



NOVASCOTIA  
PUBLIC PROSECUTION SERVICE

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**ABORIGINAL CASES**

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**NOTE:**

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE "**WORDS & PHRASES**" SECTION OF THIS PART OF THE MANUAL.

## ABORIGINAL CASES

**[Note:** In this policy document, the term “**aboriginal**” has the meaning established in s. 35(2) of the *Constitution Act, 1982*, i.e. it includes the Indian, Inuit, and Metis peoples of Canada. “**Aboriginal cases**” are cases involving (or potentially involving) reference to rights under section 35 of the *Constitution Act, 1982*, or aboriginal treaties.]

### Introduction

Prosecutions involving aboriginal persons or issues differ from other prosecutions. In some cases the differences are subtle; in other cases, the differences are substantial. All of these cases require sensitivity to the aboriginal culture, and many require specialized knowledge. It must be recognized, for instance, that hunting, fishing, trapping and certain other activities integral to the aboriginal way of life may be protected by specific treaties; awareness of such treaties is essential when prosecuting cases wherein these matters may arise. The *Criminal Code* demands a unique approach to the sentencing of aboriginal persons. Parliament has also given unique constitutional protection to aboriginal rights through Section 35 of the *Constitution Act, 1982*. Those prosecuting aboriginal persons must be knowledgeable in regard to the nature and extent of these protections. Moreover, the Supreme Court of Canada has stated that

....the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

**R.v. Sparrow**, (1990), 56 C.C.C.(3d) 263, per Dickson, C.J.C. at p. 287.

This dictum colours the approach which is taken to interpretation of statutory provisions affecting aboriginal persons and is a further example of the how aboriginal cases may require a different approach.

Prosecutors must also be aware that the aboriginal rights arguments put forward as defences in criminal and quasi-criminal prosecutions often connect with arguments developed in parallel civil litigation and may impact the positions taken by parties attempting to resolve very serious issues in another forum. This further emphasizes the need for the PPS to have a consistent, informed, and coordinated approach to aboriginal cases.

## **Aboriginal Law Working Group**

In order to help ensure that the PPS continues to be able to deal with aboriginal cases competently and in a timely fashion, the PPS has determined that it is appropriate to establish and maintain an Aboriginal Law Working Group (ALWG) as a standing committee.

### **Composition of the ALWG**

The ALWG shall be chaired by the Chief Crown Attorney -Special Prosecutions, and shall include at least four other prosecutors, as may be directed by the DPP on the recommendation of the Chief Crown Attorney -Special Prosecutions. As far as is possible, the members of the ALWG shall be prosecutors who have demonstrable expertise and interest in aboriginal issues. [Currently (December, 2003), the ALWG includes Crown Attorneys Richard MacKinnon, William Delaney, James Clarke, and Darcy MacPherson.]

### **Mandate of the ALWG**

The ALWG shall:

- identify Crown Attorneys willing and able to develop the expertise necessary to review and prosecute aboriginal cases ;
- be available for consultation with Crown Attorneys in regard to aboriginal cases;
- promote consistency in the prosecution of aboriginal cases;
- identify research projects relating to aboriginal issues in which the PPS should participate, and coordinate PPS participation in inter-governmental initiatives relating to aboriginal prosecutions; and
- ensure that effective processes are in place to identify aboriginal cases as they arise, so that appropriate prosecution resources are made available for such cases in a timely fashion.

### **Handling Aboriginal Cases**

The Crown Attorney who first becomes aware of an aboriginal case is required to prepare a "Case Bulletin" in regard to the case [see the separate policy re Case Bulletins], unless it is clear that the case is "routine" and will not involve new arguments or issues relating to treaty rights or the *Constitution Act, 1982*. If there is uncertainty in this regard, a Case Bulletin should be prepared. In addition to the usual distribution list, a copy is to be sent to the Chief Crown

### Attorney -Special Prosecutions.

The Crown Attorney who first becomes aware of an aboriginal case must also immediately bring the case to the attention of the Chief Crown Attorney for the region where the case arose. Unless the case clearly will not involve new arguments or issues relating to treaty rights or the *Constitution Act, 1982*, the Chief Crown Attorney should promptly contact the Chief Crown Attorney -Special Prosecutions to determine who shall prosecute the case. This will often require that the file (or a copy of it) be delivered to the Chief Crown Attorney -Special Prosecutions so that it can be carefully assessed.

The Chief Crown Attorney -Special Prosecutions, in consultation with the ALWG, shall consider these options:

- (1) the Special Prosecutions Branch shall assume carriage of the case;
- (2) the case shall be prosecuted by the local Crown Attorney with a member of the ALWG as co-counsel;
- (3) the case shall be prosecuted by the local Crown Attorney with advice or instructions from the ALWG; or
- (4) some other arrangement for prosecution is appropriate.

In determining the approach to be taken, consideration shall be given to the nature and complexity of the issues, the availability of expert counsel from the ALWG, the prosecution resources of the region, and the recommendation, if any, of the Chief Crown Attorney of the region where the case arose. If difficulty is encountered in promptly determining a satisfactory approach, the DPP, or his designate, should be consulted.

Ideally, the decision regarding who shall have carriage of the case should be made within one week of the file being delivered to the Chief Crown Attorney -Special Prosecutions, and before any hearing dates are set.

The Chief Crown Attorney -Special Prosecutions, as Chair of the ALWG, is to ensure that other branches of government involved in aboriginal issues are kept appropriately informed of the existence and progress of aboriginal cases being prosecuted by the PPS.