

# INDEPENDENCE OF THE ATTORNEY GENERAL IN CRIMINAL MATTERS

*“Freedom and independence form my character.”*

- Mustafa Kemal Atatürk (1881 - 1938)

## Foundation

The role of the Attorney General in the prosecution of crime derives from the Royal Prerogative. In *R. v. Wilkes* Chief Justice Wilmot of the Court of Common Pleas explained the constitutional basis for this role:

By our Constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society. As indictments and informations, granted by the King’s Bench, are the King’s suits, and under his control; informations, filed by His Attorney General are most emphatically his suits, because they are the immediate emanations of his will and pleasure.<sup>1</sup>

Since then there has been a steady expansion of the responsibilities of the Attorney General.

All decisions to prosecute, terminate proceedings or launch an appeal must be made in accordance with established legal criteria. Two important principles flow from this proposition. First, prosecution decisions may take into account the public interest,<sup>2</sup> but must not include any consideration of the political implications of the decision. Second, no investigative agency, department of government or Minister of the Crown may instruct pursuing or discontinuing a particular prosecution or undertaking a specific appeal. These decisions rest solely with the Attorney General (and his or her counsel). The Attorney General must for these purposes be regarded as an independent officer, exercising responsibilities in a quasi-judicial manner, similar to that of a judge.

The absolute independence of the Attorney General in deciding whether to prosecute and in making prosecution policy is an important constitutional principle in England, Canada and throughout the Commonwealth. As the Supreme Court stated in *Law Society of Alberta v. Krieger*<sup>3</sup>: “It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial

decisions.” In 1925, Viscount Simon, Attorney General of England, made this oft-quoted statement:

I understand the duty of the Attorney-General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney-General, as head of the Bar, is satisfied that the case for prosecution lies against him. He should receive orders from nobody.<sup>4</sup>

However, it is quite appropriate for the Attorney General to consult with Cabinet colleagues before making significant decisions in criminal cases. Indeed, sometimes it will be important to do so. The proper relationship between the Attorney General and Cabinet colleagues (and, thus, between Crown counsel and government departments) was best described by the Attorney General of England, Sir Hartley Shawcross (later Lord Shawcross) in 1951:

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.

In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.<sup>5</sup>

This statement, often referred to as the “Shawcross principle”, has been adopted by federal and provincial Attorneys General in Canada.

In dealing with a case which has been referred to him, the Attorney General of Newfoundland and Labrador is unquestionably entitled to obtain information and advice from whatever source he sees fit, including his colleagues in Cabinet.<sup>6</sup> The course of action which he adopts in particular cases must, however, in the last analysis be his decision. The Attorney General does not act on directions from his colleagues, other members of the House of Assembly or anyone else in discharging his duties in the enforcement of the law. On the other hand he must, of course, be prepared to answer in the House for what he does.<sup>7</sup> These principles are well known and established not only in all provinces of Canada, but in the United Kingdom and elsewhere where the system of Parliamentary democracy exists.<sup>8</sup>

As regards the decision whether or not to institute public prosecutions the Attorney General acts in a quasi-judicial capacity, and does not take orders from the government that he should or should not prosecute in particular cases. In political cases, e.g., sedition, he may seek the views of the appropriate ministers, but he should not receive instructions.<sup>9</sup>

Expressions of these principles have not, however, been confined to Attorneys General. The judiciary has supported them<sup>10</sup>, as have leading authorities on the role of the Attorney General.<sup>11</sup>

Although the Attorney General can become involved in decision-making in relation to individual criminal cases, such a practice would leave the Minister vulnerable to accusations of political interference. Accordingly, it is traditional to leave the day-to-day decision-making in the hands of the Attorney General’s Agents (the Crown Attorneys). The Minister is entitled to be advised on the status of all cases, including high profile or sensitive cases. He is entitled to receive reports on the handling of a particular case

and may request such information where a related question has arisen in the House of Assembly. Ultimately the Attorney General is entitled to make a decision in individual cases, but for the reasons given it should be a rare event involving a case of significant importance to the public interest.

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<sup>1</sup> (1768), 4 Burr 2527; 97E.R. 123 at p.125; more recently see *R v. Charlie* (1998), 126 C.C.C. (3d) 513 (B.C.C.A.) at para 32.

<sup>2</sup> See also in this Guide Book “The Decision to Prosecute”, respecting the test to be applied when deciding to institute or continue criminal proceedings.

<sup>3</sup> [2002] SCC 65.

<sup>4</sup> L.L.J. Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 215.

<sup>5</sup> U.K., H.C. Debates, vol. 483, cols. 683-84, (29 January 1951).

<sup>6</sup> Canada, H.C. Debates, vol. 4 at 3881 (17 March 1978).

<sup>7</sup> It is an important function of the Director of Public Prosecutions to ensure that the Attorney General is well briefed in this regard.

<sup>8</sup> The statement was attached as an appendix to Canada, Senate Debates, 28 Elizabeth II at 126 (18 October 1979). See also 110-115.

<sup>9</sup> Canada, Senate Debates, 28 Elizabeth II at 113 (18 October 1979).

<sup>10</sup> *R. v. Smythe* (1971), 3 C.C.C. (2d) 98 at 110 and 112, aff'd at 122, further aff'd by the Supreme Court of Canada at 3 CCC (2d) 366, esp. at 370; *Gouriet v. Union of Post Office Workers*, [1977] 3 All E.R. 70 (H.L.); *Re Saikaly and the Queen* (1979), 48 CCC (2d) 192 at 196 (Ont. C.A.); *Re M and The Queen* (1983), 1 CCC (3d) 465 at 468 (Ont H.C.); *R. v. Harrigan and Graham* (1976), 33 C.R.N.S. 60 at 69 (Ont. C.A.); *The Royal Commission on Civil Rights in the Province of Ontario* (Chief Justice McRuer, Chairman) (1968) Report No. 1 at 933-4; *Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police* (Mr. Justice D.C. McDonald, Chairman) (1981) at 509.

<sup>11</sup> J. L.J. Edwards, *Law Officers of the Crown*, supra, note 4; J. L.J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell), 1984); P.C. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986), esp. at 290-300; *Royal Commission on the Donald Marshall, Jr Prosecution*, vol V., “Walking the Tightrope of Justice: An Examination of the Office of the Attorney General”, a series of opinion papers prepared by J.L.J. Edwards (1989), esp. at 128-146;

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Law Reform Commission of Canada, Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), esp. 8-14.