

Appendix “A” (from the factum of the Attorney General of Canada)

The Attorney General exercises the discretion in the public interest

40. Section 63(1) and the discretion it confers upon Attorneys General cannot be viewed divorced from the broader constitutional structure of the Westminster system of government. The Attorneys General have an important role to play within our constitutional framework which includes the responsibility to maintain public confidence in the integrity of the judiciary.

41. The Attorney General has historically, and by statute, been recognized as the guardian and protector of the public interest. The Minister of Justice and the Attorney General of Canada is by virtue of s. 4 and 5(a) of the *Department of Justice Act*, charged with over-arching duties and responsibilities.

“4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall

...

(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;

5. 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...”

Department of Justice Act, R.S.C. 1985, c.J-2, as am., ss.4, 5, **AGC Authorities, Tab x**

See also: Ministry of the Attorney General Act, R.S.O. 1990, c.M.17, as am, s.5, **AGC Authorities, Tab x**

42. The antecedence and uniqueness of the Attorney Generals’ duties and special role in Cabinet was recognized by Chief Justice McRuer:

[...] [T]he Attorney General must of necessity occupy a different position politically from all other Ministers of the Crown. As the Queen’s Attorney,

he occupies an office of judicial attributes and in that office is responsible to the Government. He must decide when to prosecute, and when to discontinue a prosecution. In making such decisions, he is not under the jurisdiction of the Cabinet, nor should such decisions be influenced by political considerations. They are decisions made as the Queen's Attorney and not as a member of the Government of the day.

*Report of the Royal Commission of Inquiry in Civil Rights 1968, (the "McRuer Report"). AGC Authorities, **Tab x***

43. As Chief Law Officer of the Crown, the Attorney General's responsibilities include law making and both civil and criminal enforcement. Attorneys General are also charged with defending the judiciary, often responding to political or media criticism of unpopular decisions, and have the power to bring actions for contempt where appropriate.

*Huscroft, Grant, The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator? (1995) 5 N.J.C.L. 126 at 130, AGC Authorities, **Tab x***

Edwards, John, *The Attorney General, Politics and the Public Interest*, (London: Sweet and Maxwell, 1984) at 360, **IC Authorities, Tab 23**

J.L.J. Edwards, *The Attorney General and the Charter of Rights*, in Sharpe, Robert J. *Charter Litigation*, (Toronto: Butterworths, 1987), pp. 45-51

In addition to his prosecutorial functions, the Attorney General may take over or stay private prosecutions where it is in the public interest to do so. While normally defending the constitutionality of legislation, he may also concede a violation. In light of these roles, by convention, the Attorney General is independent of both Cabinet and the legislature when he exercises his powers in the public interest.

[R. v. Campbell, \[1999\] 1 S.C.R. 565 at paragraph 51](#), **AGC Authorities, Tab x**

*Huscroft, Grant, supra, at XX, AGC Authorities, **Tab x***

Edwards, John, The Law Officers of the Crown, (London: Sweet and Maxwell, 1964) at 215, IC Authorities, Tab 22

44. In exercising the referral power, the Attorney General does not act as a member of Cabinet, but is instead acting in his role as guardian of the public interest. It is in recognition of the responsibility of the Attorney General to sustain an independent judiciary. The request for an inquiry does not interfere with the judicial function as it merely triggers an inquiry process that might otherwise be engaged by private citizens' complaints.

Gouriet v. Union of Post Office Workers, [1997] 3 All ER 70 (H.L.)

45. The decision by an Attorney General to request an inquiry is not entered into lightly. The Attorney General is accountable to Parliament or the Legislature. The suggestion that the exercise of discretion under s.63(1) could be used for political or improper purpose is inimical to the office of Attorney General. As Ian Scott reflected, “the Attorney General’s assessment of a public interest must absolutely exclude any consideration of the political implications of a particular decision”.

Scott, Ian, “The Role of the Attorney General and the Charter”, (1986-1987) 29 Crim. L.Q. 187 at 190. AGC Authorities, Tab x

Speech by the Hon. R. Basford, Minister of Justice, Hansard, House of Commons Debates, 17 August, 1988, at 18437-38

46. The nature and scope of the inquiry to be held is not mandated by statute. In the *Boilard* case, the Council adopted the submissions of Independent Counsel that the Inquiry Committee ought to have refused to consider whether the judge should be removed for any of the reasons set out in section 65 of the *Act*. The complaint related solely to the exercise of Justice Boilard’s judicial function and the complaint by the Attorney General contained no allegation of bad faith or abuse of office. The Council explained their preferred approach to such cases in the following terms

Where the Minister of Justice or an Attorney General of a province questions a judicial decision and requests an inquiry under s.63(1) of the Act, but makes no allegation of bad faith or abuse of office and where, on its face the judicial decision itself discloses no indication of bad faith or abuse of office, then, the Council would be justified in considering, or an Inquiry Committee appointed under s.63 should consider, as a preliminary matter, whether there is anything to rebut the presumptions of good faith and due consideration of the issues. Although the circumstances may vary from case to case, if there is nothing of that nature, the Council or an Inquiry Committee should, as a general rule, decline to deal with the matter further on the basis that the nature of the request for the inquiry and the essential evidence is so lacking in proof of misconduct that there is no reason to continue the inquiry.

Report of the Canadian Judicial Council to the Minister of Justice of Canada concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec, December 19, 2003, IC Authorities, Tab 3

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48. When viewed through the broader lens of the Constitution as a whole, the failings in the argument become readily apparent. The Attorney General has an unquestioned right to refer the question of removal to Parliament. It remains unclear why the exercise of a discretion to refer the same question to the CJC is, or even could be unconstitutional.