

# **The Attorney General in Nova Scotia**





**NOVA SCOTIA**

Department of Justice

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## **Role of the Attorney General**

*“Simply stating the powers of the Attorney General, of course, does not make clear the principles that should govern the proper exercise of those extraordinary powers. Neither does such a statement delineate the appropriate relationship between the Attorney General and other members of Cabinet when it comes to exercising that prosecutorial discretion. In fact the important and special constitutional characteristics of this unique office are not widely understood, even among those who occupy it from time to time.”<sup>1</sup>*

### **History of the Office of the Attorney General:**

The history of the office of Attorney General can be traced back to the 13th Century England. Possibly as early as 1243, Lawrence del Brok, professional attorney, was prosecuting pleas on behalf of the sovereign. Del Brok and other predecessors of today’s Attorney General were known as the "King’s Attorney" or the “King’s Sergeant.” These men were elite members of the legal profession who, in addition to their private legal practice, maintained the interests of the sovereign before the royal courts. Prior to their appointment, any member of the realm could go to court to sue on behalf of the King in any matter affecting the King’s interests.

The title of "Attorney General of England" did not appear until 1461. It was also around that time that the role of Attorney General became vested in one person rather than a number of lawyers.

Early Attorney Generals did not play a role in the Parliamentary system other than as legal adviser to the House of Lords. In 1614 Sir Francis Bacon, who was an elected member of the House of Commons when he was appointed as Attorney General, became the first Attorney

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<sup>1</sup> Royal Commission on the Donald Marshall, Jr., Prosecution, Commissioners’ Report, Findings and Recommendations 1989, Vol.1, p. 223.

General to sit in the House of Commons. However, well into the 19th century the primary role of the Attorney General continued to be as the King's representative in the courts.<sup>2</sup>

***Public Service Act:***

Since 1900, the *Public Service Act* has defined the responsibilities of the office of the Attorney General in Nova Scotia. That legislation was modelled after federal legislation which created the Federal Department of Justice and defined the role of the Federal Attorney General and Minister of Justice.

In 1988, the *Public Service Act* was amended to create the Department of the Solicitor General and the office of Solicitor General of Nova Scotia. The amendments resulted in a division of responsibilities between the Attorney General, who retained responsibility for prosecutions, and the Solicitor General, who was responsible for policing and corrections.

In 1993, the *Public Service Act* was again amended and the office of the Solicitor General was abolished. The Attorney General's and Solicitor General's Departments merged to form the Department of the Justice. The head of the Department of Justice is the Minister of Justice and that person also holds the office of the Attorney General of Nova Scotia.

The amendments to the *Public Service Act* in 1993 defined the roles of these two positions. The functions, powers and duties of the Attorney General which are described in subsection 29(1) of *Public Service Act* reflect the historic role of that office in Nova Scotia:

**Functions, powers and duties**

**29 (1)** The functions, powers and duties of the Attorney General and Minister of Justice shall be the following:

- (a) the Attorney General is the law officer of the Crown, and the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council;**

Clause 29(1)(a) codifies the historic roles of the Attorney General which have evolved since the conception of the Office of the Attorney General of England in the 13th Century. "Law Officers of the Crown" was a phrase used in England to describe the Attorney General and also his deputy, the Solicitor General. The Attorney General's role as legal adviser to the Lieutenant Governor, the Queen's representative in Nova Scotia, is in keeping with the long history of the Attorney General as legal adviser to the sovereign. While clause 29(1)(a) provides that Nova Scotia's Attorney General is "the legal member of the Executive Council," in Britain the Attorney General is not a member of cabinet but rather is the legal adviser to cabinet. In addition

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<sup>2</sup> The Law Officer's of the Crown, J.L.J. Edwards, pp. 12-31.

to the roles listed in clause 29(1)(a), historically, the Attorney General has also had the duty to act as legal adviser to the House of Assembly.

**(b) the Minister of Justice shall see that the administration of public affairs is in accordance with the law, and has the superintendence of all matters connected with the administration of justice in the Province not within the jurisdiction of the Dominion of Canada;**

**(c) the Attorney General shall advise the heads of the several departments upon matters of law concerning such departments or arising in the administration thereof;**

The roles of the Minister of Justice and Attorney General set out in clauses 29(1)(b) and (c) are closely related to one another.

The Minister of Justice and Attorney General is assisted in fulfilling both of these responsibilities by the lawyers of the Legal Services Division of the Department of Justice. As set out in the Mission Statement of the Legal Services Division: “The Legal Services Division provides efficient and effective legal counsel and services to the Crown and promotes the fair and lawful administration of public affairs in accordance with the law.”

Clause 29(1)(b) provides for what is known as the “Minister’s Duty.” “In fulfilling the Minister’s duty, the Minister can be seen as the ‘gate keeper of parliamentary democracy’. The public service is subject to the rule of law. Legislative enactments are the expression of the public will. Accountability on the part of the public service and indeed the Minister in fulfilling the Minister’s duty is fundamental to the parliamentary form of democratic government.”<sup>3</sup> Not only must the Minister of Justice see that the administration of public affairs within the Department of Justice is in accordance with the law, the Minister’s duty extends to the administration of public affairs throughout government.

While clause 29(1)(c) provides that the Attorney General shall advise the heads of the several departments of government, in fact the Attorney General and the lawyers acting on the Attorney General’s behalf have one but client, the Crown, and advise the heads of the departments of government who are agents of that client. “If the Crown’s agents are not acting in accordance with the law, they are outside of the scope of their agency”.<sup>4</sup> For this reason, there is no conflict between the Minister’s duty to see that the administration of public affairs is in accordance with the law as set out in clause 29(1)(b) and the Attorney General’s role as legal adviser to the heads of the several department of government as set out in clause 29(1)(c). In fact, the legal advisory role is a mechanism by which the Minister’s duty can be achieved.

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<sup>3</sup> “Report on the Duty of the Minister of Justice to see that the administration of public affairs is in accordance with the law,” James Gregg, December 11, 1997, p. 2.

<sup>4</sup> *Ibid*, p. 2.

**(d) the Attorney General has the settlement and approval of all instruments issued under the Great Seal;**

Historically, certain documents, such as Treaties, required authentication under the Great Seal of the Realm. Before 1939, such documents had to be sent to London as Canada did not have its own seal. The *Seals Act*, SC 1939, c.22, created the Great Seal of Canada.

**(e) the Attorney General has the regulation and conduct of all litigation for or against the Crown or any public department in respect of any subject within the authority or jurisdiction of the government;**

The Attorney General is assisted in the role set out in clause 29(1)(d) by the litigation lawyers in the Legal Services Division. It should be noted that clause 29(1)(d) does not provide that the Attorney General shall represent the Crown and departments of government in litigation but rather gives the Attorney General the power to “conduct and regulate” such litigation. This means that litigation for or against the Crown is controlled by the office of the Attorney General. Section 12 of the *Proceedings Against the Crown Act* provides that in any proceeding against the Crown, the Crown shall be designated as “The Attorney General of Nova Scotia representing Her Majesty the Queen in the right of the Province of Nova Scotia.” That Act sets out the claims which can be brought and the remedies which can be attained against the Crown, as well as the venue for proceedings against the Crown. Historically, a civil claim could not be brought against the Crown.

**(f) the Attorney General has the functions and powers that belong to the office of the Attorney General of England by law or usage so far as the same are applicable to this Province, and also the functions and powers that previous to the coming into force of the *British North America Act, 1867*, belonged to the office of the Attorney General in the Province and under the provisions of that Act are within the scope of the powers of the government of the Province including responsibility for affairs and matters relating to courts and prosecutions;**

The *British North America Act, 1867* created the new Dominion of Canada by uniting Ontario, Quebec, Nova Scotia and New Brunswick. It is part of Canada's Constitution and divides legislative authority between the federal government and the provinces. Under the *British North America Act, 1867*, the provinces have authority over the administration of justice.

Prof. J. Edwards has referred to clause 29(1)(f) as a "reaffirmation of the historic links between Nova Scotia and Britain." It has been noted that long after confederation in 1867, the new provinces, including Nova Scotia, relied upon the constitutional conventions and precedents which had prevailed in their jurisdictions in interpreting the prerogative powers of the Attorney General. This provision is a recognition of the historic evolution of the role of the Attorney General which is still relevant in defining that role today.

**(g) Attorney General and Minister of Justice has such other powers and shall discharge such other duties as are conferred and imposed upon the Attorney General or Minister of Justice by any Act of the Legislature of the Province or by order in council made under the authority of any such Act.**

Currently, there are over 360 references to the “Attorney General” and over 130 references to the “Minister of Justice” in the Nova Scotia Statutes. The powers and duties imposed on these two offices by statute are extensive and diverse.

***Public Prosecutions Act:***

In accordance with one of the recommendations of the Marshall Inquiry, the *Public Prosecutions Act*, SNS 1990, c. 21 was enacted in 1990. The purpose of the *Public Prosecutions Act*, as set out in s.2, is to “ensure fair and equal treatment in the prosecution of offences by (a) establishing the position of Director of Public Prosecutions (b) providing for a public prosecution service and (c) providing for the independence of the Director of Public Prosecutions and the public prosecution service.”

In the recent Kaufmann report, the Honourable Mr. Kaufman comments: “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 Assembly. These power and duties go with the office and they were not removed by the new legislation.”<sup>5</sup>

In an opinion prepared by Bruce Archibald, he states that in the scheme of the *Public Prosecutions Act* “operational independence and freedom from partisan political interference is balanced against the requirement for accountability of government to the legislature in a democratic society.”<sup>6</sup> However, the Kaufman report actually refutes the notion that independence and accountability need to be balanced. Rather, Kaufman believes that in a democratic system the greater the independence an official enjoys the greater the accountability which should be required of him or her.<sup>7</sup>

Section 6 of the *Public Prosecution Act* describes the role of the Attorney General in relation to the independent public prosecution service. It limits the Attorney General’s traditional broad

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<sup>5</sup> “Review of the Nova Scotia Public Prosecution Service, Final Report”, The Honourable Fred Kaufman, C.M., Q.C., June 1999.

<sup>6</sup> An Opinion Prepared for the Attorney General and Minister of Justice of the Province of Nova Scotia The Honourable Dr. Jim Smith in Relation to the Prosecution of Dr. Nancy Morrison, by Professor Bruce P. Archibald, June 23, 1998, p. 8.

<sup>7</sup> Kaufman, p. 18.

powers with respect to prosecutions which are derived from English common law doctrine and constitutional principle. For example, prior to the *Public Prosecutions Act*, the Attorney General had free reign to give direction to Crown Prosecutors on the conduct of individual prosecutions. This power is now circumscribed by Section 6.

However, the Attorney General may still exercise his traditional powers to the extent that they are not inconsistent with Section 6.<sup>8</sup> For example, in determining whether to exercise his discretion in an individual case, the Attorney General, traditionally, was free to seek advices from a variety of sources including defence counsel and other members of the public. This prerogative is only restricted, not precluded, by s. 6(d) and, therefore, may still be exercised. Thus, Section 6 should in no way be viewed as an exhaustive statement of the role to be played by the Attorney General with respect to prosecutions.

Section 6 provides as follows:

**Power and Duties of the Attorney General**

**6** The Attorney General is the minister responsible for the prosecution service and is accountable to the Assembly for all prosecutions to which this Act applies and

**(a) after consultation with the Director of Public Prosecutions, may issue general instructions or guidelines in respect of all prosecutions, or a class of prosecutions, to the prosecution service and shall cause all such instructions or guidelines to be in writing and to be published at the direction of the Director of Public Prosecutions as soon as practicable in the Royal Gazette;**

This section provides for the issuance of general instructions by the Attorney General on the conduct of prosecutions to the Public Prosecution Services. Recommendation 12 in the Ghiz-Archibald report “Independence Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation” was that s.6(a) of the *Public Prosecution Act* be maintained. The Authors state that the formulation of criminal justice policy should rest with an elected official who is accountable to the electorate. “We believe that this is fair and workable in that being accountable for its actions the Attorney General must be able to have ultimate control over the PPS but that control through section 6 and the publication of guidelines allows public awareness and scrutiny of the Attorney General’s actions.”<sup>9</sup>

**(b) after consultation with the Director of Public Prosecutions, may issue instructions or guidelines in a particular prosecution, and shall cause such instructions or guidelines to be in writing and to be published at the direction of the Director of Public Prosecutions as soon as practicable in the**

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<sup>8</sup> *Ibid.*, p. 8.

<sup>9</sup> “Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: a Review and Evaluation”, Joseph A. Ghiz, Q.C., Dean and Professor of Law, and Bruce P. Archibald, Professor of Law, August 31, 1994.

**Royal Gazette except where, in the opinion of the Director of Public Prosecutions, publication would not be in the best interests of the administration of justice, in which case the Director of Public Prosecutions, instead, shall publish as much information concerning the instructions or guidelines as the Director of Public Prosecutions considers appropriate in the next annual report of the Director of Public Prosecutions to the Assembly;**

Section 6(b) provides for intervention by the Attorney General in the form of instructions to the PPS with respect to a particular prosecution. In determining whether to exercise his/her discretion under s. 6(b), the Attorney General should take into consideration whether there has been “an inappropriate or unwise exercise of prosecutorial discretion in terms of fact, law or public interest.”<sup>10</sup>

**(c) may consult with the Director of Public Prosecutions and may provide advice to the Director of Public Prosecutions and, subject to clauses (a) and (b), the Director of Public Prosecutions is not bound by such advice;**

Section 6(c) provides for a consultative relationship between the Attorney General and the D.P.P. The Attorney General may seek advice from the D.P.P. not only with respect to general prosecution policy but also with respect to particular prosecutions. One of the recommendations of the Kaufman report was that the *Public Prosecutions Act* be amended to require that not less than once a month the Attorney General and D.P.P. meet to discuss policy matters as well as existing and contemplated major prosecutions.<sup>11</sup>

While s.6(c) provides that the D.P.P. does not have to follow the advice of the Attorney General, Professor Archibald comments: “If the Attorney General believes that the D.P.P.’s proposed course of action in an individual case is an inappropriate or unwise exercise of prosecutorial discretion in terms of the facts, law of legitimate public interest considerations, he or she has the power and the duty to intervene. This could be to issue written instructions to the D.P.P. under subsection 6(b) or to take independent action in the exercise of the Attorney General’s statutory functions, for example under the Criminal Code, pursuant to subsection 6(e) of the *Public Prosecutions Act*.”

**(d) may consult with members of the Executive Council regarding general prosecution policy but not regarding a particular prosecution;**

The Marshall Inquiry made note of the unique position the Attorney General holds within the Cabinet in that as a law officer of the Crown the Attorney General must exercise his or her

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<sup>10</sup> Archibald, p. 10.

<sup>11</sup> Kaufman, p. 14.

prosecutorial function independent of pressure from cabinet colleagues.<sup>12</sup> This is not a new principle with respect to the office of the Attorney General and in fact it is for the purpose of retaining this independence that in Britain the Attorney General is not a member of cabinet.

Section 6(d) codifies the principle that the Attorney General should exercise prosecutorial discretion independent from his/her cabinet colleagues. It should be noted that the section makes a distinction between prosecutorial discretion, that is, a decision with respect to a particular prosecution and general government policy on prosecutions. In the latter case, it is appropriate for the Attorney General to seek the advice of his cabinet colleagues. Professor Archibald has cautioned though that it would be inappropriate for an Attorney General who is faced with a decision on a particular prosecution to seek the advice of his cabinet colleagues under the guise of general government policy on prosecutions.<sup>13</sup>

**(e) may exercise statutory functions with respect to prosecutions, including consenting to a prosecution, preferring an indictment or authorizing a stay of proceedings after consultation with the Director of Public Prosecutions.**

Section 6(e) refers to powers the Attorney General has under the Criminal Code. For example, under s.579 of the Criminal Code, the Attorney General may direct a stay of proceedings.

It should also be noted with respect to s.6(e) that many provincial statutes require the consent of the Attorney General to proceed with the prosecution of a provincial offence.

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<sup>12</sup> Royal Commission on the Donald Marshall, Jr. Prosecution, Commissioners' Report Finding and Recommendations, Vol. 1, p. 224.

<sup>13</sup> Archibald, p. 9.