Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

PROSECUTORIAL STANDARDS AND ETHICS

TAB 2

THE ROLE OF THE ATTORNEY GENERAL and the DELEGATION OF AUTHORITY

Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
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TAB 2A

The Attorney General

Relevant Passages from *Krieger v. Law Society of Alberta* (S.C.C, 2002), paras. 26-32

[2002] 3 S.C.R. 372 (Iacobucci and Major JJ.)

A. *The Role of the Attorney General*

...

26 In Canada, the office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*. Although the specific duties conventionally exercised by the Attorney General are not enumerated, s. 135 of that Act provides for the extension of the authority and duties of that office as existing prior to Confederation. A similar provision applicable to the Attorney General of Alberta is found in the *Alberta Act*, S.C. 1905, c. 3 (reprinted in R.S.C. 1985, App. II, No. 20), at s. 16(1). Furthermore, s. 63 of the *Constitution Act, 1867* requires that the Cabinets of Quebec and Ontario include in their membership the Attorneys General.

27 Attorneys General in this country are, of course, charged with duties beyond the management of prosecutions. As in England, they serve as Law Officers to their respective legislatures, and are responsible for providing legal advice to the various government departments. Unlike England, the Attorney General is also the Minister of Justice and is generally responsible for drafting the legislation tabled by the government of the day. The numerous other duties of the provincial and federal Attorneys General are broadly outlined in the various Acts establishing the Departments of Justice in each jurisdiction.

28 The present respondent's duties are outlined in the *Government Organization Act*, R.S.A. 2000, c. G-10, Sch. 9. This Schedule to the Act provides, at s. 2, that:

> **2** The Minister
>
> (a) is the official legal advisor of the Lieutenant Governor;
> (b) shall ensure that public affairs are administered according to law;
> (c) shall superintend all matters relating to the administration of justice in Alberta that are within the powers or jurisdiction of the Legislature or the Government;
> (d) shall advise on legislative acts and proceedings of the Legislature and generally advise the Crown on matters of law referred to the Minister by the Crown;
> (e) shall exercise the powers and is charged with the duties attached to the office of the Attorney General of England and the Solicitor General of England by law or usage

insofar as those powers and duties are applicable to Alberta;

...

(j) is responsible for the conduct of the following matters, the enumeration of which shall not be taken to restrict the general nature of any provision of this Schedule:

...

(iii) the consideration and argument of appeals from convictions and acquittals of persons charged with indictable offences;

...

(vi) the appointment of counsel for the conduct of criminal business;

See also, e.g., the *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 5; the *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5.

29 The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. See Edwards, *supra*, [page388] at pp. 174-76. Unlike the U.K., Cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of Cabinet but also Minister of Justice, and in that role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.

30 It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada, *supra*, at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).

31 This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. In *R. v. Power*, [1994] 1 S.C.R. 601, L'Heureux-Dubé J. said, at pp. 621-23:

> It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive ...

Donna C. Morgan in "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 *Crim. L.Q.* 15, at pp. 20-21, probes the origins of prosecutorial powers:

> Most [prosecutorial powers] derive ... from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative [page389] powers are subject to the supremacy of Parliament, since they may be curtailed or abolished by statute.
>
> ...

In "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 *Crim. L.Q.* 378, at pp. 378-80, J. A. Ramsay expands on the rationale underlying judicial deference to prosecutorial discretion:

> ...
>
> It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal. [Emphasis in original.]

32 The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process __ rather than the conduct of litigants before the court __ is beyond the legitimate reach of the court. In *Re Hoem and Law Society of British Columbia* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.), Esson J.A. for the court observed, at p. 254, that:

> The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.

...

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III. The Present Role of the Attorney General

A full understanding of the Attorney General in today's context requires consideration of each of the various roles the position entails. The Attorney General must act as a member of Cabinet, accountable to Parliament and the public. The Attorney General must superintend the prosecution service, directing the course of criminal prosecutions conducted by the state, and supervising private prosecutions. As head of the prosecution service, the Attorney General is accountable to the courts. The Attorney General federally has had, and in some provinces continues to have, responsibility for the police.

A. The Attorney General and Parliament

In England the Attorney General is not a member of Cabinet, and is independent from its dictates with respect to the exercise of prosecutorial authority. It has been clear since the early part of this century that the English Attorney General may seek the advice of Cabinet but is not required to do so. The most well-known explanation of this relationship is that of Lord Shawcross, while Attorney General of England in 1951:

> I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration 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.[28]

It is noteworthy, however, that this independence is a matter only of convention. As one commentator has noted, it is difficult to find "any clear *legal* ground for asserting a right in the Attorney-General to act independently".[29]

The extent to which the Attorney General of Canada is independent is less clear. Unlike in England, the Attorney General of Canada is a member of Cabinet, and is by statute also the Minister of Justice, responsible for "superintendence of all matters connected with the

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28. Lord Shawcross' statement is to be found in J.LI.J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 223 [hereinafter *Law Officers*].

29. G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon, 1984) at 112.

administration of justice in Canada".[30] In addition, the Canadian Attorney General has always had duties and responsibilities held by the Home Secretary and Lord Chancellor in England, both of whom are members of Cabinet.

Stenning has pointed out that in colonial times, when the Attorney General was a professional lawyer retained by the government, "No law officer of these days could seriously have thought that he enjoyed, or was entitled to, anything resembling 'political independence' from the dictates of the Governor of the day."[31] In 1840, after the union of the two Canadas, the Attorneys General (and Solicitors General) of Canada East and Canada West were required to hold seats in Parliament, and to "take part in political affairs".[32] Stenning notes that "the two heads of the Janus-like government of the Province at this time, Baldwin and Lafontaine, were respectively the Attorneys General of Canada West and Canada East."[33] This combining of functions continued with Confederation, as Sir John A. Macdonald held the post of Attorney General between 1867 and 1873.[34]

Further, Edwards points out (albeit "sadly") that prior to 1978:

> [T]he evidence of previous administrations, irrespective of party affiliation, suggests that earlier Prime Ministers and Attorneys General subscribed to a totally different philosophy in which decisions in highly political cases were made by the Cabinet and carried out by the Attorney General.[35]

Edwards then discusses cases in the St. Laurent, Diefenbaker and Pearson governments, suggesting that at those times:

> [M]ost Ministers of the Crown would have viewed their involvement in the disposition of such prosecutorial questions in Cabinet as a natural application of the principle of collective responsibility for unpalatable political decisions.[36]

In recent years, however, the "Shawcross principle" has been cited as applicable to Canada. Beginning in 1978 with Mr. Basford, at least four Attorneys General in Canada have embraced the statement of principle made by Lord Shawcross that the Attorney General

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30. *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4(b).

31. *Supra*, note 6 at 288.

32. *Ibid.*

33. *Ibid.* at 288-289.

34. J.LJ. Edwards, *The Attorney General, Politics, and the Public Interest* (London: Sweet & Maxwell, 1984) at 358 [hereinafter *Attorney General*]. Edwards also points out that William Aberhart acted as Attorney General of Alberta while Premier, and that "Many instances are on record, well into the present century, where the Premier of a Provincial Government has simultaneously fulfilled the duties of Attorney General." Notable among these was Maurice Duplessis, Premier of Quebec, who also acted as Attorney General.

35. *Ibid.* at 361.

36. *Ibid.* at 362.

is not subject to control by the Cabinet in making prosecutorial decisions.[37] Mr. Basford stated:

> 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.[38]

The McDonald Commission reached a similar conclusion about the need for the Attorney General to put aside personal or party political concerns when determining whether to initiate a prosecution.[39]

Several other writers have considered the role of the Attorney General, in particular with respect to *Charter of Rights* cases.[40] The Attorney General of Ontario stated that, if he was satisfied that a statutory provision creating an offence was unconstitutional, or that a prosecution would violate the accused's rights, it would be his duty to intervene to stay the proceedings.[41] Taking this obligation a step further, Mr. Scott contemplated that if he was convinced that a fellow minister's proposed course of action was unconstitutional, and he was unable otherwise to prevent it, the Attorney General might have to take legal proceedings against that minister. He concluded:

> The public and the legal profession should be vigilant to see that the Attorney General vigorously pursues this obligation in a matter that respects the fundamental principles of independence and objectivity that have historically guided the exercise of the Attorney General's responsibilities.[42]

Nevertheless, the federal Attorney General is appointed by the Prime Minister and so could be dismissed from office for insisting on a course of conduct that is against the advice of the Cabinet. In such circumstances the Attorney General might feel compelled to resign

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37. R. McMurtry, "The Office of the Attorney General" in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at 2-3 and 5-6 (former Attorney General of Ontario) and I. Scott, "The Role of the Attorney General and the Charter of Rights" (1986-87) 29 C.L.Q. 187 at 189-192 (present Attorney General of Ontario). The remarks of Mr. R. Basford and Mr. M. Macguigan (both former federal Ministers of Justice) are quoted in Edwards, *Attorney General*, *supra*, note 34 at 359-364.

38. Canada, *House of Commons Debates* at 3881 (17 March 1978).

39. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Third Report: Certain R.C.M.P. Activities and the Question of Governmental Knowledge* (Ottawa: Supply and Services Canada, 1981) (Chairman: Justice D.C. MacDonald) at 509.

40. See, *e.g.*, Scott, *supra*, note 37; D.C. Morgan, "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the Charter" (1986-87) 29 C.L.Q. 15; J.LlJ. Edwards, "The Attorney General and the Charter of Rights" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 45-68.

41. Scott, *supra*, note 37 at 199.

42. *Ibid.*

before being dismissed.[43] Either event could be expected to have a serious political impact affecting even the government's survival.

It is also clear, having been stated both by Attorneys General and the judiciary, that the Attorney General is accountable to Parliament or the appropriate legislature. One leading case that expressly refers to this accountability is *Smythe* v. *The Queen*.[44] In that case, Chief Justice Fauteux stated that the court could not review the exercise of the Attorney General's discretion regarding the election to proceed by way of summary conviction, but that the Attorney General could be questioned in the legislature about the decision, and sanctioned by that body, if appropriate.

This amounts to saying that the accountability of the Attorney General to Parliament lies in the fact that ministers of the Crown can be called upon to answer questions in the House and can be censured by the House. But this theoretical accountability must be considered in the context of the reality that party solidarity would likely lead to the support of any Attorney General, whether independent in decision-making or not. As Lord Shawcross noted:

> Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there, which is the party to which the Attorney General of the day must belong. One has only to remember the so-called Shrewsbury "martyrs" and the Clay Cross affair to realize that that party will obviously not criticize the Attorney General of the day for not taking action which, if taken, might cause embarrassment to their political supporters.[45]

Further, it is the view of Edwards[46] that this accountability arises only after the fact: when the decision not to prosecute has been made, or when the prosecution is complete. The Attorney General cannot, it seems, be required to defend a decision while the case is still before the courts. As a result, Stenning points out:

> [T]he very nature of the Attorney General's prosecutorial discretion, and the desire to ensure that the administration of criminal justice is kept as far as possible removed from strong political pressures, have tended to ensure that parliamentary control over his discretion in this area can only be less than adequate. In the first place, in the pressure of business with which Legislatures are involved, they inevitably can and do become far removed from the stream of run-of-the-mill criminal prosecutions which are processed through the inferior

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43. Although such events are not common, the former Attorney General of British Columbia, Brian Smith, resigned his post in 1988: see note 4. Similarly, in 1977, Robert Ellicott resigned his post as Attorney General of the Commonwealth of Australia. Edwards, in *Attorney General, supra*, note 34, notes at 384 that in his letter of resignation to the Prime Minister, Ellicott charged that "decisions and actions which you and the Cabinet have recently made and taken have impeded and in my opinion have constituted an attempt to direct or control the exercise by me as Attorney General of my discretion". In his resignation speech, Mr. Ellicott quoted Lord Shawcross' statement of principle.

44. [1971] S.C.R. 680.

45. This quotation from Lord Shawcross was itself quoted in the paper given by the former Attorney General of Ontario, R. McMurtry, *supra*, note 37 at 5.

46. *Law Officers*, *supra*, note 28 at 224-225.

> courts every day. The volume and low visibility of these cases (which form the vast bulk of all criminal cases heard by the courts) make it fairly easy for abuses to go undetected by the politicians, and ensure that parliamentary control over such abuses is unlikely to be very consistently effective. . . . Secondly, such valuable parliamentary rules as the *sub judice* rule ensure to some extent that even when abuses do come to the attention of politicians, such control as they are able to exercise through the parliamentary process, being necessarily *ex post facto*, will often have very limited effectiveness in terms of securing justice for the accused. . . . The *sub judice* rule ensures that, once a prosecution has been launched, it is not until after the accused has been acquitted or convicted that the politicians can do anything about it. . . .[47]

Thus there are limits on both the accountability that can be demanded, and the control that can be exerted by a legislature.

It must also be noted that the "Shawcross principle" itself — that the Attorney General is to be free from political influences — has been questioned. Edwards has suggested that some qualification must be made to the principle, to take account of a distinction between types of political considerations. What the Attorney General must ignore are partisan political considerations: that is, considerations "designed to protect or advance the retention of constitutional power by the incumbent government and its political supporters."[48] On the other hand the Attorney General should have regard to "non-partisan" political considerations such as "maintenance of harmonious international relations between states, the reduction of strife between ethnic groups, the maintenance of industrial peace and generally the interests of the public at large."[49]

However, this distinction has not been universally accepted. It has been pointed out in reply that

> [E]ven those decisions which have the greatest appearance of consensus (e.g. laws passed by a representative democratic parliament) cannot necessarily be automatically characterized as "non-partisan", since they are almost invariably the product of a partisan political system in which one partisan faction (or a coalition of partisan factions) predominates and is able to implement its own policies. The distinction between partisan and non-partisan decisions according to this view, is not one of kind but of degree, and relies heavily for its validity on the ability of the dominant political faction to convince the populace that the decisions it proposes to implement "involve the wider public interest that benefits the population at large".[50]

Further, although it may be clear that the public interest is involved in a decision, that does not make clear what the decision should be. The nature of the political process is such that different political parties will in good faith disagree. It has been noted that the

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47. *Supra*, note 6 at 303-304.

48. J.L.J. Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services Canada, 1980) at 69-70.

49. *Ibid.*

50. Stenning, *supra*, note 6 at 291-292.

maintenance of harmonious international relations, reduction of strife between ethnic groups, and maintenance of industrial peace

> [A]re precisely the areas in which conservative and socialist politicians trust each other least. It might be, for example, that a politician holding the office of Attorney-General could believe that industrial peace would be endangered if legal proceedings were taken against strikers acting unlawfully in the alleged pursuance of a trade dispute. He might be right in this factual supposition, but those of a different political persuasion might not be willing to accept a decision based on this view as non-partisan.[51]

Given this, it is not sufficient simply to say that the Attorney General may give consideration to the wider public interest. It is not difficult to imagine circumstances in which the Attorney General claims to act based on the public interest, but is accused by opposition parties of acting out of partisan political motives. This is not to say that non-partisan political considerations do not exist; it is simply that the distinction between partisan and non-partisan motives may not always be clear in practice. In such circumstances the final arbiter must be public opinion. If the majority of the population is persuaded that the motives are non-partisan and acceptable, then the government will continue to have public support; if the public are not so persuaded, the government, or at least the Attorney General, will lose that support. Ultimately public opinion provides the only measure of whether a political motive is non-partisan.

Though there may be disagreement on how clear this distinction is in practice, it does not seem to be questioned by anyone that, in principle, partisan political considerations have no place in the normal operation of the prosecution service. The tradition in England, and in Canada, that the Attorney General is only in unusual circumstances involved in individual prosecutions is one method of achieving this aim. The tradition that exists in England, and which has recently been affirmed in Canada, against Cabinet direction of any decision by the Attorney General concerning individual prosecutions is a second method. But an important point flows from this. It must be recognized that the independence of the Attorney General is not an end in itself; rather, it is a means of assuring that improper motives do not enter into the decision whether to prosecute.[52]

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51. Marshall, *supra*, note 29 at 115.

52. Edwards, in *Attorney General (supra*, note 34), notes at 362-363 that:

> In making these decisions it should not be assumed that the Cabinet would necessarily be governed by politically partisan motives. At the same time, it would be unrealistic not to envisage situations in which, in the absence of any clearly understood constitutional prohibition against the referral by the Attorney General of prosecution matters for decision by the Cabinet or any group of ministers or by the Prime Minister, partisan influences would rise to the surface and prevail in whatever decision ultimately emerged.
>
> In reply, it might be suggested that an equally useful protection would be the understanding by Cabinet that partisan motives should not affect their decisions on prosecutorial matters, when political considerations do arise. This is arguably a better safeguard, since it is a direct rather than indirect statement of the relevant principle.

In light of this, and also in recognition that there are times when wider considerations of public interest should indeed affect individual prosecutions, there are those who disagree with the principle of the independence of the Attorney General, if this is taken to mean that the decision to prosecute in individual cases will always, in the end, be a decision made exclusively by the Attorney General.[53] Prosecutorial decisions are not alone in having potentially far-reaching consequences; decisions on matters of defence, foreign relations, the environment, or public health and safety can have equally broad consequences. This is not taken to be a justification for excluding Cabinet from any say in those decisions.[54]

In the same context, it can be questioned what the purpose of mere consultation by the Attorney General with the Cabinet might be. There would be little sense in the Attorney General, the legal adviser to the government, seeking legal advice from the Cabinet. But if the advice sought is not legal, then that suggests that the decision is not merely a legal one. In this case, one might hold that there is no reason in principle for the decision to be restricted to the law officer.[55]

Nonetheless it must be recognized that the principle of the independence of the Attorney General has become increasingly entrenched as a constitutional convention. This recognition raises several issues that must be borne in mind in considering any reform of the Attorney General's office. First, political considerations should not in normal circumstances affect prosecutorial decisions. However, when individual cases do raise political considerations, partisan motives must not be brought to bear. In such circumstances the Attorney General may seek the advice of Cabinet, but is not bound by that advice. Lastly, the final judges of whether a motive is partisan or not are the public. Any adequate system must see to it that these principles are protected.

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53. Lord Asquith, writing in 1924, discussed the decision to be made in 1914 in England whether to prosecute leaders of the Ulster movement for high treason. He queried:

> Is it really suggested that the Law Officers of the day should have assumed the undivided responsibility for instituting or withholding proceedings and that the Cabinet could have claimed no voice in a decision on which the whole political future of Ireland might have turned? (quoted in Edwards, *Law Officers*, *supra*, note 28 at 214, n. 48).

54. P. Stenning, *Submission to the Royal Commission Investigating the Prosecution of Donald Marshall, Jr.* [unpublished].

55. Edwards, in *Attorney General* (*supra*, note 34 at 363), discusses Cabinet consideration by the St. Laurent government of the case of James Endicott, a Canadian clergyman who had made statements suggesting that bacteriological weapons had been used by United Nations Forces during the Korean war. The Cabinet minutes show discussion of the fact that the easiest charge to prove would be treason, but that the only penalty at the time on conviction was death. The Cabinet noted that there would be a great deal of unfavourable international attention. One could well argue that these are non-partisan political considerations, and that there is in fact nothing objectionable about this type of Cabinet involvement.

Marshall (*supra*, note 29 at 113-114) argues that there is a distinction between an Attorney General seeking advice on the political advisability of a prosecution, and seeking advice about facts within the knowledge of another minister. He gives the example of a decision by an Attorney General in the Heath government in Britain seeking advice from the Secretary of State for Foreign Affairs on whether lives of hostages held by Palestinian guerrillas would be in greater danger if a particular airline hijacker were prosecuted.

Relevant Passages from Ontario Ministry of the Attorney General website, "Roles and Responsibilities of the Attorney General"

www.attorneygeneral.jus.gov.on.ca /english/about/ag/agrole.asp

Roles and Responsibilities of the Attorney General

The Attorney General has a unique role to play as a Minister.

One part of the Attorney General's role is that of a Cabinet Minister. In this capacity the Minister is responsible for representing the interests and perspectives of the Ministry at Cabinet, while simultaneously representing the interests and perspectives of Cabinet and consequently the Government to the Ministry and the Ministry's communities of interest.

The Attorney General is the chief law officer of the Executive Council. The responsibilities stemming from this role are unlike those of any other Cabinet member. The role has been referred to as "judicial-like" and as the "guardian of the public interest".

Much has been written on the subject of ministerial responsibilities and the unique role of the Attorney General.

There are various components of the Attorney General's role. The Attorney General has unique responsibilities to the Crown, the courts, the Legislature and the executive branch of government. While there are different emphases and nuances attached to these there is a general theme throughout all the various aspects of the Attorney General's responsibilities that the office has a constitutional and traditional responsibility beyond that of a political minister.

The statutory responsibilities of the office are found in section 5 of the *Ministry of the Attorney General Act*. Section 5 states:

The Attorney General,

(a) is the Law Officer of the Executive Council;
(b) shall see that the administration of public affairs is in accordance with the law;
(c) shall superintend all matters connected with the administration of justice in Ontario;
(d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law and usage, so far as those powers and duties are applicable to Ontario, and also shall perform the duties and powers that, until the Constitution Act, 1867 came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;

(e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government;
(f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature;
(g) shall advise the heads of ministries and agencies of Government upon all matters of law connected with such ministries and agencies;
(h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of government in respect of any subject within the authority or jurisdiction of the Legislature;
(i) shall superintend all matters connected with judicial offices;
(j) shall perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant Governor in Council. "

What follows is an overview of the various components of the Attorney General's roles and responsibilities, primarily as outlined in the Act.

...

Criminal prosecutions (s.5(d))

One of the most publicly scrutinized aspects of the Attorney General's role is the responsibility for criminal prosecutions encompassed in section 5 (d) and s. 92 of the Constitution Act, 1867. Section 92 gives the provinces authority to legislate in matters related to the administration of criminal justice and thereby gives the provincial Attorney General authority to prosecute offences under the Criminal Code.

The Attorney General does not, however, direct or cause charges to be laid. While the Attorney General and the Attorney General's agents may provide legal advice to the police, the ultimate decision whether or not to lay charges is for the police. Once the charge is laid the decision as to whether the prosecution should proceed, and in what manner, is for the Attorney General and the Crown Attorney.

It is now an accepted and important constitutional principle that the Attorney General must carry out the Minister's criminal prosecution responsibilities independent of Cabinet and of any partisan political pressures. The Attorney General's responsibility for individual criminal prosecutions must be undertaken - and seen to be undertaken - on strictly objective and legal criteria, free of any political considerations. Whether to initiate or stay a criminal proceeding is not an issue of government policy. This responsibility has been characterized as a matter of the Attorney General acting as the Queen's Attorney - not as a Minister of the government of the day.

This is not to suggest that decisions regarding criminal prosecutions are made in a complete vacuum. A wide range of policy considerations may be weighed in executing this responsibility, and the Attorney General may choose to consult the Cabinet on some of these considerations. However any decisions relating to the conduct of individual prosecutions must be the Attorney General's alone and independent of the

traditional Cabinet decision making process. In practice, in the vast majority of cases, these decisions are made by the Attorney General's agents, the Crown Attorneys.

An important part of the Crown's - and thus the Attorney General's - responsibility in conducting criminal prosecutions is associated with the responsibility to represent the public interest - which includes not only the community as a whole and the victim, but also the accused. The Crown has a distinct responsibility to the court to present all the credible evidence available.

The responsibility is to present the case fairly - not necessarily to convict. This is a fundamental precept of criminal law, even if it is not a particularly well-understood concept among the general public. One of the Attorney General's responsibilities in fostering public respect for the rule of law, is to assist the public in understanding the nature and limits of the prosecutorial function.

Ultimately the Attorney General is accountable to the people of the province, through the Legislature, for decisions relating to criminal prosecutions. Such accountability can only occur, of course, once the prosecution is completed or when a final decision has been made not to prosecute. The *sub judicae* rule bars any comment on a matter before the courts that is likely to influence the matter. The *sub judicae* rule strictly prohibits the Attorney General from commenting on prosecutions that are before the courts. Given the stature of the Attorney General's position, any public comment coming from the office would be seen as an attempt to influence the case.

Although the Attorney general can become involved in decision-making in relation to individual criminal cases, such a practice would leave the Minister vulnerable to accusations of political interference. Accordingly, it is traditional to leave the day-to-day decision-making in the hands of the Attorney General's agents, the Crown Attorneys, except in cases of exceptional importance where the public would expect the Attorney General to be briefed.

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