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THE POWERS OF ATTORNEYS-GENERAL

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Attorneys-General have two separate, but possibly conflicting, Hydra-like roles. They serve the government as the chief legal advisor and, in Canada, serve as a member of the Cabinet while also serving as the Sovereign's representative before the courts both in protecting the public interest and prosecuting offenders both civilly and criminally.

This dual role creates an inherent conflict of interest for how does an Attorney-General prosecute another governmental department or official in his/her capacity as guardian of the public interest? In the British context at least, such action has never been taken. One commentator has suggested that the Attorney-General would have to advise the department in question to take corrective action but if such advise was ignored, the Attorney-General would have to resign and explain the reasons for her/his resignation.¹

In addition to the powers and jurisdiction granted to the federal Attorney-General (AGC) under the *Department of Justice Act*, the AGC has general powers as enjoyed by the Attorney-General of England arising both by law and by usage:

The Attorney General of Canada

(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the Constitution Act, 1867, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada...²

These imported powers have been conveniently summarised:

The prerogatives of England's Attorney General include the power to initiate and stay criminal prosecutions, prefer direct indictments, advise on the grant of pardons, and confer immunity to witnesses who agree to appear on behalf of the Crown. The Attorney General controls the institution of relator proceedings [that is permitting someone else to use the name of the Attorney General in an action] and has the right to appear in litigation to protect or enforce public rights. He or she also has authority to institute proceedings for contempt of court in criminal and civil matters and to apply for judicial review, in addition to

¹ S.A. de Smith, *Judicial Review of Administrative Action*, 5th ed. by Lord Woolf, J. Jowell & A.P. Le Sueur (London: Sweet & Maxwell, 1995) at 149.

² R.S.C. 1985, c. J-2.

the duties of representing the Crown in legal proceedings and providing legal advice to the Parliament, Cabinet and the Executive Council.³

The Attorney-General has the power to initiate proceedings when a public right is infringed or threatened. This public interest is very broad and captures any matter that interferes with the public and where there has been the unsatisfactory performance of duties by public bodies for the benefit of the public. Attorneys-General also enjoy the historical right to bring proceedings relating to charities.⁴ Attorneys-General for provinces may also intervene to protect public rights arising from federal jurisdictional matters.⁵

The Attorney-General's discretion is not only broad but it is also discretionary and subject to little or no review, at least as it relates to decisions to institute proceedings to protect a public right. Lord Halsbury of the Privy Council wrote:

...but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.⁶

Thus, there is little option if the Attorney-General declines to prosecute a matter unless a private citizen seeks public interest standing. Writs of *mandamus*, a discretionary writ issued by a court directing a public official to fulfill a public legal duty, are inapplicable to Attorneys-General: "I have this view because of the abundant jurisprudence to the effect that the Attorney General, when performing his accusatorial functions is exercising his executive authority and while so acting, he is not subject to review by the Courts barring flagrant impropriety."⁷ To compel a Attorney-General to prosecute a case would unnecessarily interfere in the division of powers between the executive and the judiciary, who's job is to listen to cases brought before it and not to, in effect, bring cases before it.

Of most concern is the Attorney-General's prerogative power of *nolle prosequi* which permits the Attorney-General to stay a proceeding. The criminal power is preserved by the *Criminal Code*⁸ but the status of the civil right is at best unclear.⁹ The civil right has

³ Debra M. McAllister, "The Attorney General's Role as Guardian of the Public Interest in Charter Litigation," 21 Windsor Y.B. Access to Just. 47

⁴ de Smith, *supra*, note 1 at 147.

⁵ *Ontario (Attorney General) v. Niagara Falls International Bridge Co.*, 1873 CarswellOnt 17.

⁶ *London County Council v. Attorney-General*, [1902] A.C. 165 (H.L.) at 169. There is a long line of cases in Canada that support this rule. See, for instance, Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2003) at 4-38 for such a list.

⁷ *Jefford v. Canada (Ministry of Consumer & Corporate Affairs)*, 1988 CarswellNat 183 (F.C.A.) at para. 9.

been abolished in the U.K.¹⁰ but I was unable to find anything that suggests the right have been abolished in Canada. It is mentioned in passing by the Ontario Court of Appeal, which cited *Evans, supra* but there it was applied in a different context.¹¹

⁸ R.S.C. 1985, c. C-46, s.579(1): "The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated."

⁹ The only civil case I was able to find was *R. v. Evans* (1819), 6 Price 480 at 481.

¹⁰ Lord Hailsham of St. Marylebone, ed. *Halsbury's Laws of England*, 4th ed., vol. 8(2) (London: Butterworths, 1996) at para. 533.

¹¹ *R. v. Yuhasz*, 1960 CarswellOnt 139 (C.A.) at para. 4.