

## Role of Special Prosecutors

### Historical Background

In 1991, a public inquiry was held in British Columbia that was called the “Discretion to Prosecute Inquiry.” Stephen Owen, Q.C. presided as the Commissioner. The Inquiry arose out of a decision by the Criminal Justice Branch to not prosecute a provincial Cabinet Minister for alleged criminal wrongdoing.

Commissioner Owen recommended that a “special prosecutor” be appointed in all cases where there is a significant potential for real or perceived improper influence in the administration of criminal justice, because of the proximity of the suspect (or someone with a close relationship to the suspect), to the investigation, or the processes involved in charge assessment and prosecution. This recommendation was accepted and given statutory effect through the *Crown Counsel Act*, which explicitly allows for the appointment of a Special Prosecutor under section 7(1).

### Special Prosecutors

Special Prosecutors are appointed where it is considered in the public interest to have legal advice provided to investigators, or decisions made on a prosecution file, by someone who is at arm’s length from the Criminal Justice Branch and the Ministry of Justice.

Special Prosecutors are experienced lawyers in private practice who are not employed by government in the role of Crown Counsel with the Criminal Justice Branch.

There are two main scenarios in which Special Prosecutors may be appointed:

- The police or another investigative agency requests of the Criminal Justice Branch that a Special Prosecutor be made available to provide legal advice during the course of an investigation; or
- A Report to Crown Counsel has been received by the Criminal Justice Branch, and a Special Prosecutor is considered necessary to assess whether charges should be approved and, if so, to conduct the prosecution and any related appeal.

Special Prosecutors are generally appointed for investigations or prosecution files that involve:

- Cabinet Ministers;
- Members of the Legislative Assembly;
- Senior public or Ministry of Justice officials;
- Employees of the Criminal Justice Branch;
- Members of the judiciary; or
- Persons in a close relationship to any of these individuals.

### Appointment Process

Under the *Crown Counsel Act*, the only official with authority to appoint a Special Prosecutor is the Assistant Deputy Attorney General (ADAG), who is the head of the Criminal Justice Branch. Special Prosecutors are appointed on a case-by-case basis at the discretion of the ADAG. The ADAG will consider an appointment where some aspect of an investigation, or prosecution file, carries a significant potential for real or perceived improper influence in the decision making unless a prosecutor from outside the Criminal Justice Branch and Ministry of Justice has conduct of the matter.

The Criminal Justice Branch has a policy in place that guides the ADAG's decision to appoint a Special Prosecutor (SPE 1) and defines the circumstances in which the appointment will be made public.

Special Prosecutors are appointed from a list of experienced lawyers in private practice that is maintained by the ADAG. These lawyers are approved for the list after a review by both the ADAG and the Deputy Attorney General. The review takes into consideration a records search that is first conducted by the Law Society of British Columbia, with the consent of the lawyer. This search will reveal information that might exist about complaints and/or discipline involving the lawyer, so that the ADAG and the Deputy Attorney General are fully informed. Once someone is approved to be on the list of Special Prosecutors, his or her status is reviewed every five years.

Prior to a Special Prosecutor being appointed, the Criminal Justice Branch reviews the potential appointment with counsel, for the purpose of ensuring that there is no conflict of interest or adverse public perception about the appointment. The Special Prosecutor is required to disclose any engagement or involvement, of a professional or private nature, that might reasonably give rise to a perception of compromised objectivity or impartiality.

## Mandate of a Special Prosecutor

When the ADAG appoints a Special Prosecutor, the Prosecutor is provided with a written mandate that defines his or her role and responsibilities. Special Prosecutors exercise their discretion in providing legal advice to investigators, or conducting a prosecution, independent from government and the Criminal Justice Branch.

When providing legal advice to investigators, a Special Prosecutor does not control, supervise, or direct the investigation. It is up to the investigators, once they have received any advice, to independently decide whether and how they should conduct the investigation; who should be investigated; and what evidence to gather.

## Accountability

When exercising discretion on a prosecution file, including the decision to approve criminal or regulatory charges and initiate a prosecution, Special Prosecutors must apply the policies of the Criminal Justice Branch. However, they apply these policies independent of the Branch and their decisions on a particular matter are final, subject only to direction that may be provided in writing by the ADAG, the Deputy Attorney General, or the Attorney General. Where written direction is provided to a Special Prosecutor, it must be published in the Gazette.

When Special Prosecutors are working on a particular matter, they are expected to keep the ADAG informed of material developments in the file, and to do so in a timely way. This includes things such as:

- the approval of charges;
- the scheduled dates for a preliminary inquiry or trial;
- proposed plea resolutions;
- a decision to stay or terminate the proceedings; or
- in the event of an acquittal, any decision to initiate an appeal.