

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

DIRECTOR OF PUBLIC PROSECUTIONS ACT

Directive

Whereas the Honourable A. Anne McLellan was asked to review the roles of the Minister of Justice and Attorney General of Canada and issued a report and recommendations on August 14, 2019; and

Whereas I have consulted with the Director of Public Prosecutions under subsection 10(2) of the *Director of Public Prosecutions Act*;

I issue the following directives to the Director of Public Prosecution, which will be published on the website of the Public Prosecution Service of Canada:

1.2 Duty to Inform the Attorney General under Section 13 of the *Director of Public Prosecutions Act*

Public Prosecution Service of Canada Deskbook

Directive of the Attorney General Issued under subsection 10(2) of the *Director of Public Prosecutions Act*

July 6, 2023

Table of Contents

- 1. Introduction
- 2. Types of Cases that Should be Reported under Section 13
 - 2.1. Prosecutions
 - 2.2. Appeals
 - 2.3. Interventions
- 3. Notice at the Pre-charge Stage and Regarding Decisions not to Prosecute
- 4. Timing of Notice
- 5. Content of Notice
- 6. Treatment of Notice

1. Introduction

Section 13 of the *Director of Public Prosecutions Act*¹ (DPP Act) provides that the Director of Public Prosecutions (DPP) has a duty to “inform the Attorney General in a timely manner of any prosecution, or intervention that the Director intends to make, that raises important questions of general interest.” This duty arises from the relationship between the Attorney General and the

¹ *Director of Public Prosecutions Act*, SC 2006, c 9 [DPP Act].

DPP, since the Attorney General may rely upon information provided under section 13 in deciding whether to issue directives to the DPP under subsection 10(1), to intervene in proceedings under section 14,² or to assume conduct of a prosecution under section 15.³

Section 13 is not intended to be the exclusive mechanism for information flow between the DPP and the Attorney General in respect of prosecution matters. Rather, section 13 is intended as a statutory guarantee that the DPP will inform the Attorney General to enable the Attorney General to properly execute their functions as chief law officer of the Crown. Section 13 notices are issued by the DPP and are intended for the Attorney General personally.

Section 13 does not apply to proceedings conducted by the Public Prosecution Service of Canada (PPSC) on behalf of the Attorney General in relation to the Attorney General's powers, duties and functions under the *Extradition Act*⁴ and the *Mutual Legal Assistance in Criminal Matters Act*⁵ pursuant to subsection 3(9) of the DPP Act,⁶ nor does it apply to prosecutions under the *Canada Elections Act*.⁷

2. Types of Cases that Should be Reported under Section 13

Section 13 notices are required in cases that raise “important questions” that are of “general interest”. The framers opted for the term “general interest” which is broader than “public interest”. As the legislative summary of Bill C-2, *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, explained:

A distinction is made between the term “public interest” and the broader term “general interest” (considered to subsume “public interest”) so that the DPP will have a broader duty to inform the Attorney General of important matters. The House Committee removed the need for questions of general or public interest to be “beyond the scope of those usually raised in prosecutions,” as it was considered to be unnecessary and unduly limit the ability of the Attorney General to intervene.⁸

² See the PPSC Deskbook guideline “3.15 Appeals and Interventions in the Provincial and Territorial Courts of Appeal”.

³ Although section 13 does not limit the Attorney General's power to issue directives or assume conduct of a prosecution.

⁴ SC 1999, c 18.

⁵ RSC 1985, c 30 (4th Supp).

⁶ Subsection 3(9) of the DPP Act authorizes the DPP to exercise, under and on behalf of the Attorney General, any of the Attorney General's powers, duties or functions under the *Extradition Act* or the *Mutual Legal Assistance in Criminal Matters Act*. The section 13 notice requirement is restricted to “prosecutions and interventions” and thus does not cover extradition and MLAT matters.

⁷ Section 13 of the DPP Act requires notice specifically for “prosecutions and interventions”. The definition of “prosecution” in section 2 of the DPP Act expressly excludes *Canada Elections Act* (CEA) prosecutions under subsection 3(8) of the DPP Act, which stipulates that the DPP initiates and conducts CEA prosecutions, appeals and other prosecution-related CEA proceedings on behalf of the Crown. In contrast to the DPP's other duties and functions as set out in subsection 3(3), subsection 3(8) prosecutions are not undertaken under and on behalf of the Attorney General.

⁸ Footnote 45 of Bill C-2 Legislative Summary 1st Sess, 39th Parl.

The qualifier “important questions” acts as an additional threshold to distinguish matters of significance from more routine or recurring matters.

Examples of cases that may involve important questions of general interest and thus generally would be subject to a section 13 notice include prosecutions, appeals and interventions as set out below.

2.1. Prosecutions

- Cases giving rise to concerns regarding public confidence in the administration of justice, including the manner in which a prosecution is conducted insofar as the impartiality or independence of the PPSC is at issue;
- Cases that may have a significant impact on established jurisprudence;
- National security prosecutions;
- War crimes, crimes against humanity and genocide prosecutions;
- Novel official languages issues in prosecutions;
- Prosecutions that involve novel aboriginal rights issues;
- Criminal organization prosecutions that raise “important questions of general interest” by virtue of the significance or novelty of the issues being litigated, or any broader government concerns such as border security;
- Environmental prosecutions that raise issues of national importance;
- Capital markets fraud cases of national significance;
- Cases with an international dimension;
- Constitutional challenges (*Canadian Charter of Rights and Freedoms* (Charter) or division of powers) to legislation or to federal government programs that are novel (that is, notices would not be required on routine or recurring constitutional challenges); and
- Cases that give rise to sustained, significant and/or anticipated media interest and that also raise important questions, for example, when a matter puts into question the public’s confidence in the administration of justice.

2.2. Appeals

- Supreme Court of Canada appeals, whether on leave or as of right; and
- Other appeals, to provincial and territorial courts of appeal and summary conviction appeals, which raise “important questions of general interest”. They would include
 - Cases involving constitutional challenges to legislation (Charter, division of powers, Aboriginal rights), official languages rights;
 - Cases that may have a significant impact on police and prosecutorial powers, duties and functions;
 - Cases that raise a significant impact on rules of procedure and evidence; and
 - Cases that raise other significant Charter issues.

2.3. Interventions

- Interventions to be made on behalf of the DPP or the Attorney General,⁹ whether in the Supreme Court of Canada, in any court of appeal or at trial.

3. Notice at the Pre-charge Stage and Regarding Decisions not to Prosecute

The section 13 notice requirement is limited to “prosecutions and interventions”. Under section 2 of the DPP Act, the term “prosecutions” is defined to include not only a prosecution under the Attorney General’s jurisdiction, but also “a proceeding respecting any offence where the prosecution or prospective prosecution” comes within the Attorney General’s jurisdiction. Generally, the DPP does not provide section 13 notices in respect of investigations, in recognition of the independent investigative function.¹⁰ However, the section 2 reference to “prospective prosecutions” indicates that the section 13 notice requirement extends to pre-charge “proceedings”. This would include various *ex parte* Crown applications to obtain judicial authorization to use investigative or enforcement techniques (special search warrants, restraint orders and management orders). That said, it is anticipated that section 13 notices in respect of *ex parte* Crown applications would be exceedingly rare at the pre-charge stage in large part because the fundamental principle of police independence at the investigative stage must inform what is an important question of general interest.

In most Canadian jurisdictions, decisions to decline prosecution are made post-charge and dealt with by way of a stay of proceedings or withdrawal of charges. Proceedings to stay or withdraw charges are subject to s. 13. However, by virtue of the s. 2 definition of “prosecutions” which is limited to “proceedings”, s. 13 would not extend to prosecutorial decisions not to prosecute in pre-charge approval jurisdictions (Quebec, British Columbia and New Brunswick) because the prosecutorial decision-making is not a “proceedings”. For the same reason, s. 13 would not apply to decisions of the DPP not to consent to institute criminal proceedings.¹¹ That said, while such decisions to decline prosecution would not constitute “proceedings” and thus would fall outside the scope of s. 13, the DPP will apply the spirit of s. 13 and notify the Attorney General of such pre-charge decisions if they raise important questions of general interest so that the Attorney General may decide whether or not to issue a directive under subsection 10(1) or to assume conduct of a prosecution under s. 15 where the DPP has declined to prosecute. It is conceivable, for example, that the Attorney General could reach a different conclusion in applying the “public interest” criteria of the decision to prosecute test.¹²

⁹ The Attorney General and the DPP cannot both intervene in a case prosecuted by a provincial Attorney General. Paragraph 3(3)(b) of the DPP Act provides that the DPP can intervene unless the Attorney General has decided to intervene. Section 13 imposes a positive duty on the DPP to give advance notice, in a timely manner, of interventions that the DPP intends to make.

¹⁰ The conduct of any investigation is the sole responsibility of the law enforcement agency involved. The law enforcement agency does not require authorization from the prosecution before commencing an investigation nor does the prosecution direct an investigation or prohibit the continuation of an investigation. In practice, of course, investigators may and regularly do consult the prosecution during the investigation.

¹¹ Certain *Criminal Code* offences require consent of the Attorney General to institute proceedings.

Paragraph 3(3)(a) of the DPP Act delegates this consent function to the DPP to “initiate prosecutions”.

¹² See the PPSC Deskbook guideline “2.3 Decision to Prosecute”. For commentary on the public interest factor see Robert J. Frater, *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at 9-13: “The ‘guardian of the public interest’ role is particularly noteworthy in a federal state such as Canada, where there are many attorneys general

4. Timing of Notice

Section 13 requires that notice be given “in a timely manner”. By necessity, the timelines for providing a section 13 notice will vary from case-to-case in accordance with the particular facts, including any applicable time limitation periods.¹³ That said, the section 13 timeliness requirement must be interpreted to uphold the overarching principle that, to the extent possible, the Attorney General must be given sufficient opportunity to react.

Notices should be given in respect of prosecutions that raise important questions of general interest at various milestone stages of the prosecution, notably prior to initiating prosecutions, discontinuing proceedings, staying a prosecution, including a private prosecution, and prior to decisions to appeal or to intervene. The decision of whether to issue a notice (or a follow-up notice) should be made to give effect to the Attorney General’s role as chief law officer of the Crown, including the powers that the Attorney General may exercise pursuant to the DPP Act regarding directions given to the DPP (s. 10), assuming conduct of a prosecution (s. 15), and interventions by the Attorney General (s. 14).

5. Content of Notice

Section 13 notices should include a contextual explanation setting out why the Attorney General is being informed of the matter, as well as details concerning relevant timelines, such as filing deadlines, hearing dates, and trial dates, and other information that would be relevant to inform any decision by the Attorney General.

6. Treatment of Notice

Insofar as they contain legal advice and other privileged information, section 13 notices are to be treated as privileged. They are also confidential insofar as they relate to the exercise of prosecutorial discretion. The Attorney General may share section 13 notices with the Deputy Minister of Justice or others for the purpose of obtaining advice as to whether they should exercise their authority to issue a directive or take over a prosecution. The Attorney General may seek additional information from the DPP upon receiving a section 13 notice. As noted above, the Attorney General relies on the information contained in section 13 notices in deciding whether to issue specific directives, intervene in proceedings or take over a prosecution. The Attorney General may issue specific directives or take over a prosecution on public interest grounds or because they are of the view that there is, or is not, a reasonable prospect of conviction.

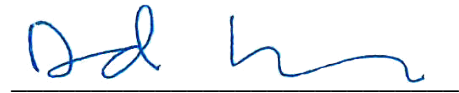
This directive takes effect on its publication on the website of the Public Prosecutions Service of Canada.

and directors of public prosecution. Determining what the public interest demands in a particular situation is a subject on which reasonable people may sometimes differ, depending on how much weight they choose to attach to objectively relevant factors.”

¹³ All appeals and interventions are governed by mandatory time limitation periods, usually 30 days, except for leave applications in the Supreme Court of Canada, which are 60 days.

The Directive of the Attorney General to the Director of Public Prosecutions made on June 16, 2014, and published in the *Canada Gazette* on August 30, 2014, ceases to be in effect on the publishing of this directive, only as it pertains to this part.

Ottawa, July 6, 2023

A handwritten signature in blue ink, consisting of the letters 'D' and 'L' followed by a stylized flourish.

The Honourable David Lametti
Attorney General of Canada