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CONSTITUTIONAL RECOGNITION OF THE ROLE OF THE ATTORNEY GENERAL IN CRIMINAL PROSECUTIONS: *KRIEGER V. LAW SOCIETY OF ALBERTA*

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After the release of *Krieger v. Law Society of Alberta*,¹ commentary on the case focused on the fact that Crown Attorneys, like all other lawyers, could be subject to discipline by provincial Law Societies in the event of professional misconduct.² While it is true that *Krieger* clearly established that provinces had the constitutional power to regulate Crown Attorneys to some extent, what is most interesting about the case, from a constitutional law perspective, is its examination of how Crown Attorneys, as agents of the Attorney General, are *unlike* any other lawyers. Although hinted at in earlier decisions,³ in *Krieger*, the Supreme Court explicitly recognized, for the first time, that the independence of the Attorney General in the exercise of prosecutorial discretion is a principle of Canadian constitutional law.

Prior to *Krieger* various commentators noted that the office of the Attorney General has constitutional dimensions. Professor John L.I. Edwards, an academic expert in the area, wrote that the Attorney General has “a privileged

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¹ 2002 S.C.C. 65.

² See “Crowns Subject to Law Society Discipline,” *Law Times*, October 21, 2002; “SCC Sets Rules for Law Societies Disciplining Crowns,” *Lawyer’s Weekly*, November 8, 2002; *Alberta Crown Attorneys’ Criminal Case Bulletin*, Vol. 8, No. 17, October 10, 2002; “SCC Rules on Jurisdiction of Alberta Law Society and Prosecutorial Discretion,” The Continuing Legal Education Society of British Columbia; “Law Society Entitled to Review Ethics of Crown Prosecutor,” *Great Library Digests*, October 15, 2002; G. Hatley, *Law Society Oversight of Prosecutorial Behaviour* (2002).

³ See *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Power*, [1994] 1 S.C.R. 601.

constitutional status”⁴ and enjoys “immense constitutional powers.”⁵ Chief Justice Wells of the Ontario High Court stated “there has existed in the U.K. and thus in Canada a constitutional discretion in the Attorney General.”⁶ Supreme Court Justice Ian Binnie has remarked that the independence of the Attorney General is a principle of fundamental justice under section 7 of the Charter.⁷ And Ian Scott, former Attorney General of Ontario, declared that the “absolute immunity of the Attorney General on questions of prosecution policy is accepted as an important constitutional principle.”⁸ However, it was not until *Krieger* that the Supreme Court expressly entrenched the independence of the Attorney General within the Canadian Constitution when it observed:

It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.⁹

This paper will examine the independence of the modern office of the Attorney General and its agents Crown Attorneys, and how this concept evolved both as a matter of convention and constitutional law. With emphasis on the *Krieger* decision, the meaning and scope of “prosecutorial discretion” will also be explored. In order to further determine the nature of independence and prosecutorial discretion, the independence of the Attorney General will be compared to judicial independence and the independence of statutory tribunals. Finally, potential implications of the *Krieger* decision will be canvassed.

I. EVOLUTION OF THE ROLE OF THE ATTORNEY GENERAL

The office of the Attorney General has evolved to include two distinctive functions: the “political” Attorney General, who, as an elected member of the legislature and member of Cabinet, is a member of the Executive branch of the government of the day and thus plays a role in formulating government policy; and the “chief law officer of the Crown” charged with providing legal advice to government and directing criminal and civil litigation and ensuring it is con-

⁴ J. Edwards, *The Attorney General, Politics and the Public Interest*, (London: 1984), at 360 [hereinafter “Edwards, *Politics*”].

⁵ J. Edwards, “The Attorney General and the Charter of Rights,” in *Charter Litigation*, R. Sharpe, ed. (Toronto: Butterworths, 1987), at 68 [hereinafter “Edwards, *Charter*”].

⁶ *Re The Queen v. Conn Stafford Smythe*, 70 DTC 6382, Sup. Ct. of Ont., December 10, 1970, at 12.

⁷ *R. v. Regan*, [2002] 1 S.C.R. 297, at paras. 157-58.

⁸ I. Scott, “The Role of the Attorney General and the Charter of Rights,” in *Charter Cases 1986-1987*, G.A. Beaudoin, ed. (Cowansville: 1987) at 133 [hereinafter “Scott, *Charter*”].

⁹ *Krieger*, *supra*, note 1, at para. 3.

ducted in accordance with the public interest. John Ll. Edwards believed these were opposing roles — that the political responsibilities of the Attorney General might impede his or her ability to carry out the legal responsibilities of the office independent of partisan concerns. This concern may be largely academic, however, as it is now widely accepted, and expected, that in his or her role as chief law officer to the Crown, the Attorney General must put aside the partisan considerations of the political Attorney General and exercise independence from Cabinet and the government.

1. History of the Office of the Attorney General

The original federal and provincial legislation, which created the office of the Attorney General in various Canadian jurisdictions, expressly conferred the powers and duties that traditionally belonged to the Attorney General of England on the Canadian office-holders.¹⁰

As early as the 13th century, the King of England entrusted a barrister, the “King’s Attorney,” to supervise his legal interests throughout the country. The role of this Attorney evolved over the centuries and came to include the right to initiate and terminate prosecutions, (the majority of which were still brought privately). This right remains one of the most important powers of the modern Attorney General.¹¹

The English colonies founded in the Maritimes and Upper Canada adopted the British legal system (with some modifications) and thus each established an office of the Attorney General. However, from the beginning, the Canadian Attorney General took a far greater role in prosecutions than in Britain. For example, Upper Canada established a system of Crown Attorneys in 1857, more than 20 years before a similar system was developed in England.¹²

The modern office of the Attorney General continued to take shape as the result of the union of Upper and Lower Canada in 1840 and an 1846 report on the administration of justice in the Province of Canada.¹³ After the union, the Attorney General’s main responsibility was to conduct the Crown’s business before courts and to advise Cabinet colleagues on legal matters. When the Attorney General or Solicitor General was unable to appear in court they could instruct counsel, usually Queen’s Counsel, to appear as their representative.¹⁴

¹⁰ P. Stenning, *Appearing for the Crown* (Cowansville: 1986), at 72-75 and 79-87.

¹¹ Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62, 1990, at 3 [hereinafter “LRC”].

¹² M. Bloos, *The Public Prosecutions Model from Upper Canada*, (1989) 32 C.L.Q. 69, as cited in LRC, at 3.

¹³ Stenning, *supra*, note 10, at 64-68.

¹⁴ *Id.*, at 64-68.

The office of the Attorney General continued this way until Confederation in 1867. Unlike most modern constitutions within the British Commonwealth, the *British North America Act* was “somewhat less than explicit in stating the legal foundations on which the posers and functions of the Canadian office of the Attorney General . . . is said to rest.”¹⁵ Nevertheless, the office did receive some attention in the *Constitution Act, 1867*. Sections 9 and 11 provide that executive authority remains vested in the Queen, and that the Queen is advised by an executive council comprised of people appointed by the Governor General, although it did not specify who those people should be. However, the first council did include the Attorney General.¹⁶

The Act was more clear regarding the role of the provincial Attorneys General. Pursuant to sections 34 and 63, the Attorney General is among the list of executive officers initially included on the executive councils of Ontario and Quebec. Additionally section 135 provides that the “rights, powers, duties, functions, responsibilities or authorities” vested or imposed on the Attorney General prior to Confederation continue, until otherwise provided by the legislature.

Also relevant to the role of the Attorney General were the division of powers concerning the administration of justice. Section 91(27) gave the federal government exclusive jurisdiction over criminal law and procedure, while section 92(14) gave the provincial governments jurisdiction over the administration of justice, constitution of the criminal and civil courts, and civil procedure. In practical terms, this division of powers meant that the federal Attorney General and his or her agents prosecuted federal statutory offences, with the exception of offences under the *Criminal Code*, which were conducted by provincial Attorneys General and their agents in addition to the prosecution of provincial “quasi-criminal” offences.¹⁷

After Confederation, the federal government and provinces enacted legislation creating and defining the office of the Attorney General (in some provinces called the Minister of Justice). Although again based on the British model, the Canadian office of the Attorney General was significantly different than that in Britain, where the Attorney General was not a member of the Cabinet and had much more limited responsibilities. Pursuant to *An Act Respecting the Department of Justice*,¹⁸ passed in 1868, the federal Attorney General was given responsibility for prosecutions, providing legal advice to government, administering the courts, and supervising the police, prisons, and penitentiaries,

¹⁵ Edwards, *Politics*, *supra*, note 4, at 356.

¹⁶ The first Attorney General of Canada, John. A. MacDonald, was also the Prime Minister.

¹⁷ LRC, *supra*, note 11, at 6.

¹⁸ S.C. 1868, c. 39.

in addition to the political responsibilities of the Minister of Justice. In 1966, responsibility for the RCMP and the prisons was given to the Solicitor General. With this exception, the responsibilities of the federal Attorney General have remained the same since 1868.¹⁹

Today, the division of responsibilities concerning the criminal justice system varies to some degree across the provinces but most mirror the federal model. The exception is Nova Scotia, where the operational and political functions of the Attorney General were expressly severed by the creation of the office of the Director of Public Prosecutions (D.P.P.) in 1990.²⁰ The D.P.P., a deputy of the Attorney General, heads the public prosecution service and is mandated to ensure that prosecutions in the province are conducted independent of the Attorney General's direction and in a non-partisan manner.²¹ Nevertheless, the Attorney General maintains "superintendence" over prosecutions. The D.P.P. and the Attorney General may consult with one another on policy issues or even in respect to a particular prosecution. However, the D.P.P. is required to comply with the Attorney General's instructions or guidelines only if they are issued in writing and published in the *Royal Gazette* or the D.P.P.'s *Annual Report* — in other words, the Attorney General may only intervene if he or she

¹⁹ It is noteworthy that the combined responsibilities of the federal Canadian Attorney General and Solicitor General are divided among five different positions in England: two are members of the Cabinet, the Home Secretary who is responsible for the police, Crown Prosecution Service and prisons, and the Lord Chancellor who is responsible for the administration of the courts, judicial appointments and legal services such as legal aid; two are Law Officers who are government Ministers, but not members of the Cabinet: the Attorney General and Solicitor General; and the last is the Director of Public Prosecutions, who reports to the Attorney General and is responsible for ensuring the independence of criminal prosecutions.

²⁰ The new delineation of prosecutorial functions in Nova Scotia was the result of recommendations made by the Commissioners of the Inquiry into the Wrongful Conviction of Donald Marshall, who adopted some of the ideas presented by John L.L. Edwards in his report to the inquiry entitled "*Walking the Tightrope of Justice: an examination of the Office of the Attorney General.*" The change was seen as a way to avoid some of the conduct demonstrated by Crown prosecutors and police involved in the Marshall prosecution. The creation of the office of the D.P.P. was preceded by the creation of the Solicitor General's Ministry in 1987, which was given responsibility for policing and corrections. However, in 1993, the Solicitor General's Ministry and the Ministry of the Attorney General were merged, bringing responsibility for criminal prosecutions, policing, corrections, court operations and the D.P.P. under one Ministry. Some critics allege this undermines the independence of the D.P.P. See Bruce P. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions Between Punitive and Restorative Paradigms of Justice" (1998) 3 Can. Crim. Law Rev. 69, at 76.

²¹ The D.P.P.'s independence from the Attorney General is said to be secured by the non-partisan consultation process which occurs prior to the D.P.P.'s appointment, his or her security of tenure, his or her status as a deputy minister with authority to hire or dismiss members of the public prosecution service, his or her salary, which is equal to the Chief Judge of the Provincial Court, as well as the right and duty to prepare an annual report for the Legislative Assembly.

is willing to “go public” regarding the intervention.²² Political accountability for prosecutions remains with the Attorney General who is answerable to the Legislative Assembly and the public.

While the Nova Scotia system is a novel attempt in Canada to maintain independence in prosecutorial discretion, it is not without its critics.²³ The prosecution of the owners and managers of the Westray Mine illustrated a potential problem with this system. In this case, despite his power to intervene, the Attorney General of Nova Scotia chose not to. It was therefore the D.P.P. that bore much of the criticism from the victims’ families instead of the more politically accountable Attorney General.²⁴

2. The Attorney General’s Independence from Political Influence

It has been recognized in Britain since the early 1900s that the Attorney General cannot take direction from Cabinet in matters of prosecutorial discretion, although he or she may consult or advise Cabinet in such matters. The appropriate relationship between Cabinet and the Attorney General was articulated in 1951 by Lord Shawcross, while he was Attorney General of England:

I think the true doctrine is that it is the duty of an Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that

²² Archibald, *supra*, note 20, at 77.

²³ *Id.*, at 77.

²⁴ As noted by Archibald, *id.*, at 98:

The Attorney General must be supportive of the D.P.P.’s policies in general terms and be prepared to state this support publicly, otherwise the notion of accountability becomes a sham and the system will eventually fall into disrepute. If the D.P.P. is consistently used as a political scapegoat, the office will soon suffer irreparably.

I have indicated affect government in the abstract arise it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations.²⁵

As noted by one commentator, it is difficult to find the legal basis for the right of the Attorney General to act independently as asserted by Lord Shawcross. Nevertheless, in England it was accepted as a matter of convention.²⁶

The legal source of the independence of the Attorney General in Canada is equally unclear. In colonial times the Attorney General was a private lawyer retained by the government, and therefore would not have considered that he had or was entitled to independence from the government of the day. This situation continued with the union of Canada East and Canada West as the Attorneys General and Solicitors General of the new province were required to hold seats in Parliament and to take part in political affairs. Moreover, government leaders frequently also acted as Attorney General. This combination of functions continued with Confederation as John A. MacDonald served as both Prime Minister and Attorney General from 1867 to 1873.

It was not until 1978, over a century after Confederation, that the “Shawcross” principle — the independence of the Attorney General from political influence — was explicitly recognized in Canada. In a statement to the House of Commons discussing the principles that guided him in his exercise of prosecutorial discretion, Ron Basford, then Attorney General of Canada stated:

The first principle, in my view, is that there must be excluded any consideration based upon narrow partisan views, or based upon the political consequences to me or to others.

In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself.²⁷

Professor John L. Edwards has commented that this was not always the case: the evidence of previous administrations, irrespective of party affiliations, suggests that earlier Prime Ministers and Attorneys General did not view independence as necessary to the role of the Attorney General, and decisions in highly political cases were often made by the Cabinet and carried out by the Attorney General.

²⁵ J. Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 223.

²⁶ G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: 1984) at 112, as cited in LRC, *supra*, note 11, at 6.

²⁷ The Attorney General was discussing whether to lay charges under the *Official Secrets Act* against a Member of Parliament and *The Toronto Sun* newspaper, in connection with an article based on an RCMP report on the Russian intelligence services.

Although the Attorney General is independent from Cabinet or political influence, it should be noted that the Attorney General is accountable to Parliament or the appropriate legislature for his or her decisions — “accountable politically but also aloof from partisan politics” as it was stated by the former Attorney General of Ontario, and current Chief Justice of Ontario, Roy McMurtry.²⁸ It is quite open to the members of Parliament to question the Attorney General about prosecutorial decisions. However, as noted by the Law Reform Commission of Canada, this accountability “must be considered in the context of the reality that party solidarity would lead to the support of the Attorney General, whether independent in decision making or not.”²⁹

3. The Attorney General and Legal Advice to Government

One of the Attorney General’s main duties as chief law officer of the Crown is to provide legal advice to government. The duty of the Attorney General to act independently is no less important in this regard. Any advice to government has to be a “balanced, impartial and accurate analysis of the law,” and independent of partisan political considerations.³⁰ In the rare instances where private sector lawyers are consulted, the ultimate advice flows through the Attorney General or his or her agents.³¹ Although, ultimately, Cabinet may not like or choose to follow the Attorney General’s legal advice, the Attorney General is required to give it independent of partisan considerations.³²

The Attorney General must also “bring the focus of justice to questions of politics” and “bring a particular concern for principle, constitutionalism and rights to his [or her] policy making function.”³³ That is, when the Attorney General functions in his or her “political” role and participates in making government policy, he or she must also demonstrate a measure of independence and object to unprincipled solutions to problems.

²⁸ R. McMurtry, “The Office of the Attorney General” in *The Cambridge Lectures*, D. Mendes da Costa, ed. (Butterworths: Toronto, 1981), at 2.

²⁹ LRC, *supra*, note 11, at 11.

³⁰ M. Frieman, Deputy Attorney General of Ontario, *Remarks at the 2001 Constitutional Cases Conference*, April 12, 2002, at 7.

³¹ The Attorney General does not disclose the contents of legal advice due to solicitor-client privilege and respect for individual privacy. Nevertheless, prior to legislation being introduced, it is typically vetted by civil lawyers employed by the Ministry of the Attorney General.

³² Edwards, *Charter, supra*, note 5, at 9.

³³ I. Scott, “Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980’s” (Spring 1989) 39 U.T.L.J. 109-126, at 119-120 [hereinafter “Scott, *Law Policy*”].

4. The Attorney General and Litigation

In his or her role as the superintendent of criminal and civil litigation, the Attorney General must ensure that his or her decisions are not only free from political influence, but are also based on the rule of law and the public interest. In the sphere of criminal law, the Attorney General's independence or "prosecutorial discretion" includes the ability to decide whether or not to prosecute an individual that has been charged by the police. This decision must be an objective one, based on the circumstances of the case. As expressed by the former Attorney General of Ontario, Ian Scott:

[I]n determining whether or not to prosecute ... the attorney general must be guided solely by considerations that are independent of his affiliation with a political party or the government. His decision must be based on his best assessment of what the law and the public confidence in it require. This necessarily follows from his role as the chief law officer of the state where that state policy is based on the rule of law. The confidence of the public administration of justice prohibits the use of the criminal law for partisan purposes. Moreover, as a guardian of the public interest, the attorney general must act in accordance with the interests of those whom the government represents, and not simply in the interest of the government to which he belongs.³⁴

As a practical matter, prosecutorial discretion is most often exercised by the Attorney General's agents, Crown Attorneys. Crown Attorneys not only derive their prosecutorial discretion from the Attorney General but must also exercise it in the same independent way.³⁵ The fact that the decision to prosecute must be made independently, however, does not mean that certain kinds of socio-political factors are not brought to bear on the decision-making process. In his or her role as the protector of the public interest, an Attorney General can consider the social repercussions of the decision to prosecute and the guidelines they issue to Crown Attorneys. Further, these decisions may be determined after consultation with Cabinet colleagues. However, the ultimate decision must be that of the Attorney General alone, and "must be for the public good, and not for the good of the government of the day."³⁶

³⁴ *Id.*, at 112.

³⁵ LRC, *supra*, note 11, at 15.

³⁶ Scott, *Law Policy*, *supra*, note 33, at 121. The considerations that apply to the decision to prosecute are similar to those that apply to the actual conduct of a criminal prosecution, where the role of the Crown prosecutor has been described as that of a "minister of justice." As stated by Rand J. in *R. v. Boucher*, [1955] S.C.R. 16, at 23-24:

It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of facts is presented: it should be done firmly and pressed to its legitimate strength but it must

When a provincial government is involved in civil, as opposed to criminal litigation, an Attorney General may, and often does, take a far more active role. This role includes issuing instructions to civil Crown Attorneys on positions to be taken in court or when settlement is appropriate. Typically, civil Crown counsel act as the Attorney General's agents in defending lawsuits involving torts or contracts, or Charter challenges. The Attorney General may also act as a plaintiff to recover damages. Far less frequently, the Attorney General exercises wider authority to seek an injunction on behalf of the public interest to enforce public legal rights such as enjoining a public nuisance.³⁷ This "public interest standing" can also be used to intervene in litigation that raises important public or Charter issues.³⁸ The Attorney General is also provided with notice of all judicial reviews and constitutional challenges in the province and is entitled to intervene in those proceedings.³⁹

The marked difference between the role of the Attorney General in criminal and civil litigation was explored by Ian Scott.⁴⁰ In addition to the existence of a convention of independence in criminal matters, Scott noted that the distinguishing factor between criminal and civil litigation is one of legislative responsibility. When prosecuting a criminal case, a provincial Crown Attorney is not prosecuting a law that the provincial government has made or a law for

also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility.

³⁷ For example, consider the involvement of the Ontario Attorney General in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. Although Dr. Morgentaler and his colleagues were acquitted at trial, the Ontario Court of Appeal overturned that decision, and the accused appealed to the Supreme Court of Canada. While the case was waiting to be heard, the Toronto police again charged the doctors with the same offence. Although, as Ian Scott notes, they certainly had reasonable and probable grounds to believe the offence was being committed, there were other things that had to be considered. The Ontario High Court of Justice had held that it would not proceed with any further trial of the accused while their appeal was pending before the Supreme Court (*Campbell v. Ontario (Attorney General)* (1987), 60 O.R. (2d) 617 (C.A.)). Moreover, given that the facts supporting the new charges and the defence raised would likely be identical to that of the charges on which they had been tried and acquitted, it was, in Scott's opinion, prudent to hold the prosecution in abeyance until the Supreme Court released its judgment, and thus the charges were stayed. See Scott, *Law Policy*, *supra*, note 33, at 117-18.

³⁸ For example, s. 122 of the Ontario *Courts of Justice Act* S.O. 1984, c. 11, required that the Attorney General be notified and given the opportunity to participate in litigation challenging the constitutionality of an Ontario statute, [as does s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43] see Scott, *Charter*, *supra*, note 8, at 137.

³⁹ *Judicial Review Procedure Act*, R.S.O. 1990 c. J.1, s. 9(4) and *Courts of Justice Act*, R.S.O. 1990 c. C.43, s. 109.

⁴⁰ Scott, *Law Policy*, *supra*, note 33, at 116 and 124-25.

which it has legislative responsibility.⁴¹ However, civil litigation involves provincial statutes or acts for which the Attorney General has responsibility. In this case, Scott wrote that it was appropriate for the Attorney General to be more activist and interventionist, as civil matters were within his or her responsibility and may be a reflection of a particular government policy. Nevertheless, Scott cautioned that civil litigation must still be approached from a principled perspective — the Crown’s position must be consistent and uniform, and in accordance with the law, regardless of policy preferences.⁴²

Scott’s theory is a partial answer to the question of why an Attorney General approaches criminal and civil litigation differently. It does not, however, reflect the reality that while *Criminal Code* prosecutions are federal matters, they can vary to a certain degree from province to province as a result of policy choices by particular provincial governments. For example, the protocol for dealing with cases involving domestic abuse may be nuanced from province to province; or the prosecution of young offenders may vary from province to province depending on the comprehensiveness of criminal diversion programs.⁴³ A provincial Attorney General may also intervene in certain criminal matters by seeking an injunction in relation to a *Criminal Code* provision. For example, where a statutory penalty does not appear to be acting as a deterrent, and there is a continual flouting of the law, a court may grant the Attorney General an injunction to aid in the enforcement of the law. This has been attempted on several occasions in an effort to curb street prostitution.⁴⁴ Scott’s explanation also fails to address regulatory or other “quasi-criminal” prosecutions under provincial statutes in which the Attorney General will typically not issue instructions despite the fact that the provincial government maintains legislative responsibility for the statute under which the charges are laid.

Another explanation may rest in the role of the Attorney General. In criminal matters, the Crown prosecutor’s view of how the administration of justice will

⁴¹ For example, in Scott’s opinion, if an Attorney General believes that a *Criminal Code* provision under which it prosecutes is unconstitutional, it must defer to the judgment of the federal government that the law is constitutional and continue the prosecution. In the event of a court challenge, it is then the federal government that should have the responsibility for defending the provision.

⁴² Frieman, *supra*, note 30, at 7.

⁴³ Sections 8 and 23 of the new *Youth Criminal Justice Act*, S.C. 2002, c. 1, allow provincial governments to set up programs which allow authorities to issue cautions to young offenders instead of instituting judicial proceedings, and to screen charges against young offenders before they are laid. However, provinces are not required to set up such programs. See Bala, *Youth Criminal Justice Law* (Irwin Law: 2003).

⁴⁴ See J. Berryman, *The Law of Equitable Remedies* (Irwin Law: 2000), at 135-36.

be served in a particular case must be free from extraneous influences.⁴⁵ In civil matters however, the Attorney General and his or her agents typically act as the government's "spokesperson," reflecting the government's position or policy objective in a particular matter. Yet a further explanation may lie in the severity of the consequences for the party opposite the Crown. The principle of prosecutorial discretion is followed in criminal and quasi-criminal matters because of the possibility of incarceration upon conviction. In contrast, civil matters typically result in damages or discipline. Not one of these explanations for the unique role of the Attorney General in criminal matters provides a complete answer but cumulatively, they do provide a compelling rationale for the independence principle.

In *R. v. Power*, the Supreme Court held that the independence of the Attorney General in prosecutorial decision-making includes independence from judicial scrutiny. The Court noted that this was a function of the respect for the rule of law and the separation of powers between the three branches of government — the legislative, the executive, and the judicial. As criminal law is, and thus prosecutorial decisions are, within the domain of the executive, it is not normally within the ambit of the courts' powers to interfere in such matters.⁴⁶

Nevertheless, courts do maintain a discretion to remedy an abuse of the court's process and as such, can review prosecutorial conduct, including discretionary decisions. *Power* made it clear, however, that courts should be very reluctant to question prosecutors' decisions:

[T]he Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair or indecent to proceed, then and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.⁴⁷

⁴⁵ In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at para. 80, the Supreme Court described the role of the Crown in criminal matters as the "singular antagonist," compared with the Crown's role in civil matters where it is more mediation minded.

⁴⁶ [1994] 1 S.C.R. 601, at para. 29.

⁴⁷ *Id.*, at paras. 10 and 11.

Although the number of abuse of process cases before the courts has increased in recent years, the high threshold set in *Power* has generally been upheld. Where it can be shown that the right to a fair trial has been prejudiced, courts will generally grant a remedy, most often a stay of proceedings. However, in cases where there is some evidence of an abuse of process that does not go to the fairness of the trial (the “residual” category of abuse of process), courts have been far more reluctant to grant a remedy under section 24(1) of the Charter, and particularly a stay of proceedings.⁴⁸

The scope of prosecutorial discretion, and what constitutes Crown misconduct, continues to receive considerable judicial attention in the context of malicious prosecution actions against Crown Attorneys. In these cases, as demonstrated in *Nelles v. Ontario*⁴⁹ and more recently in *Proulx v. Quebec (Attorney General)*,⁵⁰ courts continue to afford prosecutorial decision-making a high level of deference.⁵¹

Prior to *Nelles*, Crown Attorneys in some provinces were immune from suits for malicious prosecution. However, Lamer J. (as he then was) found that this immunity was contrary to public policy as it negated a private right of action and therefore a remedy for those who were maliciously prosecuted. It was also Lamer J.’s view that people who were maliciously prosecuted would experience a violation of their section 7 Charter rights, and that absolute immunity would prevent such a person from seeking a remedy under section 24(1).⁵²

Nonetheless, the Court in *Nelles* placed “a formidable burden” on plaintiffs bringing malicious prosecution actions. He or she must prove a prosecutor did not have reasonable and probable grounds for initiating or continuing the pro-

⁴⁸ See D. MacAlister, “Does the Residual Category for Abuse of Process Still Exist?” (1999), 28 C.R. (5th) 72; N. Gorham, “Regan: The Residual Category of Abuse of Process Continues to Shrink” (2002), 49 C.R. (5th) 87; L. Stuesser, “Abuse of Process: The Need to Reconsider” (1994), 29 C.R. (4th) 92.

⁴⁹ [1989] 2 S.C.R. 170.

⁵⁰ [2001] 3 S.C.R. 9.

⁵¹ In 2001, the Ontario Court of Appeal released *Oneil v. Toronto (Metropolitan) Police Force* (2001), 195 D.L.R. (4th) 59, which appeared to alter the test set out in *Nelles* by suggesting that in certain cases malice could be inferred from an absence of reasonable and probable grounds to commence or continue a prosecution. If the majority of the Court of Appeal did intend to lower the standard set in *Nelles*, they would certainly be at odds with the decisions in *Proulx*, *Dix* and now *Krieger*, all released after *Oneil*. Nevertheless, on March 27, 2003 the court released *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (Ont. C.A.), which relied both on *Oneil* and on *Milgaard v. Kujawa* (1994), 118 D.L.R. (4th) 653 (Sask. C.A.), among other cases, in holding that *Nelles* and *Proulx* did not settle the law as to whether Crown Attorneys may only be sued for malicious prosecution, and that actions for abuse of process, conspiracy to injure and intentional infliction of harm against Crowns may exist at law. This reasoning appears to go beyond the accepted interpretation of *Nelles* and *Proulx*.

⁵² *Nelles*, *supra*, note 49, at para. 50.

ceedings. In order to have reasonable and probable grounds a prosecutor must have:

[a]n honest belief in the guilt of the accused based upon a full conviction, founded on reasonable and probable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.⁵³

If a plaintiff can establish that the prosecutor did not have reasonable and probable grounds to believe the accused was guilty, he or she must further prove that the prosecutor initiated or continued the proceedings motivated by malice, in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney. As expressed by Lamer J.:

This burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in so doing perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct.⁵⁴

Interestingly, although the Supreme Court recognized the historical role of the Attorney General as legal adviser to the Crown, and the status of a Crown Attorney as a “minister of justice” in both *Nelles* and *Proulx*, it made no mention of any historic legal foundation for these powers which formed the foundation of the test for malicious prosecution.

The Supreme Court’s most recent pronouncement on the scope and meaning of prosecutorial discretion, *Krieger*, arose in an entirely unique context — professional disciplinary proceedings against a Crown Attorney. *Krieger* not only explicitly upholds the deferential standard set in *Nelles* and *Power*, but strengthens it by giving it a constitutional foundation.

II. KRIEGER V. LAW SOCIETY OF ALBERTA

1. Facts

Krieger, a Crown Attorney in Alberta, was assigned to prosecute a murder. Before the preliminary inquiry, he received the results of DNA and biological tests that implicated someone other than the accused. Ten days later, he advised the accused’s counsel that the results of the testing would not be available in time for the preliminary inquiry. After the first day of the inquiry, however, defence counsel learned that there were in fact preliminary test results that were

⁵³ *Id.*, at para. 43.

⁵⁴ *Id.*, at paras. 45 and 46.

favourable to his client. He complained to the Deputy Attorney General that there had been a lack of timely and adequate disclosure.

After a review by the Attorney General, Krieger's delay in disclosing the test results was found to be unjustified and he was reprimanded and removed from the case. The accused complained to the Law Society of Alberta about Krieger's conduct. Before the Law Society could conduct a review, Krieger sought an order that the Law Society had no jurisdiction to review the exercise of prosecutorial discretion by a Crown Attorney and an order that the rule in the Code of Professional Conduct requiring a prosecutor to make timely disclosure to the accused or defence counsel was of no force and effect.

The Court of Queen's Bench dismissed Krieger's application, holding that it was within the power of the province of Alberta to regulate lawyers and to delegate that authority to the Law Society. Also, as the rule at issue dealt only with matters of prosecutorial discretion where there were allegations of bad faith or dishonesty, it survived constitutional scrutiny. Justice MacKenzie rejected the argument that a Crown Attorney could only be disciplined by the Attorney General. He found that the Attorney General did not have the same duties to the public as the Law Society, which is charged with protecting the public from dishonest lawyers.

The Alberta Court of Appeal overturned that decision. Although they found that the rule in question was *intra vires* the province, it did not give the Law Society the power to further investigate *this* particular complaint, as the investigation would necessarily entail a review of the Attorney General's decision that there had been no dishonesty or bad faith in Krieger's conduct. The rule at issue gave the Law Society the power to review prosecutorial decisions only in cases of bad faith. Because the Attorney General had determined there was no bad faith in this case, the Law Society was outside its jurisdiction in reviewing the matter.

The Law Society's appeal was allowed by the Supreme Court of Canada.

2. The Independence of the Attorney General

Before turning to the substantive issues on the appeal, Iacobucci and Major JJ. reflected on the "unique and important role of the Attorney General and his agents as distinct from private lawyers."⁵⁵ They noted that the office of the Attorney General had changed little since its inception in 13th century England, and that its main function was, and is, the control of public and private prosecutions. In Canada, they observed, the office is one with "constitutional dimensions recognized in the *Constitution Act, 1867*." Although the Court recognized

⁵⁵ *Krieger*, 2002 SCC 65, at para. 43.

that the duties conventionally exercised by the modern Attorney General are not enumerated, they found that section 135 of the Act provided for the extension of the authority and duties of the Attorney General that existed prior to Confederation.⁵⁶ Moreover, section 63 of the *Constitution Act, 1867*, also provides that the Attorney General must be included in the cabinets of Ontario and Quebec.

The Court also acknowledged the advisory and political functions of the modern office of the Attorney General, and the expansive role Attorneys General play in government and the administration of justice. Nevertheless, the Court stated that the independence of the Attorney General lies in its power, to “bring, manage and terminate prosecutions”⁵⁷ — a power of such gravity that it has created an expectation that the Attorney General will carry out this role “fully independent from the political pressures of government.”⁵⁸ The Court observed that in the U.K. the fear of political pressure has been addressed by ensuring that the Attorney General does not sit as a member of Cabinet. As such, the dual role of the Canadian Attorney General makes the principle of independence in the exercise of prosecutorial discretion even more important than in Britain. It is so crucial in fact, that the Court declared: “it is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.”⁵⁹

The Court found support for its view in *R. v. Regan*,⁶⁰ released seven months before *Kreiger*, and the Law Reform Commission of Canada’s seminal paper “*Controlling Criminal Prosecutions in Canada*.”⁶¹ Interestingly, although the Court relied on the dissent of Binnie J., in *Regan*, they declined to follow his lead and expressly declared the independence of the Attorney General to be a principle of fundamental justice under section 7 of the Charter. In *Regan*, Binnie J. wrote:

In *R. v. G.D.B.* ... we held that “the right to effective assistance of counsel” in the criminal justice system reflects a principle of fundamental justice with the meaning of s. 7 of the *Charter*. The duty of a Crown Attorney to respect his or her “Minister of Justice” obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances

⁵⁶ *Id.*, at para. 26.

⁵⁷ *Id.*, at para. 29.

⁵⁸ *Id.*

⁵⁹ *Id.*, at para. 30.

⁶⁰ [2002] 1 S.C.R. 297.

⁶¹ LRC, *supra*, note 11, at 9-11.

of our criminal justice system and easily satisfies the criteria first established in *Re B.C. Motor Vehicle Act*...⁶²

Justices Iacobucci and Major also found the Attorney General's independence to be rooted in its freedom from judicial interference arising from the "fundamental principle of the rule of law under our Constitution"⁶³ as established by the Court in *R. v. Power*. The independence of the Attorney General limits the court's supervision of the Attorney General (Crown Attorney) to his or her conduct before the court and not his or her exercise of prosecutorial discretion.

In *Krieger*, the Court concluded its assessment of the role of the Attorney General by observing that:

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not 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. Clear constitutional lines are necessary in areas subject to such grave potential conflict.⁶⁴

Whether the independence of the Attorney General will be elevated to a section 7 of the Charter principle of fundamental justice by a majority of the Court is a matter for future cases. Notably, a section 7 constitutional question was not stated in *Krieger*, and therefore the court focused on the constitutional principles involved in the separation and division of powers.

Although the Court did not expressly frame it this way, *Krieger* appears to create a new unwritten constitutional principle which flows from the rule of law, and the fact that our Constitution is intended to be "similar in principle to that of United Kingdom."⁶⁵ the independence of the Attorney General in prosecutorial decision-making. While the appropriateness of recent judicial decisions based on unwritten constitutional principles set out in the preamble to the Con-

⁶² *Regan, supra*, note 48, at para. 157.

⁶³ *Krieger, supra*, note 55, at para. 32.

⁶⁴ *Id.*, at para. 32.

⁶⁵ The preamble to the *Constitution Act, 1867* states in part, "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution, similar in Principle to that of the United Kingdom" and the *Constitution Act, 1982* states, "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." Both have been cited by the Supreme Court in cases such as *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter "*Provincial Judges Reference*"] and the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 as one of the sources for the unwritten principles of the Canadian Constitution.

stitution to create new “rights” can be questioned, particularly in the language rights sphere,⁶⁶ constitutional recognition of a longstanding convention such as the independence of the Attorney General may be less controversial. This is especially so where the court has already recognized judicial independence to flow from the same constitutional principles.⁶⁷

The acceptance of the Attorney General’s independence as a constitutional principle is a positive development for the administration of justice — not only will the standards established by the Court in *Nelles*, *Krieger* and *Power* allow Attorneys General and Crown Attorneys to make decisions free from external pressures, they also ensure that those who are genuine victims of a malicious prosecution or abuse of process continue to have a remedy at law.⁶⁸

3. Krieger and the Division of Powers

Arguably, recent Supreme Court cases dealing with the scope of the federal government’s criminal law power under section 91(27) of the *Constitution Act* have expanded what was traditionally viewed as criminal law through the inclusion of matters such as environmental regulation and tobacco advertising within the ambit of criminal law.⁶⁹ This does not mean, however, that the provincial power to regulate local matters has been decreasing. While the Court, as it stated in the *Reference re Firearms Act (Can.)*,⁷⁰ will not hesitate to strike down legislation that is not validly criminal law, increasingly, the focus of division of powers analysis is the question of “express conflict” between overlapping provincial and federal spheres of legislative responsibility. That is, only where federal and provincial laws expressly conflict, in that compliance with one would involve the breach of the other, will the court find an inconsistency,

⁶⁶ In *Lalonde v. Ontario* (2001), 56 O.R. (3d) 505 [Monfort Hospital], the Ontario Court of Appeal relied, in part, on the “constitution’s structural principle of respect for and protection of minorities” as authority for the proposition that the Province’s Hospital Restructuring Commission could not close the Province’s only French language teaching hospital.

⁶⁷ *Provincial Judge’s Reference*, [1998] 2 S.C.R. 217.

⁶⁸ It is probable that Kent Roach would take the opposite view. In his article, “The Attorney General and the Charter Revisited” (2000) 50 U.T.L.J. 1, Roach expresses the view that the constitutionalization of abuse of process and malicious prosecution, combined with the failure of courts to recognize “constitutional torts” such as negligent prosecution, and the large scale failure of ss. 7 and 15 Charter challenges to specific aspects of prosecutorial discretion, has left victims of prosecutorial misconduct with little recourse. He also argues that because misconduct must be found to be “unconstitutional” before courts will intervene, intervention will be rare. As a result, in his view, the Charter has actually hindered opportunities to check prosecutorial misconduct.

⁶⁹ *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

⁷⁰ [2000] 1 S.C.R. 783.

and trigger the doctrine of paramountcy.⁷¹ The division of powers analysis in *Krieger* follows this formula insofar as it seeks to recognize the “co-existence” of both federal and provincial roles in the area of criminal law and the administration of justice as they relate to the regulation of lawyers.

Krieger challenged the Law Society’s jurisdiction to discipline him by alleging that Rule 28(d) of the Law Society of Alberta’s Code of Professional Conduct was an “unconstitutional regulation by the province of criminal law and procedure”⁷² and thus encroached on the federal government’s power in section 91(27). The Supreme Court found, however, that the impugned rule involved both federal and provincial matters. While provincial regulations establishing guidelines for the conduct of a lawyer in a criminal trial might have some impact on criminal procedure, in “pith and substance” such regulations were within the provincial sphere. The provincial heads of authority to legislate regarding matters involving “property and civil rights” (section 92(13)) and “the administration of justice” (section 92(14)) included the power to licence and regulate lawyers, and review their alleged breaches of ethics.⁷³

In determining that the impugned rule was a matter of professional discipline and not criminal law or procedure, the Court noted that the rule was situated in the Alberta Code of Professional Conduct, the purpose of which was to govern the ethical conduct of lawyers; that Benchers were authorized to establish an ethics code for members by the *Legal Profession Act*; that the commentary of the rule specifically noted that its application was limited to circumstances where a prosecutor acted dishonestly or in bad faith and that it was not intended to interfere with prosecutorial discretion;⁷⁴ and the examples in the commentary demonstrate that the rule is not intended to interfere with the disclosure obligations set out in the Supreme Court’s ruling in *R. v. Stinchcombe*.⁷⁵

The Court also found that the Law Society had the general power to regulate all lawyers in the province — including Crown Attorneys. Justices Iacobucci and Major disagreed with the Alberta Court of Appeal’s conclusion that the Law Society could not review Krieger’s conduct because the Attorney General

⁷¹ See P. Monahan, *Constitutional Law*, 2nd ed., (Irwin Law: 2002), at 127. *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, and *British Columbia Law Society v. Mangat*, [2001] 3 S.C.R. 113.

⁷² *Krieger*, *supra*, note 55, at para. 34.

⁷³ Interestingly, although the court acknowledged the “legislative competence of the province to regulate the Law Society has been grounded in both ss. 92(13) [“property and civil rights”] and 92(14) [“administration of justice”]” it found “the weight of authority” was in the property and civil rights jurisdiction, rather than that of the administration of justice, at para. 33.

⁷⁴ Whether the Court would make the same finding for a similar rule that did not specifically limit its application (*i.e.*, the rule of the Law Society of Upper Canada) remains an issue for a future case.

⁷⁵ [1991] 3 S.C.R. 326.

had already investigated the matter and found that Krieger did not act in bad faith. It was their view that a review by the Attorney General and a review by the Law Society were two very different inquiries. In effect, the Court found that a Crown Attorney had two masters — he or she was required to meet the departmental standards set by his or her employer, the Attorney General, and he or she was also required to be a member of the Law Society, and thus was required to follow its ethical guidelines:

The Attorney General is responsible for determining the policies of Crown prosecutors. The Law Society is responsible for enforcing the ethical standards required of lawyers. Certain aspects of a Crown prosecutor's conduct may trigger a review by the Attorney General and other aspects, usually ethical conduct considerations, may mean a review by the Law Society. A prosecutor whose conduct so contravenes professional ethical standards that the public would be best served by preventing him or her from practicing law in any capacity in the province should not be immune from disbarment. Only the Law Society can protect the public in this way.⁷⁶

Consequently, the Supreme Court permitted the Law Society to review Krieger's conduct to determine whether he had acted beyond the scope of his prosecutorial duties by exercising his discretion dishonestly or in bad faith.⁷⁷ If dishonesty or bad faith in the exercise of prosecutorial discretion is uncovered, the Law Society may proceed with disciplinary proceedings. However, if there is no evidence that the Crown Attorney's prosecutorial discretion was exercised improperly, the Law Society may not proceed any further with its review.

When considering the content and parameters of prosecutorial discretion, Iacobucci and Major JJ. were quick to point out that the term does not encompass every decision made by a Crown prosecutor. It refers specifically to "those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence,"⁷⁸ including the "discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences."⁷⁹

Prosecutorial discretion, the Court concluded, includes decisions that deal with the nature and extent of a prosecution such as: the discretion whether to

⁷⁶ *Krieger*, 2002 SCC 65, at para. 58.

⁷⁷ *Krieger v. The Law Society of Alberta* (2000), 27 A.R. 31, at paras. 41-43. Rule 28(d) of the Law Society of Alberta's Code of Professional Conduct cited the following as examples of bad faith or dishonesty: "an exercise of discretion intended to obstruct, pervert or defeat the course of justice; an exercise of discretion undertaken for the personal advantage of the prosecutor; [or] an exercise of discretion intended to deprive an individual of equality before the law by reason of discrimination ..."

⁷⁸ *Krieger*, *supra*, note 76, at para. 43.

⁷⁹ *Id.*, at para. 44.

bring the prosecution of a charge laid by the police; the discretion to enter a stay of proceedings in either a private or public prosecution; the discretion to accept a guilty plea to a lesser charge; the discretion to withdraw from criminal proceedings altogether; and the discretion to take control of a private prosecution. Decisions that involve the actual conduct of the case before the court, such as pre-trial disclosure or the methods employed in cross-examination, do not fall within “prosecutorial discretion,” and are governed by the inherent jurisdiction of the court to control its own processes (*i.e.*, abuse of process).⁸⁰

The Court also observed that while such decisions are not entirely immune from review, they are entitled to deference:

In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.⁸¹

It was recognized that discretionary decisions are essential to the efficiency of the criminal justice system but because courts will afford them a great deal of deference, they must be exercised with “objectivity and dispassion.”⁸² Courts are entitled to review decisions of the Attorney General or his or her agents in cases of “flagrant impropriety” or where malice in the course of a prosecution is shown, because in these situations, a prosecutor is acting “beyond the scope of his office as protected by the constitutional principle and the justification for such deference will have evaporated.”⁸³

Similar principles applied to review by provincial law societies, only insofar as it is shown that a prosecutor has exercised his or her prosecutorial discretion in bad faith, or for improper purpose, because actions carried out in such a way mean the Attorney General or Crown Attorney are acting beyond his or her scope of authority.

The Court illustrated its analysis through the example of the legal obligation of a Crown prosecutor to disclose all relevant information to the defence in a criminal trial. While the Crown retains the discretion not to disclose irrelevant information, there is no discretion regarding the disclosure of relevant information save for privilege and timing issues. If there was an alleged breach of the duty to disclose, a law society must be permitted to review the matter to determine *prima facie* whether it was done in bad faith or for improper purpose and thus outside of

⁸⁰ *Id.*, at para. 46.

⁸¹ *Id.*, at para. 45.

⁸² *Id.*, at para. 48.

⁸³ *Id.*, at para. 48.

the powers of the prosecutor. It is only in those instances that a Law Society, like a court, would be allowed to interfere.⁸⁴

III. THE INDEPENDENCE “SPECTRUM”

When compared with other types of independence with constitutional or quasi-constitutional dimensions, the independence of the Attorney General appears to fall between judicial independence and tribunal independence.

It is clear that the Attorney General and his or her agents do not enjoy the hallmarks of independence enjoyed by the judiciary such as security of tenure, financial security or institutional independence from government.⁸⁵ As discussed above, the Attorney General is accountable to Parliament, or the appropriate legislature for the decisions he or she makes.⁸⁶ And even though the Attorney General is intended to be independent from other members of the executive and the Cabinet, such independence may be difficult to exercise in practice. As the Law Reform Commission of Canada reminds us, the Attorney General is appointed by the Prime Minister or a Premier, and could be stripped of his or her Cabinet post for acting against the advice of Cabinet.⁸⁷

Although agents of the Attorney General, the security of tenure and financial security of Crown Attorneys is more similar to any other government employee than the judiciary, as a prosecutor can be dismissed if he or she fails to live up to his or her employment obligations.⁸⁸ However, due to the high level of defer-

⁸⁴ *Id.*, at para. 54.

⁸⁵ The principles of judicial independence were enunciated in *R. v. Valente*, [1985] 2 S.C.R. 673, at para. 20.

⁸⁶ In practical terms, the Attorney General's accountability to the legislature generally arises only after he or she has already exercised his or her prosecutorial discretion — *e.g.*, in the form of questions in the House regarding a high-profile case. Therefore, the legislative branch of government cannot be said to have the power to interfere with the decisions made by a prosecutor on a day-to-day basis.

⁸⁷ In his article “The Role of the Attorney General and the Charter of Rights,” *supra*, note 8, Ian Scott recognized that independence from other members of Cabinet in determining prosecution policy was an important consideration for an Attorney General. For instance, Scott noted that it has been suggested that an Attorney General would also be required to take legal action against a fellow minister if he or she were convinced that a course of action was unconstitutional and was otherwise unable to prevent it. This was also recognized by the LRC, *supra*, note 11, at 10-11. This may be one factor the Court considered in *Krieger* when it noted that “membership in the Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.”

⁸⁸ In Ontario, government lawyers are not covered by labour relations statutes. Some protection in this regard is afforded by the requirement that the government employer follow the hiring practices and grievance processes set out in agreements with government lawyers. Salaries are also a matter of negotiation between the representatives of government lawyers and their employers, and

ence courts afford prosecutorial discretion in both abuse of process and malicious prosecution cases, Crown Attorneys would appear to enjoy more protection from interference by the judicial branch of government. As a result, Crown Attorneys may make decisions in individual cases free from unwarranted scrutiny from outside sources, or fear of the same (“the Chill Factor” as the trial judge in *Krieger* referred to it).⁸⁹

In contrast, although administrative tribunals are subject to statutory and common law principles of fairness and natural justice, they are not entitled as a constitutional principle to the hallmarks of independence. In the recent decision of *Ocean Port Hotel Ltd. v. British Columbia (General Manager Liquor Control Licensing Branch)*,⁹⁰ the Supreme Court noted that tribunals are bodies created by the legislative branch of government, and as such, unless administrative proceedings engage constitutional rights, it is the role of the legislature to determine relationship between the tribunal and the executive, and the degree of independence required of a particular tribunal.⁹¹

The Supreme Court jurisprudence concerning judicial independence and the independence of the Attorney General demonstrate that both concepts have similar constitutional origins in that both receive some “textual recognition”⁹² in the provisions of the Constitution, but their main foundations lie outside the express sections of the Constitution in the principle of the rule of law,⁹³ and the notion that Canada is to have a Constitution “similar in Principle to that of the United Kingdom.”⁹⁴ Conversely, administrative tribunals lack any constitutional distinction from the executive and are in fact, instruments for the implementation of government policy.⁹⁵

IV. THE IMPLICATIONS OF *KRIEGER*

In *Krieger* the Supreme Court has clearly enshrined the independence of the Attorney General in prosecutorial discretion in the Canadian Constitution.

in some instances disputes over salaries can go to binding arbitration. This process, of course, is far different from the process used to determine judicial salaries.

⁸⁹ *Krieger v. The Law Society of Alberta*, [1997] A.J. No. 689, at para. 10.

⁹⁰ [2001] 2 S.C.R. 781.

⁹¹ *Ocean Port*, *supra*, note 90, at para. 20.

⁹² *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at para. 29. As noted above, there is some acknowledgment of the office of the Attorney General in ss. 34, 63, 134, and 135 of the *Constitution Act, 1867*. Similarly, judicial independence finds some recognition in the judicature provisions of the *Constitution Act, 1867* (ss. 96 to 101) and in the Charter (s. 11(d)).

⁹³ Preamble to the *Canadian Charter of Rights and Freedoms*.

⁹⁴ Preamble to the *Constitution Act, 1867*.

⁹⁵ *Ocean Port*, *supra*, note 90, at para. 24.

Thus, only a very limited range of cases can be properly brought before a provincial law society, namely where the prosecutor has acted dishonestly or in bad faith. “Bad faith” in this context goes well beyond negligence and requires conscious and deliberate wrongdoing.⁹⁶ Given the recentness of the decision, it is too early to tell if provincial law societies will experience an increase in the number of complaints and discipline proceedings involving Crown Attorneys. It is hoped that such proceedings will not be used as a vehicle to chill the independent exercise of prosecutorial discretion and further, that law societies act in a manner that dissuades improper claims. It is also open to law societies to work with Attorneys General and other interested parties to create a protocol which would ensure that only appropriate cases are brought before professional discipline committees.

Krieger effectively upholds the *Nelles* and *Power* standards of “improper purpose” or “flagrant impropriety” and applies them to professional discipline proceedings. Since *Nelles* was released in 1989, there have only been two cases in Canada (*Proulx and Dix v. Canada (Attorney General)*)⁹⁷ in which the plaintiffs in malicious prosecution actions have been successful.⁹⁸ Although it appears that the number of malicious prosecution cases instituted is on the rise, in Ontario such actions very rarely go to trial. Typically, they are withdrawn, abandoned or dismissed on a summary judgment motion. Given the seriousness of the allegations raised in malicious prosecution actions, both for the individual and the general office of the Crown Attorney, the Ontario Ministry of the Attorney General takes these cases seriously. The approach taken is intended to dissuade frivolous litigants and ensure that Crown counsel can pursue prosecutions without fear of retribution by accused persons or their counsel.

As with malicious prosecution actions, it is hoped that the nature of Law Society authority will allow Crown Attorneys to carry on with their duties without fear of illegitimate claims, while still protecting the interests of individuals who come into contact with the criminal justice system. As noted by the trial judge in *Krieger*:

[w]hen the steps that are required to deal a complaint to the Law Society are considered it must be said that the hurdles to be jumped and the hoops to be dived

⁹⁶ This proposition relies on a traditional interpretation of “bad faith,” such as the one in Black’s Law Dictionary, 6th ed., “not simply bad judgment or negligence but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.” To give true effect to the meaning and spirit of *Krieger*, it may be prudent for law societies to include a definition of “bad faith” in their codes of professional ethics.

⁹⁷ 2002 ABQB 580.

⁹⁸ A lack of success that Kent Roach, a strong critic of the scope of prosecutorial discretion, calls “the failed promise of malicious prosecution suits.” Roach, *supra*, note 68, at 12.

through are at least as onerous as those a plaintiff in a malicious prosecution faces.⁹⁹

At the end of the day, Krieger's most important legacy will be its recognition of the independence of the Attorney General in prosecutorial decision-making as a principle of Canadian constitutional law. It will also be viewed as a continuation of the Supreme Court's deference to decisions made by prosecutors. The Supreme Court's persistent application of a deferential standard as evidenced in the malicious prosecution cases continues to be applied in disciplinary cases. For Crown Attorneys, this means they will be able to carry out their responsibilities effectively without interference from those less qualified to make prosecutorial decisions.

⁹⁹ *Krieger*, 2002 SCC 65, at 51.

<i>Bank of Montreal v. Hall</i>	189
<i>Beauregard v. Canada</i>	195
<i>British Columbia Law Society v. Mangat</i>	189
<i>Campbell v. Ontario (Attorney General)</i>	180
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<i>Dix v. Canada (Attorney General)</i>	196
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i>	181
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