IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT)

B E T W E E N :

Court file no. 36466

HER MAJESTY THE QUEEN

Appellant

- and -

ORDINARY SEAMAN CAWTHORNE

Respondent

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, and DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DUE QUÉBEC

Interveners

A N D B E T W E E N:

Court file no. 36844

HER MAJESTY THE QUEEN

Appellant

- and -

J.G.A. GAGNON and A.J.R. THIBAULT

Respondents

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, and ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

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PART I
OVERVIEW AND FACTS

A. Overview of the intervener's position

1. The Attorney General of Ontario does not take a position on the Constitutional Questions stated by the Court. Ontario intervenes to offer submissions on a number of important issues raised by these appeals which bear on the constitutional roles and responsibilities of those exercising prosecutorial functions, including the Attorney General.

2. Ontario agrees with the Appellant that prosecutorial independence is a principle of fundamental justice under s. 7 of the Charter. The independence of prosecutors, and the fact that this independence has constitutional status, has been consistently recognized by this Court and should be affirmed as a principle of fundamental justice.

3. Prosecutorial independence imposes a positive duty on those exercising prosecutorial functions to exercise their discretion in accordance with the merits of the case, and not on the basis of extraneous factors or considerations. The "merits" of a case involves not just a consideration of whether there is a reasonable prospect of conviction but also whether the conduct of the prosecution is in the public interest.

4. Because prosecutorial independence is a constitutional principle, it necessarily has implications for the context in which prosecutorial discretion is to be exercised. In particular, the institutional framework within which discretion is exercised must reflect the complementary principles of independence as well as accountability. These complementary principles ensure adherence to the rule of law and nourish public confidence in the administration of justice.

5. The independence of the prosecution function requires that those exercising discretion must be free to do so in accordance with their constitutional duty. This means that the institutional context must not expose or subject those exercising prosecutorial discretion to improper pressure or influence. Conversely, the accountability principle requires that those who exercise discretion must do so within an institutional context that ensures they are accountable for their decisions.

6. There is no single or ideal institutional framework to give effect to the principle of prosecutorial independence and the values which form its underpinning. Indeed the variety of institutional arrangements surrounding the role of the Attorney General that have evolved in the provinces and at the federal level reflect this diversity. Moreover there are a wide variety of public officials who perform, or otherwise participate, in prosecutorial functions. This includes, in certain instances, members of Cabinet other than the Attorney General.

7. There is no evidence before the Court to suggest that these various other institutional arrangements are in any way inconsistent with prosecutorial independence. Therefore, in deciding the specific constitutional questions posed on these appeals, the Court should take care not to cast doubt on the appropriateness of other prosecutorial approaches that are not before the Court and on which it has not had the benefit of evidence.

B. The facts

8. Ontario does not make any submissions on the facts.

PART II
STATEMENT OF POSITION ON QUESTIONS IN ISSUE

9. As stated by this Court, the constitutional questions raised in these appeals, on which Ontario intervenes as of right are as follows:

The Queen v. Cawthorne

1. Does paragraph 245(2) of the National Defence Act, R.S.C., 1985, c N-5 violate s. 7 of the Canadian Charter of Rights and Freedoms?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?
3. Does paragraph 245(2) of the National Defence Act, R.S.C., 1985, c N-5 violate s. 11(d) of the Canadian Charter of Rights and Freedoms?
4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

The Queen v. Gagnon, et al.

1. Does section 230.1 of the National Defence Act, R.S.C. 1985, c. N-5, infringe section 7 of the Canadian Charter of Rights and Freedoms?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the Canadian Charter of Rights and Freedoms?
3. Does section 230.1 of the National Defence Act, R.S.C. 1985, c. N-5, infringe section 11(d) of the Canadian Charter of Rights and Freedoms?
4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the Canadian Charter of Rights and Freedoms?

10. The intervener takes no position on these constitutional questions but provides the submissions which follow to assist the Court in the resolution of the issues raised by these appeals.

PART III
STATEMENT OF ARGUMENT

A. Prosecutorial independence is a principle of fundamental justice

11. The Attorney General of Ontario supports the Appellant's position that "the principle that prosecutors must act independently of partisan political considerations has the characteristics of a principle of fundamental justice within the meaning of s. 7 of the *Charter*". Ontario also agrees with the appellant's argument that, "[p]roperly understood, the principle of prosecutorial independence requires that prosecutorial decisions be made free from partisan political considerations, as well as any other improper motives".[1]

12. It is further Ontario's position that this principle encompasses a requirement for basic institutional assurances that prosecutorial decisions will be made independently of improper and extraneous influences.[2] Prosecutorial independence as a principle of fundamental justice therefore relates, in part, to institutional arrangements and safeguards which protect the independence of prosecutorial decision-makers. This conception of prosecutorial independence satisfies the necessary criteria of a principle of fundamental justice: it is a recognized legal principle that is vital to societal notions of justice and can be applied with consistent precision.[3]

13. First, prosecutorial independence is a legal principle which flows from foundational legal doctrines representing the "basic values underpinning our constitutional order".[4] It gives concrete expression to the rule of law by preventing the improper exercise of prosecutorial discretion,[5] shielding prosecutorial decisions from becoming clouded by influences or motives that detract from the prosecutor's

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[1] Appellant's Factum (*Cawthorne*) at para 4

[2] See *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 32: "The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution."

[3] *R v D.B.*, 2008 SCC 25 at para 46; *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 113

[4] *Reference re Motor Vehicle Act (British Columbia) s.94(2)*, [1985] 2 SCR 486 at para 23

[5] *Roncarelli v Duplessis*, [1959] SCR 121 at 142

overriding duty to act in the public interest.[6] Prosecutorial independence also vindicates the principle of responsible government by ensuring that those who exercise this discretion are accountable to the public through the legislatures.[7] The institutional dimension of this principle balances independence and accountability: independence protects the decision-maker from improper influences, while accountability ensures that discretion is exercised within a framework that forestalls abuse of power. Accountability to the legislature promotes public confidence that the prosecutorial function will not be exercised for improper motives. Like the notions of the rule of law and responsible government, the independence and accountability of the prosecutor are intertwined and inexorably linked within our constitutional order.

14. Second, prosecutorial independence is a vital component of our legal system. The principle is a necessary precondition for prosecutorial discretion, itself "a necessary part of a properly functioning criminal justice system".[8] Prosecutorial independence requires the maintenance of institutional measures, providing meaningful assurances to justify the presumption that prosecutorial discretion will be exercised properly in good faith. These assurances inform the "long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of that discretion",[9] which upholds the separation of powers and party autonomy.[10] Moreover, the public's confidence in the administration of justice, itself a

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[6]For *e.g.*, charge-screening by Crown counsel in Ontario is conducted with reference to two considerations: (1) whether there is a reasonable prospect of convictions, and if so, (2) whether it would nevertheless be in the public interest to discontinue the prosecution. In this context, any other motivation or influence considered in charge-screening would be extraneous and improper. See Ministry of the Attorney General (Ontario), *Crown Policy Manual*, "Charge Screening" (21 March 2005), available online: <https://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ChargeScreening.pdf>.

[7]The advent of responsible government, meaning self-government under parliamentary institutions, made the interest of the people "constitutionally transcendent" in the administration of public affairs, and it was this innovation that made it possible to conceive of the Attorney General as an independent overseer of the legality and constitutionality of his or her administration. It was responsible government, too, that caused the Attorney General to acquire ministerial responsibility for the machinery of justice in Ontario. See Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: Osgoode Society, 1986), at pp. 8-9

[8]*R v Anderson*, 2014 SCC 41 at para 37; *Krieger v Law Society of Alberta*, *supra* note 2 at para 43

[9]*R v Anderson*, *ibid* at para 37

[10]*Krieger, supra* note 2 at para 45; *R v Power*, [1994] 1 SCR 601 at para 34

component of the public interest, is also contingent on this independence.[11] It is therefore unsurprising that the case law, commentary, and statements by various Attorneys General cited below demonstrate a broad consensus on this point.

15. Finally, a definition that turns on the sufficiency of institutional arrangements and safeguards "is readily administrable and sufficiently precise to yield a manageable standard".[12] This definition avoids the need to consider the subjective decision-making process of individual prosecutors, which this Court has found to be "inevitably highly contextual" and incapable of being "applied with precision".[13] These institutional safeguards may be arranged in a variety of ways, including a mix of constitutional conventions, statutes, common law authorities, as well as patterns of practice, policies, procedures, and guidelines. As discussed below, this definition gives the principle of independence meaningful content and avoids the "adjudication of policy matters".[14]

B. The meaning of prosecutorial independence as a principle of fundamental justice

16. Whether the statutory conferral of prosecutorial power interferes with the right to liberty guaranteed by s. 7 of the *Charter* in a manner that is inconsistent with the principle of prosecutorial independence turns on the meaning and scope of that principle. To have meaningful content as a principle of fundamental justice, prosecutorial independence must involve more than a duty or obligation to act independently. There must also be a reasonable expectation that the principle of independence can and will bind the decision maker when exercising prosecutorial power.

17. The prosecutor's duty to act independently must be supported by institutional arrangements which protect the duty, thereby supporting public confidence in the rule of law and the impartial administration

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[11] *R v Hall*, 2002 SCC 64 at para 37

[12] *R v D.B.*, supra note 3 at para 69

[13] In this regard, independence is distinct from objectivity. Since the application of Crown objectivity is "inevitably highly contextual", it fails to meet the criteria for recognition as a principle of fundamental justice under s. 7: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 94

[14] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8

of criminal justice. Those exercising prosecutorial discretion must be able, and be seen to be able, to do so based on their independent judgment of the merits of the case, including whether there is a public interest in proceeding with the matter. These institutional arrangements could take a variety of forms and include conventions, policies, legal rules and institutional structures. What is fundamental is the expectation and confidence that prosecutors will exercise discretion free of improper, extraneous influence, whether from within or outside of government.

18. Equally important to independence is the accountability of those exercising prosecutorial discretion. For example, in Ontario this is achieved by vesting in the Attorney General the authority to superintend all matters relating to the administration of justice.[15] Likewise, in public prosecution service models, the Attorney General is empowered to issue directions to the Director of Public Prosecutions (DPP). In each instance, the Attorney General's accountability to the Legislature and the public ensures that appropriate accountability is in place.

19. Prosecutorial independence can be fostered and protected by differing institutional arrangements. No prescribed model is required to substantively achieve this objective. The adoption of different arrangements by offices of the Attorney General throughout Canada is illustrative of how the goals of independence and accountability are served in different structural arrangements.

20. As discussed below, owing to their unique history and position, Canadian Attorneys General easily satisfy these requirements (see Part C, *infra*). Indeed, the office of the Attorney General is given express constitutional status in the *Constitution Act, 1867.* This does not, however, mean that prosecution authority may only be vested in the Attorneys General. So long as the independence of the decision-maker is adequately protected by institutional arrangements, other office holders, including other cabinet ministers, may also be vested with prosecutorial discretionary authority.

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[15] *Ministry of the Attorney General Act,* RSO 1990. c.M17, s.5(c)

21. Institutional safeguards equivalent to those surrounding the office of the Attorney General may not be necessary for constitutional compliance. The *Charter* sets out minimum standards to which laws must conform. As recently affirmed by this Court in *Bedford*:

> The principles of fundamental justice set out the ***minimum requirements*** that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to ***set the parameters of that right***" (*Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R.486, at p. 512).[16]

A grant of discretionary prosecutorial authority to a public official will be consistent with the principles of fundamental justice provided that the institutional context in which the authority is exercised, viewed as a whole, does not impair the ability of prosecutors to act independently of extraneous or improper considerations.

C. The independence of the Attorney General

22. It is a constitutional principle in Canada that Attorneys General must act independently of partisan concerns when exercising their prosecutorial function. The principle of independence protects the use of powers that constitute the core of the Attorney General's office from the influence of improper political and other vitiating factors.[17]

23. The office of the Attorney general is tightly bound to the principle of independence. As stated by this Court in *Krieger v. Law Society of Alberta*:

> 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***. [emphasis added][18]

The expectation that the Attorney General and his or her agents will meet this "high standard" was remarked upon by Binnie J, in *Regan*:

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[16] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para 94; ***See also:*** *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25 at para 23; *R v. Levkovic*, 2013 SCC 25 at para 40; *R v. B.G.*, [1999] SCJ 29 at para 83

[17] *Krieger v. Law Society of Alberta*, *supra* note 2 at para 3, 30

[18] *ibid* at para 29

> The courts ***rightly presume, such are the high traditions of the prosecutorial service in this country***, that they are met in the thousands of decisions taken every day that so vitally impact the lives of those who find themselves in trouble – rightly or wrongly – with the law. [emphasis added][19]

24. Confidence in the independence of the Attorney General is grounded in many factors which combine to provide considerable security against the abuse of the Attorney General's powers in the exercise of the prosecutorial function.[20]

(i) constitutional structure

25. Chief among these factors is a history of tradition and convention that has forged the "unique and important role of the Attorney General and his agents", as observed by this Court in *Krieger*.[21] The power to manage prosecutions of individuals for criminal acts was delegated by the sovereign to the office of the Attorney General at its inception. This original power, which finds its source in the Attorney General's role as legal advisor to the Crown, has remained constant.[22] The *Constitution Act, 1867* preserved the rights, powers, duties functions and responsibilities of the Attorney General as vested prior to Confederation.[23]

26. Fundamental principles of independence and objectivity have historically guided the exercise of the Attorney General's responsibilities.[24] The independence of the Attorney General in the exercise of

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[19] *R. v. Regan*, [2002] SCJ 14 at para 158

[20] In his thoughtful article, "*The Attorney General and the Administration of Criminal Justice"* (2009) 34 Queen's LJ 813, Marc Rosenberg, former Justice of the Court of Appeal for Ontario; former Assistant Deputy Attorney General, Public Law and Policy Division and Civil Law Division in 1995, examines the combined influence of "constitutional, legal and institutional structures surrounding the administration of criminal justice in [Ontario] and the rest of the country" in demonstrating "an evolving system of checks and balances that minimize the opportunity for corruption and impropriety". [at p. 817]

[21] *supra* note 2 at para 23

[22] *supra* note 2 at para 24, 25

[23] *Constitution Act, 1867* (U.K.), 30 & 31 Vic., chap.3, ss.63, 134-35

[24] Ian G. Scott, "*The Role of the Attorney General and the Charter of Rights*" (1986-1987) 29 Crim LQ 187 at p. 199

the prosecution function has evolved into an important constitutional convention.[25] This convention infuses the role of the Attorney General. It is animated by political declarations[26] and through a venerable tradition of understanding and adherence to the principle of independence. As expressed by Ian Scott, former Attorney General of Ontario:

> There are two aspects of this independent role: First, the existence of the principle of independence as an established constitutional principle; second, ***a tradition of respect for the principle by the attorney general and the Cabinet of the day. It is understood in our province that the attorney general is first and foremost the chief law officer of the Crown,*** and that the powers and duties of that office take precedence over any others that may derive from his additional role as minster of justice and member of Cabinet.[27]

(ii) institutional structure

27. Well-developed institutional safeguards provide further assurance that this understanding of the Attorney General's role will routinely inform the practices of her office. In this regard, three critical components of the modern office of the Attorney General are identified by Rosenberg: the delegation of prosecutorial authority to agents; the relationship between the Attorney General and the Crown prosecutor; and the *sub judice* rule.[28]

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[25]L.R.C.C., *Controlling Criminal Prosecutions* (Working Paper 62, 1990) at pp. 9-11, 14; **See also:** Marc Rosenberg, "*The Attorney General and the Administration of Criminal Justice*", *supra* note 20 at p. 819 - "The most important of these constitutional conventions is that although the Attorney General is a cabinet minister, he or she acts independently of the cabinet in the exercise of the prosecution function. This convention is now so firmly entrenched in the Canadian political system that any deviation would likely lead to the resignation of the Attorney General or would, at the very least, spark a constitutional crisis." **See also:** M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (2001) at p. 642

[26]J. Edwards*, The Law Officers of the Crown* (1964) at p. 190, p.215, pp 222-4;
J. Edwards, *The Attorney General, Politics and the Public Interest* (1984) at p. 319, pp 356-367;
J. Edwards, *Walking the Tightrope of Justice: An examination of the Office of the Attorney General* (1989) at pp. 135-141

[27]Ian Scott, "*Law, Policy and the Role of the Attorney General: Constancy and change in the 1980s*" (1989), 39 University of Toronto Law Journal 109, at p122. **See also**: *The Law Officers of the Crown* (1964) at p. 174 where Professor J. Edwards expresses his opinion that the "ultimate strength" of the office of Attorney General rested primarily "on a firm adherence to this long-fought-for principle of constitutional independence".

[28]Marc Rosenberg, *supra* note 20 at pp. 832-838

28. As delineated by Rosenberg, broad, discretionary powers are delegated to a large, geographically diffuse group of full time, professionally trained Crown counsel who are supervised at both local and regional levels by full time managers. He points out that these institutional arrangements have three significant practical consequences: first, the vast majority of daily decision-making is done without the Attorney General's involvement; second, it would be exceedingly difficult for the Attorney General or a political staff member to attempt to secretly and corruptly influence a prosecution; and third, as Rosenberg puts it:

> For all practical purposes, the person who is really at the apex of the administration of criminal justice on the prosecution side is the Assistant Deputy Attorney General (ADAG) Criminal Law or a person occupying a comparable position, such the Director of Public Prosecutions in Nova Scotia.[29]

29. Rosenberg also describes the "culture" within the system which promotes independence in prosecutorial decision-making by individual Crown prosecutors. This refers to "the steps taken within the higher levels of the ministry to shield prosecutors from interference from the Attorney General or the political staff".[30] These institutional controls provide a further check against improper intervention by the Attorney General in the prosecution of individual cases.

30. The Attorney General's main role and responsibility in criminal prosecutions is to establish broad policy guidelines for Crown counsel. These guidelines are provided in writing. The are made publicly available, enhancing public awareness and understanding of the Attorney General's role.[31]

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[29] *ibid* at p. 833; ***See also:*** Michael Code, "*Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage*" (1998) 40 Crim LQ 326 at pp. 350-353

[30] *ibid* at p. 835-836

[31] Ministry of the Attorney General (Ontario), *Crown Policy Manual* (21 March 2005) online: https://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/

Other Ministry of the Attorney General (Ontario) publications regarding the role of the Attorney General:

Ministry of the Attorney General (Ontario), *Roles and Responsibilities of the Attorney General* (30 October 2015)
online: https://www.attorneygeneral.jus.gov.on.ca/english/about/ag/agrole.php

Ministry of the Attorney General (Ontario), *M.A.G. Organization Chart* (22 February 2016)

31. Finally, the *sub judice* rule reduces the risk of improper influence by the Minister by minimizing the practical need for briefings about prosecutions while they are ongoing.

(iii) judicial oversight

32. Exercises of prosecutorial discretion are reviewable solely for abuse of process.[32] This Court has explained why prosecutorial discretion is "entitled to considerable deference":

> 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".[33]

33. Traditionally, the exercise of discretion by the Attorney General was immune from judicial oversight. This development in the law contributes a new element to the checks and balances against abuse by Attorneys General and their agents by giving rise to binding legal obligations.

34. As observed by the Court in *Anderson*, the kinds of prosecutorial conduct that constitute abuse of process have been described as "flagrant impropriety"; as conduct which "undermines the integrity of the judicial process" or "results in trial unfairness"; and as conduct carried out in "bad faith" or with "improper motive[s]".[34] A prosecutorial decision regarding the nature and extent of the prosecution will fall within this category if it is tainted by partisan political considerations.[35]

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online: https://www.attorneygeneral.jus.gov.on.ca/english/about/mag_org_chart-EN.pdf

Ministry of the Attorney General (Ontario), *Report of the Review of Large and Complex Criminal Case Procedures* (14 March 2016)
online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/

[32] *R v. Anderson*, *supra* note 8 at para 36, 51

[33] *ibid* at para 32, 46-48, quoting from *R. v. Power*, [1994] 1 SCR 601; ***See also:*** *Kreiger, supra* note 2 at para 45, 48

[34] *R v. Anderson*, *supra* note 8 at para 49

[35] *Marc Rosenberg supra* note 20 at p. 823

35. Narrow limits on judicial review of prosecutorial discretion make it "all the more imperative that the discretion be exercised in a fair and objective way".[36] Confidence in the ability of Crown prosecutors to fulfil the expectation that they will act fairly and objectively is reflected in the presumption of good faith, as remarked upon by this Court 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.[37]

D. The principle of independence can be protected by a variety of institutional arrangements

36. The principle of independence binds the decision maker to act without partisan motives. It also protects the decision maker from political interference when exercising discretionary powers. No specific institutional structure is necessary to ensure compliance. Indeed, no particular arrangement could be expected to *guarantee* adherence to the principle. Moreover, institutional independence must be balanced with accountability. It is essential to the public interest that the prosecution authority be answerable for her decisions to Parliament or the legislature.[38] Compliance with the principle of independence is assured by a variety of factors, *including* the establishment of institutional structures which promote and protect it. This objective can be served by a variety of institutional protocols and arrangements.[39]

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[36] *R v. Regan*, *supra* note 19 at para 168, (Binnie J in dissent but not on this point); cited with approval in *Krieger, supra* note 2 at para 48

[37] *R. v. Anderson*, *supra* note 8 at para 55; ***See also:*** *Application under s.83.28 of the Criminal Code (Re), supra* note 13 at para 95

[38] Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Independence in the Prosecution of Offences in the Canadian Forces Military Policing and Prosecutorial Discretion* (Ottawa: Public Works and Government Services Canada, 1977) (James W. O'Reilly and Patrick Healy) at p. 43.

[39] B.A. MacFarlane, *"Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency",* Winnipeg, 2000, at pp. 20-28

37. In different contexts, this Court has recognized that "some variation in provincial practices in the administration of the criminal law is to be expected and allowed in certain circumstances".[40] In *S.(S.)*, Dickson C.J. observed:

> 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. Different application arises from a recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities.[41]

38. Delegation of the prosecutorial function to an official who is institutionally independent reflects a policy choice which may be made for the purpose of enhancing independence. The adoption of such models has occurred in circumstances where it was determined that measures were required to restore public confidence in the administration of criminal justice in the aftermath of political events which compromised it.[42] However, as highlighted in critical commentary, the selection of a particular prosecutorial model is not determinative of the actual independence of those engaging in prosecutorial decision making.

39. For instance, in 1998 the Hon. Fred Kaufman was appointed by the Attorney General of Nova Scotia to review the performance of the Nova Scotia Public Prosecution Service. The Final Report noted

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[40] *R v. Regan, supra* note 19 at para 71 - The Crown's involvement in pre-charge witness interviews did not give rise to an abuse of process in violation of s.7. Although Crown practices varied among the provinces, no particular approach was constitutionally prescribed.

[41] *R v. S.(S.)*, [1990] 2 SCR 254 at para 49 - Section 4 of the *Young Offenders Act* granted discretion to the provinces in deciding whether to implement alternative measures programs. Ontario's failure to implement a program "cannot be constitutionally attacked simply because it creates differences as between provinces." [at para 44]

[42] For example, Marc Rosenberg, *supra* note 20 at pp. 814-815 referred to the Report of the Royal Commission on the Donald Marshall Jr. Prosecution as demonstrating "profound systemic failures in the way that justice was administered in our criminal courts", and that these failures "reached to the highest levels in the Ministry of the Attorney General in Nova Scotia". The Commissioners concluded that confidence in the Nova Scotia justice system could be restored only through "unwavering and visible application of the principles of the principles of absolute fairness and independence". This led to the adoption of the DPP model currently employed in that province. - Nova Scotia, Royal Commission on the Donald Marshall, Jr. Prosecution, *Commissioner's Report: Findings and Recommendations, 1989,* vol 1 (Halifax: Queen's Printer, 1989) at p. 194

that although the Nova Scotia *Public Prosecutions Act* stressed the independence of the Director of Public Prosecutions, it preserved the traditional powers of the Attorney General who retained ultimate control over prosecutions. This arrangement was seen as necessary to maintaining accountability: "for the very essence of responsible government is that someone - in this case the Attorney General - is answerable to the House."[43] The Report found that "in the immediate post-*Marshall* era, the reality of this institutional arrangement was "largely overlooked, with the result that 'independence' took on a meaning beyond the intended scope":

> The facts uncovered by the Marshall Commission cried out for change and 'independence' was seen as the solution. However, what was required was independence from political interference, and not independence from the Attorney General, who was, and continues to be, the chief law officer of the Crown and who was, and is responsible to the House of the Assembly. These powers and duties go with the office and they were not removed by the new legislation.[44]

40. An earlier review of Nova Scotia's Public Prosecutorial Service was conducted by Joseph Ghiz, Dean of Dalhousie Law School. The review explored the question of balance between professional independence in the prosecution function and accountability. The authors of the evaluation found that although the DPP in Nova Scotia has a measure of operational independence, it did not permeate meaningfully beyond that office. It was "almost the unanimous view of Crown Attorneys and others associated with the Service that there has been little visible change in the actual day to day operation of the Prosecution Service since the Passage of the *Act*".[45]

41. A paper prepared in 2006 by the Parliamentary Research Branch, Law and Government Division, explores whether the establishment of a federal DPP in Canada would be advantageous; and concludes that will depend on "one's view of the current system, the extent to which it allows prosecutions to be

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[43]F. Kaufman, "*Review of the Nova Scotia Public Prosecution Service: Final Report",* Vol. 1 (Halifax, 1999) at p. 2

[44]*ibid* at p. 11

[45]J. Ghiz and B Archibald*, "Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation"* (Halifax, 1994) at pp. 54-55

conducted improperly, and other ways of achieving accountability".[46] This conclusion was based on several considerations.

42. First, in practice it would be extremely rare for the Attorney General to become directly involved in individual prosecution decisions which are routinely carried out by professionals in the government department who are detached from partisan considerations. Such direction would have the appearance of being politically inspired, would provoke objection by the public or other political parties and could lead to confusion and loss of confidence on the part of the public in the political neutrality of the criminal justice system.

43. Second, the creation of an independent DPP does not guarantee impartiality and accountability. To the contrary, there is the risk of fostering public mistrust or the belief that the institution is accountable to no one. Separation and independence from government can qualify the extent to which government may be held responsible for prosecutorial decisions.

44. Third, prosecutorial independence may be enhanced through an open and accountable process which emphasizes transparency and accountability, rather than by structure. Examples of such measures are the retention of "independent prosecutors" in sensitive cases where it is important that prosecution decisions are seen to be free of political influence, along with informal government arrangements for the transfer of cases where there may be the appearance of institutional conflicts of interest.

45. Finally, accountability to the courts provides an additional assurance that prosecution decisions will be made in a manner that is consistent with the principles of fundamental justice.

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[46]W.R. Raaflaub, "*The Possible Establishment of a Fereral Director of Public Prosecutions in Canada"* (Ottawa: Library of Parliament, 2006) at pp. 8-12

PART IV
SUBMISSIONS ON COSTS

46. The Attorney General of Ontario makes no submissions as to costs.

PART V
ORDER REQUESTED

47. The Attorney General of Ontario takes no position with respect to the outcome of these appeals. The intervenor for Ontario intends to present oral argument.

ALL OF WHICH is respectfully submitted this 15th day of April, 2016 by:

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Patrick Monahan
Deputy Attorney General of Ontario
Jamie Klukach
Counsel for the Attorney General of Ontario

PART VI
AUTHORITIES CITED

Para(s)

PART VII
STATUTORY PROVISIONS

None.