

The power of the Attorney General of Canada to issue directives and to assume conduct of proceedings

Attorney General of Canada Independence and Responsibility for Prosecutions

The Attorney General of Canada is ultimately responsible for criminal prosecutions. She must carry out those responsibilities independent of Cabinet and of any political considerations, and must be seen to undertake those responsibilities on objective and legal criteria. Whether to initiate or stay a criminal proceeding is not a political matter, and the Attorney General of Canada is acting in her capacity as chief law officer of the Crown, not a Minister of the government of the day, when she makes such decisions.

Policy considerations may be weighed in making decisions on criminal prosecutions. She may choose to consult members of Cabinet at a general level on policy considerations but decisions related to the conduct of individual prosecutions must be hers alone and not the result of a Cabinet decision making process.

Director of Public Prosecutions

Since 2006, the importance of independence in making decisions on criminal prosecutions has been further highlighted by the creation of the Office of the Director of Public Prosecutions. The Office was created to ensure that the mechanisms to protect prosecutorial independence from improper influences, including improper political influence, are statutory and transparent.

The Director, under and on behalf of the Attorney General, initiates and conducts prosecutions on behalf of the Crown (s. 3(3)(a) of the *Director of Public Prosecutions Act*).

Attorney General of Canada's Power to Assume Conduct of a Prosecution

The Attorney General of Canada may, after consulting with the Director, assume conduct of a prosecution (s. 15(1)). She must give the Director a notice of intent to do so which must be published in the Canada Gazette. Publication may be delayed if the Director or the Attorney General considers it to be in the interests of the administration of justice (s. 15(3)). If the Attorney General of Canada assumes a prosecution, she is not required to undertake the prosecution personally. She may appoint a prosecutor to act as her agent. The Attorney General of Canada has never exercised this power.

Attorney General of Canada's Power to Issue Directives

The Attorney General of Canada may also, under the Act, issue directives on the initiation or conduct of any specific prosecution (s. 10(1)) and with respect to the initiation or conduct of prosecutions generally (s. 10(2)). Those directives must be in writing and published in the Canada Gazette. The publication of a directive in a specific prosecution may be delayed "in the interests of the administration of justice" but not beyond the completion of the prosecution or any related prosecution (s. 11(1)).

To date, the Attorney General of Canada has not issued any directives in respect of specific cases. The practice of successive Attorneys General has been to refrain from becoming involved in the operational decision-making in specific prosecutions, even prior to the enactment of the *Director of Public Prosecutions Act*.

The Attorney General of Canada has issued several directives in respect of prosecutions generally. For example in 2015 a directive was issued confirming the role of the Public Prosecution Service of Canada in terrorism-related prosecutions.

Remediation Agreements

Budget Implementation Act, 2018, No. 1 amended the *Criminal Code* to provide prosecutors with the authority to enter into remediation agreements with organizations charged with certain scheduled offences. The new remediation agreement provisions will come into force 90 days after Royal Assent (i.e., September 19, 2018).

A remediation agreement would hold organizations accountable for their wrongdoing and would provide an incentive to rectify their wrongdoing, while avoiding some of the negative consequences of a criminal conviction. It could help achieve faster reparations to victims and protect jobs of innocent employees and investments of innocent shareholders. The possibility of being able to negotiate a remediation agreement may also encourage corporations to disclose wrongdoing and cooperate more readily with investigators.

There are statutory conditions to be met before the prosecutor may take this option including the prosecutor being of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances (s. 715.32(1)).

Among other things, a remediation agreement must include an admission of responsibility by the organization for the act that forms the basis of the offence, forfeiture of any proceeds from the act in question to the Crown, financial penalties, and reparations to be paid to victims (s. 715.34(1)).

A negotiated remediation agreement must be approved by a judge if the judge is satisfied that the agreement applies to a schedule offence, is in the public interest and that its terms are fair, reasonable and proportionate to the gravity of the offence. The prosecution may resume if the court terminates the agreement on being satisfied that the organization has breached a term of the agreement.

The Attorney General of Canada is entitled to receive information from the Director in order to understand a decision with respect to a remediation agreement in a specific case. If the Attorney General of Canada does not agree with a prosecutor on the question of whether the conditions to negotiate a remediation agreement are met, she could use her power to issue directives to direct that the prosecutor reconsider the decision. She could also direct that a specified prosecutor be appointed to conduct a reassessment and to act on its results.

The Attorney General of Canada could also take conduct of the prosecution. She could then as the prosecutor consider whether the statutory conditions are met and, if such were the case, appoint a prosecutor to act as her agent in negotiating an agreement and having it enter into force.

The Attorney General of Canada is entitled to seek advice with respect to the exercise of her powers under the *Director of Public Prosecutions Act* and the *Criminal Code*. She could therefore engage someone outside the Office of the Director to assess the case and advise her as to whether the conditions for a remediation agreement are met. It would be advisable that this course of action be made public at an appropriate stage of the matter in order to line up with the need to be transparent about her role with respect to specific cases. Upon receiving this advice she would need to decide whether to accept the decision of the prosecutor, or use one of her statutory powers as discussed above.

Considerations

Both the constitutional and statutory frameworks prioritize independence and transparency in order not to jeopardize either the lawfulness of the prosecution or the public's perception of the fairness of the criminal process. Any decisions by the Attorney General of Canada are hers to make, independent of political considerations or processes, and in the public eye.

Review by the Courts

The *Criminal Code* sets out certain criteria which must be considered by a prosecutor in exercising their discretion to invite an organization to enter into negotiations for a remediation agreement.

In its 2014 decision *R. v. Anderson*, the Supreme Court of Canada reaffirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system.

The Court quoted with approval its pronouncements from earlier cases. The fundamental importance of prosecutorial discretion lies, "not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as 'ministers of justice'". It reiterated that "Not only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law".

The court held that prosecutorial discretion is entitled to considerable deference. It must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle based on the doctrine of separation of powers.

Prosecutorial discretion is reviewable only for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision.