Court File No. 36466 and 36844

SUPREME COURT OF CANADA

ON APPEAL FROM JUDGMENTS OF THE COURT MARTIAL APPEAL COURT OF CANADA

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

ORDINARY SEAMAN W.K. CAWTHORNE

RESPONDENT

AND:

HER MAJESTY THE QUEEN

APPELLANT

AND:

WARRANT OFFICER J.G.A. GAGNON and CORPORAL A.J.R. THIBAULT

RESPONDENTS

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF QUÉBEC, AND DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC

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PART I – OVERVIEW

1. The Constitutional Questions stated in these appeals ask whether prosecutorial independence is a "principle of fundamental justice" within the meaning of s. 7 of the *Canadian Charter of Rights and Freedoms,* and, if so, what this constitutionally guarantees to persons who are charged with an offence and subject to prosecution by the state.

2. The Attorney General of British Columbia (AGBC) has intervened on the Constitutional Questions because of the significant implications their resolution carries for public prosecution services. The Questions arise within the context of military prosecutions; however, elucidating prosecutorial independence as a principle of fundamental justice and, more importantly, defining the scope of entitlement that emerges from it also has profound impact for the federal and provincial Attorneys General.

3. The AGBC agrees with the Appellant that prosecutorial independence meets the test for a principle of fundamental justice under s. 7. In *Krieger v. Law Society of Alberta,* 2002 SCC 65, [2002] 3 S.C.R. 372, the independence of the Attorney General in prosecutions was explicitly referenced as a "constitutional principle" (at para. 30). In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, it was described as "constitutionally entrenched" (at paras. 46-47). Recognizing prosecutorial independence as a matter of "fundamental justice" does not take the existing analysis in a new direction; rather, it gives constitutional form to substance. Functionally, the law is already there.

4. The more nuanced question is what this principle guarantees to persons who are charged with an offence and subject to prosecution. *R. v. Gagnon; R. v. Thibault,* 2015 CMAC 2, holds that defendants are entitled to a prosecutor who is institutionally independent. The AGBC disagrees. This takes the principle too far.

5. The *Charter* does not mandate that public officials who exercise a prosecution function be institutionally independent, autonomous or structurally isolated from other entities or roles within executive government, including roles with a political aspect. Rather, persons who are subject to prosecution by the state are entitled to have the prosecutorial *decisions* in their cases made independent of other interests that might have a bearing on the prosecution, including

partisan political concerns.[1] The very nature of the work undertaken by prosecutors requires that "political, personal and private considerations" be set aside.[2]

PART II – INTERVENER'S POSITION

6. The AGBC has intervened solely to address the Constitutional Questions. Even so, it is not the intention of the AGBC to comment on the role of the Minister of National Defence, the constitutionality of the *National Defence Act*[3], or its impugned provisions. Rather, the AGBC will focus on two specific issues that arise out of the Constitutional Questions, namely:

- Whether prosecutorial independence is a principle of fundamental justice within the meaning of s.7 of the *Charter;* and, if so,
- What this principle guarantees to persons who are charged with an offence and subject to prosecution by the state.

7. The AGBC comes before the Court with an analytic framework for consideration within the public prosecution context. It is a framework that builds on already-existing jurisprudence and will logically extend, in one form or another, to not only the federal and provincial Attorneys General, but to any Canadian official with lawful statutory or common law authority for prosecutions. By necessary implication, this would include the statutory role of the Minister of National Defence in military prosecutions under the *National Defence Act*.[4]

8. It is the position of the AGBC that:

- prosecutorial independence is a principle of fundamental justice within the meaning of the *Charter;*

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[1] *R. v. Regan,* 2002 SCC 12, [2002] 1 S.C.R. 297, per Binnie J., dissenting on another point, at para. 156; *Krieger v. Law Society of Alberta,* 2002 SCC 65, [2002] 3 S.C.R. 372, at paras. 30-32; *Miazga v. Kvello Estate,* 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 46.
[2] Turner, K., "The Role of Crown Counsel in Canadian Prosecutions" (1962), 40 Can. Bar. Rev. 439, at p. 448.
[3] R.S.C. 1985, c. N-5.
[4] On this point, the AGBC agrees with the majority judgment in *R. v. Gagnon; R. v. Thibault,* 2015 CMAC 2, which holds that the "principle of [prosecutorial] independence applies to all prosecutors", at para. 109. The AGBC will argue, later in its factum, that *application* of the principle should be contextually informed.

- as a result, persons who are charged with an offence and subject to prosecution by the state are constitutionally entitled to have the prosecutorial decisions in their cases made independent of other interests that might have a bearing on the prosecution, including partisan political concerns;[5]

- the application of this principle must be contextually informed; as such, whether the guarantee of prosecutorial independence has been infringed in a given scenario will depend on the nature of the alleged offence and the impugned conduct, as well as the overall context of the prosecution; however,

- even where a true penal offence is at issue, and liberty is at stake, institutional independence on the part of prosecutors or their superintending authority is not a constitutional imperative; and, finally,

- a violation of the principle of prosecutorial independence will be shown when a claimant can establish, on a balance of probabilities and with reference to an evidentiary foundation, that the conduct of the prosecutor "is egregious and seriously compromises trial fairness and/or the integrity of the justice system".[6]

PART III – STATEMENT OF ARGUMENT

A. Prosecutorial Independence is a Principle of Fundamental Justice

9. This Court has long accepted that prosecutorial independence, which manifests itself through the individualized exercise of discretion by prosecutors, is a legal principle with constitutional dimensions. In *Krieger,* the independence of the Attorney General in the prosecution function was defined as a "constitutional principle" (at para. 30). Other examples from the Court, both express and implied, include the following:

- "That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case law. They have been so as a matter of principle based on the doctrine of separation of powers… ".

  R. v. Power, [1994] 1 S.C.R. 601, at p. 623 (emphasis added).

- "In *R. v. G.D.B.*, [2000] 1 S.C.R. 520, 2000 SCC 22, at para. 24, we held that "the right to effective assistance of counsel" in the criminal justice system reflects a principle of fundamental justice within the meaning of s. 7 of the *Charter*. The duty of a Crown Attorney to respect his or her "Minister of Justice" obligations of objectivity and independence is no less fundamental".

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[5] *Regan*, per Binnie J., at para. 156.
[6] *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 50.

R. v. Regan, 2002 SCC 12, [2002] 1 S.C.R. 297, per Binnie J., dissenting on another point, at para. 157 (emphasis added).

- "The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched … In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play".

  Miazga, at paras.46-47 (emphasis added).

- "Iacobucci and Major JJ., writing for the Court [in *Krieger v. Law Society of Alberta*], reviewed the nature and development of the Attorney General's office in Canada and affirmed the independence of the office as "a constitutional principle in this country".

  R. v. Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 20, citing *Krieger*, at para. 30 (emphasis added).

- "… 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 …".

  Sriskandarajah v. United States of America, 2012 SCC 70, [2012] 3 S.C.R 609, at para. 27 (citations in the original omitted, emphasis added).

- "… Judicial non-interference with prosecutorial discretion has been referred to as a "matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice" which also recognizes that prosecutorial discretion is "especially ill-suited to judicial review"… ".

  Anderson, at para. 46 (citations in original omitted, emphasis added).

- "The decision to initiate or continue criminal proceedings lies at the core of the Crown prosecutor's powers, and the principle of independence of the prosecutor's office shields prosecutors from the influence of improper political factors … Prosecutors must be able to act independently of any political pressure from the government and must be beyond the reach of judicial review, except in cases of abuse of process. This independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched… ".

  Hinse v. Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 40 (citations in original omitted, emphasis added).

10. Provincial appellate courts have taken a similar approach. In *R. v. Gill*, 2012 ONCA 607, for example, prosecutorial independence was labelled a "principle of fundamental justice"

(at para. 57). In *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337,[7] the "prosecutorial independence of the Crown" was assigned the status of a "constitutional principle" (at para. 34).

11. In light of these cases, as well as others, prosecutorial independence is clearly a "well-established public law principle" within the Canadian criminal justice system (*Krieger; Miazga*, at para. 5*)*. Moreover, there is consensus that the principle is "fundamental to the integrity and efficiency of the criminal justice system" (*Miazga*, at paras. 46-47). Finally, prosecutorial independence has been concretely stated and provides a discernable standard against which to measure impugned conduct. The principle of independence embodies a societal expectation, grounded in the rule of law, that prosecutorial authority will be exercised by public officials "independently of partisan concerns" (*Krieger*, at paras. 30-32), including "political pressures from government" (*Miazga*, para. 46). When shown on a balance of probabilities that the principle has been infringed, remedial intervention within criminal and regulatory offence proceedings is available under s. 24(1) of the *Charter* applying the abuse of process doctrine.[8] The Court's mandated criteria for qualification as a principle of fundamental justice are met.[9]

12. Characterizing prosecutorial independence this way does not introduce something new into the existing analysis. On the contrary, the principle has long been accepted as an important "cornerstone of our system of criminal justice".[10] Furthermore, since at least *Krieger*, independence in the prosecution function has been recognized by this Court as having constitutional status.

B. The Principle Safeguards Discretion from Partisan Influence

13. It has been said that the "essence" of a public prosecutor's role is dispassionate decision making, "without regard to public pressure or to political influence".[11] In this sense, the

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[7] Leave to appeal to the S.C.C. dismissed on April 8, 2009 (S.C.C. No. 33355).
[8] *Anderson*, at para. 50.
[9] *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8. In *Gagnon; Thibault*, at para. 122, the majority concluded that "[i]ndependence in the exercise of prosecutorial discretion is a principle of fundamental justice" applying the criteria established in these cases.
[10] *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, at para. 30.
[11] *Davies*, at para. 56.

prosecutor holds a *quasi*-judicial office.[12] When exercising discretion, prosecutors carry a "minister of justice" role. The "seminal concept of [prosecutor] as "Minister of Justice"" includes an inherent responsibility 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 [or her] function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.[13]

14. To give meaningful effect to this "public duty", state officials with lawful authority to "bring, manage and terminate prosecutions"[14] are expected to act:

> … free of the external pressure and influence from groups or individuals who might be tempted for their own ends, well-meaning or nefarious, to pervert the court *[sic]* of justice. [The prosecutor] is free of the internal pressure of political ambition, the urge for self advancement *[sic]*, and the desire for public acclaim that might lead them to strive for convictions rather than to see that justice is done.[15]

15. It is the principle of independence that enables prosecutors to conduct themselves "free" of external pressure or influence that is motivated by partisan fervor. The obligation embodied within this principle ensures sustainable support for non-partisan decision making. As observed in *Miazga*, at para. 47:

> In exercising their discretion to prosecute, Crown prosecutors perform a function inherent in the office of the Attorney General that brings the principle of independence into play. Its fundamental importance lies, not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfillment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as "ministers of justice"… (emphasis added).

16. Independence speaks to the "status" of a particular decision maker vis-à-vis others, or, described differently, the functional relationship between the decision maker and the persons or entities they interact with in their duties.[16] An independent decision maker is usually understood as someone who "has authority to take decisions and act without regard for any direction, control

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[12] *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.), at pp. 378-379.
[13] *Regan*, per the majority, at para. 65, citing *Boucher v. The Queen*, [1955] S.C.R.16, at pp. 23-24.
[14] *Krieger*, at para. 29.
[15] Manning, M., "Abuse of Power by Crown Attorneys", *Law Society of Upper Canada, Special Lectures, 1979* (Toronto: De Boo, 1979) 571, at pp. 578-579, quoting the late Henry Bull, Q.C.
[16] *R. v. Généreux*, [1992] 1 S.C.R. 259, at pp. 283-84, citing *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; and *Beauregard v. Canada*, [1986] 2 S.C.R. 56.

or influence from others".[17] To fulfill the "minister of justice" role, a public prosecutor must make decisions without interference by external forces, including the political arm of government, the judiciary, police, victims, the accused, media or other persons or groups with partisan interests.[18] A prosecutor's discretion "must be exercised solely upon grounds calculated to maintain, promote and defend the common good".[19]

17. In its application, prosecutorial independence affords persons who are subject to prosecution by the state a guarantee of decisions that are made in their cases independent of other interests that might have a bearing on the prosecution, including partisan political concerns.[20] Independence ensures that a prosecutor's decisions are "protected from the influence of improper political and other vitiating factors",[21] both real and perceived. Put another way, independence enables the exercise of discretion by prosecutors "free of the external pressure and influence from groups or individuals who might be tempted for their own ends, well-meaning or nefarious, to pervert the court *[sic]* of justice".[22]

18. This protection necessarily extends to the exercise of discretion on fundamental procedural and substantive issues that directly impact the interests of a defendant, including (but not limited to):

> whether to bring the prosecution of a charge laid by police; whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and whether to take control of a private prosecution …
>
> … the decision to repudiate a plea agreement …; the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal.[23]

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[17] Per Stenning P., at p. 333, The Honourable Fred Kaufman, C.M., Q.C., *Review of the Nova Scotia Public Prosecution Service, Final Report* (June 1999), Appendix D, "Independence and Accountability".
[18] *Regan*, per Binnie J., at para. 135.
[19] Turner, K., "The Role of Crown Counsel in Canadian Prosecutions", at p. 448.
[20] *Regan*, per Binnie J., at para. 156.
[21] *Krieger*, at para. 43.
[22] Manning, at 578-579, quoting the late Henry Bull, Q.C.
[23] *Anderson*, at paras. 40-44 (citations in the original omitted).

19. For each of these decisions, the defendant whose "life, liberty or security of the person is at stake" is entitled to expect under s. 7 of the *Charter* that a public prosecutor will exercise discretion independently.

C. Application of the Principle Must be Assessed Contextually

20. Principles of fundamental justice are not immutable. As noted in *R. v. Lyons,* [1987] 2 S.C.R. 309, the "requirements of fundamental justice" under s. 7 will "vary according to the context in which they are invoked".[24] The principle of prosecutorial independence should be no exception to the rule. Whether it has been infringed in a given scenario will depend on the nature of the alleged offence and the impugned conduct, as well as the overall context of the prosecution.

21. This is the same approach that has been taken to the principle of "judicial independence", which falls within the scope of s. 11(d) of the *Charter* and is itself recognized as "the lifeblood of constitutionalism in democratic societies".[25] Notwithstanding the pivotal role this principle plays in support of the rule of law, as well as public confidence in the administration of justice, the Court has accepted that "[t]he manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal and the interests at stake".[26]

22. Thus, in *Ell v. Alberta,* 2003 SCC 35, [2003] 1 S.C.R. 857, the Court held that the "level of security of tenure" required for superior court judges, the judges of a statutory provincial court, and justices of the peace can vary because of differences in the nature of their roles and responsibilities, the historical underpinnings of their powers, and the overarching constitutional, common law and statutory context in which they operate. The pre-requisites for removal of a justice of the peace from office can be less rigorous than for the others, and nonetheless withstand constitutional scrutiny, even though the principle of judicial independence applies to all three groups of decision maker. According to Major J:

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[24] Per the majority, at p. 361.
[25] *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at para. 18, citing *Beauregard,* at p. 70, *per* Dickson C.J. In *Application under s. 83.28 of the Criminal Code (Re),* 2004 SCC 42, [2004] 2 S.C.R. 248, judicial independence was noted to have been "implicitly recognized as a residual right protected under s. 7", at para. 81.
[26] *Ell*, at para. 30 (emphasis added).

> The ultimate question in each case is whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent … The perception of independence … will be upheld if the essence of each condition of independence is met.[27]

23. If a contextual approach to the application of judicial independence is justifiable, a principle that is seen as "one of the pillars upon which our constitutional democracy rests",[28] the same must also hold true for the principle of prosecutorial independence.

24. There may well be contexts in which, at first glance, the common law or legislative regimes under which a public prosecutor exercises authority, or the relationship between the prosecutor and other persons or entities with potential influence over the prosecution, raises concerns about real or perceived independence with reference to the s. 7 principle. Consider, for instance, by-law prosecutions; violation tickets that are issued and prosecuted by enforcement officers under provincial regulatory legislation; or, summary offence proceedings that may be prosecuted by a representative of an enforcement agency, or counsel instructed by the agency.

25. There could be other examples (presently or in the future), as informed by jurisdictional differences in Canadian practice, procedure, and legislative and regulatory infrastructure. Whether the principle of prosecutorial independence has been infringed in a given scenario must be informed by the nature of the alleged offence and the impugned conduct, as well as the overall context of the prosecution.

26. The analysis brought to bear in *R. v. Cooper*, 2005 BCCA 256 illustrates the AGBC's point. In this case, the appellants were issued violation tickets for provincial regulatory infractions under British Columbia's *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. They disputed the tickets and were tried before a justice of the peace. In each case, the Crown's case was presented by a police officer who also gave sworn evidence. In other words, "the prosecutor and the enforcement officer were the same person".[29]

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[27] *Ell*, at paras. 30-33 (emphasis added).
[28] *Ell*, at para. 19.
[29] *R. v. Cooper*, 2005 BCCA 256, at para. 1, leave to appeal dismissed on November 10, 2005 (S.C.C. No. 31024).

27. On appeal, the appellants brought a constitutional challenge, arguing that the dual role of prosecutor and witness, as permitted by the governing legislation, enables a "conflict of interest" that created both "structural unfairness" and the "appearance of unfairness", and "irremediably tainted the trial process".[30] Although the appellants grounded their complaints in s. 11(d) of the *Charter*, functionally, the argument raised concerns about compromised prosecutorial independence, both real and apparent.[31]

28. Ultimately, the dual role was found to violate the *Charter*. This point was conceded by the AGBC in light of jurisprudence that existed at the time.[32] However, the infringement was saved under s. 1. Applying a contextual analysis, the Court of Appeal noted that the appellants' complaint arose within the context of a "scheme designed to process, simply and efficiently, a large number of violation tickets for minor offences, in an inexpensive but balanced hearing process".[33] Furthermore, a finding of guilt for a violation ticket did not put the appellants' liberty at risk and the "impugned practice was a minimal impairment of the *Charter* right".[34] The legislation under which their hearings occurred contained a number of "safeguards" that protected against the risk of unfairness and acted "in mitigation of the breach".[35] This included, of course, the presumption of innocence and an independent and impartial trier of fact.

29. The Constitutional Questions in the present appeals are specific to military prosecutions and it is not necessary for the Court, in answering them, to work its way through every conceivable context in which the principle of prosecutorial independence might reasonably come into play. Indeed, there is no evidentiary record from which to appropriately inform the analysis.

30. The AGBC simply asks, in light of the far-reaching implications of the s. 7 ruling, that should the Court see fit to elucidate prosecutorial independence as a principle of fundamental justice for *Charter* purposes, it also explicitly acknowledge that the principle is mutable and, consistent with the approach that has been taken to other matters of "fundamental justice", the principle's application will be contextually informed. The decision in *Cooper* exemplifies the

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[30] *Cooper*, at para. 10.
[31] See the appellants' argument in *Cooper* as summarized at paragraphs 14-16 of the Court of Appeal's judgment.
[32] *Cooper*, at para. 1.
[33] *Cooper*, at para. 27.
[34] *Cooper*, at para. 33.
[35] *Cooper*, at para. 34.

importance of a careful context-by-context analysis to account for jurisdictional differences in the delegation, assignment and carriage of prosecutorial responsibilities.

D. There is No Requirement for Institutional Independence

31. Relying on the lower Court's decision in *Gagnon* and *Thibault*, it may be asserted in these appeals that prosecutorial independence, once protected by s. 7, constitutionally mandates that all public officials with prosecution responsibilities or superintending authority be institutionally independent, autonomous or structurally isolated from any political aspect of government's executive branch. In the words of the *Gagnon* and *Thibault* majority, a "Minister [of National Defence] cannot reasonably be perceived as an independent prosecutor who can act in a manner that is autonomous and independent from the chain of command, because he or she is at the apex of it".[36]

32. The AGBC agrees with the Appellant's response to this proposition. Institutional independence is a "novel requirement that Canadian law does not impose on the prosecutorial function".[37] This is true even within the context of prosecutions for true penal offences that carry the risk of a liberty deprivation.

33. Institutional independence as a necessary adjunct to prosecutorial independence finds no mention in *Krieger*, *Miazga* or the other cases referenced in paragraph 9 above. And yet, it is obvious from these rulings that in reaching the conclusions that it did, the Court appreciated the multi-faceted roles of the provincial and federal Attorneys General within the Canadian justice system, including their concurrent engagement in prosecutorial, superintending *and* political responsibilities:

> 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… [38]

34. The Attorneys General sit as a "member of Cabinet" and hold office as a Minister of Justice "with partisan political aspects" (*Krieger*, at para. 29). This fact imposes a heightened

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[36] At para. 30.
[37] Appellant's Memorandum of Fact and Law in the *Cawthorne* appeal, at p. 8, para. 27.
[38] *Krieger*, at paras. 27-28.

responsibility to be vigilant about the need to exercise prosecutorial authority "fully independent from the political pressures of the government" (at para. 29). However, the Court did not suggest in *Krieger* that the two hats are constitutionally irreconcilable; that their co-existence impairs prosecutorial independence; or that the principle of independence requires separation of the Attorneys General from Cabinet, removal of their prosecution responsibilities, or institutional independence, autonomy or structural isolation for their prosecuting agents. It is well-understood that although an Attorney General is the "chief accusatorial officer in the province under our criminal system":

> He [or she] works – duly assisted by a number of Crown agents or Crown Attorneys, who most of the time perform their tasks without direct consultation with him. In exceptional cases that Attorney-General is personally brought to examine certain files and to advise.[39]

35. *Krieger*, as well as subsequent decisions of this Court, rightly recognize that the principle of independence does more than shield the Attorneys General and their agents from external interference in the exercise of prosecutorial authority, including interference through judicial review. The principle imposes a *positive obligation* to act independently. Consistent with this obligation, and, as a matter of constitutional convention in Canada, Attorneys General adhere to the "Shawcross doctrine" in superintending the prosecution function:

- Attorneys General must take into account all relevant facts, including the effect of a successful or unsuccessful prosecution on public morale and order;
- the Attorney General is not obliged to consult with cabinet colleagues, but is entitled to do so;
- any assistance from cabinet colleagues is confined to giving advice, <u>not directions</u>;
- responsibility for prosecution decisions is that of the Attorney General alone; <u>the government is not to put pressure on the Attorney General</u>; and,
- the Attorney General cannot shift responsibility for the decision to the cabinet.[40]

36. Attorneys General are expected to lead in "ethical practice". The "Attorney General has an important role in fostering an atmosphere of ethical conduct" and, as a result, he or she

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[39] *Re Balderstone et al. and The Queen* (1983), 8 C.C.C. (3d) 532, at p. 540; application for leave to appeal to the S.C.C. dismissed on December 16, 1983.

[40] The Honourable Marc Rosenberg, "The Attorney General and the Prosecution Function of the Twenty-First Century" (2009) 34 Queen's L. J. 813, at p. 821 (citations from the original omitted, emphasis added).

"should be at the forefront of encouraging impartiality in handling cases and of encouraging a commitment to equality and fairness".[41] The Shawcross doctrine is one means by which to ensure that this occurs. In its application, the doctrine prevents partisan political concerns from flowing through the superintending function into the day-to-day work of prosecuting agents.

37. The *Gagnon* and *Thibault* ruling in the Court below fails to properly account for the positive obligation to act independent of partisan interests, which the AGBC says is innate to public prosecutions work and subsists irrespective of the nature of the organizational or administrative structure in which this work is delivered, or the connection between individual prosecutor, the prosecutor's superintending authority and the political aspects of executive government. The obligation to act independently attaches to Attorneys General, their agents and logically to all public officials with prosecutorial responsibilities.[42] As noted, the very nature of the work undertaken by prosecutors requires of them that "political, personal and private considerations" be set aside.[43] The rule of law demands no less.

38. The majority in *Gagnon* and *Thibault* holds that prosecutorial independence is a principle of fundamental justice and that prosecutors must therefore "act independently of any influence, political or otherwise".[44] The majority also accepts that this principle "applies to <u>all</u> prosecutors".[45] However, it then concludes that in the absence of "objective institutional independence",[46] only an Attorney General "may reasonably be regarded as independent in the eyes of a reasonable person", because the role of the Attorney General has "constitutional dimensions".[47]

39. This analysis is not well-founded. The "constitutional dimension" of the Attorney General's role is not a determinative factor. Rather, as the majority acknowledges, *all*

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[41] Marc Rosenberg, "The Attorney General and the Prosecution Function of the Twenty-First Century", at p. 846.
[42] It is an obligation that is reinforced externally through the availability of the tort of malicious prosecution for aggrieved persons; the jurisdiction of federal and provincial Law Societies to review allegations of misconduct on ethical grounds; and the potential for civil suits arising out of alleged violations of constitutional obligations: *Krieger* and *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214.
[43] Turner, K., "The Role of Crown Counsel in Canadian Prosecutions", at p. 448.
[44] At para. 128.
[45] At para. 109 (emphasis added).
[46] At paras. 142 and 195.
[47] At paras. 134-136.

prosecuting authorities for the state are positively obliged (or have a duty) to act independently. This is because "[t]he gravity of the power to bring, manage and terminate prosecutions … has given rise to an expectation that [the decision maker] will be fully independent from the political pressures of the government".[48] In assessing whether a "reasonable person" would perceive a prosecuting authority as independent, the positive obligation to make decisions free from partisan influence, *which carries constitutional status*, would necessarily be integral to the analysis. Reasonable perceptions are fully informed perceptions.

40. Pointing to institutional independence as a pre-condition to "judicial independence" does not assist. Institutional independence is mandated for judges because they sit as neutral arbiters in disputes involving the state:

> The historical rationale for [judicial] independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference …
>
> … In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals …
>
> Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies.[49]

41. Prosecutors do not sit as "arbiter[s] of disputes" in which the executive branch of government may be a party. The ""judicial" nature of the Attorney General's decision to prosecute does not in any way render him [or her] a "court", that is, an adjudicative entity".[50] On the contrary, prosecutors form part of the executive branch[51] and appear as "litigant" before the court, representing the prosecutorial authority (*Krieger*, at para. 32). Moreover, as noted in *R. v. T. (V.)*, [1992] 1 S.C.R. 749, the positions put forward by prosecutors in their cases may be appropriately informed by, and representative of, "the Government's enforcement priorities and the case's relationship to the Government's overall enforcement plan" (at p. 761). Within this context, a call for institutional independence is misplaced.

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[48] *Krieger*, para. 29.
[49] *Ell*, at paras. 21-23 (citations from the original omitted, emphasis added).
[50] Per McIntryre J., in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 215.
[51] "[P]rosecutorial discretion resides within the domain of the executive branch of government": *Blackmore v. British Columbia (Attorney General)*, 2009 BCSC 1299, at para. 67.

42. The judiciary must "function independently from the executive and legislative branches of government" to safeguard the substantive and perceived impartiality of its adjudicative function.[52] The prosecutor's obligation, as a member of the executive branch, is to "bring, manage and terminate prosecutions" [53] in a manner consistent with their "minister of justice" role. This includes exercising discretion without regard to "improper political and other vitiating factors".[54] It is not necessary for prosecutors to be institutionally independent, autonomous or structurally isolated from the executive branch of government to accomplish this objective. They require functional independence only.

43. Whereas the principle of judicial independence mandates the visible presence of "objective conditions or guarantees" in the form of "security of tenure, financial security and administrative independence",[55] no such institutional pre-requisites have been jurisprudentially established for prosecutorial independence. Instead, it is up to the executive branch to choose whether to put a formalized prosecution structure in place, what it consists of, and the nature of the policies, protocols and processes that may be necessary to guide prosecutors in the fulfillment of their duties. Invariably, there will be jurisdictional differences.

44. In *Regan*, the Court was asked to consider the propriety of "pre-charge" witness interviews conducted by prosecutors. In support of an alleged abuse of process, the appellant claimed that pre-charge engagement with a witness unduly compromises prosecutorial objectivity because it fails to respect the "bright line" that must be drawn, and maintained, between the role of police as investigator and the role of prosecutor as "minister of justice".[56] The appellant in *Regan* argued that "separation" between the police and prosecutor "<u>is the only way</u> to maintain the Crown's crucial objectivity when reviewing the appropriateness of charges".[57]

45. After reviewing jurisdictional differences in practice, the majority concluded that there are Canadian jurisdictions in which "public policy is served by the practice" of pre-trial

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[52] *Application under s. 83.28*, at para. 82.
[53] *Krieger*, at para. 29.
[54] *Krieger*, at para. 43.
[55] *Ell*, at para. 28.
[56] *Regan*, at para. 62.
[57] *Regan*, at para. 62 (emphasis added).

interviews; the "refusal to draw a hard line" between police and prosecutor can avoid "potentially harmful and arbitrary results".[58] Significantly, for the purpose of this appeal, the majority noted that:

> … while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained.[59]

And, at paragraph 71 of *Regan:*

> While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. This Court has already recognized that some variation in provincial practices in the administration of the criminal law is to be expected and allowed in certain circumstances. In *R. v. S. (S.)*, [1990] 2 S.C.R. 254, Dickson C.J. observed, at pp. 289-90:
>
> > It is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal system … A brief review of Canadian constitutional history clearly demonstrates that diversity in the criminal law, in terms of provincial application, has been recognized consistently as a means of furthering the values of federalism. Differential application arises from a recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities (emphasis added).

46. This same recognition should be brought to the principle of prosecutorial independence. The principle attaches to every public official who exercises or supervises a prosecutorial responsibility because of the nature of the role and the accompanying societal expectation, grounded in the rule of law, that prosecutorial authority will be exercised "independently of partisan concerns" (*Krieger,* at paras. 30-32), including "political pressures from government" (*Miazga,* para. 46). The obligation to "bring, manage and terminate prosecutions"[60] in a manner consistent with "minister of justice" values subsists *irrespective* of the institutional or administrative infrastructure in which prosecution services are delivered, including the existence of a superintending authority with dual prosecutorial and political responsibilities.

47. As such, the extent to which a particular jurisdiction decides to put legislation, policies, protocols or processes in place to safeguard and/or give demonstrable effect to the principle of prosecutorial independence is up to that jurisdiction. This is a public policy choice. As noted by

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[58] *Regan,* at para. 91.
[59] *Regan,* at para. 64 (emphasis added).
[60] *Krieger,* at para. 29.

Dickson C.J. in *R. v. S. (S.)*, [1990] 2 S.C.R. 254, "some variation in provincial practices in the administration of the criminal law is to be expected" (at pp. 289-90).

48. Take British Columbia, for example. The public prosecution model for offences that fall within the jurisdiction of the provincial Attorney General acknowledges and preserves the Attorney General's superintending authority over prosecutions, but also includes provisions that effect transparency to safeguard the exercise of prosecutorial discretion in individual cases from any perception of interference based on partisan political concerns.

49. The Attorney General's mandate on prosecutions is delivered in British Columbia by the Criminal Justice Branch (the Branch). Under provincial legislation, the *Crown Counsel Act*, R.S.B.C. 1996, c. 87, the Branch is administered by an Assistant Deputy Attorney General who is "designated" for the purpose of section 2 of the *Criminal Code* as a "lawful deputy of the Attorney General" (s. 3(2)) (the ADAG). The ADAG designates lawyers as "Crown counsel" and subject to the directions of the ADAG (or a delegate), Crown counsel are authorized to "approve" offences for prosecution and "conduct the prosecutions approved" (s. 4(3)). This includes all related appeals, whether initiated by the prosecution or a defendant.

50. If the Attorney General, or British Columbia's Deputy Attorney General, provides the ADAG with a "direction" on the approval or conduct of any prosecution or appeal, the direction must be in writing and published in the provincial *Gazette* (s. 5). Policy directives that are provided by the Attorney General or Deputy Attorney General must also be "given in writing" and the ADAG has the discretion to publish the directive in the *Gazette* if considered appropriate (s. 6(1)). The ADAG also has statutory authority to request that any directives provided by the Attorney General or the Deputy Attorney General "respecting the administration of the Branch" be given in writing and, again, the ADAG has the discretion to publish the directive in the *Gazette* (s. 6(2)).

51. This is *one* way in which to establish a model for the delivery of prosecutions, but not the only way. It is important to note that British Columbia's *Crown Counsel Act* does not institutionally isolate the prosecution function from the Attorney General, who concurrently participates as a member of Cabinet, functions in the role of Minister of Justice with political

responsibilities, and sits "at the apex of the chain of command" for the prosecution service.[61] Presumably, structural separation or institutional autonomy was not considered a legal imperative. For the Court to now rule that institutional independence *is* mandated under s. 7 of the *Charter* would have profound impact for governments across this country, including the potential for structural and resource re-organization.

52. The *Crown Counsel Act* contains publication provisions specific to directives that may be issued by the Attorney General, but these provisions do not take away the Attorney General's plenary authority over prosecutions. Rather, as a policy choice, they make the directives and their underlying rationale transparent and open to public scrutiny. Even when the ADAG appoints a lawyer who is not employed by the Branch to act as a "Special Prosecutor" in politically sensitive cases, or cases for which there might reasonably be a perceived conflict of interest, the Attorney General "maintains residual responsibility [under s. 7(4)] to "intervene in the public interest and on the public record" by means of further directions, in writing and Gazetted".[62] The Attorney General's plenary authority has been preserved, notwithstanding the concurrent roles of prosecutorial superintendence and elected member of the legislature.

E. Violations are Assessed under the Abuse of Process Doctrine

53. Recognizing prosecutorial independence as a principle of fundamental justice would not require the Court to establish a new analytic approach for remedial consideration in the face of an alleged s. 7 violation. A framework to guide this determination already exists through the *Charter* subsumed abuse of process doctrine.

54. Prosecutorial independence manifests itself through the exercise of discretion in individual cases. Although not immune from "all judicial oversight", this Court has repeatedly held that "prosecutorial discretion is entitled to considerable deference".[63] Within the context of criminal and regulatory offence proceedings, a discretionary decision made on the "nature and extent of the prosecution" is only "reviewable for abuse of process".[64] Judicial intervention with

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[61] *Gagnon; Thibault*, at para. 160.
[62] *Blackmore*, 2009 BCSC 1299. See also: *Blackmore v. British Columbia (Attorney General)*, 2015 BCSC 1099 (under appeal to the Court of Appeal for British Columbia; judgment is reserved).
[63] *Anderson*, para. 48.
[64] *Anderson*, paras. 44 and 48 (citations in the original omitted).

an exercise of prosecutorial discretion[65] is available for "Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system".[66] When this occurs, the prosecutor has clearly stepped outside the "minister of justice" role and is no longer protected by the principle of prosecutorial independence.

55. To exemplify, in *Anderson* the Court opined that "Crown decisions motivated by prejudice against Aboriginal persons would certainly meet [the] the standard" for intervention (at para. 50). In *Proulx v. Quebec (Attorney General*, 2001 SCC 66, [2001] 3 S.C.R. 9, a civil finding of malice was upheld when a prosecutor "did not keep himself at arm's length" from a defendant in a defamation suit arising out of the same matter. The prosecutor "lent his office to a defence strategy" in the civil action and his conduct was found to constitute an "abuse of prosecutorial power" (at paras. 43-45).

56. Applying the abuse of process doctrine to assertions of compromised independence ensures that the courts do not unduly interfere with matters that fall within the domain of the prosecutor's superintending authority. The "principle of Crown independence means that decisions taken by a Crown attorney pursuant to his or her prosecutorial discretion are generally immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process".[67]

57. Prosecutorial independence "finds form in the principle that courts will not interfere with [the Attorney General's] exercise of executive authority, as reflected in the prosecutorial decision-making process".[68] To "subject [prosecutorial discretion] to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict".[69]

58. Finally, the burden of proof for showing an abuse of process lies on the claimant and the violation must be established on a balance of probabilities.[70] A trial or hearing judge should not embark on a s. 7 enquiry unless first satisfied that a "proper evidentiary foundation" is available

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[65] See *Anderson,* at paras. 40-45.
[66] *Anderson*, para. 50.
[67] *Miazga*, at para. 6 (emphasis added).
[68] *Krieger*, at para. 31.
[69] *Krieger*, at para. 32.
[70] *Anderson,* at para. 52 (citations from the original omitted).

in support of the alleged breach.[71] The claimant must be able to "show a reasonable likelihood that the hearing can assist in determining" whether the principle of prosecutorial independence has actually been infringed.[72] As noted in *Anderson:*

> Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 95.

59. This "presumption" of good faith necessarily includes a prosecutor's appreciation of the positive obligation to exercise discretion independent of other interests that may have a bearing on the prosecution, including partisan political concerns.[73]

PART IV – ORDER SOUGHT

60. The AGBC makes no submissions on the order to be granted by the Court.

PART V – ORAL ARGUMENT

61. The AGBC intends to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

M. Joyce DeWitt-Van Oosten, QC
Counsel for the Attorney General of British Columbia

Dated this 12th day of April, 2016.
Victoria, British Columbia

[71] *Anderson*, at para. 53.
[72] *Anderson*, at para. 53, citing *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343.
[73] *Regan*, per Binnie J., at para. 156.

PART VI – TABLE OF AUTHORITIES

Paragraph

Other Material

PART VII – STATUTES

Crown Counsel Act, R.S.B.C. 1996, c. 87

Responsibilities of Crown counsel

4 (3) Subject to the directions of the ADAG or another Crown counsel designated by the ADAG, each Crown counsel is authorized to

(a) examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate,

(b) conduct the prosecutions approved, and

(c) supervise prosecutions of offences that are being initiated or conducted by individuals who are not Crown counsel and, if the interests of justice require, to intervene and to conduct those prosecutions.

Directions from Attorney General on specific prosecutions

5 If the Attorney General or Deputy Attorney General gives the ADAG a direction with respect to the approval or conduct of any specific prosecution or appeal, that direction must be

(a) given in writing to the ADAG, and

(b) published in the Gazette.

Policy directive from Attorney General

6 (1) If the Attorney General or Deputy Attorney General wishes to issue a directive respecting the Criminal Justice Branch policy on the approval or conduct of prosecutions, that directive must be given in writing to the ADAG and, in the discretion of the ADAG, may be published in the Gazette.

(2) If the Attorney General or Deputy Attorney General wishes to issue a directive respecting the administration of the Branch, that directive must, if requested by the ADAG, be given in writing and may, in the discretion of the ADAG, be published in the Gazette.