

## ***Balancing Independence with Accountability***

### ***A Legal Framework for the Exercise of Prosecutorial Discretion in British Columbia***

#### **Executive Summary**

**November 2014**

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#### **The Role of the Attorney General as Chief Law Officer of the Crown –**

- the Attorney General “superintends” all matters connected with the administration of criminal justice in British Columbia that are not within the jurisdiction of the federal government: *Attorney General Act*, s.2(c).
- this includes the prosecution of criminal and regulatory offences.
- in carrying out these responsibilities, the Attorney must act independently.
- this independence is “so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched”: *Miazga v. Kvello Estate*, 2009 SCC 51, para.46.

#### **The Importance of Independence –**

- the Attorney must “act independently of political pressures from government” and other external bodies: *Miazga*, para.46; *Krieger v. Law Society of Alberta*, 2002 SCC 65, paras.30-32.
- doing so ensures that the Attorney’s agents, Crown counsel, can properly fulfill their *quasi*-judicial role as ministers of justice: *Miazga*, para.47.
- the role of minister of justice is governed by fundamental principles, each of which seeks to maintain, promote and defend the common good.
- these principles include: 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.

#### **Carrying Out the Prosecution Function –**

- in British Columbia, the Attorney General “superintends” the prosecution function: *Attorney General Act*, s.2(c).
- the Criminal Justice Branch administers the prosecution service under the leadership of the Assistant Deputy Attorney General.
- the Branch is responsible for approving and conducting all prosecutions in British Columbia that are not within the jurisdiction of the federal prosecution service, as well as appeals and ancillary proceedings arising out of these same prosecutions: *Crown Counsel Act*, s.2.
- Crown counsel are appointed to represent the Attorney General before the courts on prosecution files. Subject to direction from the Assistant Deputy Attorney General, Crown counsel have authority to approve criminal charges, conduct prosecutions and appeals, and take conduct of private prosecutions: *Crown Counsel Act*, s.4.

- the prosecutor administers justice at the local level and acts as “agent for the Attorney General”: *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at 191.
- the constitutionally-entrenched independence of the Attorney General attaches to the Assistant Deputy Attorney General and to Crown counsel.
- independence advances the public interest “by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi-judicial* role as “ministers of justice””: *Miazga*, para.47.
- the independence of Crown counsel does not mean they are not accountable for their decisions.
- prosecutors are accountable to their supervisors within the Ministry of Justice; to the Attorney General; to the courts if the manner in which they conduct a prosecution proves abusive; and to the provincial Law Society.
- if they act with malice, Crown counsel can be sued for malicious prosecution.

### **The Attorney’s Independence Finds Form in Prosecutorial Discretion –**

- Crown counsel have considerable discretion in carrying out their prosecution 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”: *R. v. Beare* (1988), 45 C.C.C. (3d) 57 (S.C.C.), at 76.
- discretion that goes to the “core” of a prosecutor’s responsibilities is known as “prosecutorial discretion”. This includes (but is not limited to), the discretion to initiate criminal charges; enter a stay of proceedings; accept a guilty plea to a lesser charge; withdraw from criminal proceedings; and take control of a private prosecution: *Krieger*, paras.43-47; *R. v. Nixon*, 2011 SCC 34.
- prosecutorial discretion “constitutes an indispensable device for the effective enforcement of the criminal law”: *Sriskandarajah v. United States of America*, 2012 SCC 70, para.[27].
- the authority of Crown counsel to exercise prosecutorial discretion emanates directly from the powers that “constitute the core of the Attorney General’s office”. As a result, it is “protected from the influence of improper political and other vitiating factors by the principle of independence”: *Krieger*, paras.43-47.
- independence ensures that the prosecutor “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”: James Hamilton, “Prosecutorial Independence and Accountability”, March 2011.
- independence means that exercises of prosecutorial discretion are not subject to review by the courts or other external bodies, except in rare circumstances. Nor are prosecutorial authorities “bound to provide reasons for their decisions, absent evidence of bad faith or improper motives”: *Sriskandarajah*, para.[27].
- the decisions of Crown counsel on core prosecution responsibilities can be reviewed by the criminal courts only for abuse of process. To warrant review, there must be conduct that is “egregious and seriously compromises trial fairness and/or the integrity of the justice system”: *R. v. Anderson*, 2014 SCC 41, at paras.49-50.

- independence also means that Criminal Justice Branch policies or directives which seek to condition prosecutorial discretion will likely be unlawful if they fetter discretion in its entirety: *R. v. Catagas* (1978), 38 C.C.C. (2d) 96 (Man.C.A.).
- unless otherwise mandated by law, prosecution policies established by the Criminal Justice Branch, or by the Attorney General, cannot direct that Crown counsel always approve criminal charges or take the same position on sentencing for a specific category of offences, irrespective of individual circumstances.
- prosecutorial discretion must be available to Crown counsel on a case-by-case basis. 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”: *Miazga*, para.47.

#### **The *Crown Counsel Act* Codifies and Safeguards Independence –**

- the administrative relationship between the Attorney General, the Criminal Justice Branch and Crown counsel is defined with reference to the *Attorney General Act* and the *Crown Counsel Act*.
- this legislation does not alter the relationship between the Attorney and his or her agents as established at common law.
- historically, the Chief Law Officer of the Crown would attend to all individual prosecutions. The appointment of Crown prosecutors “arose from the increasing difficulty for the Attorney General to attend effectively to all of his duties”: *Nelles*, at 191. Prosecutors were necessary to “administer justice” at the local level: *Nelles*, at 191.
- in British Columbia, the *Crown Counsel Act* facilitates the administration of justice at the local level.
- at the same time, it does not take away from the Attorney’s ultimate authority for the prosecution function. The Attorney retains supervisory authority and is accountable to the Legislature for the conduct of Crown counsel. The “power to prosecute is that of the Attorney General ...”: *R. v. Luz*, [1991] O.J. No.1996 (High Ct.), at para.25.
- in a supervisory capacity, the Attorney maintains regard for overall prosecution policy.
- the Attorney is also entitled to be told in advance of major or difficult prosecutions so that, should the need arise, the Attorney might exercise the ultimate power of direction in the public interest.
- the *Crown Counsel Act* contains publication provisions for directions provided by the Attorney General or Deputy Attorney General to the Criminal Justice Branch. Section 5 mandates that directions on specific prosecutions or appeals be published in the *Gazette*. Section 6 is permissive. Directions provided in respect of Criminal Justice Branch policy or its administration can be published at the discretion of the Assistant Deputy Attorney General.
- the *Crown Counsel Act* does not give the Attorney, the Criminal Justice Branch and/or Crown counsel “independence”. Their independence is constitutionally mandated through the Attorney’s role as public prosecutor and pre-existed the *Crown Counsel Act*.

- nor does the *Act* circumscribe the Attorney's prerogative powers as Chief Law Officer of the Crown. Rather, it facilitates transparency in accordance with recommendations made in 1990 by the Commissioner of British Columbia's *Discretion to Prosecute Inquiry*, and gives statutory recognition to a long-standing convention in Canada, namely, that the Attorney General does not involve him or herself in the day to day operations of the prosecution service.
- except in extraordinary circumstances, the provincial Attorneys General have confined their intervention in the affairs of the prosecution service almost exclusively to the creation and monitoring of policy and procedure: Philip C. Stenning, *Appearing for the Crown* (Brown Legal Publications, 1986), at 312.
- they have done so in recognition of the fact that they play a dual role – Attorney General and member of the provincial Cabinet. Unlike the Attorney, the prosecutor “is free of the external pressure and influence from groups or individuals who might be tempted for their own ends, well-meaning or nefarious, to pervert the course of justice”: Manning, M., “*Abuse of Power by Crown Attorneys*”, Law Society of Upper Canada Special Lectures, 1979 (Toronto: De Boo, 1979), at 578-79.
- the importance of maintaining distance from daily operations has been judicially recognized: “The Attorney-General is the chief accusatorial officer in the province under our criminal system. He works – 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”: *Re Balderstone and the Queen* (1983), 8 C.C.C (3d) 532 (Man.C.A.), at 538, emphasis added.
- the publication provisions of the *Crown Counsel Act* safeguard the Attorney's independence.
- they effect transparency in directions provided by the Attorney and support public confidence in the administration of justice. Transparency avoids allegations of improper political influence that, even when unfounded, can have significant adverse implications for the Attorney, for government and for the public's perception of justice: *Vogel v. Canadian Broadcasting Corp., Bird and Good*, [1982] 3 W.W.R. 97 (B.C.S.C.); *Discretion to Prosecute Inquiry*; *Blackmore v. British Columbia (Attorney General)*, 2009 BCSC 1299.
- the “rule of law in a democracy requires the public's ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of our system can cripple it. Perception becomes reality when suspicion of injustice is allowed to fester ... “: *Discretion to Prosecute Inquiry*, Commissioner's Report (Stephen Owen), at 6.

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**Ministry of Justice**