

The Tripartite Collaborative Technical Table on the Enforcement and Prosecution of First Nations Laws

Co-Chairs Report: Year Two
May 2022 – May 2023

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Message from the Co-Chairs

To the readers of this report,

As Co-Chairs of the Tripartite Collaborative Technical Table on the Enforcement and Prosecution of First Nations Laws (the “Table”), it is our pleasure to present our second annual report.

We are guided by our mandate to study the ongoing obstacles to the enforcement and prosecution of First Nations laws within Ontario, with the goal of developing concrete and lasting recommendations that will ensure these laws can be consistently and reliability enforced and prosecuted.

We know that many First Nations in the province continue to face urgent realities and crises. This year, as we continued our work to identify the ongoing challenges faced by First Nations within Ontario, these realities were front of mind.

We know that First Nations themselves, with support from Canada and Ontario, where requested, are best positioned to address these realities, but that the success of community-led solutions necessarily depends on First Nations’ being able to pass laws that are consistently enforced.

In response to ongoing gaps, Justice Canada and Ontario’s Ministry of the Attorney General were pleased to have announced pilot funding to support interested First Nations to hire private legal counsel to undertake work related to the prosecution of First Nations laws through 2022-23 and 2023-24 fiscal years. Yet, we recognize that this interim measure is only the beginning, and other immediate and long-term pathways forward are urgently required.

We continued to be humbled in learning from the Elders, First Nations Working Group, and Table representatives who enrich our perspectives and lend guidance towards our collective goal of fulfilling the promise of this Table.

We look forward to continuing this important work with open minds and open hearts.

Jackie Lombardi
Director of Justice, Chiefs of Ontario

Raj Dhir
Executive Director, Indigenous Justice Policy
Indigenous Justice Division, Ministry of the Attorney General of Ontario

Laurie Sargent
Assistant Deputy Minister
Department of Justice Canada

Message from Elder Donna Debassige and Elder Barney Batise

Two years into this important work, we are beginning to see some progress for the communities and leaders who have been calling for change for decades. For First Nations in a position to do so, funding has been made available to hire lawyers to prosecute their laws. That is significant as our laws have not been prosecuted in the colonial courts for many, many years.

This is just a first step. Going forward, we need continued commitment and recognition of our sovereignty. We need governments to listen to our people, our leaders and to the Elders engaged in this work. Our laws are in place to ensure the health and safety of our communities. The restoration of harmony and peace by their consistent and effective enforcement is of the utmost importance.

The answers are in our laws and with our Knowledge Keepers. We have always known this.

The path is long, but we will continue to walk it with purpose and focus.

Work Undertaken in Year Two

What We've Heard

This year, the Table has worked on consolidating what it learned about the challenges and potential solutions regarding enforcement with a view to advancing potential recommendations to the enforcement gaps and to transition its focus towards a study of prosecutions-related obstacles and solutions. The Table heard the following presentations offered by First Nations, federal, and provincial representatives:

- July 14, 2022 – Chiefs of Ontario
- September 23, 2022 – United Chiefs and Councils of Mnidoo Mnising (UCCMM)
- December 15, 2022 – Land Advisory Board and Resource Centre (LABRC)'s level-setting presentation on prosecutions
- February 14, 2023 – Whitecap Dakota First Nation, as well as Saskatchewan Government representatives, were present to discuss different initiatives developed in the province of Saskatchewan to address the lack of enforcement of First Nations laws
- April 17, 2023 – Criminal Law Division of the Ontario Ministry of the Attorney General and the Public Prosecution Service of Canada provided presentations on Crown prosecutions of First Nations laws

On July 14, 2022, in collaboration with the First Nation Working Group (FNWG), Chiefs of Ontario summarized what the Table heard regarding enforcement gaps and potential solutions. Elements including the lack of prosecutions, concerns regarding liability of enforcement officers, questions about the authority to enforce First Nations laws, review of First Nations laws pursuant to Ontario Provincial Police (OPP) policies, and lack of funding were identified as some of the main obstacles to the enforcement of First Nations laws. Potential pathways for

solutions were also identified, including the review of OPP policies, providing more clarity to enforcement officers regarding their liability when enforcing First Nations laws, legislation on liability protections, alternative enforcement mechanisms, ensuring that the *Community and Safety and Policing Act (CSPA)* regulations confirm that enforcement of FN laws is a mandatory police function, and the interim measures brought forward via mandate by Chiefs of Ontario.

On September 23, 2022, the United Chiefs and Councils of Mnidoo Mnising provided a presentation on their By-Law Program, which includes a “Hearing Circle” to process infractions with a restorative justice approach. The Table heard how such alternative initiatives can offer flexible solutions tailored to community-specific needs. There was also a FNWG Roundtable where First Nations representatives provided feedback on enforcement-related recommendations. Members of FNWG raised questions regarding the need for concrete action and the meeting was extended to October 4, 2022 to complete the discussion. At the October meeting, it was confirmed that, in response to one of Chiefs of Ontario interim requests, Ontario and Canada will be co-funding a prosecution pilot for First Nations interested in securing private prosecutors to prosecute infractions to First Nations laws.

At the December 15, 2022 meeting, more details on the prosecution pilot were provided by Ontario. At this meeting LABRC also provided a level-setting presentation on prosecutions to mark the Table’s shift to studying prosecutions, while ongoing work continued on formalizing enforcement-related recommendations. The presentation outlined some of the most salient prosecution challenges and identified potential options to resolve the gaps. Participants agreed that there is no one-size-fits-all approach to prosecutions and that the lack of resources is a common challenge. There remained questions regarding the need for broader consultation and new mandates to develop and advance initiatives to resolve a variety of prosecution issues.

As part of the Table’s interest in identifying practical solutions to enforcement and prosecution challenges, Whitecap Dakota First Nation as well as Saskatchewan representatives were invited on February 14, 2023, to discuss different initiatives developed in Saskatchewan to address the lack of enforcement of First Nations laws. These included the Community Safety Officers Program developed in partnership with Saskatchewan and Canada, and the trilateral Memorandum of Understanding signed by Muskoday and Whitecap Dakota First Nations and Saskatchewan to establish the Trilateral Task Group to find solutions to issues associated with the enforcement of First Nations laws. The proposed amendments to the *Summary Procedure Offences Act* that would enable Saskatchewan First Nations to use the provincial summary convictions procedure were also discussed with a view to inform participants about potential options that could be considered in Ontario.

On April 17, 2023, representatives of both the Criminal Law Division of the Ontario Ministry of the Attorney General and the Public Prosecution Service of Canada attended the Table to share provincial and federal prosecution services’ understanding of existing challenges, experiences, mandates, and limitations regarding the prosecution of First Nations laws. There were

discussions on how both prosecutorial services saw their role going forward with regards to the prosecutions of First Nations laws and supporting the Table's work more generally.

First Nations Working Group

The First Nations Working Group continues to play an instrumental role in guiding the progress of the Table. The FNWG is mandated with bringing forward the concerns and issues from their regions and member nations to help set priorities for the Table and contribute to discussions on recommendations and solutions. This year, the FNWG highlighted various areas of importance, including:

- Closing the enforcement/prosecution gaps as soon as possible
- Restorative justice practices and programming, highlighting an example developed at Asubpeeschoseewagong (Grassy Narrows) First Nation
- Capacity support for First Nations' law development and the revitalization of First Nations laws and legal systems
- Enforcement training available for police and compliance officers
- Ensuring First Nations private prosecutors have the same protections afforded to Crown prosecutors
- Multipronged approach that must be taken to ensure First Nations have access, flexibility, and choice in how and by whom their laws are enforced and prosecuted
- Involvement of Elders and Knowledge Keepers in the prosecution process
- Unique and significant issues experienced by fly-in First Nations who have specific realities and challenges, and significant resource constraints
- Avoidance of a pan-Indigenous approach to address these issues
- Adequate and long-term funding made available to assist First Nations through this process
- Tangible funding and support to implement recommendations
- Development of First Nations Law Registry, highlighting the example of the Akwesasne Law Registry
- Tribunal models and appointment of s.107 Justices of the Peace to hear prosecutions of infractions of First Nations laws on a regional basis

The First Nations Working Group has also continued to meet with the Chiefs of Ontario between Table meetings to help develop agendas and provide input into the trajectory of the Table discussions. During these meetings it was stressed that the Table exercise caution not to develop one-size-fits all solutions, but rather recommendations for mechanisms that are flexible to the unique needs of First Nations, and adequate supports for First Nations to build their capacity as they develop and implement their own legal systems and laws.

Prosecution Pilot

In November 2021, via Resolution 21/37, Ontario Chiefs-in-Assembly mandated Chiefs in Ontario to advocate for various interim solutions to the ongoing enforcement and prosecution gaps, including for the federal and provincial governments take immediate steps to fund First Nations to enforce and prosecute First Nations laws.

In December 2022, the Ministry of the Attorney General - Ontario (“MAG”), in partnership and collaboration with the Department of Justice Canada (“DOJ”), launched a Prosecution Pilot (“Pilot”) in response to this Resolution. The Pilot is funded jointly by MAG and DOJ and operational for the 2022-23 and 2023-24 fiscal years.

Through the Pilot, all interested First Nations within Ontario are encouraged to apply to the Indigenous Justice Division (“IJD”) at MAG to request funding to support the prosecution of their own laws. This funding is specifically intended to support interested First Nations to retain private lawyers to prosecute infractions of First Nations laws. As of the date of this report, IJD has received expressions of interest from 19 First Nations. Applications from five First Nations have been approved. MAG is working closely with the Ontario Court of Justice, providing updates to the Chief Justice, as well as other divisions within MAG and the Ministry of the Solicitor General, to help facilitate the successful implementation of the Pilot.

IJD will be accepting applications for funding, which are reviewed by both MAG and DOJ staff, through to March 2024. To submit an application for the Pilot, or if you have any questions, please contact Sara Greenfield at IJD (sara.greenfield@ontario.ca).

While an important step, the Collaborative Table Co-Chairs recognize that the Pilot is an interim measure only. Throughout the operation of the Pilot, the Collaborative Table will gather information to contribute to the development of sustainable, long-term, and effective solutions to address the prosecution gap in respect of First Nations laws and by-laws.

Other Progress and Updates

The Co-Chairs and support staff have worked collaboratively with all Table representatives to advance the mandate of the Table. In moving this work forward, Indigenous Services Canada, the Ministry of the Solicitor General, Public Safety Canada, several divisions throughout MAG, and various police services have played important roles working with the Table to develop proposed recommendations and potential pathways forward.

Indigenous Services Canada (“ISC”) has presented to the Table on relevant funding opportunities in its purview, including their [Professional and Institutional Development program](#), which is focused on supporting the development of stable and sustainable governance foundations within First Nations. Ron Mavin, Regional Manager, First Nation Governance at Indigenous Services Canada, provided information and a contact at the [Ontario Regional Office](#) for First Nations to discuss how this program could support their law-making work.

Public Safety Canada (“PSC”) has also provided the Collaborative Table with regular updates on the federal government’s work to co-develop legislation that would recognize First Nations policing as an essential service.

The Ministry of the Solicitor General (SolGen) has played a role facilitating conversations between the Co-Chairs, staff, and representatives of the Ontario Provincial Police (OPP), including in support of the Prosecution Pilot. MAG’s Criminal Law Division and Court Services Division have also played roles supporting the Prosecution Pilot as well as several other Collaborative Table initiatives.

Following calls from First Nations Leadership, the OPP has discontinued its use of their “decision tool” related to evaluating the enforceability of First Nations laws. Discussions are ongoing with the OPP on next steps to support the effective and consistent enforcement of First Nations laws and by-laws.

Political Touch Base

On November 8, 2022, Ontario Regional Chief Glen Hare, Deputy Grand Chief Stacia Loft, and Regional Deputy Grand Council Chief Travis Boissoneau met in Toronto with the Honourable Ministers Doug Downey, Michael Kerzner, David Lametti, and Marco Mendicino, along with the Table’s Co-Chairs, to discuss the status of the Table.

During this meeting, Ontario and Canada reaffirmed their political commitment to the ongoing work of the Table to promote the consistent and reliable enforcement of First Nations laws. Further, at this meeting, Ontario and Canada announced the jointly funded Prosecution Pilot. There was also general agreement to continue to meet on a biannual basis, with the next meeting tentatively scheduled for July 2023.

Other Interim Requests

As mandated by Resolution 21/37, the Ontario Chiefs-in-Assembly provided mandates for the Chiefs of Ontario to advocate for Interim Solutions to reduce gaps created by the lack of enforcement and prosecutions while discussions about longer-term solutions are ongoing.

While the Table was able to address an interim request for Canada and Ontario to fund First Nations to enforce and prosecute their own laws through the Prosecution Pilot, COO continues to reiterate their requests to make provincial and/or federal Crown prosecutors available on request by a First Nation; and for the enforcement of First Nations by-laws to be included as a mandatory police function within the new *Ontario Community Safety and Policing Act (CSPA)* regulations.

What's Next

Formalizing Recommendations and Supporting Implementation

Although progress has been made over the past two years at the Table, there remains a great deal of work to be done. This work includes finalizing and formalizing both the enforcement and prosecution recommendations, and developing a plan to support their implementation, in accordance with the Table's Work Plan. Recognizing this, Ontario and Canada have secured funding to ensure this work continues for at least an additional two years.

Enforcement Working Group (MAG)

An Enforcement Working Group was established in early 2023. The Working Group is tasked with identifying potential pathways for supporting the implementation of the enforcement recommendations identified at the Collaborative Table. The Co-Chairs acknowledge that any actions to implement the recommendations of the Collaborative Table are subject to the necessary approvals.

Topics of discussion at the Working Group may include:

- legislative and regulatory options to enhance the enforcement of First Nations Laws, including potential provisions to confirm/clarify authority, address liability concerns, address enforcement responsibility, provide access to alternative enforcement mechanisms such as licence renewals and *Provincial Offences Act* processes
- the development of alternative enforcement mechanisms to enforce First Nations laws and by-laws
- education and training opportunities for police and/or enforcement personnel on the enforcement of First Nations laws
- funding initiatives to support First Nations in their work to revitalize their own laws, legal systems, and enforcement mechanisms
- OPP enforcement policies and Police Orders in relation to First Nation laws
- issues related to Canada's First Nations essential services legislation and the enforcement of First Nations laws

Working Group participants may include representatives from the FNWG, First Nations and First Nations organizations, First Nation and municipal police services, and various ministries and departments from within the provincial and federal governments.

How to get Involved

The Collaborative Table was established with a view to pursuing open, transparent, and collaborative approaches to developing recommendations that address barriers in the enforcement and prosecution of First Nations laws; and to support pathways that lead to the implementation of these recommendations.

If you have questions or are interested in discussing or providing feedback on the Collaborative Table, please feel free to contact the Collaborative Table's Co-Chairs at jackie.lombardi@coo.org, Raj.Dhir@ontario.ca, and Laurie.Sargent@justice.gc.ca.

Thank You

A sincere and heart-felt thank you to the Elders, whose wisdom always brings us back to the people and communities who are at the heart of this work and reminds us that “to do nothing is shameful” when we know that changes are needed. We are most grateful also to the members of the First Nations Working Group who have contributed to our discussions by sharing their priorities, perspectives, and practical experience with a view to serving their Nations and, by extension, enriching the ongoing work of the Collaborative Table. We are also in appreciation of the Collaborative Table members and observers who have shared their views and experiences in order to help the Collaborative Table work towards the consistent and reliable enforcement and prosecution of First Nations laws.