

# Crown Attorney's Independence and Accountability in Decision Making

## **Introduction**

The independence of the Attorney General, which is an integral feature of a parliamentary democracy, is firmly entrenched in our legal system, widely respected, and carefully safeguarded.

Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown Attorneys throughout Newfoundland and Labrador.

Crown Attorneys exercise their independence as representatives of the Attorney General of Newfoundland and Labrador. Accordingly, the “*independence*” of Crown Attorneys is a delegated independence.

Crown Attorneys are obliged to make decisions in accordance with the policies of the Attorney General in this Guide Book, and they act under the direction of Senior Crown Attorneys, who are in turn responsible to the Assistant Deputy Minister (Criminal Division) also known as the Director of Public Prosecutions (DPP). However, Crown Attorneys retain a significant degree of discretion in individual cases.<sup>1</sup>

Crown Attorneys, like the Attorney General, are accountable for their decisions. Since the Attorney General is accountable to the House of Assembly and the public<sup>2</sup> for decisions made in his or her name, this may mean that the Attorney General (either personally, or through the DPP), may provide Crown Attorneys with instructions in a particular case, though such situations would be relatively rare.<sup>3</sup>

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<sup>1</sup> Indeed some courts have indicated that policies that completely remove Crown counsel's discretion are improper: see *R. v. Catagas* (1977), 38 C.C.C. (2d) 296 (Man. C.A.); *R. v. Wood* (1983), 6 C.C.C. (3d) 478 (N.S.S.C., Appeal Division).

<sup>2</sup> The Attorney General and Crown Attorneys may take steps to explain decisions to the public, in order to promote public confidence in the administration of justice: see materials in this Guide Book regarding “[Communications with the Media](#)”. Canada, Working Paper 62 (1990) at pp. 16-17, 53-59. See also *Vasta v. Clare* (2002), 133 A Crim R. 114 (Qld. S.C.).

<sup>3</sup> See the discussion in [Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor](#), Ottawa: Law Reform Commission of

Despite exercising a significant degree of independence, Crown Attorneys will engage in consultations.<sup>4</sup> Prosecutorial discretion is not exercised in a vacuum. The exercise of responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators. But, to be clear, the principle of independence means that the Attorney General does not take instructions as to how to exercise discretion. Similarly, Crown Attorneys do not take instructions as to how to proceed, except from those in the line of authority leading to the Attorney General, namely, the Senior Crown Attorney, the DPP and the Deputy Minister of Justice (Deputy Attorney General).

### **Statement of the Policy**

Crown Attorneys are obliged to exercise independent judgment in making decisions. Because their decision-making powers are delegated to them by the Minister of Justice in his or her capacity as Attorney General, Crown Attorneys are subject to the same constraints faced by the Attorney General personally: they are accountable for their decisions, and they must consult where required. Prosecutorial independence is not a license to do as one wishes, but to act as the Attorney General personally would and should act.

### **Accountability**

The Attorney General of Newfoundland and Labrador is accountable to the House of Assembly for decisions taken in his or her name. This form of public accountability is crucial to a system of open justice, and Crown Attorneys acting for the Attorney General must be cognizant of this fact. This explains the need for the Director of Public Prosecutions, aided by the Assistant Director, to ensure that the Attorney General is well briefed and prepared to provide answers to questions that may be posed in the House. The principle of public accountability is most clear in situations where the law has required that some prosecutorial decisions be made by the Attorney General (or Deputy Attorney General) personally.<sup>5</sup>

An equally important form of accountability is internal accountability. All counsel for the Attorney General, whether employees within the Department

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<sup>4</sup> See the discussion of this in Chapter 6 of this Guide Book “The Decision to Prosecute” and Chapter 12 “Conduct of Criminal Litigation”. (LINKS TO CHAPTERS 6 AND 12)

<sup>5</sup> See for example *Criminal Code of Canada* sections 174(3), 283(2), 319(6) and 754(1)(a).

of Justice, or *ad hoc* agents, are accountable to their superiors for decisions taken.<sup>6</sup> The Department of Justice is organized to foster principled, competent and responsible decision making<sup>7</sup>. One of the goals of the *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* is to assist Crown Attorneys in making the numerous difficult decisions which arise in criminal litigation. In so doing, it sets objective standards against which prosecutorial conduct may be measured.

Individual prosecutors are also subject to a form of public accountability through their membership in the Law Society of Newfoundland and Labrador<sup>8</sup>. Another form of public accountability occurs through judicial review of a prosecutor's actions, for example through the abuse of process doctrine<sup>9</sup>, or judicial control of actions which may prejudice fair trial interests, such as inflammatory jury addresses<sup>10</sup>.

Further, this *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* is online and available to the public. By referring to the standards and policies within, members of the public have the means to assess the actions of Crown Attorneys in any particular case.

### ***The Delegation of Authority from the Attorney General***

As a practical matter, Crown Attorneys exercise most of the functions assigned by the *Criminal Code* to the Attorney General. The Attorney

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<sup>6</sup> See, generally the discussion in D. Stuart, "Prosecutorial Accountability in Canada", in P. Stenning, *Accountability in Criminal Justice*, Toronto: University of Toronto Press, 1995, at pp. 336-339.

<sup>7</sup> See materials in Chapter 3 of this Guide Book on the "Duties and Responsibilities of Crown Attorneys".

<sup>8</sup> Prosecutors across Canada are subject to the disciplinary rules of provincial and territorial law societies for matters of professional conduct: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. See also: [The Law Society Act SNL1999 CHAPTER L-9.1](#) and the *Code of Professional Conduct* of the CBA as adopted by the Law Society of Newfoundland and Labrador.

<sup>9</sup> See materials in Chapter 2 of this Guide Book "Independence of the Attorney General in Criminal Matters".

<sup>10</sup> See materials in this Guide Book regarding "Duties and Responsibilities of Crown Attorneys" and "[Conduct of Criminal Litigation](#)".

General delegates these powers to Crown Attorneys, but always retains a discretion to direct that a particular decision be made.

The Deputy Minister of the Department of Justice and Public Safety assigns functional responsibility for the provision of prosecution services to the Director of Public Prosecutions (DPP), who is also an Assistant Deputy Minister (Criminal Division).

As part of his or her functional responsibility, and in partnership with Senior Crown Attorneys, the Director of Public Prosecutions plays a lead role in the allocation of resources for the delivery of criminal litigation services.

Prosecutorial authority is exercised by Crown Attorneys, who are responsible and accountable to the regional Senior Crown Attorneys. The Senior Crown Attorney is, in turn, responsible and accountable to the DPP for the exercise of prosecutorial discretion.

Prosecutions are conducted in accordance with public guidelines contained in the *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*, which has been approved by the Attorney General.

### ***Consultation***

Just as the Attorney General is well-advised to consult with Cabinet colleagues on certain decisions, so too may prosecutors consult with others. Examples of persons with whom Crown Attorneys can and should consult include police officers or other investigators, government department employees, and Civil Division counsel who may be assigned to give legal advice to a relevant department or agency of government.

The purpose of consultation is to ensure that Crown Attorneys have access to a wide range of viewpoints and information, ensuring that decisions are made with full knowledge of all circumstances. Cabinet colleagues do not dictate litigation positions to the Attorney General; in the same way, neither government department employees nor police officers can dictate to prosecutors that a certain course of action be followed. This does not mean that their views are not entitled to appropriate weight in determining what the public interest demands in particular situations. Their input may be very helpful.

## *Advising and Consulting Senior Officials and the Attorney General*

The Minister of Justice and Attorney General delegates considerable authority to responsible officials. Because Crown Attorneys continue to act in the Attorney General's name, it is important that consultation be undertaken to ensure that senior officials (such as the Senior Crown Attorney, the ADDP and DPP) within the Criminal Division and, if necessary, the Attorney General are made aware of significant developments with major cases or potential problems.

In some cases, senior officials or the Attorney General may direct that a particular course of action be undertaken. This consultation is necessary to ensure consistent decision-making, and that the Attorney General approves of decisions for which he or she is publicly accountable.<sup>11</sup> Further, direction from senior officials also helps avoid the unfortunate situation in which appellate counsel must depart from the position taken by trial counsel.<sup>12</sup>

## **Crown Immunity**

### *General Principles*

Crown immunity 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*".<sup>13</sup>

Crown Attorneys generally cannot be sued for actions they take in performing their public duties. There is an exception in any case of wrongful and

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<sup>11</sup> See materials in Chapter 3 of this Guide Book "Duties and Responsibilities of Crown Attorneys" and Chapter 12 "Conduct of Criminal Litigation". (

<sup>12</sup> See *R. v. Barry*, 2004 NSCA 145. See also in this Guide Book "[Decision to Appeal](#)".

<sup>13</sup> [Ontario \(Attorney General\) v. Clark](#), 2021 SCC 18, at para. 28.

malicious prosecution.<sup>14</sup> Further, intentional or even negligent actions that violate an accused's constitutional rights may give rise to a cause of action.<sup>15</sup>

Crown immunity also applies to police actions taken against Crown Attorneys. A majority at the Supreme Court of Canada (SCC) has ruled in *Ontario v Clark*<sup>16</sup> that Crown Attorneys do not owe legal duties to the police with respect to how they carry out a prosecution. Piercing the immunity of Crown Attorneys to make them accountable to police officers would put them in conflict with their duties of objectivity, independence, and integrity in pursuit of ensuring a fair trial for the accused and maintaining public confidence in the administration of justice.

Allowing police officers to sue prosecutors for decisions they make in the course of criminal proceedings would create risks to the rights of the accused and to prosecutorial independence and objectivity, and would undermine the integrity of the criminal justice system. It would also be fundamentally incompatible with the mutually independent relationship between the police and the prosecutor. The role of the police is to investigate crime; the Crown Attorney's role is to assess whether a reasonable likelihood of conviction exists, as well as whether a prosecution is in the public interest and, if so, to carry out that prosecution in accordance with the prosecutor's duties to the administration of justice and the accused.

Crown Attorneys and police officers have complementary but separate and distinct roles to play in the administration of justice. The relationship between the Crown and police as two separate actors is not hierarchical. Maintaining their respective independence is crucial for the proper administration of criminal justice and to protect against the misuse of both investigative and prosecutorial powers.

### ***Accountability***

While the Supreme Court of Canada has affirmed the importance of prosecutorial immunity in general and specifically in relation to police officers,<sup>17</sup> that court has also recognized that absolute immunity for Crown Counsel carries negative policy implications and has thus affirmed two

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<sup>14</sup> *Ibid.* at 35.

<sup>15</sup> [Henry v. British Columbia 2015 SCC 24.](#)

<sup>16</sup> *Ibid.* at 47.

<sup>17</sup> *Henry supra* note 4.

exceptions. These exceptions are the torts of malicious prosecution<sup>18</sup> and wrongful non-disclosure.<sup>19</sup>

An allegation of malicious prosecution requires not only evidence of an absence of reasonable cause for commencing the proceedings but also proof of an improper purpose or motive.<sup>20</sup> This motive must involve an abuse or perversion of the system of criminal justice to achieve ends it was not designed to serve.<sup>21</sup> As such, this motive would incorporate an abuse of the office of the Attorney General or individual Crown Attorneys.

Allegations of wrongful non-disclosure have a lower requirement of proof than malicious prosecution, and are supposed to represent a remedy for breaches of the Crown's constitutional obligations to provide full disclosure.<sup>22</sup> Allegations of wrongful non-disclosure do not require proof of an improper purpose.<sup>23</sup> Rather, allegations of wrongful non-disclosure are meant to show that the Crown Attorney caused a person harm by intentionally withholding information when they knew, or should reasonably have known, that the information was material to the defense and that the failure to disclose would likely impinge on the ability to make full answer and defense.<sup>24</sup>

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<sup>18</sup> *Nelles v. Ontario* [1989] 2 SCR 170.

<sup>19</sup> *Henry supra* note 4.

<sup>20</sup> *Nelles supra* note 7.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Henry supra* note 4 at 31.

<sup>23</sup> *Ibid.* at 61.

<sup>24</sup> *Ibid.* at 99.