERVENE IN PRIVATE PROSECUTIONS

The DPP exercises the authority of the Attorney General of Canada respecting private prosecutions, including the authority to intervene and assume the conduct of – or direct the stay of – such prosecutions by virtue of s. 3(3)(f) of the *Director of Public Prosecutions Act*.[3]

The DPP has full authority to intervene, throughout the country, in private prosecutions of *Controlled Drugs and Substances Act* drug matters.[4]

Section 2 of the *Criminal Code* (Code) provides that the Attorney General of Canada and the Attorneys General of the provinces share responsibility for conducting prosecutions.[5] More particularly, provincial Attorneys General, and their lawful deputies have jurisdiction to prosecute *Criminal Code* offences in the provinces.[6] The Attorney General of Canada is the Attorney General in respect of proceedings taken in the Yukon, the Northwest Territories and Nunavut. The Attorney General of Canada will also have authority to prosecute federally-enacted, non-*Criminal Code* offences in the provinces where the proceedings were commenced at the instance of the federal government.

Accordingly, the DPP has full authority to intervene in private prosecutions of *Criminal Code* offences brought in the Northwest Territories, the Yukon Territory, and Nunavut.

---

[3] *Director of Public Prosecutions Act*, SC 2006, c 9.

[4] SC 1996, c 19. See definition of Attorney General in s 2 of the *Controlled Drugs and Substances Act.*

[5] Section 2 of the *Criminal Code* assigns prosecutorial roles as follows:

> "Attorney General"
>
> with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy, and
>
> with respect to
>
> the Yukon Territory, the Northwest Territories and Nunavut, or
>
> proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of a conspiracy or attempt to contravene or counselling the contravention of any Act of Parliament other than this Act or any regulation made under any such Act, means the Attorney General of Canada and includes his lawful deputy.

[6] See also *Constitution Act, 1867*, s 92(14) which assigns to provinces the following power: "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

Equally, the DPP has concurrent jurisdiction with provincial prosecuting authorities to prosecute the offences set out in ss. 2(b.1) to (g) of the Code:[7]

- extraterritorial offences in relation to cultural property (s. 2(b.1) and s. 7(2.01) of the Code;
- certain terrorism and national security offences as enumerated in s. 2(c) of the Code;
- frauds under ss. 380, 382, 382.1 and 400 of the Code.

As already noted, the s. 2 definition limits the Attorney General of Canada's authority to prosecute offences under non-*Criminal Code* federal statutes to proceedings that are commenced at the instance of the federal government. This does not cover private prosecutions in the provinces because such proceedings are not "commenced at the instance of the Government of Canada". Nonetheless, the DPP has full authority to intervene in private prosecutions commenced under federal statutes other than the *Criminal Code* – either for the purpose of conducting or staying the proceedings – where the relevant provincial Attorney General has not intervened.[8]

3. THE PRE-ENQUETE – SECTION 507.1

Section 507.1 governs pre-inquiry hearings in the case of private prosecutions.[9] It requires that a justice receiving an information sworn by a private informant refer that information to a provincial court judge or, in Quebec, to a judge of the Court of Quebec or to a designated justice to consider whether to compel the appearance of the accused. The justice or judge conducts a pre-enquete to determine whether process should issue to compel the attendance of the person named in the information to answer to the charge, thus to determine whether a criminal prosecution will be commenced. These provisions were designed to provide a judicial screening process to avoid burdening the justice system with vexatious litigation, misuse of the criminal process in order to advance a civil dispute, and to protect innocent persons from the stigma of having to appear in court on such matters.[10]

---

[7] Sections 2(b.1) to (g) of the Code provide concurrent jurisdiction for the Attorney General of Canada and the Attorneys or Solicitors General of the provinces to prosecute the offences set out in those sections.

[8] *Criminal Code,* s 579.1 was added in 1994 to give the Attorney General of Canada authority to intervene in private prosecutions commenced under federal statutes other than *Criminal Code*, where the provincial Attorney General has not intervened.

[9] By virtue of *Criminal Code,* s 507.1 (9), this process does not apply to s 810 and s 810.1 peace bonds.

[10] *R v Friesen* (2008), 229 CCC (3d) 97 (Ont SC) at paras 9-11 [*Friesen*], cited in *Ambrosi v British Columbia (Attorney General)*, 2012 BCSC 1261 at paras 54-57 [*Ambrosi*].

This "pre-enquete" or process hearing[11] places the onus on the private informant to establish that a summons or warrant should issue to compel an accused to attend before the court to answer a criminal charge. The information must establish a *prima facie* case, requiring some evidence on all of the essential elements of the offence.[12]

The judge or designated justice may issue process compelling the appearance of the accused only after considering the allegations and evidence of the informant and being satisfied that the relevant Attorney General has received a copy of the information, has been given reasonable notice of the hearing and has had an opportunity to cross-examine, call witnesses and present evidence.

A criminal proceeding commences with the swearing of an information. A criminal prosecution commences with the issuance of process to compel the appearance of the accused. Crown counsel may intervene to take over the prosecution or withdraw a charge only *after* the court makes an order issuing process.[13] Crown counsel may, however, enter a stay at any time after an information is sworn.

Sections 507(2) to (8) regarding compelling appearance in public prosecutions applies to the hearing under s. 507.1. Unless expressly prohibited in a particular statute, the *Criminal Code* provisions permitting private prosecutions apply to other federal statutes.[14] Thus, s. 507.1 applies to proceedings under the *Criminal Code* and all other federal acts.

If the pre-enquete justice does not issue process to compel the appearance of the accused, and the private prosecutor has not commenced proceedings to compel process within six months, the Information is deemed never to have been laid.[15]

4. CONDUCT OF THE PRE-ENQUETE

A s. 507.1 hearing is to be held *ex parte* and Crown counsel should request that it be held in camera.[16] Crown counsel may appear at the pre-enquete without being deemed to

---

[11] The s 507.1 hearing may be referred to as a pre-enquete, a pre-inquiry, a referral hearing, or as a process hearing because it relates to the issuing of process.

[12] *Ambrosi*, *supra* note 10 at 56.

[13] *R v McHale* 2010 ONCA 361 at paras 59-62 and 71-77.

[14] *Lynk v Ratchford et al* (1995), 142 NSR (2d) 399 (CA), by virtue of s 34(2) of the *Interpretation Act*, RSC 1993 c I-21 provides:

All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

[15] *Criminal Code,* s 507.1(5).

[16] *R v Whitmore*, (1987), 41 CCC (3d) 555 (Ont HCJ) (aff'd 51 CCC (3d) 294 (Ont CA); *McHale, supra* note 13 at para 48.

intervene in the proceeding.[17] At the process hearing, Crown counsel, as an officer of the Court, are permitted (but not required) to assist the court in determining whether or not a case for issuing process is made out (i.e. whether there is a *prima facie* case) by cross-examining the informant or the informant's witnesses, calling witnesses, presenting any relevant evidence or making submissions.

Upon receiving notice of the pre-enquete, Crown counsel should contact the informant, ask for copies of the evidence in support of the charge(s) and attend the pre-enquete. At the same time, Crown counsel should contact the relevant investigative agency to ascertain whether or not they have been investigating the matter giving rise to the private prosecution. If it appears that Crown counsel's active participation at the pre-enquete, for example by cross-examining the informant's witnesses or by presenting evidence, will assist the presiding judicial officer in determining whether a *prima facie* case has been made out, Crown counsel should assume that role.

Even when a private investigation precedes a private prosecution, it may be difficult to assess whether there is sufficient evidence to justify continuing the proceedings. Thus, in most instances where no investigative agency investigation preceded the process hearing, Crown counsel may need to conduct follow-up steps after their initial charge assessment. If additional time is needed, Crown counsel may request an adjournment, and ask the appropriate investigative agency to review the evidence and to investigate further as needed. Crown counsel should request the views of the relevant investigative agency on the sufficiency of the evidence. It may be necessary to stay proceedings while the investigation is conducted. Once the investigation is complete, the assigned Crown counsel should assess whether to commence proceedings in accordance with the two-pronged test set out in the PPSC Deskbook guideline "2.3 Decision to Prosecute".

Where the pre-enquete has resulted in an issuance of process, Crown counsel should obtain a transcript of the process hearing.

5. THE DECISION WHETHER OR NOT TO INTERVENE IN A PROSECUTION

If process issues,[18] Crown counsel assigned to review the case must assess (1) whether to assume conduct of the prosecution and terminate the proceedings by withdrawal or a stay; (2) whether to assume conduct of the prosecution and continue it or (3) whether to allow the private prosecution to run its course. In all cases, Crown counsel must consult with their Chief Federal Prosecutor (CFP) who, in cases of particular public interest or complexity, should confer with the Deputy Director of Public Prosecutions (Deputy DPP) before making a decision.

---

[17] *Friesen*, *supra* note 10 at para 11.

[18] *R v McHale* 2010 ONCA 361: A criminal proceeding commences with the swearing of an information. A criminal prosecution commences with the issuance of process to compel the appearance of the accused. The Attorney General may withdraw a charge only after process is issued but may issue a stay at any time after an information is sworn.

6. INTERVENTION IN A PRIVATE PROSECUTION IN ORDER TO STOP IT

Crown counsel shall apply the evidentiary standard and the public interest test that is applicable to all prosecutions as set out in the PPSC Deskbook guideline "2.3 Decision to Prosecute", namely, whether there is a reasonable likelihood of conviction and, if so, whether the prosecution best serves the public interest. A private prosecution should be taken over and stayed if, upon review of the evidence, either the evidential sufficiency test or the public interest test, as set out in the PPSC Deskbook guideline "2.3 Decision to Prosecute" is not met.

Where the evidentiary standard set out in the PPSC Deskbook guideline "2.3 Decision to Prosecute" is met, it nonetheless may be necessary to take over and stop the prosecution on behalf of the public where there is a particular "public interest" need to do so. Apart from the factors set out in the PPSC Deskbook guideline "2.3 Decision to Prosecute", examples of factors likely to damage the interests of justice that specifically may arise in the private prosecution context include cases where:

- the prosecution interferes with the investigation of another criminal offence;
- the prosecution interferes with the prosecution of another criminal charge;
- Crown counsel is satisfied that the private prosecution is vexatious or being undertaken on malicious grounds; and
- the prosecuting authorities have given the defendant a promise of immunity from prosecution.[19] This does not include cases where the prosecuting authorities have merely informed the defendant that they will not be bringing or continuing proceedings.

Where Crown counsel decides that taking over a private prosecution in order to stop it is the appropriate course of action, unless there are exceptional circumstances, Crown counsel should write to the private prosecutor explaining the reasons for the decision.

7. INTERVENTION IN AND CONDUCT OF A PRIVATE PROSECUTION

If it is determined that the charge is well founded, Crown counsel must then decide whether to assume conduct of the prosecution. The issue must be decided on a case-by-case basis. Normally, there is nothing wrong in allowing a private prosecution to run its course through to a verdict. There is no requirement for the DPP to take charge of the prosecution.

The following considerations will help to inform Crown counsel's decision whether or not to take charge of the prosecution:

[19] See the PPSC Deskbook guideline "3.3 Immunity Agreements".

1. the need to strike an appropriate balance between the right of the private citizen to initiate and conduct a prosecution as a safeguard in the justice system, and the responsibility of the Attorney General of Canada for the proper administration of justice;
2. the relative seriousness of the offence – generally, the more serious, the more likely it is that the DPP should intervene;
3. there are detailed or complex disclosure issues to resolve;
4. the prosecution requires the disclosure of highly sensitive material or the conduct of the prosecution involves applications for special measures or for witness anonymity;
5. there is a reasonable basis to believe that the private prosecutor lacks the capacity or the funding to effectively carry the case forward to its completion;
6. there is a reasonable basis to believe that the decision to prosecute was made for improper personal or oblique motives, or that it otherwise may constitute an abuse of the court's process such that, even if the prosecution were to proceed, it would not be appropriate to permit it to remain in the hands of a private prosecutor;
7. given the nature of the alleged offence or the issues to be determined at trial, it is in the interests of the proper administration of justice for the prosecution to remain in private hands.

If the reviewing Crown counsel recommends allowing the matter to proceed privately, he or she should advise the CFP in writing of the circumstances and, in cases of particular public interest or complexity, if the CFP agrees with the recommendation, the CFP must seek approval of the appropriate Deputy DPP. Similarly, Crown counsel must seek written approval of their CFP prior to intervening in a private prosecution to stop it or stay it.

Where new information or a change in circumstances comes to light that could reasonably impact the DPP's decision not to intervene in a private prosecution such that the DPP may want to take charge of and stop or conduct the prosecution, Crown counsel should be prepared to revisit the decision regarding intervention.

8. SCOPE OF PRIVATE PROSECUTOR'S AUTHORITY

In summary conviction proceedings, the private prosecutor controls the proceedings from start to finish unless the Attorney General intervenes. In indictable matters, a private prosecutor may conduct the preliminary inquiry and the trial. However, the private prosecutor requires a judge's written consent under s. 574(3) of the Code to prefer an indictment.

9. PROCEDURAL MATTERS

When drafting a written pleading in a private prosecution matter, Crown counsel should refer to the informant as "[Name of Informant] as Private Prosecutor".

Challenges to the exercise of Crown discretion to take charge of or stay a private prosecution may be brought as a judicial review of DPP decision-making in the Federal Court. Such matters should be referred to the Department of Justice.