

Appendix B (from the Attorney General of Ontario)

I. Constitutional role of the Attorney General in the administration of justice

21. *Judges Act* s. 63(1) gives the Attorney General of a province the power to request a judicial inquiry into the conduct of a judge. This power is one of many statutory recognitions of the historic, constitutional role of the Attorney General as a guardian of the public interest and the supervisor of the administration of justice. The context in which *Judges Act* s. 63(1) operates cannot be understood adequately without an appreciation of the role of the Attorney General in the Canadian legal system.

22. The office of the Attorney General has deep roots in the history of the common law. The office has its beginnings in thirteenth-century England where its medieval precursors, the King's Attorney and the King's Sergeant, exercised powers derived from the royal prerogative and were charged with the responsibility of maintaining the Sovereign's interests before the royal courts. Over the centuries the office of the English Attorney General has evolved in various ways, but the Attorney General has always been the chief law officer of the Crown, the titular head of the legal profession, and the official guardian of the public interest. In Canada, the office of the provincial Attorney General is one with constitutional dimensions recognized in *Constitution Act, 1867* ss. 63, 134 and 135.

Constitution Act, 1867 ss. 63, 135 and 135

Krieger v. Law Society of Alberta [2002] 3 S.C.R. 372 at para. 26

Gouriet v. Union of Post Office Workers, [1978] A.C. 435 (H.L.)

J.L.J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 3

P.C. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986) at 14-16

23. The many constitutional responsibilities of the office of the Attorney General are now commonly and consistently expressed, throughout the country, in various statutes. In Ontario, the principal statutory recognition of the responsibilities of the Attorney General is set out in *Ministry of the Attorney General Act* R.S.O. 1990, c. M.17, s. 5, which codifies the historical common law position of the Attorney General.

Ministry of the Attorney General Act R.S.O. 1990, c. M.17, s. 5:

5. The Attorney General,

(a) is the Law Officer of the Executive Council;

(b) shall see that the administration of public affairs is in accordance with the law;

(c) shall superintend all matters connected with the administration of justice in Ontario;

(d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the Constitution Act, 1867 came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper

Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;

(e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government;

(f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature;

(g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies;

(h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;

(i) shall superintend all matters connected with judicial offices;

(j) shall perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant Governor in Council.

Compare:

Attorney General Act, R.S.B.C. 1996, c. 22, s. 2

Government Organization Act, S.A. 1994, c. G-8.5, sched. 9, s. 2

Department of Justice Act, S.S. 1983, c. D-18.2, ss. 9-10

Department of Justice Act, C.C.S.M., c. J-35, ss. 2-2.1

An Act Respecting The Ministère De La Justice, R.S.Q., c. M-19, ss. 3-5

Public Service Act, R.S.N.S. 1989, c. 376, s. 29

24. In the exercise of his or her constitutional duties, the Attorney General is responsible to the Legislature. The Supreme Court of Canada, provincial appellate courts and academic commentators have all noted that, in the independent exercise of his or her quasi-judicial discretion, the Attorney General is not subject to judicial review but is publicly accountable to the Legislature.

R. v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.) at 12-16

Re Hoem et al. v. Law Society of British Columbia (1985), 20 C.C.C. (3d) 239 (B.C.C.A.) at 255-256

D. Vanek, "Prosecutorial Discretion" (1987-88), 30 Crim. L.Q. 219

D.C. Morgan, "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 Crim. L.Q. 15 at 18-19:

Along with the exalted status of his office come high expectations as to the Attorney-General's performance of his functions. A large measure of constitutional trust is reposed within him, and he bears a heavy obligation to conduct himself with dignity and fairness. In many situations, he is described as acting either judicially or quasi-judicially. When exercising his "grave" discretion in prosecutorial matters, he must take into account not only the position of the individual, but what the public interest demands. In doing so, he must stand alone, acting independently of political or other external influences. He is to be neither instructed or restrained, save by his final accountability to Parliament.

25. While the quasi-judicial role of the Attorney General in initiating or terminating criminal proceedings has been subject to much comment, it is not the Attorney General's only exercise of his or her constitutional function. The Attorney General also acts as a guardian of the public interest in the civil courts. For example, the Attorney General is responsible for enforcing and vindicating public rights, including claims for public nuisance, by bringing civil injunction proceedings. Similarly, the Attorney General may, as protector of the public interest, obtain an injunction where the law as contained in a

public statute is being flouted.

British Columbia v. Canadian Forest Products Ltd. [2004] S.C.J. No. 33 at para. 67
Ontario (Attorney General) v. Grabarchuk (1976), 11 O.R. (2d) 607 (Div. Ct.),
followed in *R. v. Consolidated Fastfrate Transport Inc.* (1995), 125 D.L.R. (4th) 1
(Ont. C.A.)

Ontario (Attorney General) v. Ontario Teachers' Federation (1997), 36 O.R. (3d) 367
(Gen. Div.)

26. The Attorney General occupies a unique position in Canadian law. While both an elected member of the Legislature and a member of the Executive, he or she is also the Chief Law Officer of the Crown, with an independent responsibility to sustain and defend the Constitution and the rule of law. This unique position imposes a duty on the Attorney General to consider, objectively and independently of partisan considerations, what actions must be taken to uphold the rule of law.

The Hon. Ian G. Scott, "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s" (1989) 39 U.T.L.J. 109 at 122:

It is understood in our province that the attorney general is first and foremost the chief law officer of the Crown, and that the powers and duties of that office take precedence over any others that may derive from his additional role as minister of justice and member of Cabinet.

The Hon. J.C. McRuer, *Royal Commission Inquiry Into Civil Rights, Report No. 1, vol. 2, c. 62* (Toronto: Queen's Printer, 1968) at 945:

The duty of the Attorney General to supervise legislation imposes on him a responsibility to the public that transcends his responsibility to his colleagues in Cabinet. It requires him to exercise constant vigilance to sustain and defend the Rule of Law against departmental attempts to grasp unhampered arbitrary powers, which may be done in many ways.

The Hon. R. Roy McMurtry, "The Office of the Attorney General", in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at 7:

Attorneys General are above all servants of the law, responsible for protecting and enhancing the fair and impartial administration of justice, for safeguarding civil rights, and maintaining the rule of law.

The Hon. Ian G. Scott, "The Role of the Attorney General and the Charter of Rights" (1986-87) 29 Crim. L.Q. 187 at 193:

In advising on questions of constitutionality, the Attorney General must give paramount consideration to the obligation to ensure that government action complies with the law, in this case the supreme law of Canada. The giving of constitutional advice must be carried out with the same independence and detached objectivity with which the Attorney General approaches questions of prosecution policy.

27. It is from this independent responsibility to uphold the rule of law that the Attorney General's role as supervisor of the administration of justice arises. The Attorney General of Ontario is charged with ensuring that the administration of public affairs is in accordance with the law, and with supervising all matters connected with the administration of justice in the province and all matters connected with judicial offices. To further this duty, the Attorney General may assert a purely public interest in maintaining the respect of public officials and bodies for the statutory and constitutional limits of their authority. He or she is also responsible for all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary.

Additionally, the Attorney General serves as the guardian of the public interest in all matters having to do with the legal profession.

Ministry of the Attorney General Act R.S.O. 1990, c. M.17, s. 5(b), (c), (i)

Courts of Justice Act R.S.O. 1990, c. C.43, s. 71

Judicial Review Procedure Act R.S.O. 1990, c. J.1, s. 9(4)

Courts of Justice Act R.S.O. 1990, c. C.43, s. 109

Sutcliffe v. Ontario (Minister of the Environment) (2004), 69 O.R. (3d) 257 (C.A.) at para. 24

Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 at para. 32

Law Society Act R.S.O. 1990, c. L.8, s. 13(1)

28. The Attorney General's function pursuant to *Judges Act* s. 63(1) is entirely consistent with the constitutional responsibility of the Attorney General for supervising the administration of justice. While an Attorney General himself or herself has no power to sanction, suspend or remove a judge, an Attorney General does have the ability to initiate a process of judicial investigation in cases where the Attorney General is concerned that the public interest requires such an inquiry. In coming to the conclusion that such an inquiry is necessary, an Attorney General is exercising his or her quasijudicial discretion as guardian of the public interest. Such discretion is necessary to fulfil the Attorney General's general responsibility for the efficient and proper functioning of the court system. The Attorney General bears responsibility for the administration of justice as a whole, and not for the outcome of a particular case. In this respect, it should be noted that the Attorney General who requested the present inquiry is not the same individual who held that office during the trial of *R. v. Julia Yvonne Elliott*. ***Proulx v. Quebec (Attorney General)* [2001] 3 S.C.R. 9 at para. 81 per L'Heureux-Dubé J. (dissenting but not on this point):**

The Attorney General and the Attorney General's prosecutors are the guardians of the public interest, and assume a general responsibility for the efficient and proper functioning of the criminal justice system. Their role is not limited to that of private counsel who is responsible for an individual case.

***Mackin v. New Brunswick (Judicial Council)* (1987), 44 D.L.R. (4th) 730 at 743 (N.B.C.A.) per Ryan J.A. (dissenting but not on this point):**

The Attorney General is the guardian of the public interest. He, above all ministers, is charged with responsibility for the administration of justice. It is his duty to concern himself with matters of a public nature because the people of this province have a continuing interest in seeing that laws are obeyed; and that all officers of the law, within the different levels of the justice system, do not abrogate their responsibilities or defy the tenets of their appointment or position. In matters related purely to the administration of justice, the Attorney General, because of the strength of his office, is an appropriate person to bring his concerns about the conduct of any provincial court judge, before the Judicial Council. It then becomes the duty of the Judicial Council, following the procedures set forth in the Provincial Court Act, to deal with the validity of the concerns expressed by the Attorney General if they are received under s. 6.2(1) as a complaint. If the Attorney General is in error, he is answerable to the legislature for his conduct. Until and unless any such error is referred to the legislature, it is the duty of the Attorney General to inform himself of the facts and to make the ultimate decision, on his own initiative, whether to complain or advise the Judicial Council of what he perceives to be legitimate matters of concern within the administration of justice in the Province. This he has done, using the vehicle established by government, the Judicial Council, as the action

unit to investigate and address these concerns.

29. The Attorney General of a province is not in the same position as a private litigant, who does not bear general responsibility for the administration of justice and whose interests may be restricted to the outcome of a particular case. While it is both necessary and desirable that complaints against judges made by private citizens should be subject to internal screening by the CJC, because the vast majority of them are unmeritorious, the same is not true of the concerns raised by Attorneys General. A decision by an Attorney General to request an inquiry under *Judges Act* s. 63(1) is an exercise of his or her constitutional responsibility as guardian of the public interest and, absent any indication of impropriety or bad faith, should not be readily frustrated.

30. While the provincial Attorneys General are the most frequent litigants in the courts of the provinces, they represent a vanishingly small proportion of complainants to the CJC. Between 1990 and 2003, more than two thousand complaints against superior court judges were filed with the CJC by private litigants, counsel or other judges. By contrast, provincial Attorneys General made only four requests for an inquiry pursuant to *Judges Act* s. 63(1) in the same period. This record contradicts any suggestion that provincial Attorneys General have used, or are reasonably perceived to use, inquiries under the *Judges Act* for political purposes, or as a way to “avenge” themselves against judges who have made rulings adverse to their interests. On the contrary, the record suggests that provincial Attorneys General are extremely reluctant to request inquiries under *Judges Act* s. 63(1), doing so only where there is a most serious issue of public confidence at stake.

Canadian Judicial Council Annual Report, 2003-2004

Canadian Judicial Council Annual Report, 1993-1994

Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990

Report of the Bienvenue Inquiry Committee to the Canadian Judicial Council, June 1996

Report of the Flynn Inquiry Committee to the Canadian Judicial Council, December 2002

Report of the Boilard Inquiry Committee to the Canadian Judicial Council, August 2003

31. The record of requests by Attorneys General pursuant to *Judges Act* s. 63(1) demonstrates that the administration of justice requires the intervention of an Attorney General, in those rare and exceptional cases where a judge’s conduct brings into serious question the public confidence in the judiciary.