

CODE OF CONDUCT FOR CROWN PROSECUTORS

EFFECTIVE: May 4, 2022

This Guideline provides direction to Crown prosecutors on the principles and standards that must be followed when prosecutors make discretionary decisions in their quasi-judicial role as agents of the Attorney General.

BACKGROUND

The purpose of the *Code of Conduct for Crown Prosecutors Guideline* is to ensure that Crown prosecutors conduct themselves according to the highest ethical standards of fairness, dignity, impartiality and integrity, and to preserve and enhance public confidence in the prosecution service through accountability and transparency.

The Role of the Attorney General

The Attorney General enjoys two areas of responsibility. By convention and by statute¹ the Attorney General is the Minister of Justice and is legal advisor to the Crown and to the various departments of government.² The Attorney General is also charged with responsibility for the administration of justice in Alberta, including the prosecution of those alleged to have offended criminal and other statutes.

In *R. v. Proulx*, L'Heureux-Dubé J. summarized the prosecutorial function of Attorneys General (adopting the opinion of LeBel J.A. (as he then was) in the Quebec Court of Appeal):

The Attorney General is traditionally responsible for administering justice and for initiating or terminating criminal and penal prosecutions. He also acts as the representative of the Crown in the courts and in various criminal proceedings. Those functions give him the status of constitutional guardian of the social peace, who has a duty to ensure that crimes and violations of the law are punished ... The Attorney General and the Attorney General's prosecutors are the guardians of the public interest, and assume a general responsibility for the efficient and proper functioning

¹ Schedule 9, s. 1(1) of *Government Organization Act*, RSA 2000, c. G-10

² ***Krieger v. Law Society of Alberta***, [2002] 3 SCR 372 at paras. 27-28

*of the criminal justice system. Their role is not limited to that of private counsel who is responsible for an individual case.*³

There are several fundamental and interrelated concepts that inform how the Attorney General and, by extension, all Crown prosecutors are to perform this public function.

Independence of the Attorney General

The independence of the Attorney General in deciding whether to prosecute is an important constitutional principle. As prosecutor, the Attorney General must operate independently of partisan concerns.⁴ This concept has been explained as follows:

*[O]ther members of cabinet, who usually collectively share responsibility for decisions and directions of their colleagues, do not have to take any role or responsibility in connection with decisions the Attorney General makes in exercising his or her prosecutorial discretion. In fact, it is not constitutionally proper for them to direct those decisions. As law officer of the Crown, the Attorney General must exercise his or her prosecutorial function as an independent officer, independent of pressure from his or her cabinet colleagues. The prosecutorial decision is that of the Attorney General. The result is that the Attorney General occupies a position of independence unique among cabinet ministers.*⁵ [underline added]

Stated differently, being independent means that the Attorney General “stands alone, acting independently of political or other external influences”.⁶

To be clear, however, independence does not exclude the notion of consultation. 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 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

³ ***Proulx v. Quebec (Attorney General)*** 2001 SCC 66 at para. 81 (per L'Heureux-Dubé J. in dissent, but concurring with the majority on this point)

⁴ ***Krieger v. Law Society of Alberta***, *supra*, at paras. 29-32

⁵ Royal Commission on the Donald Marshall, Jr. Prosecution (Commissioners' Report, Volume 1: Findings and Recommendations, 1989) (the “Marshall Report”) at p. 224

⁶ ***R. v. Power***, [1994] 1 SCR 601 at para. 32 (QL)

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.⁷

Discretion of the Attorney General

Inextricably linked to the concept of independence is that of discretion. Prosecutorial discretion refers to the discretion exercised by the Attorney General in relation to the prosecution of alleged offences.⁸ It is because Attorneys General exercise such discretion that they are often described as acting quasi-judicially.

The importance of preserving discretion in the criminal justice system cannot be overemphasized. The Supreme Court of Canada described prosecutorial discretion as follows:

Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.⁹

⁷ U.K., H.C. Debates, vol. 483, cols. 683-684, (January 29, 1951)

⁸ *R. v. Power*, *supra*, at para. 32

⁹ *R. v. Beare*, [1988] 2 SCR 387 at para. 51

The Public Interest

Inextricably linked to the Attorney General's discretion is the concept of public interest. Discretionary decisions of the Attorney General must reflect the interest of the community to see that justice is properly done.¹⁰ Stated differently, when exercising discretion in a particular prosecution, the public's interest in pursuing the prosecution under consideration is pivotal.¹¹

In *R. v. Power*, L'Heureux-Dubé J., quoting from Donna Morgan's article "Controlling Prosecutorial Powers – Judicial Review, Abuse of Process and Section 7 of the Charter," emphasized the importance of the public interest:

*Along with the exalted status of his office come high expectations as to the Attorney-General's performance of his functions. A large measure of constitutional trust is reposed within him, and he bears a heavy obligation to conduct himself with dignity and fairness. In many situations, he is described as acting either judicially or quasi-judicially. When exercising his "grave" discretion in prosecutorial matters, he must take into account not only the position of the individual, but what the public interest demands.*¹²

[underline added]

Accountability of the Attorney General

Having independence and discretion does not mean that the Attorney General is not accountable. In fact, *accountability* might be considered a further fundamental concept. As the "chief law enforcement officer," the Attorney General is accountable to the Legislature and society for the process through which justice is administered and for departmental decisions that are made in respect of specific cases.¹³ In a similar vein, the Supreme Court of Canada has observed that the Attorney General is restrained only "by his final accountability to Parliament."¹⁴

Being both accountable and independent means that the Attorney General "functions within the context of two key constitutional principles – parliamentary supremacy and the rule of law."¹⁵

¹⁰ *R. v. Power*, *supra*, at para. 12

¹¹ *R. v. Power*, *supra*, at para. 32. See also *R. v. Regan* 2002 SCC 12 at para. 159 (per Binnie J., in dissent).

¹² *R. v. Power*, *supra*, at para. 31

¹³ Marshall Report at pp. 224, 227

¹⁴ *R. v. Power*, *supra*, at para. 32

¹⁵ Marshall Report at p. 223

Delegation of Authority to Crown Prosecutors

As a practical matter and owing to the difficulty of Attorneys General to attend to all of their duties, agents (i.e., Crown prosecutors) are appointed to administer justice at a local level.¹⁶

Through these appointments, Attorneys General empower agents to perform their prosecutorial duties. The Supreme Court of Canada has explained this concept as follows:

The Attorney-General is the chief law officer of the Crown and a member of the Cabinet. He heads a ministry of the government that exercises the authority over the administration of justice and the constitution and the maintenance and organization of the courts that is conferred upon the provincial government by the constitution.... [T]he Attorney-General is the prosecutor and hence, in effect, a litigant in every criminal case except.... In practice, the Attorney-General acts in individual cases through the numerous Crown Attorneys and Assistant Crown Attorneys who are appointed as his agents to prosecute for criminal offences on his behalf.¹⁷
[underline added]

The concept of *delegation* is qualified in two critical respects. First, the employment of agents does not detract from the ultimate accountability of the Attorney General for decisions made in respect of individual prosecutions. The interplay of the concepts of delegation and the Attorney General's accountability has been explained as follows:

Under our system, the Attorney General is ultimately responsible to the people while local Crown Attorneys are granted a broad and generous area of unfettered discretion in criminal prosecutions. Subject only to very wide and general guidelines as to policy, the Crown Attorney is free to decide whether or not to launch a prosecution, the manner in which it will be prosecuted and how he will handle the matter at trial.¹⁸

Second, delegation (together with the previously described concepts) commands that, in appointing agents, the Attorney General must ensure that these agents are:

1. Empowered to carry out the Attorney General's prosecutorial duties and responsibilities;
2. Able to and are directed to perform their duties independent of political or other improper external influences;

¹⁶ *Nelles v. Ontario* [1989] 2 SCR 170 at paras. 38-39

¹⁷ *R. v. Power*, *supra*, at para. 32

¹⁸ Marshall Report at p. 227

3. Able to exercise prosecutorial discretion; and
4. Accountable to the Attorney General for their decisions.

Because of the staggering number of discretionary decisions that are made by Crown prosecutors, accountability is created through this *Code of Conduct for Crown Prosecutors Guideline*, and through the Attorney General's other Guidelines.

The Alberta Crown Prosecution Service

The Alberta Ministry of Justice and Solicitor General includes the Alberta Crown Prosecution Service (ACPS), which is responsible for the prosecution of persons charged with *Criminal Code*, *Youth Criminal Justice Act*, and provincial statute offences. The ACPS and all of its Crown prosecutors promote safe communities by vigorously prosecuting cases involving serious and violent crime, and by working with individuals and organizations in the community to identify and implement improved and alternative approaches to the administration of criminal justice. In addition, they develop criminal law policy for the province and support criminal law consultation with other levels of government.

The mission of the ACPS is to serve the public and the interests of justice through excellence in prosecutions. The ACPS and its prosecutors are committed to delivering effective prosecution services with these values:

- Integrity and fairness in prosecuting and in dealing with people in the prosecution process, the public, and each other;
- The independent exercise of prosecutorial discretion;
- Respect for the rule of law;
- Respect for people and the rights and freedoms guaranteed to them by law;
- Respect and support for victims and their rights;
- Understanding and respect for people's diverse experiences and backgrounds;
- Understanding the needs of distinct communities, whether they be urban or rural, and working collaboratively with those communities to ensure a just and effective criminal justice system; and
- Continuing policy and educational support for Crown prosecutors and other members of the ACPS.

The Role of Crown Prosecutors

As agents of the Attorney General, Crown prosecutors are the "local embodiment of the Attorney General's discretionary prosecutorial powers,"¹⁹ and many of the principles that

¹⁹ Marshall Report at p. 226.

govern the performance of the Attorney General's prosecutorial role are transposed to each of these agents.

The general role of Crown prosecutors is described in the statement of Rand J. in *Boucher v. The Queen*:

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; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.²⁰

At a more specific level, the daily responsibilities of Crown prosecutors encompass a multitude of duties and decisions, even a partial list of which is formidable:

- Charge screening;
- Plea resolution;
- Provision of disclosure;
- Whether to proceed to trial or discontinue a prosecution;
- Conduct of private prosecutions;
- Entering a stay of proceedings;
- Withdrawing charges;
- Electing to proceed summarily or by indictment;
- Determining what evidence to call and in what order;
- Taking a position on sentence; and
- Launching Crown appeals.²¹

The role of Crown prosecutors as advocates merits specific comment. The adversarial process is an important part of our judicial system and is a valuable tool in the search for justice. However, objectionable submissions or comments by Crown prosecutors have been found to have deprived accused persons of the right to a fair trial.²² For this reason, it is important that Crown prosecutors be guided in their advocacy by the following principles:

²⁰ *Boucher v. The Queen* [1955] SCR 16 at pp. 23-24

²¹ See *Nelles v. Ontario* [1989] 2 SCR 170 at para. 40

²² The Lamer Commission of Inquiry, Report and Annexes, pp. 151-155, 291-296

- While Crown prosecutors are fully entitled to be strong advocates within the adversarial process, the words and actions of each Crown prosecutor must be guided by the values of accuracy, fairness and dispassion;
- Crown prosecutors are entitled to press fully, firmly and to the best of their ability all legitimate arguments tending to establish guilt;
- It is improper for Crown prosecutors to express personal opinions as to the accused person's guilt or innocence, or as to the credibility of any witness;
- Crown prosecutors must be accurate when summarizing or referring to evidence or testimony, and must not present as fact that which is unsupported by the evidence; and
- Crown prosecutors must not appeal to the trier of fact's fears, emotion or prejudice.²³

Prosecutorial Independence

As the Attorney General's agents, Crown prosecutors enjoy the same level of independence as the Attorney General. The Supreme Court of Canada has referred to this concept as follows:

*The prosecutor must assess, in good faith and without any motive but the furtherance of the administration of justice, whether the presumption of innocence can be rebutted in a court of law. This is a practical decision based on the prosecutor's experience and knowledge, and on his or her assessment of all the potentially relevant evidence.*²⁴ [underline added]

Moreover, the Alberta Court of Appeal has also considered the notion of prosecutorial independence and prosecutorial discretion. It has stated that the authority or responsibility for deciding whether a prosecution should proceed, and if so, on what terms:

[C]an only be discharged by qualified prosecutors who have the training, judgment and courage to make the necessary decisions inherent in every prosecution. For example, whether to proceed, and if so on what charge, whether to oppose bail, whether to seek a particular sentence and whether to appeal. Many times these decisions will be difficult and even unpopular, but the responsibility for making them must always rest with the Crown and not with victims of crime, or other interested parties.

Abdication of this prosecutorial responsibility to others who are interested in the outcome of the case, but have little or no understanding of the

²³ See also, Frater, Robert J., *The Seven Deadly Prosecutorial Sins* 7 Can. Crim. L. R. 209.

²⁴ ***Proulx v. Quebec (Attorney General)***, *supra*, at para. 8

*complexities, or even the basic tenets of our justice system, is wrong, and represents a serious threat to the fair administration of criminal justice.*²⁵

Independence does not mean just the absence of political interference. Rather, it is a very broad concept that requires prosecutorial discretion to be free from improper pressures or influences. Any erosion (or perceived erosion) of a Crown prosecutor's independence is a threat to the proper exercise of prosecutorial discretion and to the fair administration of justice.

In this regard, the relationship between investigators and Crown prosecutors merits specific comment. Although Crown prosecutors work closely with investigators, the separation between their respective roles is of fundamental importance to the proper administration of justice. Investigators investigate alleged offences and lay charges when they believe, on reasonable grounds, that an offence has been committed. Crown prosecutors do not simply and uncritically inherit and pursue the investigator's brief; rather, they must carefully review all charges, and must scrutinize the potential evidence and potential defence theories to ensure the requisite standard for initiating or continuing a prosecution is, and continues to be, met. A distinct line between these two functions, which allows both the investigators and Crown prosecutors to exercise discretion independently and objectively, forms part of a system of checks and balances. This independence of roles and responsibilities, upon which the justice system depends, must be respected and maintained.

To be clear, however, the independence principle does not mean that Crown prosecutors need not consult. Quite to the contrary, responsible prosecutorial decision-making often requires consultation with colleagues uninvolved in the prosecution of the case, superiors and investigators. Indeed, prosecutorial discretion is not exercised in a vacuum. The principle of independence simply means that the Attorney General does not take instructions as to how to exercise discretion. And, as described next, Crown prosecutors do not take instructions as to how to proceed, except from those in the line of authority leading to the Attorney General.

Prosecutorial Discretion

Like the Attorney General, Crown prosecutors occupy an office that is often described as quasi-judicial. This descriptor stems from the concept of prosecutorial discretion, which has been explained as follows:

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the

²⁵ **R. v. Tkachuk** [2001] AJ No. 1277 at paras. 24-28 (CA)

*Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.*²⁶

As to the importance of prosecutorial discretion to the administration of justice, the Supreme Court has also stated:

*In the criminal law process prosecutorial discretion exists throughout the entire process, from the initial investigation stage through to the conclusion of the trial. The people involved in the process, be they police officers ... or other individuals charged with the responsibility of investigating breaches of various laws, or Crown Attorneys, are not the same nor will they necessarily act in the same way in exercising the discretion they have. This may lead to a situation where one person is charged with an offence, while another in seemingly identical circumstances is not; one person is prosecuted by indictment, another by summary conviction; one person is dealt with under one provision of a particular statute while another is dealt with under a different, perhaps harsher provision.*²⁷

Prosecutorial discretion is, however, not absolute. Discretion at the local level is circumscribed and guided by obligations and duties imposed upon Crown prosecutors by statute, judicial decisions, the *Canadian Charter of Rights and Freedoms*, ethical standards of the various law societies, and the directions and guidelines created by Attorneys General. In Alberta, the Attorney General's directions to Crown prosecutors are described in this *Code of Conduct for Crown Prosecutors Guideline* and other Guidelines issued by the Attorney General.

Consideration of the Public Interest

In exercising their discretion, Crown prosecutors must consider whether the prosecution is in the public interest. As Commissioner in the Sophonow Inquiry, former Supreme Court of Canada Justice Peter Cory observed, the "community looks upon the Crown prosecutor as a symbol of fairness, of authority and as a spokesman for the community."²⁸ Similarly, the Law Society of Alberta's *Code of Conduct* recognizes that "[w]hen engaged as a prosecutor the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately."²⁹

²⁶ *Krieger v. Law Society of Alberta*, *supra*, at para. 43

²⁷ *R. v. V.T.* (1992) 71 CCC (3d) 32 at p. 40 (SCC), referring with approval to *R. v. Poirier* (June 7, 1989) unreported (Man PC)

²⁸ The Inquiry Regarding Thomas Sophonow (Commissioner: The Honourable Peter Cory, 2001) at p. 39

²⁹ Law Society of Alberta's Code of Conduct, Chapter 5, Rule 5.1-4, Commentary

As to the primacy of serving the public's interest, Martin J. stated in his *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, "[a]s ministers of justice, their [i.e., Crown prosecutors'] ultimate task is to see that the public interest is served, in so far as it can be, through the use, or non-use, of the criminal courts."

Accountability of Crown Prosecutors

While not directly accountable to the Legislature or the public, Crown prosecutors are accountable to the Attorney General.³⁰ Of Crown prosecutors in Ontario, it has been said:

*Crown counsel in Ontario are responsible ultimately to the Attorney-General, who is responsible to the Legislature.... The Ministry of the Attorney-General exercises careful supervision of prosecutions for which it is responsible.*³¹

The accountability of ACPS Crown prosecutors is no different.

To be clear, Crown prosecutors who exercise their discretion in a principled manner in accordance with the Guidelines issued by the Attorney General and other directions issued by the Assistant Deputy Minister (ACPS) and who, when faced with difficult decisions, consult with supervisors and colleagues will be supported in their decision-making.

GUIDELINE

In discharging their public duties, each Crown prosecutor shall:

1. Serve the general public's interest, and seek to uphold the rule of law and the integrity of the criminal justice system;
2. Maintain the highest professional standards of honesty and fairness;
3. Be and appear to be, consistent, objective, impartial and independent, and avoid all conflicts of interest, and objectively reasonable perceptions of conflict of interest or bias, that might appear to undermine their independence or that of the Attorney General;
4. Comply with the *Code of Conduct for Crown Prosecutors Guideline*, the *Decision to Prosecute Guideline* and any other Guidelines issued by the Attorney General and any Practice Protocols or Directives issued by the Assistant Deputy Minister (ACPS);

³⁰ Marshall Report at p. 227

³¹ *R. v. Power*, *supra*, at para. 33

5. Comply with the requirements of the Government of Alberta's *Code of Conduct and Ethics for the Public Service of Alberta* and the *Alberta Justice and Solicitor General Supplemental Code of Conduct and Ethics*;
6. Comply with the Law Society of Alberta's *Code of Conduct*;
7. Never seek or act upon instructions from any source external to the Alberta Crown Prosecution Service;
8. Seek authorization from the Attorney General or their designate for discretionary decisions when required to do so by the *Criminal Code* or by Guidelines issued by the Attorney General;
9. Remain uninfluenced by:
 - a. Personal interests or feelings;
 - b. Public or media pressures;
 - c. The race, religion, sex, national or ethnic origin, sexual orientation or gender identity, political associations, activities or beliefs of the suspect, accused person or any other person involved in the case;
 - d. Any possible political advantage or disadvantage to a government, or any political group or party;
 - e. Any personal advantage; or
 - f. Any other kind of improper discrimination or influence;
10. Respect the right of the accused person to a fair trial;
11. Ensure to the best of their ability that a just verdict is reached at the end of the trial process and not strive for a conviction at all costs;
12. Never knowingly make a false or misleading statement of material fact or law to a court, or offer evidence that is known to be incorrect. If this somehow occurs, take all necessary steps to correct it as soon as possible after the error has been discovered. It is an appropriate exercise of prosecutorial discretion:
 - a. Not to call evidence which is reasonably considered to be untrue or likely untrue; or
 - b. To advise a trier of fact not to rely upon evidence if, after it has been admitted, the evidence is deemed by the Crown prosecutor to be inherently unreliable;
13. Never discuss matters relating to a case with a presiding judge without the participation of the accused person and, if applicable, defence counsel;
14. In speaking to judicial interim release, advise the judge of all relevant circumstances and never fail to disclose, or agree with defence counsel not to disclose, all outstanding criminal charges or an accused person's criminal record;
15. In speaking to sentence, advise the judge of all relevant circumstances and never fail to disclose, or agree with defence counsel not to disclose, an accused person's criminal record; and
16. Respect and support the interests and rights of victims and witnesses.