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# Parental Child Abduction

## Alberta Crown Prosecution Service - Practice Protocol

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**EFFECTIVE: February 8, 2021**

This Practice Protocol provides prosecutors with guidance and direction in relation to the determination of whether to commence or continue a prosecution in relation to the abduction of a child by a parent or guardian.

### Background

Parental child abduction occurs when one parent, guardian or person having the lawful care or charge of a child (“parent”), without either legal authority or the permission of the other parent, takes a child under the age of 14 from the parent who has lawful custody. There may be both international and domestic aspects to child abductions. Although children may not be in extreme physical danger, their lives are greatly disrupted. Children have the right to security, stability, and continuity in their lives. When one parent unilaterally takes exclusive possession of a child, the child is deprived of these rights. The purposes of sections 282(1) (parental child abduction where there is a custody order in effect) and 283(1) (parental child abduction where there is not a custody order in effect) of the *Criminal Code* are to prevent the denial of the child’s rights and to encourage parents to settle child custody and access issues in court and abide by any court orders that are made.

Sections 282(1) and 283(1) both require that the offending parent “take, entice away, conceal, detain, receive or harbour” a child under the age of 14 “with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that child, of the possession of that child.”

Not all cases of parental child abduction will be considered criminal in nature. Whether a charge can be laid depends on several factors, including evidence of criminal intent, the burden of proof beyond a reasonable doubt, and the availability of statutory defences of consent and danger of imminent harm.<sup>1</sup>

This Practice Protocol is intended to supplement the considerations regarding the prosecution standard as set out in the *Decision to Prosecute Guideline*.

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<sup>1</sup> Section 284 provides a defence if the alleged abductor establishes that the taking of the child was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of the child. The consent of the child is not a defence (s. 286). Section 285 provides a defence if the court is satisfied the taking of the child was necessary to protect the child from danger of imminent harm or if the alleged abductor was escaping from danger of imminent harm.

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### Protocol

Given the significance of charging a parent with abducting their child, it is important that Crown prosecutors consult with senior colleagues before proceeding with a prosecution under the *Criminal Code*. Consent of the Attorney General is required for any prosecution under section 283(1). All Chief Prosecutors and Deputy Chief Prosecutors are counsel instructed by the Attorney General for the purposes of consenting to the commencement of proceedings.

When considering whether to proceed with a prosecution, it is important to consider whether a civil enforcement remedy, usually in family court, may be more appropriate than criminal charges.

The federal *Family Orders and Agreements Enforcement Assistance Act* establishes procedures to ascertain the addresses of parents and children residing in Canada from federal information banks to facilitate the enforcement of custody orders.

If it is alleged that the child has been taken out of the country, the police or Crown prosecutor should contact the Central Authority in Alberta<sup>2</sup> for the *Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)* to determine if there are civil proceedings for the return of the child underway or available under the Convention.

Extradition of a parent may be possible from some countries, but an extradition order will not in itself result in the return of the child. Therefore, any consideration of extradition proceedings must involve an analysis of the public interest factors in prosecuting the parent and the effect on the welfare of the child.

Factors to be considered when deciding whether there is a reasonable likelihood of conviction and whether a prosecution is in the public interest are described in the *Decision to Prosecute Guideline*. However, the following factors specific to this type of a prosecution should also be considered.

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<sup>2</sup> Contact the Issues Advisor for Legal Services Division for contact persons in Family and Surrogate Court Litigation (FASCL)

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### ***Factors or Circumstances Favouring Prosecution***

- The child has been taken from a situation where there has been some degree of permanency, contrary to a settled (written or otherwise) or ongoing arrangement;
- Custody proceedings have been initiated or are anticipated, and the alleged abductor, in taking the child, is frustrating proceedings. This may include, but is not restricted to, situations in which the court has stated that, pending a determination, the child is not to be removed from the jurisdiction;
- The child has been taken in contravention of a Canadian or foreign custody order;
- The child has been taken by the alleged abductor contrary to existing custody rights, it appears that they may cause harm to the child, and a criminal charge is necessary to ensure the protection of the child;
- The alleged abductor takes the child surreptitiously and disappears with the child;
- The alleged abductor takes the child where there is a provision in an order or agreement restricting the ability of a parent to remove the child from the jurisdiction;
- The alleged abductor has taken the child and in so doing has permanently or indefinitely frustrated the other parent's rights, where such rights by their nature involve a significant degree of care and control over the child;
- It appears that the alleged abductor has repeatedly breached s. 282(1) or 283(1); or
- There are reasonable grounds to believe that the alleged abductor is incapable of looking after the child (e.g., due to substance abuse or diminished capacity).

### ***Factors or Circumstances Weighing Against Prosecution***

- There is evidence that the alleged abductor is not aware of the existence of the terms of a custody order prior to the laying of the charge. (However, it should be noted that section 282(2) allows for a conviction under section 283(1) where it is found at trial that the accused did not have knowledge of the custody order at the time of the offence, but the evidence still proves an offence under section 283);
- The alleged abductor is merely late in returning a child from an access visit;
- The custody order is not clear on its face as to the terms of custody allegedly breached;
- The guardianship, parenthood, possession, or charge of the child may be unclear and should be resolved in family court;
- A less onerous civil remedy is available and would be more appropriate in the circumstances;
- Although technically possible, a charge should not normally be laid in circumstances in which one party moves out of the home with the child while in the course of separating



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from the other party, if it appears that the parties are attempting to resolve custody either through the courts or by agreement;

- Where there are competing interim or final orders issued by different courts dealing with the custody of a child; or
- In a case of international parental abduction, if the commencement of a prosecution could prevent the return of the child through the *Hague Convention*. In these cases, the Crown prosecutor should consult with counsel for the Central Authority in the Family and Surrogate Court Litigation (FASCL) division of Justice and Solicitor General.