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Editorial

The Role and Accountability of Prosecutors

This special issue is devoted to the important role of prosecutors. In many respects, prosecutors are the most important participants in the justice system. They control the decision to proceed with charges and whether to offer and accept a plea. The accountability of prosecutors to courts and legislatures remains controversial and contested.

Although prosecutors are no longer immune from suits for malicious prosecutions or discipline by the law societies, the courts have been careful not to interfere with how prosecutors exercise their special responsibilities.

In *Kvello Estate v. Miazga*, 2009 SCC 51, the Supreme Court unanimously reversed a finding that a prosecutor in the Martensville debacle had engaged in malicious prosecution. The court stressed that the exercise of prosecutorial discretion should not be second-guessed. It was not necessary for a prosecutor to have a subjective belief in the guilt of the accused, and the court found no evidence of malice that was inconsistent with the prosecutorial role.

Miazga suggests that prosecutors may not be held accountable to the courts except for the most flagrant of abuses. Justice Charron explained that both abuse of process and malicious prosecution will only “. . . provide remedies when a Crown prosecutor’s actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified. Both abuse of process and malicious prosecution have been narrowly crafted, employing stringent tests, to ensure that liability will attach in only the most exceptional circumstances, so that Crown discretion remains intact.” (*Ibid.*, at para. 51.)

If prosecutors are to be afforded a large margin of deference in the courts, what about their political accountability? *Miazga* affirms prosecutorial independence from governmental direction by stating that “The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney

General act independently of political pressures from government and set the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process." (*Ibid.*, at para. 46). This suggests that the Attorney General is not directly accountable to the elected government for the exercise of prosecutorial discretion.

The creation of a Director of Public Prosecutions (DPP) in a number of jurisdictions and most recently at the federal level also means that the Attorney General (AG) should only intervene in prosecutorial decisions in a formal and transparent manner through published instructions. This may diffuse political accountability for prosecutorial decisions even further than under the convention of the AG's independence.

The lead article in this special issue by Professor Philip Stenning provides a critical, comparative and timely examination of the principle of prosecutorial independence and how it is to be reconciled with prosecutorial accountability. Drawing on experience from Britain and many other countries, Professor Stenning questions the realism of the convention of prosecutorial independence in exceptional and high stakes cases.

He examines a recent British case in which a prosecutor was faced with threats that a bribery prosecution might result in Saudi Arabia not providing important intelligence information to the British government. The prosecutor in this case after consulting with a number of officials concluded that he had no choice but to withdraw the prosecution, but the case raises many questions. Professor Stenning questions whether in such extreme circumstances the idea of a politically independent prosecutor represents anything more than a rather less than credible fiction. He also questions the distinction drawn by Professor John Edwards between the ability of a prosecutor to be guided by non-partisan public interest considerations and those that affect the government of the day. Finally, he suggests that new institutional arrangements such as DPP systems have not brought us closer to resolving the appropriate balance between independence and accountability for the exercise of prosecutorial powers.

Professor Mary Condon offers a reflection on Professor Stenning's important paper. She, like Professor Stenning, is skeptical about Professor Edwards' conclusions that it is only the personal integrity of the Attorney General that can ensure appropriate prosecutorial decision-making. She observes that few would accept such an approach in the corporate context.

Professor Condon argues that more attention to the insights of organizational and corporate theory and administrative law may constructively redirect attention from the current focus on accountability for decisions already made to the proper inputs and procedures that should govern prosecutorial decision-making.

My own paper focuses on the role of Canadian prosecutors in terrorism prosecutions. It provides a critical account of the impact of the 2006 *Director of Public Prosecutions Act* in such prosecutions. The Act bifurcates prosecutorial decisions so that the federal DPP can decide whether to bring charges, while the Attorney General of Canada has personal responsibility under s. 38 of the *Canada Evidence Act* with respect to the disclosure of sensitive intelligence.

The paper expresses a preference for the AG resuming the prosecutorial role in terrorism cases. It also defends the convention of prosecutorial independence and the Shawcross doctrine that allows the AG to consult but not be dictated by Cabinet colleagues. In such a context, I argue that Professor Edwards' warnings about the importance of the AG's personal integrity make sense and still hold true.

The final paper by Stuart Whitley examines the important subject of prosecutorial ethics. It assesses the Supreme Court's decision in *Kreiger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, affirming that prosecutors can in certain circumstances be subject to discipline by law societies. It notes, however, that there is a dearth of thinking about the specific ethical duties of prosecutors.

Like Stenning, Whitley examines the contested issue of what it means to allow prosecutorial decisions to be informed by the public interest. After examining a range of moral and institutional issues of relevance to the ethics and conflicting duties of prosecutors, Whitley proposes draft ethical guidelines specifically tailored to the distinct duties and obligations of prosecutors.

We thank the University of Toronto's Centre for the Legal Profession for convening a conference at which most of the papers in this issue were originally presented. Hopefully this collection of essays will spur increased thinking and writing about the important topic of the role of prosecutors.

K.R.