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THE POSSIBLE ESTABLISHMENT OF A FEDERAL DIRECTOR OF PUBLIC PROSECUTIONS IN CANADA

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INTRODUCTION

In 1990, the Law Reform Commission of Canada (the Law Reform Commission) called for the creation of a new, independent post of Director of Public Prosecutions (DPP) within the federal government to increase the neutrality of Crown prosecutors.(1) The objective was to ensure the independence of the prosecution service from partisan political influences, and reduce potential conflicts within the Office of the Attorney General. The creation of a more or less independent position would reduce the risk of public and political pressure on the federal Minister of Justice, who also serves as Attorney General and is a member of Cabinet.

Although no federal DPP currently exists, the possibility has once again been suggested as part of the government's new accountability framework.(2) This paper begins by reviewing similar initiatives in Nova Scotia, British Columbia, Quebec, England and Australia. It then examines the possibility of such an initiative in the Canadian federal context, given the current framework for federal and provincial prosecutions and other considerations. In a final section, possible responses and alternative approaches to the establishment of a federal DPP in Canada are reviewed.

APPROACHES IN SELECT JURISDICTIONS

This section reviews approaches in jurisdictions that are often cited as having a DPP. It should first be understood that simply because a jurisdiction has a DPP, this does not

(1) Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and Crown Prosecutors*, Ottawa, 1990, pp. 41-59.

(2) Conservative Party of Canada, Federal Election Platform, *Stand Up for Canada*, December 2005, p. 13. During the election campaign for 2006, the other major political parties did not propose, or respond to, the possible creation of a federal DPP.

mean that the position is entirely independent of the government. For example, a DPP often reports to an Attorney General, who may overrule prosecutorial decisions under certain circumstances. The extent to which a DPP is separate and independent of the government depends on the specific institutional structure, lines of reporting, procedural mechanisms and transparency of decision-making.

A. Nova Scotia

In most Canadian provinces, and at the federal level, prosecutions are conducted by Crown counsel who ultimately report, through a management hierarchy, to an Attorney General. The first notable exception to this model exists in Nova Scotia, where an independent public prosecution office was established in 1990 by the *Public Prosecutions Act.*(3) This was largely in response to the wrongful conviction of Donald Marshall Jr. and the Royal Commission that was called as a result.(4) Responsibility for prosecutions under the *Criminal Code* and provincial statutes was transferred from the Department of the Attorney General (now Department of Justice) to the independent DPP.

The DPP, who is head of the public prosecution service, reports annually and directly to the House of Assembly and has the status of a deputy minister. While the DPP must comply with all instructions and guidelines that are properly published in the *Gazette* by the Attorney General, he or she must be consulted ahead of time and is not bound by less formal advice. The DPP and Attorney General are also required to meet 12 times a year to discuss policy matters, including existing and contemplated prosecutions.

B. British Columbia

Unlike Nova Scotia, which has structurally created a DPP, British Columbia relies on procedural mechanisms to ensure prosecutorial independence and accountability. In 1991, it passed the *Crown Counsel Act*,(5) which assigns to the Assistant Deputy Attorney General responsibility for criminal prosecutions within the province's authority. Although he or she

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(3) S.N. 1990, c. 21.

(4) Royal Commission on the Donald Marshall, Jr., Prosecution, *Commissioner's Report: Findings and Recommendations*, Halifax, 1989, recommendation 53.

(5) R.S.B.C. 1996, c. 87.

reports through the usual bureaucratic hierarchy, the Attorney General or Deputy Attorney General may give direction in a specific case only if it is in writing and published in the British Columbia *Gazette*. Any general policy directions must also be in writing.

As a further mechanism for ensuring impartiality, the Assistant Deputy Attorney General in British Columbia may appoint a "special prosecutor" in cases raising significant public interest. A decision of the special prosecutor on whether and how to proceed is final unless the Attorney General, Deputy Attorney General or Assistant Deputy Attorney General overrules that decision in writing, again with publication in the *Gazette*.

C. Quebec

In December 2005, Quebec passed *An Act respecting the Director of Criminal and Penal Prosecutions* (DCPP).(6) The legislation created the office of the DCPP, who has the status of Deputy Attorney General and directs criminal and penal prosecutions under Quebec's jurisdiction. He or she is under the general authority of the Minister of Justice and Attorney General, who remains responsible for establishing public policy in justice matters. The Minister may take charge of, or intervene in, a matter that comes under the DCPP's responsibility, provided that the DCPP has been consulted and the Minister publishes a notice of intent to take charge, or instructions on the conduct of the matter, in the *Gazette officielle du Québec*. The DCPP reports to the National Assembly, although through the Minister.

The DCPP in Quebec is more comparable to the DPP in Nova Scotia than it is to the Assistant Deputy Attorney General in British Columbia. The latter lacks the structural independence of the first two, as well as the entitlement to be consulted before prosecutorial decisions are dictated or overruled by the Attorney General. There is also no statutory requirement for British Columbia's Assistant Deputy to make a report to the provincial legislative assembly, unlike in the other two jurisdictions.

D. England

England has had a DPP since 1880,(7) who conducts and supervises prosecutions under the statutory "superintendence" of the Attorney General. Neutrality and accountability

(6) L.Q. 2005, c. 34.

(7) *Prosecution of Offences Act, 1879* (U.K.), 42-43 Vict., c. 22.

were further enhanced in 1985 with the establishment of the Crown Prosecution Service as an independent organization.(8) At the same time, a code for Crown prosecutors was introduced, under which the decision whether to prosecute is based on the sufficiency of evidence and the public interest. Although the DPP is politically independent, he or she is answerable to Parliament for the decisions of the Crown Prosecution Service through the Attorney General. Of note is the fact that the Attorney General in England attends, but is not a member of, Cabinet.

E. Australia

The Commonwealth of Australia placed control of prosecutions in the hands of a DPP in 1983.(9) The Attorney General retains the ability to be involved in the prosecution service, either through general guidelines or in dealing with individual cases, but he or she must consult with the DPP and provide any direction in writing. In addition to publication in the *Gazette*, the directions or guidelines must be tabled before each House of Parliament.

CANADA'S FEDERAL AND PROVINCIAL PROSECUTION FRAMEWORK

This section of the paper reviews the constitutional division of powers in Canada regarding criminal matters, and the assignment of prosecutorial authority from Parliament to the provinces. It then suggests what the implications of these two considerations may be for the creation of a federal DPP.

A. Division of Powers

Under s. 91(27) of the *Constitution Act, 1867*,(10) Parliament has jurisdiction in relation to "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." Under s. 92(14), the provinces have jurisdiction in relation to "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction." While these

(8) *Prosecution of Offences Act, 1985* (U.K.), 1985, c. 23.

(9) *Director of Public Prosecutions Act 1983* (Australia), no. 113/1983. Note that jurisdictions within Australia, such as the State of Victoria and the Australian Capital Territory, also have a DPP.

(10) (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

competing heads of power both concern some aspects of the criminal law, they have been interpreted as giving the federal government prosecutorial power over all federal laws.(11) Simply put, if a particular level of government has the power to create an offence, it is that level of government that has the power to prosecute it. Accordingly, the prosecution of all offences under the *Criminal Code*(12) and other federal legislation is the original responsibility of the federal government.

B. Assignment of Prosecutorial Authority to the Provinces

Although Parliament has the criminal law power, it has assigned the prosecution of most *Criminal Code* offences to the provinces. Specifically, "Attorney General" is defined in that statute, for the purpose of most offences, as the Attorney General or Solicitor General of the province in which proceedings are taken.(13) The Attorney General of Canada has retained the responsibility to prosecute all *Criminal Code* (and other federal) offences in the three territories(14) and reserves the possibility of prosecuting certain types of offences under the *Criminal Code*, such as terrorism offences, regardless of where the proceedings are taken.(15) The federal Crown also retains practical responsibility for offences under the jurisdiction of the military justice system.(16)

The federal government prosecutes most, but not all, violations of federal statutes other than the *Criminal Code*, such as the *Controlled Drugs and Substances Act*,(17) *Competition Act*(18) and *Canadian Environmental Protection Act*.(19) For example, in provinces other than

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(11) See *Canada (Attorney General)* v. *Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206 and *R.* v. *Wetmore*, [1983] 2 S.C.R. 284.

(12) R.S.C. 1985, c. C-46.

(13) *Ibid.*, s. 2, paragraph (a) of the definition of "Attorney General." The *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 2, incorporates the definition of "Attorney General" from the *Criminal Code*.

(14) "Attorney General" is defined in paragraph (b) as the Attorney General of Canada with respect to proceedings in the Yukon Territory, the Northwest Territories or Nunavut.

(15) For proceedings in relation to a terrorism offence and other listed offences, paragraphs (c) to (f) of the definition of "Attorney General" indicate that it means *either* the federal or provincial Attorney General.

(16) *National Defence Act*, R.S.C. 1985, c. N-5.

(17) S.C. 1996, c. 19. "Attorney General" is defined in s. 2 as the Attorney General of Canada or the Attorney General of a province with respect to proceedings commenced at the instance of the government of that province and conducted by or on behalf of that government.

(18) R.S.C. 1985, c. C-34. See s. 23(2).

(19) S.C. 1999, c. 33. See s. 295.

Quebec and New Brunswick, the Attorney General of Canada prosecutes all federal drug violations. In Quebec and New Brunswick, however, the Attorney General of Canada prosecutes only drug cases investigated by the RCMP, leaving those initiated by provincial and municipal police forces to be prosecuted by the provincial Attorneys General.(20) This example demonstrates that the question of which level of government prosecutes a particular offence may depend on the definition of "Attorney General" in the applicable statute, which level of government initiates the proceedings,(21) and the practical working relationship between the federal and provincial prosecution services.

C. Jurisdictional Implications in the Creation of a Federal DPP

One of the primary reasons for which the provinces have been assigned prosecutorial discretion with respect to many federal offences is that they are responsible for the allocation of limited administrative, financial and judicial resources. However, given the constitutional division of powers, the federal government retains the ability to assume responsibility for all prosecutions under the *Criminal Code* and any other federal Act.(22) It may do so either by exercising discretion under the existing statute or by altering existing federal-provincial working arrangements. However, where Parliament has entirely given responsibility for the prosecution of certain offences to the provinces (as with most *Criminal Code* offences), a statutory amendment or provisions in a new Act may be necessary in order to "take back" that responsibility, whether generally or in specific situations.

There are jurisdictional implications for the establishment of a federal DPP, as both legally and practically, the provinces have the responsibility to prosecute most criminal offences, even where they are committed by members of Parliament, federal government institutions or the public service. For example, if a DPP were to assume responsibility for all prosecutions "under federal jurisdiction," exactly which offences would, or could, be overseen by the DPP would have to be clearly set out. If the DPP were given the mandate to review

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(20) See Department of Justice Canada, *Federal Prosecution Services Deskbook*, Ottawa, 2005, available on-line at http://canada.justice.gc.ca/en/dept/pub/fps/fpd/toc.html.

(21) This can be a particularly difficult factor to analyze, as it sometimes requires an interpretation of whether or not proceedings were "commenced at the instance of the Government of Canada" or "conducted by or on behalf of that Government."

(22) See John D. Whyte, "The Administration of Criminal Justice and the Provinces," *Criminal Reports*, 3rd series, Vol. 38, 1984, p. 184.

decisions on prosecutions relating to a government program or other matters that have been, or become, the subject of investigation by the Auditor General or Ethics Commissioner, that jurisdiction would also need to be laid out in the enabling statute. Perhaps even more importantly, such powers and responsibilities of a federal DPP would require the practical support and cooperation of the provinces, as it is their existing prosecutorial authority in criminal matters that would be most affected.

PARTICULAR FRAMEWORK FOR A FEDERAL DPP

In the context of its 1990 report,(23) the Law Reform Commission recommended that a DPP be appointed for a ten-year term by Cabinet on the advice of an independent committee, which term could be renewable once only. He or she could be removed from office, by a vote of the House of Commons following a review by a parliamentary committee, on grounds such as incompetence, conflict of interest and refusing to follow formal directives. While in charge of an independent federal prosecution service, the DPP would report to the Attorney General and be required to follow the latter's general and case-specific guidelines, which would have to be published in the *Canada Gazette* in the interest of transparency.

Given the recommendations of the Law Reform Commission, the way that the federal government shares prosecutorial responsibility with the provinces, and the varying frameworks in the jurisdictions discussed above, the following questions might be considered in the establishment of a federal DPP in Canada:

- How and by whom would a DPP be appointed? For what length of term? What qualifications, if any, would a DPP be required to have?
- Under what circumstances, and by what means, could a DPP be removed from office?
- For which prosecutions would the DPP be responsible? If he or she would be able to control certain prosecutions currently undertaken by the provinces, which ones and under what circumstances?
- What role, if any, would the provincial prosecution services play in a federal scheme involving a DPP, whether statutorily or less formally?
- Would the DPP report structurally to the Attorney General?

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(23) Law Reform Commission (1990), recommendations 1 to 10, pp. 53-54.

- Would the DPP report periodically to Parliament? If so, directly or through the Attorney General?
- Under what circumstances, if any, could the Attorney General impose general prosecutorial guidelines or directives in a specific case?
- Would guidelines and directives from the Attorney General require publication? Tabling before Parliament? Prior consultation with the DPP?
- Would there be any exceptions, in the interest of justice or national sensitivity, to making the Attorney General's advice public?
- Which prosecutors and other members of the public service would report to the DPP? What would be the structure of the Office of the DPP? What financial or other administrative authority would he or she have?
- Would the DPP be able to appoint other persons, such as special prosecutors, to certain cases? If so, which types of cases and under what circumstances?

RESPONSES TO THE POSSIBILITY OF A FEDERAL DPP

The establishment of a federal DPP in Canada may or may not be necessary or advantageous, depending on one's view of the current system, the extent to which it allows prosecutions to be conducted improperly, and other ways of achieving accountability.

A. Extent of Any Current Problem

It is true that Attorneys General in Canada can direct individual prosecution decisions. They can instruct that charges be laid, that proceedings be discontinued, that appeals be brought, and, in theory, that a particular individual be called as a witness on behalf of the Crown in an individual case. However, in practice, such direction has been said to be extremely rare.(24) First, and most importantly, these types of decisions are routinely made by professionals in the government department, detached from partisan considerations. A direction from the Attorney General in a particular case, though permissible, cannot be given without conveying at least the impression that the direction was politically inspired, thereby provoking objections on the part of the public or other political parties.

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(24) Bruce A. MacFarlane, Deputy Minister of Justice and Deputy Attorney General for the Province of Manitoba, "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency," Winnipeg, 2000, p. 23 (article also published in *Criminal Law Quarterly*, Vol. 45, 2001, p. 272).

A second reason why Attorneys General refrain from providing direction in individual cases is to prevent improper public expectations. Even where the evidence falls short of demonstrating an intervention for political purposes, the facts may nonetheless suggest that the direction expresses broad government policies that will be pursued in future cases. This may result in a public understanding that normal prosecution decisions will be made in a certain way. If they subsequently are not made that way, there may be confusion on the part of the public or a view that there has been inconsistency. In the situations just mentioned, there is the possibility of damage to public confidence in a particular decision, or in the political neutrality of the criminal justice system generally.(25) The fear of this possibility, in and of itself, is often sufficient to prevent a display of prosecutorial bias or misconduct.

B. Possible Shortcomings of an Office of the DPP

The creation of an independent DPP does not guarantee impartiality and accountability. The Nova Scotia model has been the subject of controversy on a number of fronts, including its effectiveness, organizational structure, level of resources and public confidence.(26) Accordingly, the establishment of a new position or office of a DPP, which of course requires much cost and effort, may itself end up resulting in public and political discontent. Rather than bringing about independence, accountability and public confidence, the mere existence of the structure may foster citizens' mistrust, or the belief that the institution is accountable to no one.(27) Indeed, by creating a DPP that is separate and independent of the government, one also reduces the ability to hold the government accountable for perceived failures.

The Office of the DPP in Nova Scotia has been the subject of at least two reviews, one in 1994(28) and the other in 1999.(29) Among other things, the 1994 review recommended more independent management of personnel and finances by the DPP, the use of a different

(25) *Ibid.*, pp. 23-24.

(26) *Ibid.*, p. 21.

(27) *Ibid.*, pp. 27-28.

(28) Joseph Ghiz and Bruce Archibald, *Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation*, Halifax, 1994.

(29) Honourable Fred Kaufman, *Review of the Nova Scotia Public Prosecution Service*, Final Report, Halifax, 1999.

media spokesperson than the Department of Justice, separate locations for the respective head offices, publicly accessible directives governing the relationship between public prosecutors and other justice department lawyers, the creation of a comprehensive policy and procedure manual, the release of the DPP's annual report to the Minister of Justice and general public at the same time that it is tabled in the House of Assembly, and extension or clarification of the responsibilities of the public prosecution service so that they include representing the Attorney General at fatality inquiries and proceedings in relation to mentally disordered accused.(30)

The 1999 review called for several improvements, such as greater public awareness of the role of the DPP, better communication with victims, an end to "Crown shopping" by the police, closer monitoring of contract or *per diem* Crown attorneys, and greater professional development and upgrading of prosecutors' skills.(31) While the criticisms and recommendations of both reviews of the Nova Scotia public prosecution service point to possible pitfalls in the establishment of a federal DPP, they of course also suggest how such an office may be improved, or how independence and accountability may be enhanced *through* it. Indeed, some of the recommendations in the 1999 report gave rise to amendments to Nova Scotia's *Public Prosecutions Act*. For example, there have been amendments requiring the Attorney General to give notice in the *Gazette* where he or she consents to a prosecution, prefers an indictment or authorizes a stay of proceedings, and requiring monthly meetings between the DPP and Attorney General.

C. Less Formal Mechanisms for Independence and Accountability

A possible response to the proposed creation of a DPP is that prosecutorial independence may be achieved by way of an open and accountable *process* rather than *structure*. Unlike Nova Scotia, British Columbia has not created a DPP, instead choosing to emphasize transparency and public accountability within the parameters of the current structure (i.e., giving prosecutorial authority to the Assistant Deputy Attorney General). This has apparently been found to work well in practice.(32) Other aspects of the British Columbia approach have the further advantage of being copied with less reliance on legislation. For example, "special

(30) Ghiz and Archibald (1994), recommendations 1 to 35, pp. 153-160.

(31) Kaufman (1999), recommendations 1 to 29, pp. 415-418.

(32) MacFarlane (2000), pp. 24-25.

prosecutors" or "independent prosecutors" may be administratively retained in sensitive cases where it is important to be seen to be making prosecution decisions apart from government and political considerations.

Other less formal mechanisms have also developed across Canada that suggest the importance of a transparent process, more than a particular structure. The principal strategy is the informal practice by which provincial justice departments and the federal Department of Justice "share" or "transfer" files in situations where there are institutional conflicts of interest, or where the proposed prosecutions involve persons employed in the administration of criminal justice.(33) Although this informal intergovernmental arrangement has no statutory foundation, it has apparently served to defuse public or political controversies surrounding individual cases. Decisions are made, and *seen* to be made, on a fair and dispassionate basis by someone, from another province or level of government, who has no connection with the case. Given these other strategies, statutorily created structures or offices may not be the only way of maintaining independence, impartiality and accountability with respect to public prosecutions.

D. Other Methods of Control

In addition to having to answer to general public and political pressure, a prosecution service may also be accountable to the courts.(34) Although there has been a traditional reluctance on the part of the courts to exercise their powers to supervise and review prosecutorial decisions, this has changed in more recent decades.(35) Courts have intervened, for example, where there has been an abuse of process or a breach of fundamental principles of justice and fairness in relation to the accused.(36) However, as these cases have generally involved prosecutorial conduct that has gone too far, it is unclear to what extent a court may intervene where the prosecution has not gone far enough, for example, in not laying charges

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(33) *Ibid.*, p. 25. For instance, where it was thought that the Attorney General of British Columbia might have contravened the law, British Columbia asked the Deputy Attorney General of Alberta to provide an opinion. Likewise, Manitoba provided advice to another province on whether a charge of first degree murder ought to be laid against a member of the Royal Canadian Mounted Police.

(34) See Philip C. Stenning, "The Independence and Accountability of the Office of Director of Public Prosecutions, and of the Public Prosecution Service, in Nova Scotia," in Kaufman (1999), pp. 329-394 (pp. 372-382).

(35) See, e.g., *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

(36) See, e.g., *R.* v. *Power*, [1994] 1 S.C.R. 601.

against a particular accused or treating him or her favourably for political or partisan reasons. Usually, it is the accused who initiates judicial review of prosecutorial conduct, which is unlikely where the accused feels that he or she has received preferential rather than unfair treatment.

That said, it is also possible for a prosecution service to be reviewed by quasi-judicial authorities, such as *ad hoc* commissions of inquiry, which are just as likely to be established (at the insistence of the public or another political party, for example) to examine disproportionately *favourable* prosecutorial conduct. Auditors general may also conduct reviews of government departments for a wide variety of reasons. Finally, Crown attorneys are subject to a certain amount of control and supervision by the law societies of which they are members, which may possibly intervene to address instances of bias or influence.[37]

(37) See Stenning (1999), pp. 386-390.