

Policy:

Guiding Principles

Policy Code:

GUI 1

Effective Date:

May 20, 2022

Cross-references:

Authority for Prosecutions

The Sovereign has a constitutional right and obligation to maintain peace and prosecute crimes. The duty to prosecute offences flows directly and exclusively to the Attorney General (AG), as the chief law officer of the Crown. As such, the AG has to “stand alone” acting “independently of political or other external influences.”¹

The AG is ultimately responsible for all prosecutions within provincial jurisdiction and must fulfill this constitutional role in an independent and judicial manner. The AG’s prosecutorial function is delegated to Crown Counsel, who exercise the prosecution function on the AG’s behalf as their lawful agents. The AG superintends this function and remains accountable to the Legislature for all exercises of prosecutorial authority.

Prosecutorial discretion arises from and is circumscribed by this historical, legal, and constitutional context.

Independence in Prosecutions

As the AG’s responsibility for prosecutions emanates directly from the sovereign, not from government, the AG must exercise this discretion independently of cabinet:

A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive ...²

In supervising prosecutions, the AG must act “independently of political pressures from government” and other external bodies.³ Decisions about “whether to institute or discontinue a prosecution are not matters of government policy. These decisions rest

¹ Morgan, D “Controlling Prosecutorial Powers – Judicial Review, Abuse of Process and Section 7 of the Charter” (1986-87) 29 Crim LQ 15 at para 19

² *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 45

³ *Miazga v Kvello Estate*, 2009 SCC 51 at para 46; *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 30-32

solely with the AG, who must be regarded for these purposes as an independent officer, exercising a function that in many ways resembles the functions of a judge.”⁴ The AG’s independence is “so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched.”⁵

In conducting prosecutions, Crown Counsel act as the AG’s agents. Their authority stems directly from the powers that constitute the core of the AG’s office. The independence of the AG flows through to the Assistant Deputy Attorney General (ADAG), the BC Prosecution Service (BCPS), which is the Criminal Justice Branch of the Ministry of Attorney General, and Crown Counsel. The role of Crown Counsel is quasi-judicial.⁶ They are ministers of justice:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing...⁷

The prosecutor’s role as “minister of justice” involves three principal components:

The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus – either negative or positive – towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.⁸

Crown Counsel should be vigilant in challenging biases and stereotypes that can undermine the equal and impartial delivery of justice. Crown Counsel’s independence and dispassionate objectivity is critical to promoting public safety and the rule of law. In turn, Crown Counsel should respect the roles of other justice system participants. Crown Counsel should assume that the trial will unfold before an impartial and unbiased judge or jury acting in accordance with the law and should not usurp the role of the judge or jury by substituting their own subjective view of the ultimate weight or credibility of evidence for those of the judge or jury.

Independence from Police

Within the justice system, police and prosecutors make their decisions separately and independently from each other and from all outside influence. The relationship between

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

5 *Miazga v Kvello Estate*, 2009 SCC 51 at para 46; *Krieger v Law Society of Alberta*, 2002 SCC 65

6 *Miazga v Kvello Estate*, 2009 SCC 51 at para 47

7 *R v Boucher* (1954), 110 CCC 263 (SCC) per Rand J.

8 *R v Regan*, 2002 SCC 12 per Binnie J. at para 156, dissenting on another point

police and Crown Counsel is one of “mutual independence” which “provides a safeguard against the misuse of both investigative and prosecutorial powers and can ensure that both investigations and prosecutions are conducted more thoroughly and fairly”.⁹ Crown Counsel must remain objective in their dealings with police and in assessing charges.

Guarding the mutual independence of the role of investigator and prosecutor promotes objectivity and the rule of law. In discharging their respective duties, both the police and Crown Counsel have a “discretion that must be exercised independently of any outside influence”.¹⁰

Neither the AG nor the BCPS has any authority to conduct or direct investigations. It is the police, in the independent exercise of their discretion, who are authorized and required to conduct investigations into alleged criminal wrongdoing and to decide if an investigative file should be referred to the BCPS for charge assessment and possible prosecution. Investigators independently decide whether and how they should conduct an investigation, who should be investigated, what evidence to gather, and whether to seek legal advice during an investigation.¹¹ Before becoming involved in a case, Crown Counsel must receive from an investigative agency either a request for legal advice or a Report to Crown Counsel.

Independence and the Rule of Law

The “rule of law” is a foundational principle of fundamental justice. It requires that “all persons, institutions and entities, public and private ... are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.”¹² It requires that everyone is equally subject to the law, and it precludes arbitrary discrimination. It protects individuals from arbitrary state action and promotes a stable, predictable, and ordered society.¹³

The principle of prosecutorial independence is critical to maintaining the rule of law. 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.”¹⁴ In its application, the principle of prosecutorial independence promotes public confidence that the criminal justice will be administered impartially and free from partisan political concerns.

⁹ *Smith v Ontario (Attorney General)*, 2019 ONCA 651 at para 86

¹⁰ *R v Beaudry*, 2007 SCC 5 at para 48

¹¹ *R v Metropolitan Police Commissioner ex parte Blackburn*, [1968] 1 All ER 763 (CA)

¹² United Nations Security Council, “The rule of law and transitional justice in conflict and post-conflict societies”, S/2004/616 at para 6

¹³ *Reference re Secession of Quebec*, 1998 2 SCR 217 at para 70

¹⁴ 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”

Crown Counsel must operate within the rule of law, and protect the integrity of the criminal justice system, by exercising their discretion fairly, impartially, in good faith, and in accordance with the highest ethical standards. Political, personal, and private considerations must not affect any exercise of prosecutorial discretion. Crown Counsel's "obligations of objectivity and independence ... is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power". Along with judicial independence, the independence of Crown Counsel is "one of the more important checks and balances of our criminal justice system".¹⁵

Crown Counsel are accountable to their supervisors within the BCPS; to the AG; to the courts before which they appear, for their tactics in court or for abuse of the court's process; and to the provincial Law Society in its governance of the standards of the legal profession. As the AG's agents, Crown Counsel cannot irrevocably bind the AG by the exercise of their discretion.¹⁶

Crown Counsel Act

The *Crown Counsel Act*¹⁷ gives meaningful effect to the principle of prosecutorial independence. Under the *Crown Counsel Act* the BCPS is responsible for approving and conducting, on behalf of the Crown, all criminal and regulatory prosecutions and appeals in British Columbia that do not fall within the jurisdiction of the Government of Canada. The BCPS is administered by the ADAG, who is designated as the AG's lawful deputy for purposes of the *Criminal Code*.¹⁸ The ADAG designates or appoints Crown Counsel, *ad hoc* legal counsel, and special prosecutors to approve and conduct prosecutions and appeals, on behalf of the Crown.

The *Crown Counsel Act* also governs the relationship between the BCPS and government through the AG and provides the BCPS with significant independence in the exercise of its mandate. It imposes transparency by requiring that any directions from the AG or Deputy Attorney General (DAG) on specific prosecutions be set out in writing and published in the Gazette. Any policy directions provided by the AG or DAG must also be set out in writing and may be published in the Gazette at the discretion of the ADAG. Transparency avoids allegations of improper political influence that, even when unfounded, can have significant adverse implications for the AG, for the government, and for the public's perception of justice.¹⁹

¹⁵ *R v Regan*, 2002 SCC 12, per Binnie J at para 157, dissenting on another point

¹⁶ *R v Nixon*, 2011 SCC 34

¹⁷ *Crown Counsel Act*, RSBC 1996, c.87

¹⁸ *Crown Counsel Act*, RSBC 1996, c.87 section 3(2)

¹⁹ *Vogel v Canadian Broadcasting Corp., Bird and Good* [1982], 3 WWR 97 (BCSC); *Report of Commissioner Stephen Owen on the Discretion to Prosecute Inquiry*, 1990; *Blackmore v British Columbia* (Attorney General), 2009 BCSC 1299

The *Crown Counsel Act* also protects politically sensitive prosecutions from improper political interference by providing the ADAG with the authority to appoint a Special Prosecutor. Special Prosecutors make their decisions on prosecution files independent of the BCPS and outside the immediate supervisory authority of the AG. The AG, the DAG, or the ADAG may give a direction to a special prosecutor in respect of any matter within the mandate of the special prosecutor, but that direction must be given in writing and be published in the Gazette.

The *Crown Counsel Act* also provides the BCPS a measure of independence and autonomy with respect to public communications. When the ADAG determines it is in the public interest to release a public statement about a decision in a high-profile case, the BCPS may release a Clear Statement.

Purpose of Policy

Independent, fair, and effective prosecutions are essential to the rule of law. The justice system is enhanced by well-developed policy guidelines, which assist Crown Counsel in the difficult decisions that they must make in the public interest.

The Crown Counsel Policy Manual (the “Manual”) provides both general and situation-specific guidance to Crown Counsel in the exercise of their discretion, including on fundamental prosecution considerations such as charge assessment, alternative measures, bail, and resolution discussions. Crown Counsel must regularly make these independent and discretionary decisions in order for the justice system to operate fairly and effectively. When Crown Counsel make principled decisions in accordance with the policies set out in this Manual, regardless of the outcome, the BCPS and the ADAG will support their decisions.

The Manual is a public document. Its publication advances the goal of transparency. It helps to explain how prosecution services are delivered and how prosecutors exercise their constitutional independence in the public interest on individual cases.

The Manual does not have the status of law. It does not in any way override the *Criminal Code*, *Canadian Charter of Rights and Freedoms*, or any other applicable legislation and it is not intended to provide legal advice to members of the public or create any rights enforceable at law in any legal proceeding.

Principled Decision Making

The primary purpose of policy is to assist Crown Counsel in their decision-making on fundamental issues. Specific policies reflect appropriate public interest considerations and provide a framework for the exercise of discretion. Policies also reflect the jurisprudence governing the extent and proper exercise of prosecutorial discretion.

Crown Counsel should seek further advice whenever appropriate. Even very senior Crown Counsel will seek the counsel of colleagues and, when required by policy, the approval of supervisors. Developments in legislation and jurisprudence, technology, court rules, and procedures mean that the legal landscape is always changing. Referring to policy can be particularly helpful in unfamiliar areas of practice or procedure.

Policy provides for accountability to the AG and a consistent and principled application of prosecutorial discretion. Ultimately its goal is to enhance public confidence in the justice system.

On the other hand, the proper exercise of prosecutorial discretion neither requires nor countenances the rigid application of policy to every decision. Policy provides guidance, but it cannot and should not dictate the result in every case. Crown Counsel need to make decisions that fit the unique circumstances of each case.

Policies may require the consideration of specific public interest factors or require that senior members of the BCPS are consulted or give approval in certain situations. However, policy should not completely fetter Crown Counsel's exercise of prosecutorial discretion. For this reason, policies rarely contain mandatory directives. Where they do, they normally leave room for the consideration of exceptional factors. It is always open to Crown Counsel to seek consent of the ADAG to depart from policy if, in the exercise of their prosecutorial discretion, Crown Counsel consider it necessary to ensure a just result.

Prevention of Wrongful Convictions

The BCPS recognizes that, despite established evidentiary and procedural safeguards within the criminal justice system, wrongful convictions can occur. The safeguards include the presumption of innocence, the high burden of proof on the Crown, and the independence of the police, Crown Counsel, and courts. The guarantees of the *Charter of Rights and Freedoms*, such as the right of an accused to full disclosure by the Crown, further prevent individuals from being wrongly convicted.

Although they should always be mindful of the factors that can contribute to wrongful convictions, Crown Counsel should never hesitate to prosecute an appropriate case or press it to its legitimate strength. Crown Counsel protect and promote the public interest by conducting firm but fair prosecutions.

Leading Causes of Wrongful Convictions

Research shows that wrongful convictions can result from a variety of possible factors, either working alone or in concert. In the conduct of every prosecution, Crown Counsel should keep these factors squarely in mind. The leading causes of wrongful convictions include problematic evidence, such as:

- mistaken eyewitness identification: well-meaning, honest, and credible eyewitnesses can be wrong
- faulty expert evidence and forensics: tainted, tailored, or unsubstantiated expert evidence, couched in scientific terms and language, and based on unreliable facts or debunked science
- false confessions and guilty pleas: some accused individuals confess or plead guilty despite being factually innocent
- dishonest in-custody informer witnesses: reliance on their evidence poses unique risks that are specifically addressed in the *In-Custody Informer Witnesses* (INC 1) policy

Crown Counsel “tunnel vision”, the tendency to focus on a particular theory of a case and dismiss or undervalue evidence which contradicts that theory,²⁰ has also been identified as a contributing cause of wrongful convictions. Independence from police, objectivity in the assessment of evidence, and principled decision making, as informed and guided by BCPS policy, helps Crown Counsel to avoid tunnel vision. Therefore, when properly executed, the role of Crown Counsel protects against wrongful conviction.

Miscarriages of justice occur regardless of gender, race, age, or socioeconomic status of an accused. Nevertheless, Crown Counsel must be aware of, acknowledge, and take reasonable steps to address systematic biases, prejudices, and stereotyped assumptions, which can exacerbate inequality, and result in unfair prosecutions and wrongful convictions.

In addition to working to prevent wrongful convictions, Crown Counsel must remain vigilant even after a prosecution is ended. If there is a reasonable basis for concluding that a miscarriage of justice may have occurred, the BCPS will take the necessary steps to remedy the matter.

Indigenous Persons

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons (First Nations, Métis, and Inuit), whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous persons.²¹

20 Heads of Prosecution Report, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch2.html, FPT Heads of Prosecution Committee, 2018.

21 *R v Ipeelee*, 2012 SCC 13

The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.²²

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for any charge assessment involving an Indigenous person as a victim or potential accused. These consequences “must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.”²³

Research suggests Indigenous persons suffer a disproportionate number of wrongful convictions due to various cultural and socioeconomic reasons.²⁴ At every stage of the criminal justice process, Crown Counsel should consider the challenges Indigenous persons face in their interactions with justice system and how these challenges can manifest in wrongful convictions.²⁵

Meaning of Phrases

Within the Manual, the term “Indigenous” refers to First Nations, Métis, or Inuit people of Canada. It is used in place of the term “Aboriginal,” which is used in various statutes including the *Criminal Code* and is consistent with the *BC Declaration of the Rights of Indigenous Peoples Act*, SBC 2019, c. 44.

Further, within the Manual, there is a very important distinction to be drawn between the words “should” and “must”:

“Crown Counsel should” means that Crown Counsel will ordinarily follow the policy guidelines, unless they determine the interests of justice require a decision inconsistent with that policy guideline

“Crown Counsel must” constitutes a direction of the Assistant Deputy Attorney General (ADAG) under section 4(3) of the *Crown Counsel Act*

²² *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016

²³ *Ewert v Canada*, 2018 SCC 30 at paras 57 and 58; *R v Barton*, 2019 SCC 33 at paras 198-200

²⁴ Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada” *Flanders Law Journal* 17, 2015 at para 224; Amanda Carling, *A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions*, 2017 64 CLQ 415

²⁵ *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, c 10, s 3: FPT Heads of Prosecution Committee, 2018 (www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch10.html#ch10_3)