Minister of Justice
and Attorney General of Canada

CANADA

Ministre de la Justice
et procureur général du Canada

PROSECUTION POLICY OF THE ATTORNEY GENERAL OF CANADA

Guidelines for the Making of Decisions in the Prosecution Process

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The eight chapters in this booklet outline the policies of the Attorney General of Canada which are most commonly applied on a day-to-day basis. They have been extracted from the Crown Counsel Policy Manual, made public by the Attorney General of Canada in January 1993. The complete manual, which is also available, consists of 37 chapters concerning the conduct of criminal litigation.

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FOREWORD

Criminal trials in Canada are conducted within an adversarial framework. Crown counsel are advocates, trained to conduct their duties with industry, skill and vigour. Indeed, the public is entitled to expect excellence on their part. However, Crown counsel are more than just advocates. They are also public officers engaged in the administration of justice. Their functions are, in many respects, quasi-judicial in nature. In this Foreword, I would like to comment on two aspects of the role of Crown counsel that are of special importance.

First, and above all else, counsel appearing for the Crown are expected to conduct prosecutions fairly and dispassionately. Almost 40 years ago, a member of the Supreme Court of Canada described the role of Crown counsel in terms which have since attained almost classic dimensions:

> It cannot be overemphasized 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.

In addition, the criminal law confers broad discretionary powers on the Attorney General which, in daily practice, are placed on counsel representing the Attorney General. The exercise of this discretion plays an important role in the criminal justice system. Indeed, as the Supreme Court of Canada has recently observed, "a [criminal justice] system that attempted to eliminate discretion would be unworkably complex and rigid."

Prosecutorial discretion arises at many stages in the trial of a criminal case. For instance, Crown counsel are entitled to stay proceedings, elect the mode of trial, accept pleas to lesser offences, and launch appeals against an acquittal or the sentence imposed after conviction. The *Criminal Code* does not, however, describe the critèria by which this discretion is to be exercised.

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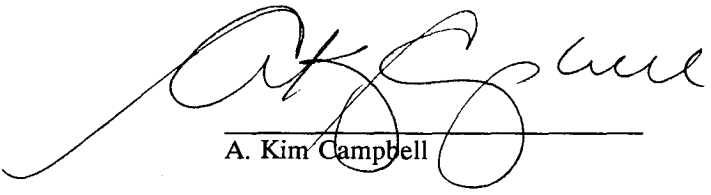
In my view, the proper exercise of this discretion requires a balance to be struck between the right of an accused to a fair hearing and the interest that the public has in the effective enforcement of the criminal law. The attached policy, which sets out the general principles that will guide Crown counsel in the exercise of prosecutorial discretion, seeks to strike this balance. Its application will promote consistency in the conduct of proceedings brought at the instance of the Government of Canada. It will also assist in ensuring that discretion is exercised according to the principles set out in the *Charter of Rights and Freedoms*. Equally important, it will serve the purpose of informing the public of the basis upon which the Attorney General of Canada exercises the discretion conferred upon that office by law.



A. Kim Campbell

Chapter 1
THE DECISION TO PROSECUTE

Introduction

This chapter explains the criteria for deciding whether to prosecute. It is based on standards that have been developed over the years by Attorneys General in Canada and elsewhere in the Commonwealth.

Deciding whether to prosecute is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

Fairness and consistency are important objectives in the process leading to the institution of criminal proceedings. However, fairness does not preclude firmness in prosecuting, and consistency does not mean rigidity in decision-making. The criteria for the exercise of the discretion to prosecute cannot be reduced to something akin to a mathematical formula; indeed, it would be undesirable to attempt to do so. The breadth of factors to be considered in exercising this discretion clearly demonstrates the need to apply general principles to individual cases and to exercise good judgment in so doing.

Crown counsel must consider two main issues when deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued?

Sufficiency of the Evidence

In the assessment of the evidence, a bare *prima facie* case is not enough; the evidence must demonstrate that there is a *reasonable prospect of conviction*. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law.

A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well

as the admissibility of evidence implicating the accused. Crown counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction.

Crown counsel are expected to apply this evidential standard throughout the proceedings — from the time the investigative report is first received until the time of trial. When charges are laid, the test may have to be applied primarily against the investigative report, although it is certainly preferable — particularly in borderline cases — to look beyond the statements of the witnesses. Later in the proceedings, especially after a preliminary inquiry, counsel may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and of course there can never be an assurance that a prosecution will succeed. Nonetheless, counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction.

The Public Interest Criteria

If satisfied that there is sufficient evidence to justify the institution or continuation of a prosecution, Crown counsel must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.

It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Sir Hartley Shawcross, Q.C., then Attorney General of England (now Lord Shawcross), outlined the following principles, which have since been accepted as correct by successive Attorneys General of Canada:

> It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute, amongst other cases: "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest."

That is still the dominant consideration.[1]

The factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued.

The resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases. The corollary is that the available resources should be employed to pursue with due vigour those cases worthy of prosecution.

In some cases it will be appropriate for Crown counsel to obtain the views of the investigative agency or client department when determining whether the public interest requires a prosecution to be commenced or continued. This can, in most instances, be accomplished through discussion with the investigators or the Departmental Legal Services Unit attached to the client department. Ultimately, however, Crown counsel must decide independently whether the public interest warrants a prosecution.[2]

Where the alleged offence is not so serious as plainly to require criminal proceedings, Crown counsel should always consider whether the public interest requires a prosecution. Public interest factors which may arise on the facts of a particular case include:

(a) the seriousness or triviality of the alleged offence;

(b) significant mitigating or aggravating circumstances;

(c) the age, intelligence, and physical or mental health or infirmity of the accused;

(d) the accused's background;

(e) the degree of staleness of the alleged offence;

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1 U.K., H.C. Debates, vol. 483, col. 681 (29 January 1951).

2 See Chapter 8, "The Independence of the Attorney General."

(f) the accused's alleged degree of responsibility for the offence;

(g) the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;

(h) whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;

(i) the availability and appropriateness of alternatives to prosecution;

(j) the prevalence of the alleged offence in the community and the need for general and specific deterrence;

(k) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;

(l) whether the alleged offence is of considerable public concern;

(m) the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;

(n) the attitude of the victim of the alleged offence to a prosecution;

(o) the likely length and expense of a trial, and the resources available to conduct the proceedings;

(p) whether the accused agrees to cooperate in the investigation or prosecution of others, or the extent to which the accused has already done so;

(q) the likely sentence in the event of a conviction; and

(r) whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, or national security.

The application of these and other relevant factors, and the weight to be given to each, will depend on the circumstances of each case.

The proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Mitigating factors present in a particular case can then be taken into account by the court in the event of a conviction.

Irrelevant Criteria

A decision whether to prosecute must clearly *not* be influenced by any of the following:

(a) the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;

(b) Crown counsel's personal feelings about the accused or the victim;

(c) possible political advantage or disadvantage to the government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Chapter 2
DIRECT INDICTMENTS

Introduction

Section 577 of the *Criminal Code* permits the Attorney General or the Deputy Attorney General to send a case directly to trial without a preliminary inquiry or after an accused has been discharged at a preliminary inquiry. This chapter outlines the criteria that will be applied by the Attorney General of Canada when determining whether to consent to the preferment of an indictment pursuant to this provision. It will also describe the procedure for departmental counsel and agents to follow when making a recommendation for a "direct indictment."

Statement of Policy

The discretion vested in the Attorney General under section 577 of the *Criminal Code* will be exercised only in exceptional circumstances involving serious violations of the law. The controlling factor in all instances is whether the public interest requires a departure from the usual procedure of indictment following an order to stand trial made at a preliminary inquiry. The public interest may require a direct indictment in circumstances which include (but are not restricted to) the following:

(a) where the accused is discharged at a preliminary inquiry because of an error of law, jurisdictional error, or palpable error on the facts of the case;[1]

(b) where the accused is discharged at a preliminary inquiry and new evidence is later discovered which, if it had been tendered at the preliminary inquiry, would likely have resulted in an order to stand trial;

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[1] For a discussion of "palpable error" as a basis for controverting findings of fact made in earlier proceedings, see: *MacNeill and Shanahan* v. *Briau*, [1977] 2 S.C.R. 205; *Hoyt* v. *Grand Lake Devl. Corp.*, [1977] 2 S.C.R. 907 at 911-12, adopted in *R.* v. *Purves* (1979), 50 C.C.C. (2d) 211 at 222-24 (Man. C.A.).

(c) where the accused is ordered to stand trial on the offence charged and new evidence is later obtained that justifies trying the accused on a different or more serious offence for which no preliminary inquiry has been held;

(d) where significant delay in bringing the matter to trial resulting, for instance, from persistent collateral attacks on the pre-trial proceedings, has led to the conclusion that the right to trial within a reasonable time guaranteed by paragraph 11(b) of the *Charter of Rights and Freedoms* may not be met unless the case is brought to trial forthwith;

(e) where there is a reasonable basis to believe that the lives, safety or security of witnesses or their families may be in peril, and the potential for interference with them can be reduced significantly by bringing the case directly to trial without preliminary inquiry;[2]

(f) where proceedings against the accused ought to be expedited to ensure public confidence in the administration of justice — for example, where the determination of the accused's innocence or guilt is of particular public importance;

(g) where a direct indictment is necessary to avoid multiple proceedings — for example, where one accused has been ordered to stand trial following a preliminary inquiry, and a second accused charged with the same offence has just been arrested or extradited to Canada on the offence; or

(h) where the age, health or other circumstances relating to witnesses requires their evidence to be presented before the trial court as soon as possible.

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[2] Wherever reasonably practicable, Crown counsel should first ask the investigators to prepare a confidential threat assessment where a direct indictment is being considered on this basis.

The circumstances in a case for which a direct indictment is recommended must meet the charge approval standard described in Chapter 1, "The Decision to Prosecute" — namely, that there is a reasonable prospect of conviction at trial, and the public interest requires a prosecution to be pursued.

Procedure

(i) **Regional Office**

The Regional Director must ensure preparation of the following:

(a) a concise statement of facts sufficient to conclude that there is a reasonable prospect of conviction at trial and that the public interest requires a prosecution to be pursued. The statement must include the names of the accused, the charges and the evidence, the reasons for requesting a direct indictment and the date for which the indictment is required. Where the indictment charges several accused, the statement must be sufficient to demonstrate that there is sufficient evidence to implicate each accused individually;

(b) a statement of the extent of disclosure already given to the defence or that will be given before trial;

(c) two original indictments containing all charges for which the indictment is requested. Both should be signed in the usual way by the person who normally signs indictments in the regional office. Below that, the following should appear:

> I hereby consent to the preferment of this indictment pursuant to section 577 of the *Criminal Code*. Dated at Ottawa, Ontario, this__ day of _____, 199_.
>
> _____
> Deputy Attorney General of Canada
> (or Attorney General of Canada, as the case may be)

The Regional Director shall review each recommendation and, if satisfied that the case is appropriate for a direct indictment, send it to the Senior General Counsel (Criminal Law) or, in drug or proceeds of crime cases, the Senior General Counsel (National Strategy for Drug Prosecutions).

(ii) Headquarters

The Senior General Counsel reviews the request and prepares a recommendation for the Assistant Deputy Attorney General (Criminal Law). If it is recommended that a direct indictment be preferred and the Assistant Deputy Attorney General agrees, the recommendation will be forwarded to the Deputy Attorney General for consent. If the Assistant Deputy Attorney General concludes that a direct indictment is not appropriate in the circumstances, the Regional Director will be advised that no recommendation will be made to the Deputy Attorney General. In unusual circumstances involving a significant public interest, the Assistant Deputy Attorney General may recommend that the Attorney General consent to the preferment of the indictment personally.

If the Deputy Attorney General accepts the recommendation, one of the original indictments, signed by the Deputy Attorney General, is sent to the regional office. The second signed original is filed in the appropriate Senior General Counsel's office.

Once the trial has been completed, the Regional Director must report the outcome to the appropriate Senior General Counsel.

Procedural Considerations After Preferment of a Direct Indictment

Where an indictment has been preferred pursuant to a consent under section 577, Crown counsel assuming responsibility for the trial should ensure that two important procedural issues are considered. First, where the case is being sent directly to trial without a preliminary inquiry, there is a heightened need for early and full disclosure in accordance with Chapter 3, "Pre-Trial Disclosure." Second, where, after a full review of the evidence, Crown counsel concludes that any or all of the charges ought to be withdrawn, stayed or reduced, the appropriate Senior General Counsel in the Criminal Law Branch or the Assistant Deputy Attorney General should first be consulted, wherever time reasonably permits.

Re-elections

Where an indictment has been preferred pursuant to a consent under section 577, the accused is deemed under subsection 565(2) to have elected to be tried by a court composed of a judge and jury. Under that same subsection, however, the accused may re-elect for trial by a judge without a jury, with the written consent of Crown counsel. The procedures necessary to give effect to this right of re-election are described in subsections 565(3) and (4), and subsections 561(6) and (7). Crown counsel should consider the criteria described in Chapter 4, "Elections and Re-Elections," when assessing whether consent should be provided to a proposed re-election.

As noted earlier in this chapter, a direct indictment should be endorsed to read that consent has been given "pursuant to section 577 of the *Criminal Code*." This is intended to avoid the erroneous conclusion that the preferment of the indictment by the Attorney General or the Deputy Attorney General was intended to *require* a jury trial under section 568. A requirement of that nature, given its extraordinary character, will be expressly endorsed on the indictment (as outlined in Chapter 4).

Laying a New Information

Where an accused has been discharged at the conclusion of a preliminary inquiry, a new information may be laid with the personal consent in writing of the Attorney General or the Deputy Attorney General (paragraphs 577(b) and (c) of the *Criminal Code*).

Where the evidence meets the charge approval standard outlined in Chapter 1, but the case fails to meet the test for a direct indictment described above ("exceptional circumstances involving serious violations of the law"), it may nonetheless be appropriate to consider laying a new information. A new information may be laid where:

(a) the accused was discharged at the preliminary inquiry because of an error of law, jurisdictional error, or palpable error on the facts of the case;[3] or

[3] *Supra*, note 1.

(b) new evidence has been discovered after the accused was discharged which, if it had been tendered at the preliminary inquiry, would likely have resulted in an order to stand trial.

Chapter 3

PRE-TRIAL DISCLOSURE

Statement of Policy

1. Counsel appearing for the Attorney General of Canada in a criminal matter shall, on request, disclose to the accused, or counsel for the accused, the evidence on which the Crown intends to rely at trial as well as any evidence which may assist the accused, whether intended to be adduced or not.[1] In all cases, whether a request has been received or not, Crown counsel shall disclose any evidence tending to show that the accused may not have committed the offence charged. This disclosure has two main purposes:

   (a) to ensure that the accused knows the case to be met, and is able to make full answer and defence; and

   (b) to encourage the resolution of facts in issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings.

2. This policy does not require:

   (a) pre-trial disclosure of reply evidence tendered by the Crown in response to issues raised by the accused at trial, where the relevance of that evidence first becomes apparent during the course of the trial itself; or

   (b) disclosure of information that should not be disclosed in the public interest, including:

      (i) information tending to identify a confidential police informant, prejudice an ongoing police investigation, or reveal confidential investigative techniques used by the police;

      (ii) information that may be considered a confidence of the Queen's Privy Council for Canada; and

[1] If the accused is not represented by counsel, Crown counsel shall also arrange to have the accused informed that disclosure from the Crown is available under this policy; see paragraph 6, below.

(iii) information that cannot lawfully be disclosed or that would be "injurious to international relations or national defence or security" if disclosed.[2]

Guidelines for Application of this Policy

3. On receiving a request, Crown counsel shall, as soon as reasonably practicable, provide disclosure in accordance with the principles outlined in paragraphs 1 and 2. In most cases, this will mean that the defence will be given at least the following:[3]

(a) particulars of the circumstances surrounding the offence;

(b) copies of the text of all written statements concerning the offence which have been made by a person with relevant evidence to give; where the person has not provided a written statement, a copy or transcription of any notes that were taken by investigators when interviewing the witness; if there are no notes, a summary of the anticipated evidence of the witness;[4]

(c) an appropriate opportunity to examine any electronically recorded statements of a witness to a person in authority;

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[2] Sections 37, 38 and 39 of the *Canada Evidence Act* deal with the disclosure in court of this type of evidence. The investigators should be consulted about any potential disclosure of information concerning informants, ongoing investigations and investigative techniques, and in some instances it may also be appropriate to consult the Assistant Deputy Attorney General (Criminal Law) (see subparagraph 2(b)(i) in text). The Privy Council Office should, through the Assistant Deputy Attorney General (Criminal Law), be consulted on all requests for the disclosure of information that may be considered a confidence of the Queen's Privy Council for Canada, as well as evidence that could injure international relations, national defence or security if disclosed (subparagraphs 2(b)(ii) and (iii)).

[3] Usually, disclosure will occur after the investigators have given Crown counsel the details of the case. In view of the respective roles played by investigators and Crown counsel in the criminal justice system, the investigative agency is in a unique, if not an exclusive, position to give Crown counsel the evidence. If the agency fails to give Crown counsel the evidence required to be disclosed under this policy, Crown counsel may need to assess the extent to which the accused is able to have a fair trial and decide whether, in the circumstances, an adjournment, stay of proceedings, or other remedy is required or appropriate.

[4] The circumstances under which information about the identity or location of a witness may be disclosed before trial are outlined in paragraph 5, below.

(d) a copy of all written or recorded statements concerning the offence which have been made by the accused to a person in authority; in the case of verbal statements, a verbatim account, where available, including any notes of the statement taken by investigators during the interview; if a verbatim account is not available, an account or description of the statement (whether the statement, in whatever form, is intended to be adduced or not);

(e) particulars of the accused's criminal record;

(f) copies of all expert witness reports relating to the offence, except to the extent that they may contain privileged information;

(g) copies of all documents and photographs that Crown counsel intends to introduce into evidence during the case-in-chief for the prosecution, and an appropriate opportunity to inspect any case exhibits,[5] whether Crown counsel intends to introduce them or not;[6]

(h) a copy of any search warrant relied on by the Crown and, if intercepted private communications will be tendered, a copy of the judicial authorization or written consent under which the private communications were intercepted;[7]

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5 The term "case exhibits" refers to items seized or acquired by investigators during the investigation of the offence in question which are relevant to the charges against the accused. Where a case exhibit is detained by police pursuant to a court order, counsel for the accused may, depending on the circumstances, be required to obtain an order under subsection 490(15) of the *Criminal Code* before it can be examined.

6 In some types of cases, the sheer volume of case exhibits available, but not intended to be relied on by the Crown, may require Crown counsel to exercise some discretion when providing disclosure. Examples include cases involving a substantial number of documents, files or intercepted private communications. Crown counsel should respond to requests for disclosure in these types of situations case by case, in consultation with senior managing lawyers and the investigators. If appropriate, Crown counsel should ask counsel for the accused to define as precisely as possible the type or class of documents, tapes or other exhibits sought for examination. Access to existing indices or intercept logs may, in some cases, help the defence narrow its request to items relevant to the defence of the accused.

7 Concerning the extent to which access may be provided to the tapes themselves, see subparagraph 3(g) and accompanying footnotes.

(i) a copy of the information or indictment;

(j) particulars of similar fact evidence that Crown counsel intends to rely on at trial;

(k) particulars of any procedures used outside court to identify the accused; and

(l) particulars of any other evidence on which Crown counsel intends to rely at trial, and any information known to Crown counsel which the defence may use to impeach the credibility of a Crown witness in respect of the facts in issue in the case.

4. Additional disclosure beyond that outlined in paragraphs 3(a) to (l) may be made at the discretion of Crown counsel. In exercising this discretion, Crown counsel shall balance the principle of fair and full disclosure, described in paragraph 1, with the need, in appropriate circumstances, to limit the extent of disclosure, as outlined in paragraphs 2 and 5.

Protecting Witnesses Against Interference

5. If the defence seeks information concerning the identity or location of a witness, four considerations are pre-eminent: First, the right of an accused to a fair trial; second, the principle that there is no property in a witness; third, the right of a witness to privacy and to be left alone until required by subpoena to testify in court; fourth, the need for the criminal justice system to prevent intimidation or harassment of witnesses, danger to their lives or safety, or other interference with the administration of justice.[8] Accordingly, in balancing these four considerations:

(a) Where a witness does not wish to be interviewed by or on behalf of an accused, or where there is a reasonable basis to believe that the fourth consideration referred to above (interference with witnesses, etc.) may arise on the facts of the

[8] The Supreme Court of Canada recently has discussed the right of an individual to be left alone and the appropriateness of preventing the unnecessary invasion of witnesses' privacy: *R.* v. *Duarte* (1990), 53 C.C.C. (3d) 1 at 11 and 15; *R.* v. *Wong* (1990), 60 C.C.C. (3d) 460, esp. at 483; *R.* v. *Seaboyer* (1991) 66 C.C.C. (3d) 321 at 387; *R.* v. *Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 8 - 9.

case,[9] Crown counsel may reserve information concerning the identity or location of the witness unless a court of competent jurisdiction orders its disclosure.[10]

(b) Where a witness is willing to be interviewed, but there nonetheless exists a reasonable basis to believe that the disclosure of information concerning the identity or location of the witness may lead to interference with the witness or with the administration of justice as described above — including situations where the witness is under a Witness Protection Program — Crown counsel may decide to arrange for an interview by defence counsel at a location and under circumstances that will ensure the continued protection of the witness. If the witness is protected under a Witness Protection Program, the agreement of the police agency administering the program will be required.

(c) Where the witness does not object to the release of this information, and there exists no reasonable basis to believe that the disclosure will lead to interference with the witness or with the administration of justice as described above, the information may be provided to the accused without court order.

Additional Matters

6. If the accused is not represented by counsel, Crown counsel shall arrange to have the accused informed that disclosure is available under this policy,[11] and shall determine how disclosure can best be provided. Because of the need to maintain an arms-length relationship with the accused, it will in most instances be preferable to give the accused disclosure in writing.

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[9] Wherever reasonably practicable, Crown counsel should request a written threat assessment from the investigators where limits on disclosure are being considered on this basis.

[10] An adjournment may be necessary in these circumstances to ensure a fair trial.

[11] The precise method by which the accused is informed of the availability of disclosure may vary from region to region. In some instances, the summons or appearance notice may provide this information. In others, Crown counsel may wish to provide the accused with a written or oral notification in court. In some regions, the judge presiding over first appearances may tell the accused that disclosure is available from the Crown.

7. After the disclosure outlined above, Crown counsel has a continuing obligation to disclose, in accordance with this policy, the evidence on which the Crown intends to rely at trial, and any evidence which may assist the accused, whether intended to be adduced or not.

8. Any limitation on the disclosure contemplated by paragraphs 1 and 3 of this policy requires the prior written approval of the Regional Director or the senior managing lawyer in charge of the regional prosecution section.

Availability of this Policy Statement

9. This policy statement is a public document. It is to be made available on request to defence counsel, accused persons or members of the public.

Chapter 4
ELECTIONS AND RE-ELECTIONS

Introduction

This chapter sets out policies on the following:

- determining whether to proceed summarily or by indictment in "dual procedure" ("hybrid") offences;
- electing to proceed by indictment in tax evasion and certain other types of cases;
- consenting to re-election by an accused; and
- the decision of the Attorney General to require a trial by a judge and jury under section 568 of the *Criminal Code*.

Crown Elections in Dual Procedure Offences

In dual procedure offences, Crown counsel has the discretion to proceed by summary conviction or indictment.[1] This discretion allows Crown counsel the flexibility of taking the specific circumstances of a case into account to ensure that in each case the interests of justice, including the public's interest in the effective enforcement of the criminal law, are best served.

Statement of Policy

When deciding whether to proceed summarily or by indictment,[2] Crown counsel shall examine the circumstances surrounding the offence and the background of the accused. The following factors are of particular importance:

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[1] See generally: *R.* v. *Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.): the discretion given by law to the Attorney General to prosecute by way of summary conviction or on indictment is not discriminatory or contrary to the principles of equality; *R.* v. *Century 21 Ramos Realty* (1987), 32 C.C.C. (3d) 353 (Ont. C.A.): the authority of Crown counsel to elect the mode of procedure in hybrid offences is not contrary to the Charter; *R.* v. *V.T.* (1992), 71 C.C.C. (3d) 32 (S.C.C.): confirming *R.* v. *Smythe*.

[2] See generally: *R.* v. *Toor* (1973), 11 C.C.C. (2d) 312 (B.C.S.C.): Before the Crown elects, a hybrid offence is treated as an indictable offence for proceedings under the *Criminal Code* and the *Identification of Criminals Act*; *R.* v. *Robert* (1973), 13 C.C.C. (2d) 43 (Ont. C.A.): Where the Crown fails to elect the mode of procedure for a hybrid offence and the case proceeds in summary conviction court, the Crown is deemed to have elected to proceed on a summary conviction basis.

- whether the facts alleged make the offence a serious one;

- whether the accused has a lengthy criminal record or a record of criminal convictions for similar types of offences;

- the sentence that will be recommended by Crown counsel in the event of a conviction;

- the effect that having to testify at both a preliminary inquiry and a trial may have on victims or witnesses (if procedure by indictment is chosen, this may lead to the preferring of a direct indictment);[3]

- whether it would not be in the public interest to have a trial by jury (for instance, where the charge is simple possession of a small amount of marijuana).

If the accused is charged with a number of offences arising out of the same transaction, Crown counsel should consider entering elections that avoid a multiplicity of litigation. For example, where an accused is arrested for trafficking in a narcotic and is found in possession of a small amount of marijuana, resulting in both a trafficking charge and a simple possession charge, it may be appropriate to elect to proceed by indictment on the possession charge to ensure that the two charges are tried together. If convictions are entered on both counts, the accused can be sentenced on both by the same judge. As well, in the event of an appeal, both offences will be before the same appellate court.

Where, based on the above criteria, Crown counsel would normally elect to proceed summarily, but the limitation period for a summary proceeding has expired, Crown counsel should not elect to proceed by indictment unless:

- the accused contributed significantly to the delay;

- the investigative agency acted with due diligence, but the investigation continued beyond the limitation period because of the complexity of the case;

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[3] See Chapter 2, "Direct Indictments."

- the particular circumstances of the offence did not come to light until shortly before or some time after the limitation period expired, and the offence is serious; or

- the public interest otherwise warrants prosecuting.[4]

Election of the Attorney General to Proceed by Indictment in Tax Evasion Cases

Subsection 239(2) of the *Income Tax Act* states:

> Every person who is charged with an offence described by subsection (1) may, at the election of the Attorney General of Canada, be prosecuted upon indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to:
>
> (i) a fine of not less than 100% and not more than 200% of the amount of tax that was sought to be evaded, and
>
> (ii) imprisonment for a term not exceeding five years.

Statement of Policy

Procedure by indictment is reserved for more serious cases. It is appropriate to proceed by indictment in the following situations:

(a) where the accused has previously been convicted of tax evasion or conspiracy to evade tax; or

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[4] See generally *R.* v. *Belair* (1988), 41 C.C.C. (3d) 329 (Ont. C.A.): Crown counsel elected to proceed by summary conviction on a charge of sexual assault, without realizing that summary conviction proceedings were barred because the limitation period had expired. The information was quashed prior to plea, but a new information was sworn. The court held that the laying of a new information did not constitute an abuse of process, as the accused had suffered no prejudice and the public had an interest in the charge being properly tried. But see *R.* v. *Quinn* (1989), 54 C.C.C. (3d) 157 (Que. C.A.): Crown counsel intended to proceed on a charge of possession of a narcotic by way of summary conviction, but a necessary Certificate of Analyst was not returned until after the six-month limitation period had expired. Counsel then refused to prosecute the case. However, several months later, another Crown counsel agreed to prosecute the case by indictment and the accused was convicted. On appeal, the court held that it was contrary to the principles of fundamental justice that the accused should be prejudiced by having Crown counsel proceed by indictment solely because the limitation period had been allowed to expire. It should be noted that, in this case, the Crown conceded this point before the appellate court.

(b) where the tax evaded exceeds $250,000 and at least one of the following circumstances is present:

i) if a conviction is entered, Crown counsel intends to seek more than two years imprisonment and a fine of at least 100% of the tax evaded;

ii) the evasion scheme was sophisticated and demonstrated considerable planning;

iii) the accused counselled others to evade taxes;

iv) the accused acted as an adviser or consultant to others, who then innocently acted on the advice and unknowingly became involved in tax evasion;

v) an innocent third party suffered significant losses because of the actions of the accused;

vi) the accused, or someone on the accused's behalf, attempted to tamper with important evidence or witnesses;

vii) the accused used intimidation designed to induce others to assist in or acquiesce in the offence; or

viii) the accused placed assets beyond the reach of the authorities to prevent collection of taxes payable.

The personal circumstances of the accused, particularly age and health, should also be considered.

The consent to proceed by indictment need not be given personally by the Attorney General or the Deputy Attorney General.[5] It may be given by the Regional Director and, for cases in Ottawa, by the Senior General Counsel (Criminal Law).

Election of the Attorney General to Proceed by Indictment in Other Types of Cases

Some federal enactments other than the *Criminal Code* require an election by the Attorney General of Canada to proceed by indictment. Offences under subsection 20(1) of the *Atomic Energy Control Act* and subsection 327(2) of the *Excise Tax Act* are examples. As with cases of tax evasion, the election need not be made personally by the Attorney General. It can be entered or authorized on behalf of the Attorney General by the Regional Director or, in cases arising in the Ottawa area, by the Senior General Counsel (Criminal Law).

Consenting to Re-elections by an Accused

The relevant *Criminal Code* provisions on re-elections state:

> 561(1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect
>
> (a) at any time before or after the completion of the preliminary inquiry, *with the written consent of the prosecutor*, to be tried by a provincial court judge;
>
> [. . .]
>
> (c) on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial *with the written consent of the prosecutor.*
>
> 561(2) An accused who elects to be tried by a provincial court judge may, not later than fourteen days before the day first appointed for the trial, re-elect as of right another mode of trial, *and may do so thereafter with the written consent of the prosecutor.*

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[5] *Carltona Ltd.* v. *Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.); *R.* v. *Harrison* (1976), 28 C.C.C. (2d) 279 (S.C.C.); *R.* v. *Wiens* (1970), 74 W.W.R. 639 (Alta. C.A.); and also see Henry Molot, "The Exercise of a Minister's Statutory Authority," 4 *Administrative Law Journal*, no. 3 at 36.

> 565(2) Where an accused is to be tried after an indictment has been preferred... pursuant to a consent or order given under section 577, the accused shall, for the purposes of the provisions of this Part relating to elections and re-elections, be deemed to have elected to be tried by a court composed of a judge and jury and *may, with the written consent of the prosecutor*, re-elect to be tried by a judge without a jury. [emphasis added]

Statement of Policy

Crown counsel should generally consent to a timely request for re-election made by an accused or counsel for the accused. The following factors, however, are important in deciding whether to consent (in some instances, one of them may be decisive):

- the length of notice given;
- whether the proposed re-election will result in delay that could lead to a violation of paragraph 11(b) of the *Charter of Rights and Freedoms*;
- whether the accused has previously re-elected in the case;
- whether the court, including prospective jurors, will be inconvenienced by a re-election;
- whether it would *not* be in the public interest to have a trial by jury (for instance, where the only charge is simple possession of a small amount of marijuana or where the issues in dispute are primarily legal rather than factual);
- whether it *would* be in the public interest to have a trial by jury (see the criteria set out in the next section, "Decision of the Attorney General to Require Trial by Judge and Jury").

Decision by Attorney General to Require Trial by Judge and Jury

Introduction

Under section 568 of the *Criminal Code*,[6] the Attorney General may require an accused to be tried by a court composed of a judge and jury, even if the accused has elected or re-elected otherwise. The alleged offence must be punishable by more than five years imprisonment.

Statement of Policy

A requirement to be tried by judge and jury under section 568 will only be directed when the Attorney General thinks it clearly in the public interest to do so. For example, it may be appropriate to direct this requirement where someone who is normally involved in the administration of justice, such as a police officer, lawyer, or judge, is charged with a serious offence. It is important in those cases to ensure that the public has, and continues to have, confidence in the criminal justice system. It may also be appropriate to direct a jury trial where community standards are in issue, or where the accused's guilt or innocence is of particular public importance. In addition, this provision may be used where jointly charged accused select different modes of trial and the provincial court judge chooses not to exercise the power in section 567 to decline to record the non-jury elections.

In all instances the decision to proceed under section 568 shall be made personally by the Attorney General of Canada, on the advice of the Assistant Deputy Attorney General (Criminal Law).

Procedure

The Regional Director must ensure preparation of the following:

(a) a concise statement of the facts of the case;

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[6] *Re Hanneson and R.* (1987), 31 C.C.C. (3d) 560 (Ont. H.C.): This section is not contrary to the Charter.

(b) a list and an assessment of the factors to be considered in the decision to require trial by judge and jury, and the recommendation of the Regional Director;

(c) two original indictments containing all charges on which the requirement is sought to be directed. Both should be signed in the usual way by the person who normally signs indictments in the regional office. Below that, the following should appear:

I hereby require the above-named accused to be tried by a court composed of a judge and jury pursuant to section 568 of the *Criminal Code*. Dated at Ottawa, Ontario, this ___ day of _____, 199 _.

Attorney General of Canada

The documents should be forwarded to the Assistant Deputy Attorney General. If the Assistant Deputy Attorney General concludes that the circumstances do not justify directing a requirement under section 568, the Regional Director will be advised. If the Assistant Deputy Attorney General concludes that the circumstances do justify directing a requirement under section 568, then advice on the case will be prepared for the Attorney General. If the Attorney General accepts the recommendation, one of the original indictments, signed by the Attorney General, will be sent to the Regional Office. The second signed original will be filed at Headquarters.

Chapter 5
PLEA AND SENTENCE NEGOTIATIONS

Introduction

Discussions between Crown and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid unnecessary litigation altogether, form an important and necessary part of the criminal justice system. Discussions of this nature will be referred to throughout this chapter as "plea and sentence negotiations." Though not defined in the *Criminal Code*, plea and sentence negotiations embrace several practices: charge negotiations, procedural negotiations, sentence negotiations, and negotiations about the facts of the offence.

In this chapter, plea and sentence negotiations can be understood generally as negotiations between Crown and defence counsel to resolve a criminal matter or to recommend to a court how the matter should be conducted or resolved. The negotiations may conclude the criminal matter by deciding the charges on which a plea of guilty will be entered and the position of the Crown on sentence, or settle procedural issues to expedite the trial. Recommendations made to the court as part of a plea or sentence negotiation are, of course, always subject to the overriding discretion of the court to accept or reject any submission by counsel.[1]

Statement of Policy

Crown counsel may initiate plea and sentence negotiations or may respond to them if initiated by the defence, providing, in all instances, Crown counsel does not proceed with a plea of guilty if there is reason to believe that the charge approval standard described in Chapter 1, "The Decision to Prosecute," has not been met. In addition, counsel's approach to plea and sentence negotiations must be based on several important principles: fairness, openness, accuracy, and the interest of the public in the effective and consistent enforcement of the criminal law. The guidelines intended to ensure adherence to these principles are described throughout this chapter.

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[1] *R.* v. *Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.).

Guidelines for Application of the Policy

Plea and sentence negotiation practices will vary from jurisdiction to jurisdiction. The following guidelines are not designed to require a set form of plea or sentence negotiations. Instead, they inform counsel of some acceptable and unacceptable negotiating practices.

(i) Charge Negotiations

Charge negotiations may properly include the following:

- reducing a charge to a lesser or included offence;
- withdrawing or staying other charges;
- agreeing not to proceed on a charge or agreeing to stay or withdraw charges against others (for example, friends or family of the accused, or individual corporate officers);
- agreeing to reduce multiple charges to one all-inclusive charge (where permitted by law); and
- agreeing to stay certain counts and proceed on others, and to rely on the material facts that supported the stayed counts as aggravating factors for sentencing purposes.[2]

The following practices are not acceptable:

- instructing or proceeding with unnecessary additional charges to secure a negotiated plea;
- agreeing to a plea of guilty to an offence not disclosed by the evidence; or

[2] Concerning the propriety of this practice, see *R.* v. *Garcia and Silva*, [1970] 3 C.C.C. 124 (Ont. C.A.); *R.* v. *Ness* (1987), 77 A.R. 319 (Alta. C.A.); *R.* v. *Getty* (1990), 104 A.R. 180 (Alta. C.A.).

- agreeing to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct unless, in exceptional circumstances, the plea is justifiable in terms of the benefit that will accrue to the administration of justice, the protection of society, or the protection of the accused.

(ii) Procedural Negotiations

Procedural negotiations may properly include the following:

- agreeing to proceed summarily instead of by indictment;
- agreeing to dispose of the case at a specified future date if, on the record and in open court, the accused is prepared to waive the right to a trial within a reasonable time; and
- agreeing to the waiver of charges to or from a particular province or territory, or to or from a particular jurisdiction in a province or territory.[3]

(iii) Sentence Negotiations

Sentence negotiations may properly include the following:

- a recommendation by Crown counsel for a certain range of sentence or for a specific sentence;
- a joint recommendation for a range of sentence or for a specific sentence;
- an agreement by Crown counsel not to oppose a sentence recommendation by defence counsel which has been disclosed in advance;[4]

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[3] See Crown Counsel Policy Manual Chapter III-3, "Waiver of Charges," for the policy and procedure on waivers.

[4] But see the policy on sentencing outlined in Crown Counsel Policy Manual Chapters V-7, "Spousal Assault Prosecutions," and V-8, "Firearms and Other Offensive Weapons," where Crown counsel should oppose recommendations for absolute or conditional discharges except in exceptional circumstances.

- an agreement by Crown counsel not to seek additional optional sentencing measures (for example, prohibition orders, preventive detention, forfeiture). However, Crown counsel cannot negotiate sentencing measures which apply by operation of law;[5]

- an agreement by Crown counsel not to seek more severe punishment by proceeding with a Notice of Intention to Seek Greater Punishment;[6] and

- an agreement by Crown counsel not to oppose the imposition of an intermittent sentence rather than a continuous sentence.

The following practice is not acceptable:

- a promise in advance not to appeal the sentence imposed at trial.[7]

(iv) Negotiations about the Facts of the Offence

Charges shall proceed on facts that Crown counsel is satisfied can be proved in court. Fact negotiations may properly include the following:

- agreeing not to include in representations to the court embarrassing facts which are of little or no significance to the charge; and

- agreeing to rely on an agreed statement of facts.

The following practices are not acceptable:

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[5] See for example, subsection 100(1) of the *Criminal Code* which requires a prohibition order for firearms in certain cases.

[6] But see Crown Counsel Policy Manual Chapters V-6, "Drive Impaired Cases: Notice to Seek Greater Punishment," and V-8, "Firearms and Other Offensive Weapons," which set out the policy on seeking greater punishment.

[7] See subparagraph vii(b), "Fairness", regarding appealing from a disposition which accords with a negotiated plea or sentence.

- an agreement respecting facts which results in or gives the appearance of misleading the court, such as:

  (a) an agreement not to advise the court of any part of the accused's provable criminal record which is relevant or could assist the court;

  (b) an agreement not to advise the court of the extent of the injury or damages suffered by a victim;

  (c) an agreement to withhold from the court facts that are provable and relevant and that aggravate the offence; or

  (d) an agreement to outline facts to the court which, when measured against the essential elements of the offence to which the accused has pleaded guilty, would cause the presiding judge to reject the plea in favour of a plea of not guilty.

(v) Unrepresented Accused

Plea or sentence negotiations with an unrepresented accused call for extreme care. In general, Crown counsel should not initiate negotiations with an unrepresented accused; if approached by an accused, however, counsel may negotiate in accordance with this policy.

Crown counsel should first encourage the accused to retain counsel and, where appropriate, advise the accused of the availability of legal aid. If the accused declines to retain counsel, Crown counsel should generally arrange for a third person to be present during negotiations because of the need to maintain an arms-length relationship with the accused. A detailed record should be kept of all discussions. In most instances, a written agreement or written evidence of an agreement[8] will be appropriate. When the case is disposed of in accordance with a negotiated plea or sentence agreement, Crown counsel should tell the judge about the existence of the agreement and that the accused was encouraged to retain counsel but declined to do so.

[8] Such as a memorandum to file or at least a detailed endorsement on the file.

Crown counsel should not conduct plea or sentence negotiations with an unrepresented accused unless satisfied that the accused has been given full disclosure or is aware of the right to full disclosure.[9]

(vi) Accuracy

Crown counsel should maintain a complete record of all plea and sentence negotiations or agreements on the file. This will promote a consistent and informed practice.

(vii) Openness and Fairness

The general principles of openness and fairness apply to all forms of negotiation discussed above. Both principles are explained here.

(a) *Openness*

Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case — in particular, the victim (where there is one) and the investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel.[10] If a plea agreement is reached, counsel should try to ensure that victims and investigating agencies understand the substance of the agreement and the reasoning behind it. The scope of this discussion may, in unusual circumstances, have to be limited by privacy or secrecy considerations in the accused's interest or in the general public interest.

Where a plea or sentence agreement has been reached, counsel should present the proposal to the trial judge in open court and on the record. In certain circumstances, it may be necessary to discuss some aspects of the agreement with the trial judge privately. This should be done only in rare and compelling situations involving facts which, in the interest of the public or the accused, ought not to be disclosed publicly. Common examples include cases where the accused is terminally ill or has acted as a confidential

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[9] See Chapter 3, "Pre-Trial Disclosure," on providing disclosure to an unrepresented accused.

[10] See Chapter 8, "The Independence of the Attorney General."

informer for the police.[11] It is not acceptable, however, to discuss a plea agreement privately with the trial judge in advance of the hearing to determine the court's reaction to it.[12]

(b) *Fairness*

All negotiated plea or sentence agreements should be honoured by the Crown unless fulfilling the agreement would clearly be contrary to the public interest. For example, Crown counsel must not proceed with an agreement if counsel has reason to believe that the criteria set out in Chapter 1, "The Decision to Prosecute," have not been met. In addition, Crown counsel may be justified in refusing to fulfil an agreement if misled about material facts. The decision not to fulfil an agreement should only be made after consultation with, and with the approval of, the Regional Director.

As well, if counsel disagrees with an agreement earlier reached by a colleague,[13] the matter should be referred to the Prosecution Group Head or Regional Director.

If an accused enters a plea based on a negotiated plea or sentence agreement and the court disposes of the case on those terms, no appeal may be undertaken unless

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[11] Even then, it is preferable to have a court reporter present in chambers so that a complete and accurate record of the discussions can later be made available, if necessary.

[12] Pre-plea participation by the trial judge in charge or sentence negotiations has been universally condemned by the courts and others: *R.* v. *Wood* (1975), 26 C.C.C. (2d) 100 at 108 (Alta. S.C.); *R.* v. *Dubien* (1982), 67 C.C.C. (2d) 341 at 346 - 7 (Ont. C.A.); *R.* v. *White* (1982), 39 Nfld. and P.E.I.R. 196 (Nfld. C.A.). Generally, see: G.A. Ferguson, "The Role of the Judge in Plea Bargaining" (1972-3), 15 Crim. L. Q. 26; Law Reform Commission of Canada, Working Paper 60, *Plea Discussions and Agreements*, at 12-15, and Recommendation 4; Curran, "Discussions in the Judges Private Room" [1991], Crim. L. R. 79. This does not, however, prevent counsel's participation in a pre-trial conference conducted under section 625.1 of the *Criminal Code*.

[13] In *Santobello* v. *New York* (1971), 404 U.S. 257 (U.S.S.C.), the court held that prosecutors must advise each other of commitments or agreements made with respect to sentencing. The fact that another prosecutor was not a party to the agreement is no excuse for defaulting on the agreement.

exceptional circumstances exist[14] and the Regional Director authorizes the appeal after consultation with the Assistant Deputy Attorney General (Criminal Law).

[14] See *R.* v. *Wood, supra* note 12, where the court held that the Attorney General is not barred from appealing a sentence based on a position taken at trial by a Crown counsel. And see *R.* v. *Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.), where the court held that the appellate court will not necessarily hold the Crown to the position it agreed to take at trial, but would determine whether the Crown should be bound by that position depending on the circumstances of each case; and *Attorney General of Canada* v. *Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.): The Crown, on appeal should not repudiate its position taken at trial except in specific circumstances. The circumstances are as follows:

(a) imposition of an illegal sentence;

(b) misleading of Crown counsel at trial;

(c) public interest in the orderly adminstration of justice outweighed by gravity of crime and gross insufficiency of sentence.

But see *R.* v. *Agozzino*, [1970] 1 C.C.C. 380 (Ont. C.A.) and *R.* v. *Goodwin* (1981), 43 N.S.R. (2d) 106 (N.S.C.A.), where the courts held that the Crown could not, on appeal, repudiate the position it agreed to take at trial.

Chapter 6
THE DECISION TO APPEAL

Introduction

This chapter explains the criteria the Attorney General of Canada applies in deciding whether to appeal an acquittal or sentence. It also identifies who should make the decision to appeal on behalf of the Attorney General and the process for deciding.

Placing the Crown's Right to Appeal in Context

The authority to appeal in criminal proceedings comes entirely from statute.[1] Common law appeals against conviction or acquittal did not exist.[2] In Canada, even accused persons had no effective right of appeal until 1923.[3] In 1930, an amendment to the *Criminal Code* permitted Crown appeals against an acquittal, though only in cases raising a "question of law alone."[4] This restriction remains.[5]

Canadian appellate courts viewed Crown appeals as an extraordinary remedy, in some cases suggesting that the 1930 amendment was regrettable.[6] For example, in 1939, a member of the

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1 *Welch* v. *The King*, [1950] S.C.R. 412; *Dennis* v. *The Queen*, [1958] S.C.R. 473; *R.* v. *Meltzer* (1989), 49 C.C.C. (3d) 453 at 460-61 (S.C.C.).

2 *R.* v. *Meltzer*, *ibid*; *R.* v. *Robinson* (1990), 51 C.C.C. (3d) 452 at 463 (Alta. C.A.).

3 S.C. 1923, c. 41; *Cullen* v. *The King* (1949), 94 C.C.C. 337 at 340 (S.C.C.).

4 S.C. 1930, c. 11, s. 28; and see *R.* v. *Morgentaler* (1985), 22 C.C.C. (3d) 353, adopted by the Supreme Court of Canada at 37 C.C.C. (3d) 449 at 542 (per McIntyre J. speaking for the unanimous Court on this issue).

5 See *Criminal Code*, para. 676(1)(a).

6 Even before 1930, when a much more limited form of review was available to the Crown, courts were reluctant to permit trying an accused a second time: *The King* v. *Burns (No. 1)* (1901), 4 C.C.C. 323 at 327 (Ont. C.A.); *The King* v. *Karn* (1903), 6 C.C.C. 479 at 484 (Ont. C.A.).

Supreme Court of Canada described the 1930 amendment as "drastic".[7] A year later, the Supreme Court dismissed a Crown appeal on jurisdictional grounds, noting that the Code section permitting Crown appeals should be interpreted narrowly.[8] In 1949, Rand J. observed in *Cullen* v. *The King*[9] that the amendment provided "a striking departure from fundamental principles of security for the individual":

> At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and *there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.*[10] [emphasis added].

Two conclusions emerge from this historical overview. First, the 1930 amendment provided an extraordinary remedy. It created an exception to the general rule that no person should be tried twice on the same charge. Second, over the past 60 years, the courts have signalled the need to show restraint in exercising the right to appeal. Only cases that the public interest requires pursuing should be appealed.

Statement of Policy: Relevant Public Interest Criteria

Not every unfavourable ruling or error in law should be appealed. Neither the judiciary nor the Crown has the resources to review every judgment that appears to be wrong. Still, the public expects, and is entitled to, a criminal justice system that is applied consistently and is effective in the suppression of crime.

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[7] *Wexler* v. *The King* (1939), 72 C.C.C. 1 at 5. A commentator reviewing the Court's decision in the same report series remarked, "It is clear from this judgment that the roots of the principle that no man shall be twice placed in jeopardy for the same crime were not eradicated with the creation of a right to appeal for an acquittal."

[8] *Rex* v. *Wilmot* (1940), 75 C.C.C. 161 esp. at 165 (S.C.C.).

[9] (1949), 94 C.C.C. 337 at 345 (S.C.C.).

[10] *Ibid.* at 347.

Two issues must therefore be considered when deciding whether to appeal. First, is there a proper basis, both in law and on the facts, to believe that the judgment is wrong? If there is, does the public interest require an appeal?

These criteria are similar to those for deciding whether to prosecute, but with two important differences. First, since the facts have already been established at trial, it is important to ensure that significant questions of law are litigated on the basis of a proper and compelling record of evidence.

Second, because of the need to be selective in bringing appeals, the public interest plays a much more important role in the decision to appeal than it does in deciding whether to lay charges. In most potential appeals, the controlling principle is whether the public interest *requires* an appeal.

Factors which may be considered when deciding whether the public interest requires an appeal include the following:

(a) Is the issue raised by the case of widespread importance for the effective enforcement of the criminal law, or is its impact confined largely to the immediate case?

(b) Does the seriousness of the offence or the circumstances of the offender demand a reconsideration of the case?

(c) Have courts differed in interpreting the issue raised?

(d) Could the trial decision impair the effective enforcement of the criminal law if left unchallenged?

(e) Could the trial decision impair the enforcement or administration of a significant government policy initiative (for instance, proceeds of crime or spousal assault) if left unchallenged?

(f) Will the resources required to prepare and present the appeal significantly outweigh the value of pursuing the case further?[11]

(g) Is there a reasonable prospect that the appeal court may award costs against the Crown even if the appeal has merit?

(h) In sentence appeals, was the sentence clearly below the acceptable range of sentence (and not merely at the low end of the acceptable range), so that a successful appeal should lead to a significant increase in sentence?

The application of and weight to be given to these and other relevant factors will depend on the circumstances of each case.

Public expressions of concern do not in themselves provide a proper basis for bringing a review at the instance of the Attorney General. However, where the arguments for and against appealing are evenly matched, the expression of a strong public concern for a further review of the case may tip the scales in favour of an appeal.

Guidelines for Application of this Policy: Who Decides to Appeal, and How?

In general, the decision to appeal to a provincial or territorial court of appeal should be taken by or on behalf of the Regional Director, with the advice of the Prosecution Group Head or a regional appeals committee. Agents must seek the instructions of the Regional Director or Prosecution Group Head before filing a notice of appeal.

Appeals raising significant public interest considerations should first be discussed with the Assistant Deputy Attorney General (Criminal Law). The decision to appeal to the Supreme Court of Canada is made by the Attorney General personally on the advice of the Litigation Committee. Departments responsible for enforcing federal statutes (for instance, Revenue Canada in tax cases) should, wherever possible and if limitation periods permit, be consulted

[11] On the use of judicial resources, see *Borowski* v. *Attorney General of Canada* (1989), 47 C.C.C. (3d) at 14-15 (S.C.C.); *R.* v. *Robinson* (1989), 51 C.C.C. (3d) 452 at 487 (Alta. C.A.); see also Chapter I, "The Decision to Prosecute."

before filing a notice of appeal. Their advice will often be helpful in deciding whether an appeal is in the public interest.[12]

Crown counsel may sometimes need to file a "protective" notice of appeal before consultations are completed and a final decision is taken about proceeding with the appeal.[13] Protective notices should be the exception, not the rule, and counsel should ensure that a final decision is made as soon after filing the notice as is reasonably practicable.

Irrelevant Criteria

A decision whether to appeal must *not* be influenced by any of the following:

(a) the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or of any other person involved in the case;

(b) Crown counsel's personal feelings about the accused, the victim, or the trier of fact;

(c) possible political advantage or disadvantage to the government, special interest group or political party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for making the decision to appeal.

[12] See Chapter 8, "The Independence of the Attorney General."

[13] *R.* v. *Dorion* (1978), 40 C.C.C. (2d) 549 (Man. C.A.), Monnin J.A.

Chapter 7
PRIVATE PROSECUTIONS

Introduction

The relationship between the private citizen, as prosecutor, and the Attorney General, who has exclusive authority to represent the public in court,[1] was described by the Ontario Court of Appeal. The Supreme Court of Canada approved the description:[2]

> The right of a private citizen to lay an information, and the right and duty of the Attorney General to supervise criminal prosecutions are both fundamental parts of our criminal justice system.

The right of a citizen to institute a prosecution for a breach of the law has been called "a valuable constitutional safeguard against inertia or partiality on the part of authority."[3] However, this right can be abused. It is sometimes necessary for the Attorney General to intervene and conduct or stay the prosecution.

This chapter explains the law on initiating and conducting private prosecutions. It also explains when the Attorney General of Canada may and should intervene either to conduct or to stay such prosecutions.

Origin of Private Prosecutions

A private citizen's right to initiate and conduct a private prosecution originates in the early common law. From the early Middle Ages to the seventeenth century, private prosecutions were the main way to enforce the criminal law. Indeed, private citizens were responsible for preserving the peace and maintaining the law:[4]

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1 *Gouriet* v. *Union of Post Office Workers*, [1977] 3 All E.R. 70 (H.L.).

2 *Re Dowson and The Queen* (1981), 62 C.C.C. (2d) 286 (Ont. C.A.), approved unanimously by the Supreme Court of Canada: (1983), 7 C.C.C. (3d) 527 at 535-6.

3 *Gouriet* v. *Union of Post Office Workers*, [1978] A.C. 435 at 477, Lord Wilberforce.

4 P. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986) at 6-8; *A.G. Que.* v. *Lechasseur* (1981), 63 C.C.C. (2d) 301 at 307 (S.C.C.).

> [U]nder the English common law, crimes were regarded originally as being committed not against the state but against a particular person or family. It followed that the victim or some relative would initiate and conduct the prosecution against the offender....
>
> Another feature of the English common law was the view that it was not only the privilege but the duty of the private citizen to preserve the King's Peace and bring offenders to justice.[5]

Because of the increase in courts and cases in the Middle Ages, the King began to appoint King's Attorneys to intervene in matters of particular interest to the King. Intervention took two forms. The King could initiate and conduct certain prosecutions through a personal representative. The King could also intervene in cases begun by a private prosecutor where the matter was of special concern to the King. By intervening, the King's Attorney could then conduct or stop the proceedings.[6] As the English common law developed, the role of Crown law officers grew. Still, private prosecutions were allowed. To this day they are recognized in several English statutes.[7]

Foundation for Private Prosecutions in Canadian Law

No *Criminal Code* provision expressly authorizes private prosecutions. Several provisions, however, implicitly recognize such proceedings. Except where the Attorney General's consent is required, section 504 of the Code permits *anyone* to lay an information. As well, the definitions of "prosecutor" in sections 2 and 785 make it clear that someone other than the Attorney General may institute proceedings. These provisions apply to proceedings under the Code and all other federal acts.[8]

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[5] P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975), 21 McGill Law Journal 269 at 271.

[6] Stenning, *supra*, note 4 at 17-20.

[7] Stenning, *ibid.*, at 31.

[8] By virtue of subsection 34(2) of the *Interpretation Act*.

The effect of these provisions is to allow a private citizen to institute and conduct a prosecution under federal legislation without the knowledge or participation of the Government of Canada or the Attorney General of Canada.[9] In summary conviction proceedings, the private prosecutor controls the proceedings from start to finish unless the Attorney General intervenes. In indictable matters, a private prosecutor may conduct the trial, including the preliminary inquiry. However, the private prosecutor requires a judge's consent under subsection 574(3) of the Code to prefer an indictment.

Authority of the Attorney General of Canada to Intervene in Private Prosecutions

At common law the Attorney General could intervene in private prosecutions and either conduct the prosecution or enter a *nolle prosequi* (the traditional power of the Attorney General to stop proceedings).[10] Under section 5 of the *Department of Justice Act*, the Attorney General of Canada is "entrusted with the powers and charged with the duties that belong to the Office of the Attorney General of England by law or usage, insofar as those powers and duties are applicable to Canada".

The *Criminal Code* provides that the Attorney General of Canada and attorneys general of the provinces share responsibility for conducting prosecutions. However, several Supreme Court of Canada decisions have made it clear that the authority of provincial attorneys general to prosecute under federal statutes, including the *Criminal Code*, is given by the Code. Their authority does not flow from any constitutional principle based on subsection 92(14)[11] or from some historic role.[12] The provincial prosecutorial role is assigned through legislation by Parliament, not constitutionally entrenched.

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[9] *A.G. Que.* v. *Lechasseur, supra*, note 4.

[10] Stenning, *supra*, note 4 at 26-31; *R.* v. *Schwerdt* (1957), 119 C.C.C. 81 (B.C.S.C.).

[11] *Constitution Act, 1867.* Subsection 92(14) covers: "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

[12] *A.G. Can.* v. *Canadian National Transportation, Ltd.* (1983), 7 C.C.C. (3d) 449 (S.C.C.); see also *R.* v. *Wetmore and A.G. Ontario* (1983), 7 C.C.C. (3d) 507 (S.C.C.); *R.* v. *Hauser* (1979), 46 C.C.C. (2d) 481 (S.C.C.).

Section 2 of the *Criminal Code* assigns prosecutorial roles as follows:

> "Attorney General"
>
> (a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy, and
>
> (b) with respect to
>
> (i) the Northwest Territories and the Yukon Territory, or
>
> (ii) proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of or conspiracy to contravene any Act of Parliament other than this Act or any regulation made thereunder,
>
> means the Attorney General of Canada and includes his lawful deputy....

Under this definition, it follows that if a private individual lays an information, the Attorney General of Canada lacks authority to intervene in the case, whether to conduct or stay the proceedings. This is because the proceedings were not "commenced at the instance of the Government of Canada."[13]

This lack of authority for the Attorney General of Canada to intervene applies only to prosecutions brought in a province. According to the definition set out above, the Attorney General of Canada has full authority to start and stop proceedings and intervene in private prosecutions brought in the Yukon and Northwest Territories.

Statement of Policy

(i) Private prosecutions begun in the Yukon and Northwest Territories

The Attorney General has the responsibility to ensure that all criminal prosecutions are in the public interest. The Attorney General must also ensure that it is appropriate to permit private prosecutions to remain in private hands.

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[13] See *R.* v. *Sacobie and Paul* (1979), 51 C.C.C. (2d) 430 (N.B.C.A.); aff'd. 1 C.C.C. (3d) 446 (S.C.C.); P. Burns, *supra*, note 5 at 285.

When considering whether to intervene, Crown counsel should consult with the Regional Director and consider the following:

(a) the need to strike an appropriate balance between the right of the private citizen to initiate and conduct a prosecution, as a safeguard in the justice system, and the responsibility of the Attorney General of Canada for the proper administration of justice in both territories;

(b) the seriousness of the offence; generally, the more serious, the more likely it is that the Attorney General should intervene;

(c) whether there is sufficient evidence to justify continuing the prosecution, that is, whether there is a reasonable prospect of conviction based on the available evidence;

(d) whether a consideration of the public interest criteria described in Chapter 1, "The Decision to Prosecute," leads to the conclusion that the public interest would not be served by continuing the proceedings;

(e) whether there is a reasonable basis to believe that the decision to prosecute was made for improper personal or oblique motives, or that it otherwise may constitute an abuse of the court's process, such that even if the prosecution were to proceed, it would not be appropriate to permit it to remain in the hands of a private prosecutor; and

(f) whether, given the nature of the alleged offence or the issues to be determined at trial, it is in the interests of the proper administration of justice for the prosecution to remain in private hands.

Whenever the Attorney General intervenes, the decision to continue or stay the proceedings should be made in accordance with the criteria set out in Chapter 1.

In some cases, it may be difficult to assess whether there is sufficient evidence to justify continuing the proceedings, because no police investigation preceded the laying of charges. If so, it will in most instances be appropriate for the Attorney General to intervene, stay the

proceedings, and ask the RCMP to investigate. After the investigation, Crown counsel should assess whether to commence proceedings in accordance with the criteria set out in Chapter 1. If a decision *not* to prosecute is reached, subsequent proceedings brought privately should, in the absence of unusual circumstances, be taken over on behalf of the Attorney General and stayed.

(ii) Private prosecutions begun in the provinces

The Attorney General of Canada lacks authority to intervene in prosecutions commenced privately in the provinces, whether to conduct or stay proceedings. However, the Government of Canada may still have an interest in proceedings. Many private prosecutions are commenced on the basis of an enforcement scheme found in regulatory enactments such as the *Fisheries Act*. Charges of this nature ought to be brought to the attention of the Regional Director, as it may be appropriate to bring enforcement or policy concerns to the attention of the attorney general of the province so that provincial authorities can then make an informed decision about intervening.

Consultation With Senior Managing Lawyers

Where an issue concerning the conduct or potential termination of a private prosecution needs to be resolved, Crown counsel should refer the matter to the Regional Director who, in cases of particular public interest, should confer with the Assistant Deputy Attorney General (Criminal Law) before making a decision.

Case References

Re Bradley and The Queen (1975), 9 O.R. (2d) 161 (Ont. C.A.): Where the interests of justice require, the Attorney General may intervene and take over a private prosecution of a summary conviction offence.

Re Dowson and the Queen (1980), 57 C.C.C. (2d) 140 (H.C.J.); (1981) 24 C.R. (3d) 139 (Ont. C.A.); [1983] 2 S.C.R. 144: The Crown is empowered to stay a private prosecution only after a summons or warrant issues. [Note: recent amendments to section 579 of the *Criminal Code* now permit a stay of proceedings as soon as the information is laid.]

MacIssac v. *Motor Coach Ind. Ltd.*, [1982] 5 W.W.R. 391 (Man. C.A.): Since the word "prosecutor" includes the informant or counsel for the informant, it is incontestable that a private prosecution can take place in the absence of intervention by the Crown.

Re Hamilton and The Queen (1986), 30 C.C.C. (3d) 65 (B.C.S.C.): An intervention by the Attorney General in a private prosecution does not contravene section 7 of the Charter.

Campbell v. *A.G. of Ontario* (1987), 31 C.C.C. (3d) 289; aff'd. 35 C.C.C. (3d) 480 (C.A.): The court cannot review a decision by the Attorney General to stay a private prosecution, absent flagrant impropriety.

Re Faber and the Queen (1987), 38 C.C.C. (3d) 49 (Que. S.C.): A decision to stay does not infringe sections 7 or 15 of the Charter.

Chartrand v. *Quebec (Min. of Justice)* (1986), 55 C.R. (3d) 97 (Que. S.C.): Ministerial decisions, whether based on a statute, a prerogative, or the common law, are reviewable by virtue of section 32 of the Charter. Therefore, the Attorney General's decision to intervene and stay a private prosecution is also reviewable.

R. v. *Cathcart and Maclean* (1988), 207 A.P.R. 267 (N.S.S.C.): A superior court judge does not need to approve a private prosecution of a hybrid offence. An order under subsection 504(3) [now subsection 574(3)] of the *Criminal Code* is required only after the accused has been committed to stand trial on an indictable offence.

Osiowy v. *Linn* (1988), 67 Sask. R. 215 (Sask. Q.B.), *sub nom R.* v. *Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.): The Attorney General's discretion to intervene and stay a private prosecution was upheld.

Kostuch v. *Kowalski* (1990), 107 A.R. 60 (Alta. P.C.): The court will not interfere with the Attorney General's exercise of discretion to intervene in a private prosecution unless there has been a "flagrant impropriety."

Kostuch v. *Alberta* (1991), 112 A.R. 283 (Alta. P.C.); reviewed on *certiorari*: *Re W. A. Stephenson Construction (Western) Ltd. and Fradsham* (1991), 66 C.C.C. (3d) 201 (Alta. Q.B.): This case involved an application to have charges stayed as an abuse of the court's process in a multiple private prosecution. The case discussed the principles surrounding private prosecutions.

Chapter 8
THE INDEPENDENCE OF THE ATTORNEY GENERAL

Decisions to prosecute, stay proceedings or launch an appeal must be made in accordance with legal criteria. Two important principles flow from this proposition. First, prosecution decisions may take into account the public interest,[1] but must not include any consideration of the political implications of the decision. Second, no investigative agency, department of government or minister of the Crown may instruct pursuing or discontinuing a particular prosecution or undertaking a specific appeal. These decisions rest solely with the Attorney General (and his or her counsel). The Attorney General must for these purposes be regarded as an independent officer, exercising responsibilities in a manner similar to that of a judge.

The absolute independence of the Attorney General in deciding whether to prosecute and in making prosecution policy is an important constitutional principle in England and Canada. In 1925, Viscount Simon, Attorney General of England, made this oft-quoted statement:

> I understand the duty of the Attorney-General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney-General, as head of the Bar, is satisfied that the case for prosecution lies against him. He should receive orders from nobody.[2]

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

> I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful

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[1] See Chapter 1, "The Decision to Prosecute," respecting the test to be applied when deciding to institute or continue criminal proceedings.

[2] J.Ll.J. Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 215.

> or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.
>
> In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.
>
> Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.[3]

This statement, often referred to as the "Shawcross principle," has been adopted by federal and provincial attorneys general in Canada. In 1978, while explaining to the House of Commons a decision concerning a prosecution under the *Official Secrets Act*, the Attorney General of Canada, the Hon. Ron Basford, said the following:

> What I have had to face, and resolve to my satisfaction, is whether and under what circumstances to authorize prosecutions under the *Official Secrets Act*. I have been guided by those parliamentary, constitutional, and legal principles which should be taken into account by the Attorney General in the discharge of this particular responsibility. Mr. Speaker, it might be useful to set some of those out.
>
> In arriving at these I have been guided by recognized authorities such as Lord Shawcross, Edwards, Erskine, May and Bourinot, and more recently and very helpfully, my valuable discussions with Commonwealth attorneys general in Winnipeg last summer on the office of attorney general, and more particularly my personal conversations at that time with the Attorney General of England and Wales and the Lord Chancellor.
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> [. . .]

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[3] U.K., H.C. Debates, vol. 483, cols. 683-84, (29 January 1951).

> *The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others.*
>
> *In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself.* That is not to say that the Attorney General is not accountable to Parliament for his decisions, which he obviously is.
>
> Clearly, I am entitled to seek and obtain information from others, including my colleague the Solicitor General (Mr. Blais) and the Commissioner of the Royal Canadian Mounted Police, on the security implications of recent disclosures. This I have done.
>
> In my view, the special position of the Attorney General in this regard is clearly entrenched in our parliamentary practice. Based on the authorities and on my own experience as a member of the government for ten years, which has included my three immediate predecessors, this special position has been diligently protected in theory and in practice.[4] (emphasis added)

One year later, Senator Jacques Flynn, then Attorney General of Canada, made the following statement about a proposed prosecution under the *Combines Investigation Act*:

> In dealing with a case which has been referred to him the Attorney General is unquestionably entitled to obtain information and advice from whatever sources he sees fit, including his colleagues in Cabinet. The course of action which he adopts in particular cases must, however, in the last analysis be his decision. The Attorney General does not act on directions from his colleagues, other members of Parliament or anyone else in discharging his duties in the enforcement of the law. On the other hand he must, of course, be prepared to answer in Parliament for what he does. These principles are well known and established not only in Canada, but in the United Kingdom and elsewhere where the system of Parliamentary democracy exists.[5]

Senator Flynn also quoted the following passage from Professor S.A. de Smith:

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[4] Canada, H.C. Debates, vol. 4 at 3881 (17 March 1978).

[5] The statement was attached as an appendix to Canada, Senate Debates, 28 Elizabeth II at 126 (18 October 1979). See also 110-115.

> As regards the decision whether or not to institute public prosecutions the Attorney General acts in a quasi-judicial capacity, and does not take orders from the government that he should or should not prosecute in particular cases. In political cases, e.g., sedition, he may seek the views of the appropriate ministers, but he should not receive instructions.[6]

Similar views have been expressed by the Hon. Mark MacGuigan in 1983,[7] the Hon. John Crosbie in 1988[8] and, in Ontario, by the Hon. Roy McMurtry in 1978[9] and the Hon. Ian Scott in 1987.[10]

Expressions of these principles have not, however, been confined to attorneys general. The judiciary has supported them,[11] as have leading authorities on the role of the Attorney General.[12]

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6 Canada, Senate Debates, 28 Elizabeth II at 113 (18 October 1979).

7 "The Position of the Attorney General of Canada on Certain Recommendations of the McDonald Commission" (unpublished, August 1983) at 6-9.

8 Canada, H.C. Debates, at 18437-38 (17 August 1988).

9 Ontario Legislature Debates (23 December 1978).

10 "The Role of the Attorney General and the Charter" (1986-87), 29 Crim. L.Q. 187.

11 *R.* v. *Smythe* (1971), 3 C.C.C. (2d) 98 at 110 and 112, aff'd. at 122, further aff'd. by the Supreme Court of Canada at 3 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.

12 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.