

Uniform Prosecution Records Production Act

Definitions

1. In this Act,

“child protection proceeding” means a proceeding under [*relevant legislative reference*]; (“instance portant sur la protection d’un enfant”)

Commentary: The definition of child protection proceeding is intended to capture proceedings carried on by a government agency charged with child protection responsibilities. These may include court proceedings whose objective is to apprehend a child in need of protection as well as investigations and ongoing activities between the agency and the family. The definition is not intended to extend to proceedings in which the agency may be acting as a party on behalf of the child pursuant to its role as a guardian of the child.

“Crown” means the Crown in right of [*province*] or the Crown in right of Canada; (“Couronne”)

“offence” means an offence under an Act or enactment of Canada or any province or territory of Canada; (“infraction”)

“person” includes an entity, other than the Crown or a police force; (“personne”)

Commentary: The Crown and police forces are excluded from the Act which is intended to deal with disputes arising when third parties seek access to or permission to make use of a prosecution record and the Crown and the relevant police force do not consent. The Act does not limit the Crown’s or a relevant police force’s ability to use their own records.

“police force” means a police force as [defined in/established under] [*relevant legislative reference*], the Royal Canadian Mounted Police, or such other policing unit that may be designated by the Attorney General (“corps de police”)

“possession” means, with respect to a prosecution record, actual possession of or an entitlement to obtain the original prosecution record or a copy of it, that arises only as a result of the investigation or prosecution to which the prosecution record relates; (“possession”)

Commentary: Possession is defined to include an entitlement to obtain the original prosecution record or a copy of it only if that entitlement arises as a result of the investigation or prosecution to which the prosecution record relates. A person who possesses a document that also happens to be part of the prosecution record, for example a hospital with respect to its own records, would not be subject to the Act and would not require the consent of the Crown or a relevant police force in order to make use of that document in a proceeding.

“proceeding” means,

- (a) an action, application or other civil proceeding,
- (b) an administrative, disciplinary or regulatory proceeding, other than the prosecution of an offence,
- (c) an inquest or inquiry, other than,
 - (i) an [inquest/inquiry] of a [coroner/medical examiner] under the [*relevant legislative reference*], or
 - (ii) a public inquiry under the [*relevant legislative reference*],
- (d) an arbitration,
- (e) any other proceeding before a court or tribunal held under an Act of Canada or any province or territory of Canada, other than the prosecution of an offence, and
- (f) any investigation that may lead to a proceeding referred to in clauses (a) to (e); (“instance”)

“produce” means, with respect to a prosecution record, to produce, disclose, release or otherwise make the prosecution record available to another person; (“produire”)

“prosecution record” means a record that is,

- (a) made or obtained by a police force during the investigation of an offence or alleged offence, regardless of whether the record is or has been shared with the Crown, or
- (b) made or obtained by the Crown in relation to the investigation or prosecution of an offence or alleged offence; (“document de poursuite”)

Commentary: The definition of prosecution record is very broad and is intended to include information that has not been disclosed to an accused as part of the Crown disclosure obligation but is not intended to capture police intelligence gathering activities.

“record” means data or information in any form, including data or information made, recorded, transmitted or stored in digital form or in any other intangible form by electronic, magnetic, optical or any other means, and includes a portion of a record. (“document”)

Prohibition

2. (1) No court or tribunal shall make an order, other than an order made by a court under section 3, or issue a subpoena requiring the production of a prosecution record for the purposes of a proceeding unless the [*Attorney General [or the ministry responsible for the investigation and prosecution of the alleged offence]*/relevant police force] consents to the production.

Same

(2) No person shall produce a prosecution record in his or her possession for the purposes of a proceeding except in one of the following circumstances:

1. The [*Attorney General/[or the ministry responsible for the investigation and prosecution of the alleged offence]*relevant police force] consents to the production.
2. Production of the prosecution record is required by an order or subpoena made or issued with the consent of the [*Attorney General/[or the ministry responsible for the investigation and prosecution of the alleged offence]*relevant police force], in accordance with subsection (1).
3. Production of the prosecution record is required or permitted by an order made under section 3.

Same

(3) If the production of a prosecution record by a person for the purposes of a proceeding is required or permitted under any other Act, the person shall disclose whether he or she possesses the prosecution record, but shall not produce the prosecution record unless the requirements of subsection (2) are met.

Exception

(4) Subsections (1) to (3) do not apply to the transfer of a prosecution record from one child protection authority to another.

Conflict

- (5) This section applies despite any other Act, or any regulation, by-law, rule or other document made under any other Act, including the procedural rules of a court or tribunal.

Commentary: Production of the prosecution record for use in a collateral proceeding cannot be compelled without the consent of the Attorney General and, in those jurisdictions which require the consent of the police, the relevant police force. A person who receives a copy of the prosecution record is required to keep its contents confidential, however that requirement does not obviate any of that person's obligations to disclose the existence of the prosecution record as required by the disclosure obligations of another proceeding in which they are involved.

Since the Act does not apply to the Crown, if the Crown is required to disclose a prosecution record in accordance with the rules of procedure governing a proceeding in which it is itself a party, it must rely on the general law governing conduct of that proceeding. In such cases there will likely be other concerns regarding the conduct of the proceeding which may give rise to the Crown making an application for directions or orders for matters beyond the disclosure of the prosecution record, such as the timing of examinations for discovery or trial dates.

The prohibition against a person who has received a prosecution record from disclosing it to another does not apply to disclosure from one child protection authority to another. This applies to both court proceedings and to situations involving the transfer of an open file from one child protection authority to another after the investigation has concluded but service is being provided to a family even though there are no court proceedings in progress.

Application

3. (1) If the [*Attorney General*]/[*or the ministry responsible for the investigation and prosecution of the alleged offence*]/[*relevant police force*] refuses, in whole or in part, to consent to the production of a prosecution record, the person seeking the consent or any party to the proceeding in respect of whom the consent is sought may apply to the court referred to in subsection (2) for an order requiring or permitting the production.

Venue

(2) The court to which an application under subsection (1) must be made shall be determined in accordance with the following:

1. If the production is with respect to a proceeding before a court, the application shall be made to that court.

2. In the case of any other proceeding, the application shall be made to [*the superior court in the jurisdiction*].

Parties

(3) The [*Attorney General*]/[*or the ministry responsible for the investigation and prosecution of the alleged offence*]/[*relevant police force*], the parties to the proceeding and any other person that the court specifies, on motion or otherwise, are parties to an application under subsection (1).

Decision

- (4) The court shall decide the application in accordance with section 4.

Powers

(5) In making an order requiring or permitting production of a prosecution record, the court may,

- (a) require the person in possession of the prosecution record to remove or obscure such information in the prosecution record as the court may specify, before it may be produced; or
- (b) place conditions on the use, production or further disclosure of the prosecution record by any person to whom or on whose behalf the prosecution record is produced.

(6) An order made under this section authorizing access to or use of a prosecution record does not authorize further disclosure of the prosecution record.

Commentary: If the Attorney General, [or the Ministry Responsible for the investigation and prosecution of the alleged offence], and police if necessary, refuses to consent to a request for production or use of the prosecution record, the person seeking the consent or any party to the proceeding in respect of whom the consent is sought may apply to the court. In many cases, the person who is the subject of the prosecution record will be easily identifiable and should be given notice of the application and be entitled to participate in it at the outset, however there will often be instances where the number of people is such that a requirement that they all be given notice would result in an excessive burden being imposed. The Act therefore provides for the Court to make a determination as to who should receive notice. It is expected that the Crown would give consideration to who should receive notice of the application to allow them to participate in the initial application as a matter of good practice, but if not, the Court hearing the application would have to adjourn the matter to allow for such notice to be given.

Determination of public interest

4. (1) In deciding an application under section 3, the court shall determine whether the public interest in promoting the administration of justice by requiring or permitting access to or use of a prosecution record that is relevant to a proceeding prevails over any public interest that applies in the case in preventing or limiting access to or use of the prosecution record for the purposes of the proceeding.

Relevant factors

(2) The court shall consider the following factors in making the determination referred to in subsection (1):

1. The stage in the proceeding at which the court hears the application.
2. The specific purpose for which the application is made and the anticipated use of the prosecution record in the proceeding.
3. Whether the information contained in the prosecution record is readily available from another source.
4. The role of the following persons in the investigation or prosecution to which the prosecution record relates:
 - i. The party, if any, wishing to produce the prosecution record.
 - ii. Any party to whom or on whose behalf the prosecution record would be produced.
5. The privacy interests of any person who is referred to in the prosecution record.
6. In the case of a child protection proceeding, the best interests of the child who is the subject of the proceeding.
7. Any other relevant factor.

On-going investigation, prosecution

(3) If the investigation or prosecution to which the prosecution record relates is not yet completed, an application for production for the purposes of a proceeding other than a child protection proceeding shall be refused unless, in the court's opinion, special circumstances exist.

Same

(4) If special circumstances are determined under subsection (3) to exist, or if the application for production is made for the purposes of a child protection proceeding in the circumstances described in that subsection, the court shall, in addition to the factors listed in subsection (2), consider,

- (a) the right of an accused person to a fair trial; and
- (b) the stage in the investigation or prosecution at which the court hears the application and whether production of the prosecution record could reasonably be expected to jeopardize the investigation or prosecution.

Commentary: The application is to be decided by balancing the public interest in promoting the administration of justice by providing full access to the prosecution record against the public interest in preventing or limiting access to or use of the prosecution record. The Act does not set out a code. Rather, it lists factors that a court is to consider in exercising its discretion.

Production of the prosecution record is to be refused if a criminal prosecution or investigation has not been completed unless special circumstances are shown or in cases involving child protection proceedings. However, even in such cases, the court is still required to consider the right of an accused to a fair trial and the stage of both the criminal and collateral proceedings.

No new rights

5. (1) Nothing in this Act permits a person to obtain or inspect any record in the possession of the Crown or a police force, if he or she would not otherwise be permitted to do so by law.

Same

(2) Nothing in this Act requires or permits the production of a prosecution record or disclosure of whether a person possesses a prosecution record if,

- (a) the prosecution record is subject to any privilege recognized by law; or
- (b) the production or disclosure is otherwise prohibited or limited by law.

[Crown not bound

6. This Act does not bind the Crown.]

Commentary: The definition of person excludes the Crown and police forces and therefore the restrictions on the use of a prosecution record do not apply to the Crown or

a police force. This section is intended to ensure that, in those jurisdictions in which the Crown is bound by a statute in the absence of a provision to the contrary, the Act is not interpreted to restrict the ability of the Crown or a police force use their own records for such purposes as they deem fit. It is not intended to make an order under section 3 not binding upon the Crown.