

Independence of Prosecutions

Attorney General as Chief Law Officer of the Crown

Under the province's *Attorney General Act*, the Attorney General (AG) is defined as "her Majesty's Attorney General for British Columbia."¹ The AG has a duty to see that British Columbia's public affairs are conducted in accordance with the law. This includes the administration of criminal justice. The AG has overall superintending authority for the prosecution of alleged offenders.

Prosecutions are Conducted by the Criminal Justice Branch

Historically, the Chief Law Officer of the Crown would attend to all individual prosecutions. Over time, this changed. It became increasingly difficult for provincial Attorneys General to effectively attend to all of their duties and local prosecutors were retained to "administer justice" at the local level.²

In British Columbia, the Criminal Justice Branch (Branch) manages the daily prosecution function on behalf of the AG. Subject to direction from the Assistant Deputy Attorney General for the Branch (ADAG), Crown Counsel have authority to approve criminal and provincial regulatory charges, conduct prosecutions and appeals, and take conduct of private prosecutions.³ Crown Counsel act as agents for the AG when exercising this authority.

Independence of the Attorney General

In supervising prosecutions, the AG must act "independently of political pressures from government" and other external bodies.⁴ Decisions about "whether to institute or discontinue a prosecution are not matters of government policy. The Premier and Cabinet have no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken. These decisions rest solely with the Attorney General, who must be regarded for these purposes as an independent officer, exercising a function that in many ways resembles the functions of a judge."⁵

The AG's independence is "so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched."⁶

The AG may consult with Cabinet and others in government on prosecution-related matters, but must not be directed by anyone in the exercise of his or her criminal law duty.

“Parliament has the right to question and criticize... [but] does not have the right to direct [the AG] in the discharge of [his or her] constitutional duties.”⁷

The Attorney General’s Independence and the Criminal Justice Branch

The independence of the AG flows through to the Branch, the ADAG and Crown Counsel, ensuring that the province’s prosecutors can properly fulfill their quasi-judicial role as ministers of justice.⁸ As ministers of justice, Crown Counsel seek to maintain, promote and defend the common good by:

- protecting fair trial interests;
- assisting the court in its truth-seeking function;
- conducting prosecutions with dignity, objectivity and impartiality;
- exercising restraint in the application of the criminal law; and
- respecting the individualization of justice.

Crown Counsel have considerable discretion in carrying out their duties. Their discretion is an “essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.”⁹

The authority of Crown Counsel stems directly from the powers that constitute the core of the AG’s office. As a result, their discretion as prosecutors is “protected from the influence of improper political and other vitiating factors by the principle of independence.”¹⁰ This means that the exercise of prosecutorial discretion is not subject to review by the courts or other external bodies, except “solely for abuse of process.”¹¹ The independence of Crown Counsel ensures that they “can take the right decision in a case without fear or favour, without being subjected to improper pressure from another source, whether it be the media, politicians, the police, a victim seeking revenge or even a misguided public opinion.”¹²

The “public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals.”¹³ This does not mean that Crown Counsel are not accountable for their decisions. Prosecutors are accountable to their supervisors within the Criminal Justice Branch; to the AG; to the courts if the manner in which they conduct a prosecution proves abusive; and to the provincial Law Society.

The *Crown Counsel Act* Safeguards Independence

The *Crown Counsel Act* establishes the administrative relationship between the AG, the Branch and Crown Counsel. The ADAG has responsibility for the administration of the Branch. The

day-to-day prosecution function is carried out by lawyers who are hired as Crown Counsel.

The Act does not grant the AG, the Branch, or Crown Counsel “independence.” Their independence is constitutionally mandated through the AG’s role as public prosecutor and it pre-existed the Act.

What the Act does do is give practical effect to the principle of prosecutorial independence by mandating transparency. The Act requires that any direction from the AG or Deputy AG in relation to a particular prosecution be set out in writing and published in the Gazette. The Act also requires that any policy directions provided by the AG or Deputy AG be set out in writing. These may be published in the Gazette at the discretion of the ADAG.¹⁴ The publication provisions ensure transparency of the AG’s involvement in prosecutions. Transparency avoids allegations of improper political influence that, even when unfounded, can have significant adverse implications for the AG, for government, and for the public’s perception of justice.¹⁵

As a matter of constitutional convention, the provincial Attorneys General typically confine their involvement in the affairs of the prosecution service to the creation and monitoring of policy and procedure.¹⁶ They do this in recognition of their dual role as AG and members of the provincial Cabinet. The importance of maintaining distance from day-to-day operations has been judicially recognized: “The Attorney-General is...duly assisted by a number of Crown agents or Crown Attorneys, who most of the time perform their tasks without direct consultation with him. In exceptional cases the Attorney General is personally brought in to examine certain files and to advise.”¹⁷

¹ *Attorney General Act*, RSBC 1996, c 22, s 1(2). See also s 2 for an enumerated list of the powers and duties of the AG.

² *R v Nelles*, [1989] 2 SCR 170 at paras 38-39.

³ *Crown Counsel Act*, RSBC 1996, c 87, s 4.

⁴ *Miazga v. Kvello Estate* [2009] SCC 51 at para 46; *Krieger v Law Society of Alberta*, [2002] SCC 65 at paras 30-32.

⁵ Ian Scott, “The Role of the Attorney General and the Charter of Rights” (1986-87) 29 *Criminal Law Quarterly* at 190.

⁶ *Miazga* at para 46.

⁷ John L. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 360.

⁸ *Miazga* at para 47.

⁹ *R v Beare*, [1988] 2 SCR 387 at para 51.

¹⁰ *Krieger* at paras 43-47.

¹¹ *R v Anderson*, [2014] SCC 41 at paras 49-50.

¹² James Hamilton, “Prosecutorial Independence and Accountability” (Strasbourg, France: retrieved [online](#), March 15, 2011): Proceedings of the European Commission for Democracy through Law (Venice Commission) “The Independence of Judges and Prosecutors: Perspectives and Challenges”.

¹³ *Miazga* at para 47.

¹⁴ *Crown Counsel Act*, RSBC 1996, c 87, ss 5-6.

¹⁵ *Vogel v Canadian Broadcasting Corp., Bird and Good* [1982], 3 WWR 97 (BCSC); *Discretion to Prosecute Inquiry; Blackmore v British Columbia (Attorney General)*, [2009] BCSC 1299.

¹⁶ Philip C. Stenning, *Appearing for the Crown* (Brown Legal Publications, 1986) at 312.

¹⁷ *Re Balderstone and the Queen* [1983], MJ No 207 (CA) at para 26.