

Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency

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Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency

Framing the issue

Prosecution Services often have to make decisions which, while required in the public interest, almost certainly will be controversial if not publicly unpopular. A seemingly endless variety of circumstances illustrate the point. Some involve tragedy and heartbreak, such as whether a wife ought to be charged with assisting in the suicide of her terminally ill, and long suffering husband. Others raise questions concerning the right to defend oneself against crime, such as the homeowner who kills a thief during a home invasion.

Still others raise issues concerning societal values for which there exists no national consensus, such as the alleged right to an abortion¹ or the appropriateness of the death penalty.² More commonly, Attorneys General and their respective prosecutions services are regularly required to decide whether appeals should be taken against trial level decisions that have outraged the public.³

¹Concerning which, see the debate which existed between Dr. Henry Morgentaler and the Federal Government which spanned at least three decades: *R.v. Morgentaler* (1975), 20 C.C.C. (2d) 449 (S.C.C.); *R.v. Morgentaler* (1988), 37 C.C.C. (3d) 449 (S.C.C.); *R.v. Morgentaler* (1993), 85 C.C.C. (3d) 118 (S.C.C.), effectively neutralizing s. 287 of the *Criminal Code*, “Procuring miscarriages”.

²*Reference re Ng Extradition* (Can.) (1991), 67 C.C.C. (3d) 61 (S.C.C.); *U.S.A. v. Burns* (1997), 117 C.C.C. (3d) 454, lv. granted 119 C.C.C. (3d) vi, concerning the propriety of Canada directing that a person charged with an offence be returned to another country to face the death penalty.

³In an address given to the Faculty of Law at the University of New Brunswick on March 14, 1991 the Honourable John Sopinka, then a judge of the Supreme Court of Canada, cautioned the judiciary and crown attorneys about the effect that public pressure groups can have on the decision-making process in the criminal justice system. However, in *R.v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.) the majority of the Supreme Court of Canada noted at p. 10 that “the Attorney General is a member of the Executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. *The Attorney General’s role in this regard is not only to protect the public, but also to honour and express the community’s sense of justice*”. (emp. added). It should be noted that Sopinka, J. delivered the *minority* judgment in this case.

There is, however, one category of cases that engages notions of public confidence and the need for a public *perception* that proper prosecution decisions have been or will be made. This arises, most commonly, by virtue of the *players* that are involved in the case – as accused, victim or witness – rather than the nature of the crime itself. For instance, where, following a police investigation, it is proposed that criminal charges be laid against someone directly involved in the criminal justice system – prosecutors, judges and defense lawyers are good examples – there exists the need to assure the public that decisions will be made in the public interest.

Ensuring public confidence in these types of cases therefore becomes a critical issue for government. Precisely how that is achieved in practice varies from jurisdiction to jurisdiction. In England and Australia, statutorily independent Directors of Public Prosecutions carry out prosecutions quite independent from government and the endless stream of political and populist pressures. Generally speaking, Canada has not adopted this approach, with the exception of Nova Scotia which has adopted a DPP model, and British Columbia which passed the *Crown Counsel Act* almost a decade ago. I will speak more of these developments later on in this paper.

In my view, there are many paths to prosecutorial independence. Some countries have chosen, with varying degrees of success, a legislatively-based structural model. That approach has, in some cases, led to questions concerning public accountability, if not overzealousness, on the part of the prosecuting authority. In the end, each nation needs to develop an approach to independence that makes sense in the context of its own legislative and constitutional framework, as well as the traditions, practices and history of its legal system.

A number of years ago, Brandeis, J., writing extra-judicially on the importance of openness, made a powerful point when he said that “Sunlight is the most powerful of

disinfectants”.⁴ I believe he is absolutely correct. In this paper, I advance the thesis that in the context of the Canadian tradition, independence does not necessarily require legislatively-based mechanisms; rather, policies, practices or legislation which emphasize accountability through *public transparency* can achieve the level of prosecutorial independence and accountability required to ensure that the public has confidence in the decisions being made.

The Role of the Attorney General in Criminal Prosecutions

The role of the Attorney General in the prosecution of crime derives from the Royal Prerogative. In *R. v. Wilkes*⁵ 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.

Since then, however, there has been a steady expansion of the responsibilities of the Attorney General. By far the most important aspect of this expansion relates to the increasing role of the Attorney General in the work of Parliament. These political responsibilities, over time, tended to overlap and shape each other, on occasion giving rise to difficulties for Attorneys in discharging their various functions with apparent integrity and a perceived degree of independence from political considerations.

⁴See Sir Louis Blom-Cooper, Q.C., “*Public Inquiries*” (1993), 46 Cur. Leg. Prob. 204, at page 211, n. 9, quoted by Cory, J. in *Phillips v. Nova Scotia (Westray Inquiry)* (1995), 98 C.C.C. (3d) 20 (S.C.C.), at p. 67 d.

⁵ (1768), 4 Burr 2527; 97 E.R. 123 at p. 125; more recently, see *R. v. Charlie* (1998), 126 C.C.C. (3d) 513 (B.C.C.A.) at par. 32.

The absolute independence of the Attorney General in deciding whether to prosecute and in the making of prosecution policy is an important constitutional principle in England, Canada and, generally, throughout the Commonwealth. As long ago as 1792 the Attorney General, Sir John Scott (later Lord Eldon) asserted the complete independence of the Attorney General in deciding whether or not to prosecute. However, his successor, Sir Charles Denman (later Lord Denman) disagreed. He acknowledged the right of the government to give instructions to prosecute. Thus began a controversy which continued intermittently as the issue arose in particular cases.

Failure to adhere to this constitutional convention caused the British Government to fall in 1924 and resulted, four years later, in the exclusion of the Attorney General from membership in Cabinet.⁶ In the so-called Campbell affair, Cabinet had directed the Attorney General of England to stay criminal proceedings against one John Campbell, the editor of a politically-based publication. Subsequently released cabinet minutes of August 6, 1924 revealed that the Cabinet had also instructed the Attorney General that “no public prosecution of a political character should be undertaken without the prior sanction of the Cabinet being obtained”.⁷

The Prime Minister of the Government that succeeded the defeated administration proclaimed that a Cabinet instruction to the Attorney General to withdraw a prosecution

⁶ It should be observed, however, that public responsibility for justice issues is quite different in England, compared to Canada. In England, three Ministers hold the responsibilities and duties that fall to Ministers of Justice in Canada and some other Commonwealth countries – namely, the Attorney General, the Home Secretary and the Lord Chancellor. The latter, especially, plays a particularly unique role in the administration of justice. During the past thousand years or so, the office of Lord Chancellor has evolved to the point of being a judge and head of the judiciary as presiding Chairman of the Appellate Committee of the House of Lords; at the same time, he is a Cabinet Minister, supported by two Parliamentary Secretaries, and two Parliamentary Private Secretaries in the House of Commons and one in the House of Lords; and, if that was not enough, he (or she) is also Speaker of the House of Lords. The British view is that “by taking part in all three branches of government the Lord Chancellor appears to challenge the concept of the separation of powers, (although) his effective purpose is actually to *maintain* the separation of powers”: see “The Lord Chancellor’s Department,” <http://www.open.gov.gov.uk/lcd/lcdhome.htm>

⁷ See: *The Royal Commission on the Donald Marshall, Jr. Prosecution*, “Walking the Tightrope of Justice”, Vol. 5, Professor John L.I.J. Edwards, (Halifax, 1989), at pp. 135-6; and Professor John L.I.J. Edwards, *The Attorney General, Politics and the Public Interest* (Sweet and Maxwell, 1984) at p. 312.

was “unconstitutional, subversive of the administration of justice and derogatory to the office of Attorney General”.⁸ In this fashion, a previously controversial principle was elevated to the level of a binding constitutional convention. It has not subsequently been questioned in Britain.⁹ Indeed, in 1925, Viscount Simon, Attorney General of England, made this clear and 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.¹⁰

This general proposition has recently received a degree of acceptance as a recognized constitutional convention in Canada. In 1968, for instance, Chief Justice McRuer said the following in his Royal Commission Report on Civil Rights in the Province of Ontario:

[The Attorney General] must be answerable to the Legislature and it is better that he be answerable as a Minister of the Crown. Notwithstanding that this is so, he must of necessity occupy a different position politically from all other Ministers of the Crown. As the Queen’s Attorney he occupies an office with judicial attributes and in that office he is responsible to the Queen and not responsible to the Government. He must decide when to prosecute and when to discontinue a prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations. They are decisions

⁸ H.C. Debates (U.K.), vol. 179, cols. 354-5, Dec. 11, 1924.

⁹ Although it has been questioned in Australia as recently as 1999: “*The Attorney General, Politics and the Judiciary*”, a paper delivered to the fourth Annual Colloquium of the Judicial Conference of Australia in November 1999 by the Honourable L.J. King, AC, QC, a former Chief Justice of South Australia, and previously Attorney General for that state, found at: <http://www.law.monash.edu.au/JCA/KingPaper.htm> at pages 7-10, and reported at: (2000), 74 Aust. L.J. 444 (slightly edited).

¹⁰ J.L.I. Edwards, *The Law Officers of the Crown*, (London: Sweet and Maxwell, 1964), at p. 215 and 222-3; *Gouriet v. Union of Post Office Workers*, [1977] 3 All E.R. 70 (H.L.), at p. 90 (b).

made as a Queen's Attorney, not as a member of the government of the day.¹¹

Several years later, in 1977, Canada hosted the Commonwealth Law Ministers Conference at Winnipeg, Manitoba. Following the meeting, an official Communiqué was issued by the Law Ministers which stated, in part, and under the heading "Modern Role of the Attorney General", as follows:

In recent years, both outside and within the Commonwealth, public attention has frequently focussed on the function of law enforcement. Ministers endorsed the principles already observed in their jurisdictions that the discretion in these matters should also be exercised in accordance with wide considerations of the public interest, and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of the office whatever the precise constitutional arrangements in the State concerned.¹²

Two of the points made by Ministers in this 1977 Communiqué deserve emphasis. First, the political considerations to be disregarded in the making of prosecution decisions must be *partisan* in nature. The Honourable Ron Basford, as Attorney General of Canada, subsequently put the proposition in these terms: "There must be excluded any consideration based upon narrow, partisan views, or based on the political consequences

¹¹ Royal Commission Report No. 1 on Civil Rights in the Province of Ontario (Ontario, Royal Commission, 1968: 933-4), by Chief Justice McRuer. Concerning this report, and the role that Attorneys General should assume to ensure that government respects the rule of law, see: Kent Roach, "The Attorney General and the Charter Revisited", (2000), 50 *University of Toronto Law Journal* 1 at p. 31.

¹² "Meeting of Commonwealth Law Ministers, August 1977, The Communiqué", (unpublished: Commonwealth Secretariat, Marlborough House, Pall Mall, London, 1977), par. 24, p. 138; also quoted in *Appearing for the Crown* by Phillip C. Stenning, (Brown Legal Publications Inc.: Cowansville, 1986), at p. 293.

to me or to others.”¹³ It is important to understand, therefore, that prosecution decisions do not preclude consideration of broad social objectives embraced by the Attorney General, such as aggressive prosecution policies designed to reduce the level of family violence or the driving of a motor vehicle while impaired.

Second, irrespective of the laws or structures in place in a jurisdiction, principles of independence ultimately depend upon the integrity of the person occupying the office of Attorney General.¹⁴

In terms of the *nature* of the independence, therefore, this much is clear: the independence of a prosecution service flows from the independence of the Attorney General to be free, in the decision-making process, from the partisan political pressures of the day. It does not mean that an individual Crown Attorney, in the discharge of his or her responsibilities as agent of the Attorney General, is free to do whatever he or she wishes, irrespective of the law, practice or the general guidelines or policies of the Attorney General. Independence, in this context, therefore involves the insulation of the

¹³ H.C. Debates (Canada), Vol. iv, 1978, pp. 3881-83 (March 17, 1978). This view has been widely accepted: See J. L.I.J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell, 1984) at p. 360; Sir Hartley Shawcross, Attorney General of England, U.K. H.C. Parliamentary Debates 29 January 1951, at column 682; Royal Commission Report No. 1 on Civil Rights in the Province of Ontario (Ontario, Royal Commission, 1968: 933-4), by Chief Justice McRuer; The Honourable Ian Scott, Attorney General of Ontario, “Law Policy and the Role of the Attorney General: Constancy and Change in the 1980’s”, (1989), 39 U. of T. Law Journal 109 at pp.119-122; “Charge Screening, Disclosure and Resolution Discussions”, a Report of the Attorney General’s Advisory Committee, chaired by The Honourable G. Arthur Martin (Toronto: Queen’s Printer for Ontario, 1993), at pp. 80-82; and generally, see the authorities referred to in footnote 18.

¹⁴ This proposition was supported by Professor J. Edwards, in his work on the Donald Marshall, Jr. Royal Commission, *supra*, footnote 7, at p. 153: “Based on my first-hand familiarity with most of the jurisdictions, including countries which have adopted the non-political Attorney General option, I am persuaded that the correct qualities of independence and impartiality are more a matter of personal integrity and understanding of what the office demands of its incumbent than a derivation from any particular constitutional model.” Although resignations by Attorneys General on the basis of political interference are by no means common, the former Attorney General of British Columbia, Brian Smith, resigned his post in 1988 for this reason, as did Robert Ellicott, the Attorney General of the Commonwealth of Australia in 1977: see the Law Reform Commission of Canada, Working Paper 62, “Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor”, (Ottawa: 1990), p. 11, footnote 43; and, concerning Mr. Ellicott’s resignation, see: Gerard Carney, “The Role of the Attorney General”, (1997), 9 Bond L.R. 1 at p. 3. Further, see Kent Roach, *supra*, footnote 11 at pp. 9, 21 & 40.

prosecution process from partisan political considerations; equally, however, it involves Crown Attorneys' accountability to their superiors who, in turn, are accountable to the Attorney General for all prosecution decisions.¹⁵

That being said, the need for public accountability does not minimize the essential role played by individual Crown Attorneys in the exercise of independent, professional judgment on a case-by-case basis. As the Supreme Court of Canada has noted, “(prosecutorial) discretion is an essential feature of the criminal justice system”.¹⁶

Thus far, I have defined the constitutional convention of an Attorney General's role in terms of an independence from political direction and control by Cabinet and individual Cabinet members. It remains, therefore, to consider the separate but inter-related concept of an Attorney General's accountability to his or her own Cabinet for the decision-making process in criminal prosecutions.

It is quite appropriate for the Attorney General to consult with Cabinet colleagues before making significant decisions in criminal cases. In fact, sometimes it will be important to do so. The proper relationship between the Attorney General and Cabinet colleagues

¹⁵ Concerning the relationship between independence and accountability in the context of public prosecutions, see “Directors of Public Prosecutions: Independent and Accountable,” by John McKechnie, Q.C. (1996-97) *15 Aust. Bar Rev.* 122; *Review of the Nova Scotia Public Prosecution Service*, by the Honourable Fred Kaufman, C.M., Q.C. (Nova Scotia: 1999), at p. 17 and pp. 370-2; Prof. John L.I. Edwards, “The Office of Attorney General – New Levels of Public Expectations and Accountability”, a paper delivered at the meeting of Commonwealth Law Ministers in 1993 at Mauritius (Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX), published by P. Stenning, *Accountability for Criminal Justice* (Toronto: University of Toronto Press, 1995); Address to the Federal Prosecution Service Conference on June 29, 2000 by Morris Rosenberg, Deputy Minister of Justice and Deputy Attorney General, Mont-Ste-Anne, Quebec [unpublished]; concerning the concept of “Accountability” in the public sector generally, see: *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*, chaired by John C. Tait, Q.C. (Ottawa: Canadian Centre for Management Development) reprinted January 2000, esp. at pp. 7-18.

¹⁶ *R. v. Beare* (1988), 45 C.C.C. (3d) 57 (S.C.C.), at p. 76; and see *U.S.A. v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.), at pp. 224-5; *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.), at pp. 13-20; for an excellent review of the issue of prosecutorial discretion, see Wayne Gorman, “Prosecutorial Discretion in a Charter-Dominated Trial Process”, (2000), 44 C.L.Q. 15; on a related topic, concerning the extent to which Crown Attorneys, as agents of the Attorney General, are subject to disciplinary proceedings conducted by Law Societies, see: *Krieger v. Law Society of Alberta*, (unreported, Sept. 27, 2000, Alta. C.A.)

(and, in this sense between Crown Counsel on one hand, and client departments, the police or victims of crime on the other) 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 authorise 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 this 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 issue 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.¹⁷

This statement, often referred to as the “Shawcross principle”, has been adopted at both the federal and provincial level by successive Attorneys General in Canada. Likewise, the judiciary has supported these principles, as have leading authorities on the role of the

¹⁷ H.C. Debates (U.K.), vol. 483, cols. 683-84 (January 29, 1951). This principle is still applied in England: so-called “Shawcross letters” are sent by the Attorney General to ministerial colleagues to solicit comments on whether it would be in the public interest to commence (or continue) criminal proceedings in a particular case. Concerning the relationship between Attorneys General and victims of crime, see: Kent Roach, *supra*, footnote 11, at p. 26.

Attorney General.¹⁸

While I accept the validity of the “Shawcross principle”, a couple of cautionary notes are in order. First, it is well established that two criteria exist when assessing whether charges should be laid: sufficiency of the evidence, and whether prosecution is required in the public interest. In my view, consultation should only be undertaken in respect of the second issue. Decisions on the sufficiency of the evidence must always fall to the Attorney General (in practice, Crown Attorneys). Moreover, a consideration of the public interest criterion may only take place if a conclusion is reached that the evidentiary test has been met. If met, an Attorney may feel it appropriate to take a “reading” of the public interest criterion through consultation with a Cabinet colleague. That, in turn, leads to the second cautionary note.

In most situations, the consultation process will not be transparent at all. It may take place privately at the Cabinet table, or through an exchange of correspondence with the affected Minister; less commonly, it may occur quite informally over lunch or in the hallways of the Legislature. This lack of transparency may, if made public, have the effect of tainting the prosecution decision on the basis of perceived political interference, particularly where the decision ultimately was taken personally by the Attorney General.

¹⁸ *R. v. Smythe* (1971), 3 C.C.C. (2d) 98 at 100 and 112, aff’d. at 122, further aff’d. by the Supreme Court of Canada at 3 C.C.C. (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 C.C.C. (2d) 192 at 196 (Ont. C.A.); *Re M and The Queen* (1983), 1 C.C.C. (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; and J. Ll.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.Ll.J. Edwards (1989), esp. at 128-146; Law Reform Commission of Canada, Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), esp. 8-14.

Consultations of this sort ought to be confined to cases where a Cabinet colleague can make a concrete and significant contribution to the public interest issue. Two examples come to mind. First, where the legislation in question is more regulatory than criminal in nature, and it is unclear whether compliance with the legislative scheme can be achieved more effectively through prosecution or through the application of available administrative sanctions. Second, where consultation with colleagues such as the Solicitor General (at the federal level) may assist in understanding whether a prosecution, with its resulting disclosure process and full public trial, may compromise national security. In some cases, a difficult balance may have to be struck between the public interest in the effective and consistent enforcement of our criminal laws, on the one hand, and the need to keep Canada secure on the other. Regardless of the particular circumstances, the important point is this: because of the inherent absence of transparency, consultation by the Attorney General with Cabinet colleagues should very much be the exception and not the rule.

I would summarize the matter in the following way: the independent role of the Attorney General in the institution and conduct of criminal prosecutions has over time become increasingly entrenched as a constitutional convention. In the discharge of these duties, the Attorney is responsible to the Queen, *not* to the government of the day. In deciding whether to prosecute, or discontinue proceedings, or to appeal a decision, the Attorney is not under the authority of Cabinet, or even the First Minister. Rather, the Attorney occupies a quasi-judicial role, is directly accountable to the public, and receives orders from no one.

Two nuances are, however, built into this framework of constitutional independence.

First, it is beyond dispute that partisan political considerations – those which are based on the political consequences to the Attorney or others – are altogether excluded in the making of prosecution decisions. That does not, however, exclude a consideration of

broad social objectives which are embraced by the Attorney General through announced prosecution policy – such as prosecution guidelines designed to reduce family violence in our society. In this context, therefore, “prosecutorial independence” involves the insulation of the Attorney General (and Crown Attorneys) from the partisan political pressures of the day. It does not mean that Crown Attorneys are free to do whatever they want, irrespective of the prosecution guidelines of the Attorney General.

The second nuance concerns the extent to which the Attorney General is entitled to consult on whether charges should be laid. If (and only if) a conclusion is reached that there is sufficient evidence to justify prosecution, the Attorney General is entitled to consult with Cabinet colleagues on whether prosecution is required in the public interest. The advice, however, must be confined to that particular issue, and is not binding on the Attorney General. It may, however, be taken into account. As consultations of this nature are not transparent, and as they court the risk of eroding public confidence in the integrity of the decision, they should in general only be undertaken where a Cabinet colleague is in a position to provide significant assistance on the public interest issue. Such cases will be rare.

Prosecution services, regardless of their structure or underlying policies, must ensure that these principles are protected. Just how that is done becomes the next issue for discussion.

Statutory Mechanisms Intended to Ensure Independence

a) England

Because of the difficulty in reconciling the impartiality and even-handedness required for the proper discharge of the Attorney General’s legal and quasi-judicial functions with the demands of partisan politics, a notion described by some as “independent aloofness”

arose in England shortly after the Campbell affair in 1924.¹⁹ Under this approach, the Attorney General refrained from becoming involved in questions of government policy or from becoming too closely entwined in policy debates within government, except in relation to his own portfolio. As mentioned earlier, in 1928 the Attorney General was removed from Cabinet and since then has neither been a member of Cabinet nor had ministerial responsibility for a government department.²⁰

Prosecutions in England are now conducted or supervised by the Director of Public Prosecutions, who, statutorily, acts under the “superintendence” of the Attorney General. The Director is politically independent, but answerable to Parliament for the decisions of the Crown Prosecution Service through the Attorney General. The precise relationship between the two was perhaps best described by Sam Silken, Q.C., (later Lord Silken), himself a former Attorney General in the 1970’s²¹:

Some seem to think that the director is a mere creature of the Attorney General. They are mistaken. The director is essentially an independent, non-political figure...his decisions are his own and not those of the Attorney General...The vast majority of cases dealt with by the director or his staff are never seen or heard of by the Attorney General...thus it is vital to a successful relationship that the director and his staff should be perceptive as to the kind of case about which the [Attorney General is] likely to be concerned and as to the public interest factors which are likely to concern [him] and it is equally vital that so far as practicable the [Attorney General] should leave the director to carry out his functions without any greater interference than is necessitated by the duty of “general superintendence”.

¹⁹ “*The Attorney General, Politics and the Judiciary*”, a paper delivered to the fourth Annual Colloquium of the Judicial Conference of Australia in November 1999 by the Honourable L.J. King, AC QC, *supra*, footnote 9.

²⁰ *Ibid.*; and see Edwards, Royal Commission, *supra*, footnote 7, at p. 126; and see footnote 6, *supra*, and the accompanying text.

²¹ *The Parliamentarian*, published by the Commonwealth Parliamentary Association in July 1978

Sir Michael Havers (later, Lord Havers) put a finer point on this relationship when, in 1979, he said the following in the House of Commons in his capacity as Attorney General of England:²²

My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship is such that I require to be told in advance of the major, difficult, and from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction.

The Crown Prosecution Service was created in 1985 as a national independent prosecuting service. At the same time, a Code for Crown Prosecutors was established. Issued pursuant to statute by the Director of Public Prosecutions, the Code set out, for the first time, the basic principles that Crown Prosecutors should follow when making decisions in individual cases. Since then, the Code has been revised twice, most recently in 1994. Under this Code, the decision whether to prosecute is anchored, as it is in Canada, on the sufficiency of evidence and the public interest.²³

b) Australia

The Honourable L.J. King AC QC, a former State Attorney General during the 1970's, observed in 1999 that "from colonial times the Attorney General (in Australia) has always been an important political as well as legal figure. He has been a member of the

²² H.C. Debates (U.K.), vol. 976, Written Answers, cols. 187-8 (Dec. 13, 1979).

²³ "A Study of the Impact of the Revised Code for Crown Prosecutors," by Allan Hoyano *et al*, [1977] Crim. L.R. 556; "Review of the Crown Prosecution Service," [1998] Crim. L.R. 517.

Cabinet and has frequently held other portfolios [such as Prime Minister]”.²⁴ He added, somewhat gratuitously if not cryptically, that “independent aloofness played no part in their careers”.

In the 1970’s and early 1980’s, public confidence in the administration of criminal justice in Australia was severely shaken by several scandals concerning politicians and judges who were alleged to be involved in organized crime.²⁵ Special Prosecutors, independent from the Attorney General, had to be appointed under new statutory authority to ensure impartial investigations and prosecutions. Final reports of the special prosecutors recommended the establishment of a permanent office of Director of Public Prosecutions. Legislative changes followed federally, and at the state level.

The situation in the State of Victoria deserves special comment. In 1982, Victoria was the first State to establish an independent Director of Public Prosecutions in Australia. Arguably, this position became the most secure prosecution office in the Commonwealth: the incumbent was appointed by Order-in-Council, and held office until the age of 65; salary was tied to that of a Supreme Court Judge, and the Director could not be removed except by Resolution of each of the Houses of Parliament of the State of Victoria.

However, in 1993 the then DPP for Victoria charged eleven serving and former police officers with murder arising from two shootings. His decision proved to be not only controversial within the Victorian police, but also served to spark heated legal and political debate about the independent nature of the DPP’s role and responsibilities.²⁶

²⁴ The Honourable L.J. King AC QC, *supra*, footnote 9, at pages 3-4

²⁵ Edwards, *Royal Commission*, *supra*, at pp. 45 *et seq*; and Edwards, “The Office of Attorney General – New Levels of Public Expectations and Accountability”, *supra*, footnote 15.

²⁶ “Explaining Prosecution Decisions Publicly”, by Justice Goddard, formerly Deputy Solicitor General for New Zealand, [1996] *New Zealand Law Journal* 355 at p. 358; and see the authorities noted in footnote 27, *infra*.

As a consequence, the State of Victoria tabled a Bill that was intended to reduce the mandate of the Director of Public Prosecutions. In the public debate that followed, the foundational statute was repealed in favour of *The Public Prosecutions Act 1994 (Vic)*, despite widespread protest from the legal profession, media and members of the public.²⁷

Yet another event in Australia tends to support the proposition that even statutorily-created, independent prosecution agencies can be vulnerable to political pressure. A Director of Public Prosecutions in charge of an Australian prosecution service that shall remain nameless once related this to me: several years earlier, his office had commenced a prosecution program that was controversial, and was seen to be particularly resource consuming. The head of Government's Treasury Board met with the Director of Public Prosecutions, and the conversation proceeding along the following lines:

Treasury Board: This particular program is controversial, and not really supported by the public. Is it really necessary? Can you eliminate it, and reduce your expenditures?

Director of Public Prosecutions: No. In my judgement, it is necessary, and in the public interest. I intend to continue the program for at least a few more years.

Treasury Board: Fine. You have the power to do that. By the way, what is your total budget for that program?

Director of Public Prosecutions: Fifteen million dollars.

Treasury Board: Thank you for that information. Your overall budget is now cut by that amount.²⁸

²⁷ Ibid.; and see John McKechnie, Q.C., "Directors of Public Prosecutions: Independent and Accountable", (1996-1997), 15 *Australian Bar Review* 122, at p. 122; and Justice Kirby's Papers, "The English Constitutional Settlement and Judicial Tenure", by the Honourable Justice Michael Kirby AC CMG, President, Court of Appeal, Supreme Court of New South Wales, *supra*, footnote 9.

²⁸ Recently, the former Director of Public Prosecutions for Western Australia (now on the Bench and not the DPP referred to here) made this observation: "The potential for ultimate dismemberment of the office by a government is so obvious it barely needs stating. If a government or a parliament really wishes to destroy a prosecution service, each is capable of doing so." McKechnie, *supra*, at p. 122. To the same effect, see Kaufman, *Review of the Nova Scotia Public Prosecution Service*, *supra*, footnote 15, at p. 336 (authored by Dr. Philip C. Stenning).

c) New Zealand

New Zealand does not have a Director of Public Prosecutions. However, for a number of years, it has had an independent prosecution service. The Solicitor General is responsible for prosecutions and is the government's chief legal advisor. Unlike the Attorney General, who is a Member of Parliament and Cabinet, the Solicitor General is a permanent, non-elected appointee. The Solicitor General has all the powers and duties of the Attorney General. The Attorney General has the authority to intervene in prosecutions, but seldom does. As a consequence, the Solicitor General's independence is anchored on and protected by tradition, not statute.²⁹

As a matter of practice, the Solicitor General appoints district Crown Solicitors throughout the major urban and provincial centres in New Zealand. They undertake the prosecution function and exercise many, though not all, of the Attorney General's prosecutorial authority. Most Crown Solicitors are practitioners who have been drawn from the private sector, and who discharge their responsibilities of office under a Warrant through the employment of staff lawyers in their firms as Crown Prosecutors.

d) The United States of America

In her study of United States Attorneys General entitled *Conflicting Loyalties, Law and Politics in the Attorney General's Office, 1789 – 1900* (University Press of Kansas, 1992), an American academic, Nancy Baker, contends that there are two types of Attorneys General: The "Advocate", and the "Neutral". The Attorney General as "advocate" is, in the words of one writer, "the President's lawyer". Robert Kennedy was

²⁹ See Law Reform Commission Working Paper, *supra*, footnote 18, at p. 50-1; and see Edwards, *supra*, Royal Commission, vol. 5, at pp. 115-119.

perhaps the best example. He felt passionately about issues of poverty, discrimination and corruption, and maintained some involvement in political activities during his term in office. The most recent United States Attorney General, Janet Reno, is probably at the other end of the spectrum, evidenced particularly by her handling of recent controversies concerning former President Clinton: generally, see Anderson, *Janet Reno: Doing the Right Thing* (John Wiley and Sons, New York, 1994).

At the federal level in the United States, largely in response to the controversies arising from the conduct of then President Richard Nixon in the Watergate Affair, the office of “Independent Counsel” was established by statute.³⁰ Under that scheme, the Attorney General may conduct a preliminary investigation into any allegation of a violation of criminal law. If it is determined that further investigation is warranted, an application for the appointment of Independent Counsel may be made to the United States Court of Appeals for the District of Columbia. An application must have sufficient information to assist the court in selecting the counsel and to determine their needed prosecutorial jurisdiction. It is the duty of the Appeals Court to select an Independent Counsel and then to delineate their prosecutorial jurisdiction. Independent counsel must have appropriate experience, and are expected to perform their duties in a precise and cost-efficient manner.

The Appeals Court is responsible for attaining adequate authority to fully investigate and prosecute the matter for which counsel was appointed. This includes the authority to prosecute Federal crimes. The identity of the Independent Counsel may not be publicized without the consent of the Attorney General or a decision of the Appeals Court. The Attorney General and the Appeals Court can expand the jurisdiction, as can the Independent Counsel through a proposal to the Appeals Court.

³⁰ Title 28 of the *United States Code*, enacted 1978. For a history of this office, see Edwards, *supra*, “Royal Commission”, vol. 5 at pp. 69-94.

The Independent Counsel has full power and independent authority to exercise all investigative and prosecutorial functions that are vested in the Department of Justice and the Attorney General. These powers include:

- Conducting proceedings before grand juries
- Participating in court proceedings and litigation in civil and criminal matters
- Appealing any decision of a court
- Reviewing all documentary evidence available from any source
- Contesting any testimonial privilege
- Receiving national security clearances and withhold evidence in interest of national security
- Making an application to any Federal court for immunity of a witness
- Inspecting, obtaining or using a tax return
- Handling all aspects of a case in the name of the United States
- Consulting with the United States Attorney for the district in which violation occurred
- Acquiring additional personnel (investigators, attorneys, consultants)

The Independent Counsel may request the assistance of the Department of Justice in their investigation, and by law the Department must comply. The Department of Justice is also obligated to fund the entire investigation conducted by the Independent Counsel.

The Counsel who is appointed, on the other hand, must comply with the established policies of the Department of Justice during their investigation and prosecution, and comply with national security procedures used by the Department. A report is required from the Counsel every six months, and at the end of the investigation. An appointed Independent Counsel can only be removed through the action of the Attorney General.

The Independent Counsel role is terminated once the investigation is complete and a final report has been prepared.

In practice, Independent Counsel have generally been lawyers drawn from private law firms. Abdication of the prosecutorial responsibility to the private sector, subject only to a theoretical political removal power, is at best a debatable proposition in the Canadian legal framework, which traditionally has emphasized public accountability through democratically elected public officials.

Largely because of the perception that Kenneth Starr overshot his mandate as Independent Counsel in the Clinton/Lewinski controversy, and was, as some have contended, “a good idea run amok”, Title 28 of the United States Code was allowed to lapse in 1999.

The Canadian Approach

As in other jurisdictions, the approach to prosecutorial independence in Canada has evolved historically, on the basis of tradition, practice and, on occasion, political controversy.

In eight of the ten provinces, and at the federal level, prosecutions are conducted by Crown Attorneys who ultimately report, through a management hierarchy, to the Attorney General. Typically, this hierarchy involves Directors, an Assistant Deputy Attorney General and the Deputy Attorney General.

There are two exceptions to this prosecution model. The first is in the Province of Nova Scotia. There, a statutorily-based Director of Public Prosecution Office has been established, largely in response to the wrongful conviction of Donald Marshall Jr., and the Royal Commission that was called as a consequence. Since then, I think it is fair to

say that controversy has plagued this Service on a number of fronts, including its effectiveness, organizational structure, level of resources and public confidence.³¹

The second exception arises in the Province of British Columbia. There, in response to several controversies that arose during the 1980's, the Government of British Columbia passed the *Crown Counsel Act* in 1991.³² That statute assigns the Assistant Deputy Attorney General responsibility for criminal prosecutions, and provides that if the Attorney General, or the Deputy, want to give direction in a specific case, it must be in writing and be published in the *British Columbia Gazette*. Additionally, any general policy direction must be in writing. Finally, the Assistant Deputy Attorney General may appoint a special prosecutor in cases raising significant public interest. The decision of the special prosecutor is final unless the Attorney General, the Deputy Attorney General or the Assistant Deputy Attorney General overrules that decision in writing, with publication in the *Gazette*.

In 1995, the Attorney General of British Columbia in fact directed the Assistant Deputy Attorney General to apply for leave to appeal against the sentence imposed in the case of *R. v. Stone*.³³ The Attorney General instructed the appeal on the ground that the learned trial judge had erred in imposing a sentence within a sentencing range that did not sufficiently protect the public in the vicious and brutal circumstances of the offence. In

³¹ Edwards, *supra*, Royal Commission on The Donald Marshall, Jr. Prosecution; "Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation", by Joseph A. Ghiz, Q.C. and Professor Bruce Archibald. (1994); *Phillips v. Nova Scotia* (1995), 98 C.C.C. (3d) 20 (S.C.C.); *R. v. Curragh Inc.* (1997), 113 C.C.C. (3d) 481 (S.C.C.); *R. v. Regan* (1999), 137 C.C.C. (3d) 449 (N.S.C.A.), presently on appeal to the Supreme Court of Canada; "Review of the Nova Scotia Public Prosecution Service", by the Honourable Fred Kaufman, C.M., Q.C. (Nova Scotia: 1999).

³² *Crown Counsel Act*, R.S.B.C. 1996, c.87. This legislation is, in many respects, similar to the legislative model developed at the Federal level by the Commonwealth of Australia: see the earlier analysis by Prof. J. Ll. J. Edwards, Royal Commission, *supra*, footnote 7, at p. 170 *et seq.*

³³ (Unreported, February 21, 1997, Huddart, J.A.), further considered in: (1997), 113 C.C.C. (3d) 158 (B.C.C.A.), *affd.* 134 C.C.C. (3d) 353 (S.C.C.).

accordance with the *Crown Counsel Act*, that direction was published in the British Columbia Gazette on the 18th of January 1996.

This was the first time that the Attorney General of British Columbia had issued an instruction of this nature. Counsel for the accused resisted the motion on the basis that the appeal had been “motivated by political or external influences”. He further contended that the Attorney General may have permitted his interest as a member of government in the days before a general election to override his duty as the Queen’s Attorney to conduct the prosecution in accordance with the evidence and the law. In response, Crown Counsel argued that even if it could be shown that a public outcry had led to the Attorney General’s direction, the connection between the two was not inappropriate.

Against the backdrop of the Crown’s submission, Huddart, J.A. (in chambers) ruled as follows:

[11] I agree with that proposition. The “public interest” that it is the duty of the Attorney General to consider requires him to make an overall assessment of the combined weight of all factors for and against prosecution. This filtering is usually done by the Criminal Justice Branch. But the Attorney General bears ultimate responsibility for every decision to prosecute or not prosecute. Since 1991, the Attorney General has never before chosen to intervene to overrule a decision of the Assistant Deputy Attorney General responsible for that Branch as to whether to prosecute. Nor, it appears, has he done so with regard to a position being taken on a sentencing hearing. If such had happened, a direction would have been published in the Gazette.

[12] Nevertheless, it is the Attorney General’s responsibility to ensure that the courts charged with determining appropriate sentences under the *Criminal Code* are properly informed of the considerations to be taken into account in the sentencing of every person convicted of a crime.

[13] Sentences are punishment. They have significant symbolic value in our community. Parliament has fixed life imprisonment as the maximum penalty for the crime of manslaughter and no minimum term. In my view, public concern about the range of sentence habitually being imposed for the type of crime of

which the respondent was convicted is one consideration that the Attorney General may put before the court in seeking a reconsideration of the range of sentence. Thus, I am of the view that the subjective opinions of the public as expressed in the media are a factor the Attorney General may take into account in determining whether to seek a review of the range for a particular type of crime.³⁴

At law, Attorneys General in Canada unquestionably can direct individual prosecution decisions.³⁵ They can instruct that charges be laid. They can instruct that proceedings be discontinued, or that appeals be brought. In theory, an Attorney General can even direct that a particular individual be called as a witness on behalf of the Crown in an individual case.

That is the theory. In practice, such direction is virtually unheard of. There are several reasons for this. First, and most importantly, these types of decisions are routinely made by professionals in the Department, detached from partisan political considerations. A direction from the Attorney General in a particular case, though supportable in law, cannot be done without conveying at least the impression that the direction was politically inspired. That is precisely what happened in *R. v. Stone*: the defense contended that the Attorney General sought to enhance his political position before a general election by directing that an appeal be taken for the purpose of demonstrating a “get tough” approach to spousal manslaughter.

There is a second reason why Attorneys General in Canada have refrained from providing direction in individual cases. Even where the evidence falls short of demonstrating an intervention for partisan political purposes, the facts may nonetheless sustain the claim that the direction expresses broad government policies that will be

³⁴ This decision seems consistent with the views of the Supreme Court of Canada, expressed in *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.) at p. 10(e), referred to in footnote 3, *supra*.

³⁵ With the possible exception of Nova Scotia.

pursued even though they may result in outcomes that are different from normal prosecution decision-making in the province.

In both of these scenarios, the direction is lawful and for that reason the result in *Stone* is correct. There is, however, the possibility if not the probability that public confidence in the decision – and, ultimately, in the political neutrality of the criminal justice system – may be damaged in the process.

As a postscript, it should be noted that the Attorney General in the *Stone* case, subsequently the Premier of British Columbia, felt so strongly about the issues raised in the appeal that after publication of his direction, he appeared personally before the Supreme Court of Canada to argue the case, and in that sense was prepared to be held publicly accountable for the positions he advanced.

Unlike the approach in Nova Scotia and other Commonwealth countries, the British Columbia approach emphasizes transparency and public accountability over structural mechanisms. Further, less formal mechanisms have developed in Canada which also tend to underscore the importance of transparency over structures in the Canadian approach to independence and accountability. I will now describe the principal one.

Starting around ten years ago, an informal practice arose amongst provincial Justice departments and the Federal Department of Justice under which cases would be “shared” or “transferred” in situations where there were institutional conflicts of interest or where the proposed prosecutions involved persons employed in the administration of criminal justice. For instance, where it was thought that the Attorney General of British Columbia may have contravened the law, British Columbia asked the Deputy Attorney General of Alberta to provide an opinion.³⁶ Likewise, Manitoba recently has provided advice to

³⁶ See the account of this affair recorded by Stephen Owen, Inquiry Commissioner, entitled “Discretion to Prosecute Inquiry” (Vancouver: 1990), at p. 62 and p. 94 *et seq.*

another province on whether a charge of first degree murder ought to be laid against a member of the Royal Canadian Mounted Police; and several years ago Alberta sought external advice and assistance from another province where a private prosecution was commenced against the provincial Minister of the Environment, and the issue was whether the Attorney General of Alberta ought to step in and enter a stay of proceedings. It is worth noting that in an appeal arising from a decision to stay these proceedings, the Alberta Court of Appeal specifically approved of this informal practice.³⁷ The most recent example of this approach involves a request by Nova Scotia for independent counsel in a prosecution against a former Premier of that Province, where it was alleged that even the statutorily-independent Public Prosecution Service had misconducted itself during the pre-trial and trial stages of the case.³⁸

Both the British Columbia approach, and the informal arrangements amongst the provinces and the federal government, have worked well in practice for quite different reasons.

The British Columbia approach can actually be replicated in other provinces without having to rely on legislation. Several provinces now routinely retain “special prosecutors” or “independent prosecutors” in sensitive cases where it is important to be *seen* to be making prosecution decisions apart from government, and quite apart from political considerations.³⁹ A sample retainer agreement entered into between Manitoba

³⁷ *Kostuch v. A.G. Alberta* (1995), 101 C.C.C. (3d) 321 (Alta. C.A.), at p. 333.

³⁸ Alberta agreed to provide counsel in the Court of Appeal. When that counsel was appointed to the Bench, Manitoba agreed to argue the case on behalf of Nova Scotia in the Supreme Court of Canada: *R. v. Regan* (1999), 137 C.C.C (3d) 449 (N.S.C.A.), presently pending before the S.C.C. The informal arrangement between the provinces is not dissimilar to the arrangements which I understand exist within the Crown Prosecution Service (“C.P.S.”) in England and Wales. There, cases thought to have a particular local sensitivity are removed from the local C.P.S. area, and are prosecuted either by Headquarters or by a Crown Prosecutor in an adjoining C.P.S. area.

³⁹ A formal written policy which mirrors the legislation in British Columbia was announced by the Attorney General of Manitoba on the 21st of September, 2000. (See Appendix B)

and a private practitioner from British Columbia has been appended to this paper for information.⁴⁰ Key features include: the assurance that the advice is final and binding on the province, subject only to receiving contrary direction from the Attorney General or the Deputy Attorney General. Additionally, if that direction is provided, it will forthwith be made public. The terms of reference are public, as well as any amended terms of reference. Advice was also sought on what information, if any, should be made available to the public during the course of the mandate, including the final report. In some instances, as well, it has been found appropriate to make it clear in the mandate that if charges are recommended, the Independent Prosecutor will not necessarily have conduct of the trial. This minimizes if not eliminates the prospect that the Independent Prosecutor could be seen to have a vested interest in the decision whether to prosecute. Under this approach, therefore, two elements are key: the person making the decision is known publicly, and there is a commitment to accepting the advice, whatever it is, subject to being overruled in a public way.⁴¹

The informal intergovernmental “arrangement” referred to above likewise has advantages, although of a different nature. The primary advantage is that someone who routinely is involved in the conduct of prosecutions is the one who is reviewing the case. That counsel will be familiar with the role of the Attorney General and the Department in the conduct of prosecutions, as well as the Crown’s public accountability for such

⁴⁰ The retainer agreement was released to the public at the time, and is now a matter of public record. (See Appendix ‘A’).

⁴¹ Given the constitutional responsibility for the conduct of prosecutions described earlier, it is, in my view, quite doubtful that an Attorney General could abdicate his or her responsibility to the private sector in any event. Whether expressed in the mandate or not, the Attorney General will always have the ability to direct how and whether a case should proceed. Some support for this view can be found in *R. v. Doucet* (1994), 89 C.C.C. (3d) 474 (Man. C.A.), aff’d on other grounds 95 C.C.C. (3d) 287 (S.C.C.) where Huband, J.A., speaking for a unanimous Court of Appeal, said: “The Attorney General is in a unique position ...she is responsible for the prosecution of criminal cases within this jurisdiction ... whoever her agents may be, whether her permanent staff or outside special appointments, they must function under the Attorney General’s direction.” I disagree, however, with the court’s further characterization of an outside appointment as “political window dressing” – although the comment should be considered in the context of the facts of this particular case, as there was no evidence that the Special Prosecutor had previously been empowered to make independent and binding decisions, subject only to a written, published and publicly accountable override by the Attorney General.

decisions. Of course, the charge approval standard for the requesting province will apply, as will all other general prosecution policies. While this process has no statutory foundation, in practice it has worked extremely well and has served to diffuse public or political controversies surrounding individual cases, largely on the basis that decisions are made, and are *seen* to be made on a fair, dispassionate and principled basis by someone from another province who has no connection with the case.⁴²

Conclusions

Edmund Burke once observed that anyone possessing any measure of power ought to remember that they hold that authority in trust for the public. And so it is with the Attorney General, and his or her prosecuting agents: decisions which are critical to the functioning of a criminal justice system such as whether criminal charges should be laid, how the case is proved and whether appeals should be brought, are to be made on a principled basis, with the public interest as the focal point. Just how that responsibility is discharged in a manner that ensures public confidence and eliminates the intrusion of *partisan* political considerations becomes an important objective for all prosecution services.

Some countries have opted to rely upon statutorily-based structures to ensure independence and instill confidence. In certain legal, social and political contexts, that may work well. But that is not the only path to independence and accountability, and, as I have argued throughout this paper, a structure itself may end up acting as a lightning rod for public and political discontent. Rather than focusing on positive values such as independence, accountability and public confidence, the mere existence of the structure

⁴² While the *practice* of a fully transparent and publicly accountable process has worked well in Canada, legislation which mandates that same process, as in British Columbia, certainly advances the matter one step further. And it should be noted that some have argued that even the British Columbia model does not go far enough: Gil McKinnon, Q.C. and Keith Hamilton, “The Need for an Independent Prosecution Service in B.C.”, 55 *The Advocate* 37 (1997).

can result, rightly or wrongly, in fostering quite the contrary: public mistrust, and the belief that the structure is accountable to no one.

The emerging Canadian approach described in this paper trades mechanisms and structures for an open and accountable *process* – one which builds on the proposition advanced by Brandeis, J. that sunlight is the most powerful of disinfectants. Under this approach, decisions are made in a detached, neutral way, and accountability falls where it should: on the Attorney General, through a publicly transparent process which ensures, throughout, that he (or she) must account for all prosecution decisions to Cabinet colleagues, the Legislature and, ultimately, the public.

**APPOINTMENT OF SPECIAL COUNSEL
TERMS OF REFERENCE**

To: Leonard T. Doust, Q.C.
Barrister & Solicitor
Vancouver BC

On March 29, 1999 Alfred A. Monnin, Commissioner appointed pursuant to Orders-in-Council 362/1998, 497/1998 and 614/1998, presented to the Government of Manitoba his Report of the Commission of Inquiry into Allegations of Infractions of *The Elections Act and The Election Finances Act* during the 1995 Manitoba General Election. The Report makes a number of findings and provides a number of recommendations to Government.

The Report is critical of the conduct of certain individuals in the time leading up to and during the Inquiry itself. Amongst other things, there are comments with respect to the candor of certain individuals during an earlier Elections Manitoba investigation, as well as with the Commission's investigators and during testimony before the Commission of Inquiry itself. There are also comments with respect to a cover-up engineered by three named individuals.

In relation to those persons respecting whom the Commissioner has made critical comments or findings, I seek your independent written opinion on the following issues:

- a) Does there exist at the present time a sufficient basis to lay charges under the *Criminal Code* in accordance with the prosecution policy (attached) of the Province of Manitoba?
- b) If not, does there presently exist a proper basis to justify referring the matter of their conduct to police for a criminal investigation in respect of offences under the *Criminal Code*?
- c) Having regard to the advice provided in relation to (a) and (b) above, what information, if any, should be made available to the public during the course of the mandate – including the period during the review, and up to and including your report?

I wish to confirm that your opinion on these three issues is final and binding on the Department of Justice (Manitoba), subject only to receiving direction from the Attorney General or the Deputy Attorney General which direction, if given, will forthwith be made public.

I also wish to confirm that you have full access to all employees within, and all documents and information held by the Department of Justice (Manitoba). Arrangements are presently being made to forward to you all documents held by the Commission of Inquiry for which access may lawfully be given.

Your report on these issues should be provided to me by or before June 30, 1999. I understand that you have reviewed and agree with the terms of this mandate; if any aspect of it requires amendment, please contact me in writing at your earliest convenience. To ensure a fully transparent process, and public accountability, these Terms of Reference and any subsequent amendments are, and will continue to be, publicly available.

Original signed by Bruce MacFarlane

Bruce MacFarlane, Q.C.
Deputy Minister of Justice
Deputy Attorney General for the
Province of Manitoba

April 30, 1999

APPOINTMENT OF INDEPENDENT PROSECUTORS

All public prosecutions commenced at the instance of the Province of Manitoba are conducted by the Province's crown attorneys. This cadre of crown attorneys is amongst the most experienced and talented group of criminal litigators in Manitoba, and the Department of Justice is fortunate to have their services.

There is, however, one category of cases that raises issues of public confidence and the need for a public *perception* that appropriate prosecution decisions are made. Most commonly, these cases involve situations where those who are involved in the administration of criminal justice in Manitoba are themselves directly implicated in the case – as accused, victim or witness. For instance, where, following a police investigation, it is proposed that criminal charges be laid against a prosecutor, judge, defense lawyer, police officer, or provincially elected official, there exists the need to assure the public that decisions be made on a principled basis, free from any sort of bias. The purpose of this Policy Statement is to describe the steps that must be taken in cases of this nature.

Type of Cases Falling within this Policy

This Policy applies to all proposed criminal prosecutions against persons working directly in the criminal justice system in Manitoba. This includes: members of the judiciary, police officers, lawyers involved in litigation (or those having business with the Department), members of the Legislative Assembly and their immediate staff, as well as employees of the Department of Justice. In other types of circumstances, it may also be appropriate to apply this Policy, such as when an individual falling into the categories referred to above is not charged, but is the victim of the crime or will be called as a witness. This Policy must always be applied where the Department has been asked by the Commissioner of the Law Enforcement Review Agency to consider whether criminal charges should be laid following an investigation under *The Law Enforcement Review Act* respecting the conduct of a police officer.

The Process of Appointment

Where charges to which this Policy applies have already been laid, or an opinion is sought on whether charges are appropriate, counsel should immediately refer the matter to the Director of Prosecutions for the appointment of an Independent Prosecutor. Immediate steps are necessary to ensure that even preliminary issues such as release on bail, adjournment of the charges and disclosure to the defense are decided by the Independent Prosecutor rather than anyone within the Department.

Upon receiving a referral, the Director of Prosecutions will arrange for the appointment of an Independent Prosecutor on the basis of the criteria described below. In some cases,

the Director should consult with the Assistant Deputy Attorney General before making final decisions. The principal criteria for the appointment of an Independent Prosecutor are: independence from government and the individuals involved in the specific case; excellence in the practice of law; a track record for integrity; and significant previous experience in either the prosecution or defense of criminal charges in the court system. *Ad hoc* appointments will usually be appropriate as individual cases arise. In matters arising under *The Law Enforcement Review Act*, a standing appointment of the Independent Prosecutor will be made to facilitate referrals from the Commissioner of the Law Enforcement Review Agency directly to the Independent Prosecutor.

Nature of Appointments

There are an infinite variety of circumstances in which it may become necessary to appoint an Independent Prosecutor. In view of this, there are a number of alternative approaches that may be adopted to ensure an independent decision-making process. In ascending levels of independence from government, they are:

- a) *Appointment of a Private Practitioner from Manitoba*: This option will suffice in the vast majority of cases. Where the individual is a former Crown Attorney who has since left the Department, care must be taken to ensure that sufficient time has elapsed to gain a “distance” from the Department. Care must also be taken to ensure that the person selected has not had any previous dealings with the alleged offender.
- b) *Appointment of a Crown Attorney from Another Province*: Informal protocols exist between this Department and many other Provinces or Territories to facilitate the appointment of a Crown Attorney from outside of Manitoba. This approach was judicially approved by the Alberta Court of Appeal in *Kostuch v. AG Alberta* (1995), 101 C.C.C. (3d) 321 Alta. C.A., at p. 333 (in which a Manitoba Crown Attorney was appointed to prosecute in Alberta to avoid a perceived conflict of interest in that Province).
- c) *Appointment of a Private Practitioner from Another Province*: This option gives maximum independence from the Department. It is also the most expensive option, given the need to travel to and from Manitoba to interview witnesses and conduct proceedings. This option should only be pursued in exceptional cases, and after conferring with the Deputy Attorney General.

Terms and Conditions of Appointment

To ensure a transparent process, and public accountability, the terms of reference under which an Independent Prosecutor is retained should be reduced to writing and made publicly available upon request. A copy of this Policy Statement must also be provided

to the Independent Prosecutor once retained, and be made available to the public on request.

Absent exceptional circumstances, the following should generally form a part of the terms of reference:

- a) The retainer agreement, including the terms of reference and any subsequent amendments, are publicly available on request;
- b) Where a legal opinion is sought, the precise question(s) for which the advice is being sought, and the person to whom it should be provided;
- c) The advice and decisions in the case are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General, which direction, if given, will forthwith be made public;
- d) The Independent Prosecutor has full access to all employees within, and all documents and information held by the Department of Justice for the Province of Manitoba;
- e) The Independent Prosecutor is to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba, which apply to all provincial prosecutions throughout the province. This includes, for instance, the charge approval standard (reasonable likelihood of conviction), disclosure policies as well as directives from the Attorney General on the position to be taken in cases of gang-related crime, violent crime, child victims and the so-called defence of “embarrassment”;
- f) In many cases, it will be appropriate to include in the terms of reference a statement to the effect that advice is also being sought on the extent to which information concerning the case, including the opinion sought, should be made available to the public. This will be especially important where the case has attracted considerable public attention and scrutiny.