
Private Prosecutions

Alberta Crown Prosecution Service - Practice Protocol

EFFECTIVE: February 8, 2021

This Practice Protocol provides prosecutors with guidance and direction in relation to the exercise of their discretion when deciding whether to intervene on behalf of the Attorney General in a prosecution initiated by a private citizen.

Background

The Attorney General of Alberta has the right and responsibility to supervise all criminal prosecutions in the province except those undertaken by the Attorney General of Canada. This responsibility includes the supervision of prosecutions undertaken by a private citizen as a private prosecutor.

Under section 504 of the *Criminal Code*, anyone who has reasonable grounds to believe that another person has committed an indictable offence may lay an Information in writing and under oath before a justice of the peace. The expansive term “anyone” applies to everyone who lays an Information, including private citizens.

Section 507.1 of the *Criminal Code* requires a justice who receives an Information laid by a private citizen (the “informant”) to refer it to a provincial court judge or a designated justice, who shall consider whether to compel the appearance of the accused by summons or warrant to answer the charge on the Information.

The judge or designated justice may issue a summons or a warrant only after they have heard and considered the allegations of the informant and the evidence of witnesses, and the evidence discloses a *prima facie* case of the alleged offence. This hearing is called a *pre-enquete*.

The judge or designated justice must also give the Attorney General (as represented by a Crown prosecutor) the opportunity to attend the hearing, cross-examine and call witnesses, and present any relevant evidence.

This procedure provides a judicial screening process so that the justice system is not burdened with vexatious litigation and innocent persons are protected from the stigma of having to appear in court on such matters.

Although the Attorney General has an unfettered right to intervene at any stage in any private prosecution, the decision to intervene must be made on a case-by-case basis, mindful of the principles outlined in the *Code of Conduct for Crown Prosecutors Guideline*.

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When a private Information is laid, a determination must be made by a Crown prosecutor as to whether there is a reasonable likelihood of conviction and whether the prosecution is in the public interest. As with all prosecutions, this assessment is ongoing and may be conducted after the Information has been laid (but before the *pre-enquete*), during the *pre-enquete*, after the *pre-enquete*, and during any subsequent prosecution.

The Crown prosecutor assigned to review a private prosecution must apply the evidentiary standard and the public interest test that is applicable to all prosecutions (see *The Decision to Prosecute Guideline*). In conducting this review, the Crown prosecutor, where necessary, will:

1. Obtain copies of all relevant, available documentation;
2. Attempt to obtain any written statements by the complainant and the person who is the subject of the complaint;
3. Where a police investigation of the matter giving rise to the private prosecution has been conducted, obtain a copy of the police report and any other investigatory materials; and
4. Attempt to obtain such other statements or information as deemed relevant to the review.

While the Crown prosecutor is not an investigator and is not required to conduct an investigation, it is important to collect any information that may exist that may assist in determining whether the matter meets the prosecution standard.

Pre-enquete

At the *pre-enquete*, Crown prosecutors are permitted (but not required) to assist the court in its determination as to whether a case for issuing a summons or warrant is made out (i.e., whether there is a *prima facie* case). The Crown prosecutor may cross-examine the informant or the informant's witnesses, call their own witnesses, present any relevant evidence and make submissions.

In some cases, it may be difficult to assess whether there is sufficient evidence to justify continuing the proceedings because no police investigation preceded the laying of the Information. If so, it will in most instances be appropriate for the Crown prosecutor to intervene, request an adjournment of the *pre-enquete*, and ask the local policing agency to investigate. If an adjournment is not granted, it may be necessary for the Crown prosecutor to use their power under section 579(1) of the *Criminal Code* to stay proceedings while the investigation is

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conducted. After the investigation is completed, the assigned Crown prosecutor should assess whether to recommence proceedings in accordance with the *Decision to Prosecute Guideline*.

If the Crown prosecutor determines from the information available that a *pre-enquete* would be frivolous, vexatious, or an abuse of the court process, the Crown prosecutor may stay the Information prior to, or during, the *pre-enquete*. The Crown prosecutor may not withdraw the Information prior to, or during, the *pre-enquete*. The Information can only be withdrawn after the judge or designated justice has made a decision to issue a summons or warrant.¹

Prosecution

If, after the *pre-enquete*, the judge or designated justice finds a *prima facie* case has been established and issues a summons or warrant for the accused, the Crown prosecutor must determine whether a private prosecution should proceed. In addition to an assessment of the reasonable likelihood of conviction, the Crown prosecutor should give specific consideration to the following public interest factors:

1. Preventing proceedings that are not in the interest of the administration of justice;
2. Preventing the use of criminal proceedings for malicious or unfair purposes;
3. Preventing the potential abuse of the court system;
4. Ensuring the efficient allocation of court resources; and
5. Preventing persons from conducting a private prosecution to further victimize individuals they are alleged to have offended against (for example, where there are charges of intimate partner violence or criminal trespass against the person initiating the private prosecution).

Where, in the Crown prosecutor's opinion, the Information should not proceed it will be either stayed (if further investigation is required) or withdrawn, and the informant must be notified in writing.

If it is determined that the charge is well founded, the Crown prosecutor must then decide whether to assume conduct of the prosecution. While generally a Crown prosecutor will assume conduct, the issue must be decided on a case-by-case basis. The following factors will help to inform this decision:

¹ *R v McHale*, 2010 ONCA 361

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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 for the proper administration of justice;
2. The seriousness of the offence – generally, the more serious, the more likely it is that the Attorney General should intervene;
3. Whether 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 in the interests of the proper administration of justice to permit it to remain in the hands of a private prosecutor; and
4. Whether, given the nature of the alleged offence (e.g. sexual violence offences) or the issues to be determined at trial (e.g. constitutional issues), it would not be in the interests of the proper administration of justice for the prosecution to remain in private hands.

The Crown prosecutor must assume conduct of a prosecution if it involves an allegation of intimate partner violence, an allegation against a young person, or an allegation that requires the Attorney General's consent to commence a prosecution.

There may be exceptional circumstances in which the interests of justice merit allowing the matter to proceed as a private prosecution. If the reviewing Crown prosecutor recommends allowing the matter to proceed privately, their Chief Prosecutor must be advised of the circumstances and, if the Chief Prosecutor agrees with the recommendation, the approval of the Assistant Deputy Minister (Alberta Crown Prosecution Service) must be sought and obtained before the matter may proceed privately.