



Process and Parameters for the Premier and Ministers to Obtain Legal Advice from the Attorney General

Role of Attorney General

The Attorney General has two primary roles.

First, the Attorney General is the legal advisor to Cabinet and to the Government of Alberta more broadly. The Attorney General provides legal advice, based on the rule of law, to help ensure government actions are constitutional, legal, and in accordance with relevant legislation.

Second, the Attorney General is responsible for the Alberta Crown Prosecution Service (ACPS).

- The authority to conduct prosecutions, including all the discretionary decisions that must be made in every case, flows from the office of the Attorney General.
- As agents of the Attorney General, Crown prosecutors make independent decisions in respect of individual prosecutions.
 - Exercising their discretion, Crown prosecutors must decide when and how to prosecute cases, free from political or other interference or influences.
 - The Code of Conduct for Crown Prosecutors states the Attorney General must ensure that Crown prosecutors are able to and are directed to perform their duties independently of political or other external influences and are able to exercise prosecutorial discretion.
 - Only in rare and exceptional circumstances does the Attorney General become involved in an individual case. Any such involvement requires strict avoidance of political or other interference or influence, or the appearance thereof.
- While Crown prosecutors are independent, they are ultimately accountable to the Attorney General. In turn, the Attorney General is accountable only to the Legislative Assembly for the process through which justice is administered and for high-level policy directions within the justice system in the context of the work of the ACPS.
- The independence of Crown prosecutors, in exercising prosecutorial discretion, is an important constitutional principle. As described by the Supreme Court of Canada, being independent means that the Attorney General (and by extension the ACPS) “must stand alone, acting independently of political or other external influences.”¹ As described by that Court in a further decision, Attorneys General (and by extension the ACPS) “must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.”²

Process and Parameters for Seeking Legal Advice

The process and parameters outlined below are framed in relation to the Premier and Ministers but apply equally to staff in their respective offices.

The parameters outlined below also apply to requests for legal advice from Ministers, their office staff, and the civil service within a given department, when those requests are routed through that department directly to their legal team within Justice’s Legal Services Division (LSD). These guidelines do not alter existing processes by which departments obtain legal advice from LSD.

¹ *R. v. Power*, [1994] 1 SCR 601 at p. 622, quoting D. C. Morgan, “Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of The Charter” (1986-87), 29 Crim. L.Q. 15, at pp.18-19.

² *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 3.

Non-Criminal Law Matters

The Premier and Ministers may always, on behalf of the Crown, seek legal advice from the Attorney General on civil law matters (i.e., matters not related to criminal or quasi-criminal law and prosecutions).

To obtain such advice, they may contact the Attorney General, the Deputy Attorney General, or their respective office staff.

Criminal and Quasi-Criminal Law Matters

The Premier and Ministers may always seek legal advice from the Attorney General on prosecution and provincial offence-related matters that are unrelated to any specific current prosecution or to the exercise of prosecutorial discretion in relation to potential future prosecutions.

- This might occur, for example, when considering whether to establish new offence provisions or amend existing ones, whether in regulations or legislation, or when reviewing federal bills such as proposed *Criminal Code* amendments.
- The contacts for such advice are the same as those outlined above respecting civil law matters.

Restrictions apply when a communication relates to any specific current prosecution or to the exercise of prosecutorial discretion in relation to potential future prosecutions. The relevant parameters for discussing prosecutions with the Attorney General are set out below.

The Premier and Ministers should not seek to influence the way in which prosecutorial discretion is exercised relative to any existing or potential future prosecution.

- This includes seeking to influence a decision to commence, continue, or terminate a prosecution, or a decision on how a prosecution is conducted.

From time to time, the Attorney General may provide Crown prosecutors with guidance on how to evaluate the public interest in certain types of cases. This is an exercise of prosecutorial discretion on the part of the Attorney General. As outlined below, the Attorney General may consult with the Premier and Ministers on the factors that Crown prosecutors may or should consider in exercising their discretion in the relevant category of cases. Outside of that process, the Premier and Ministers should not seek to influence how the Attorney General exercises that discretion.

The Premier and Ministers may seek general information about a prosecution, including information on its status and legal implications, or on roles and responsibilities relative to that prosecution, as long as those inquiries do not seek to influence prosecutorial decision-making.

- A request for such information should be directed to the Attorney General, in writing.
- At no time should the Premier or a Minister seek to directly contact a Crown prosecutor, through any means.

If the Premier or a Minister is ever unsure as to whether it would be appropriate to raise a particular matter with the Attorney General, the Premier or Minister should communicate that to the Attorney General, in writing. The Attorney General will advise the Premier or Minister as to whether it would be proper for them to do so.

- In making that inquiry, the Premier or Minister should identify the nature of the matter they wish to raise, but must avoid including any content that seeks, or could reasonably be interpreted as seeking, to influence any exercise of prosecutorial discretion.

If the Premier or a Minister raises a matter with the Attorney General, which in the Attorney General's opinion is or may be inconsistent with these guidelines, the following process applies.

- The Attorney General will immediately advise the Premier or Minister that there is or may be a violation of these guidelines and will refer the Premier or Minister to a copy of the guidelines.
- If the matter has been raised in a verbal discussion, the Attorney General will immediately terminate that discussion.
- If upon review of these guidelines the Premier or Minister believes that raising the matter with the Attorney General is not inconsistent with these guidelines, they may raise the matter with the Attorney General, in writing.
 - In that communication the Premier or Minister should identify the nature of the matter they wish to raise, and the reasons for their view that raising it is not inconsistent with these guidelines.
 - They must avoid including any content that seeks, or could reasonably be interpreted as seeking, to influence any exercise of prosecutorial discretion.
- On receipt of that communication, the Attorney General will determine whether, in their opinion, discussion of the matter is consistent with these guidelines. If discussion of the matter, or some element of the matter, is permissible, the Attorney

General will also determine whether further communication on the matter should be in writing only, or whether verbal discussion may occur. The Attorney General will advise the Premier or Minister of their decision, in writing.

- If the Attorney General determines that discussion of a matter is not permissible, the Premier or Minister must refrain from raising it again with the Attorney General, either verbally or in writing.

Consultation by the Attorney General

As noted above, when the Attorney General provides Crown prosecutors with guidance on how to evaluate the public interest in certain types of cases, this is an exercise of prosecutorial discretion. In exercising this discretion, the Attorney General may wish to consult with others, including the Premier or a Minister, regarding the factors that Crown prosecutors may or should consider in exercising their discretion in the relevant category of cases. Notwithstanding such a consultation, final decision-making as to the content of any guidelines is entirely in the discretion of the Attorney General.

If the Attorney General initiates a consultation regarding potential guidelines to Crown prosecutors, the Premier and Ministers may provide any information or views being sought by the Attorney General. But they should not otherwise seek to influence the way in which prosecutorial discretion is exercised in relation to the proposed guidelines and also should not seek to influence how prosecutorial discretion is exercised in respect of any specific prosecution.

The above relates to consultations in respect of an exercise by the Attorney General of prosecutorial discretion and reflects the requirement for prosecutorial independence. It does not relate to consultations or collaboration in other areas where the Attorney General may be exercising the powers and duties of that office, for example when developing legislation or regulations, providing legal advice to the government, or setting policy as it relates to the Attorney General's areas of administration.