Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

PROSECUTORIAL STANDARDS AND ETHICS

TAB 1

THE ROLE OF THE CROWN AS A MINISTER OF JUSTICE AND OFFICER OF THE COURT

Taman Inquiry
into the investigation and prosecution of Derek Harvey-Zenk
Honourable Roger Salhany, Q.C., Commissioner

TAB 1A

The Role of the Crown Prosecutor Generally

Manitoba
Department of Justice
Public Prosecutions

Guideline No. 3:CRO:1.1

Policy Directive

Subject: Crown Counsel Conduct at Law - Generally

Date: October 10, 1990

POLICY STATEMENT:

The conduct of Crown Counsel must always be consistent with that expected of a Minister of Justice. The prosecutor has an enormous grant of discretionary power, and the exercise of his/her discretion must be characterized by fairness and impartiality. "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is represented: it should be done firmly and pressed with legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than (sic) which in civil life there can be non charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." R. v. Boucher [1955] S.C.R. 16 @ 23 per Rand, J.

"When engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extend required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the Court if the accused is not represented). Of all relevant facts and known witnesses, whether tending to show guilty or innocence, or that would affect the punishment of the accused." Code of Professional Conduct, Canadian Bar Association p.37:

"...in all of the cases not only in capital cases but usually in all criminal cases there is complete disclosure by the prosecution of its case to the defence. To use a colloquialism, there are no "fast ones" pulled by the Crown. The defence does not have to disclose its case to the Crown. We do not ask it for a complete and full disclosure of the case. If there are statements by witnesses, statements of accused, the defence is supplied with copies, they know exactly what our case is, and there is nothing hidden or kept back or suppressed so that the accused person is taken by surprise at a trial by springing a surprise witness on him. In other words, I again emphasize the fact that every safeguard is provided by the Crown to ensure that an accused person, not only in capital cases but in every case, receives and is assured of a fair and legal trial."

> (per W.B. Common, Q.C., Director of Public Prosecutions for the Province of Ontario in an address to the Joint Committee of the Senate and House of Commons on Capital and Corporal punishment.)

"An accused is entitled, after he has been ordered to stand trial or at his trial,

(a) to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and
(b) to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney General of the Province, a copy
  (i) of the evidence,
  (ii) of his own statement, if any, and
  (iii) of the indictment;

but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused." Section 603, The Criminal Code.

"...the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecutions." See Nelles v. R. in Right of Ontario et al (1989) 71 C.R. (3d) 358, per Lamer, J. (now C.J.) at 396. There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecutions:

(a) The proceedings must have been initiated by the defendants;
(b) The proceedings must have terminated in favour of the Plaintiff;
(c) There must be absence of reasonable and probably cause; and
(d) There must be malice, or a primary purpose other than that of carrying the law into effect.

"...to succeed in an action for malicious prosecution against the Attorney General or a Crown Attorney, the Plaintiff would have to prove the absence of reasonable and probably cause in commencing the prosecution and malice, in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "Minister of Justice". In my view this burden on the Plaintiff amounts to a requirement that the Attorney General or Crown Attorney has perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice..." See Nelles (supra) per Lamer, J. at 391 and 392.

A Crown Attorney has responsibility for the conduct of prosecutions for criminal and penal offences. See Section 5 of the Crown Attorneys Act, C.C.S.M. Cap. 330. However, except for preferring an indictment under section 574 of the Criminal Code, a Crown Attorney has no authority to institute prosecutions. See A.G. Que v. Lechasseur [1981] 2 S.C.R. 253.

Note although Section 5(1)(a) of the Crown Attorneys Act (supra) authorizes Crown Attorneys to initiate prosecution, it would appear that the legislature of Manitoba has no authority to empower anyone to initiate prosecutions other than those prosecutions in respect to Provincial Statute offences.

Crown Attorneys are empowered to direct stays of proceedings or recommending proceedings on an Indictment or an Information in a criminal matter - see Section 579 of the Criminal Code.

The conduct of prosecutions must always take place in open court where the public have a right of access.

Crown Counsel must not discuss case matters unilaterally with a Judge without participation of Defence Counsel or the unrepresented accused.

Crown Counsel should not allow themselves to be drawn into handling matters in Chambers that properly should be handled in open Court.

Crown Counsel should not agree to deal with a matter at a time other than the normal Court time for dealing with such matters in order to avoid the "media".

CROWN ATTORNEYS CODE OF PROFESSIONAL CONDUCT

The Crown Attorney's first obligation is to act as Minister of Justice, and second, as independent adversary within the criminal justice system, and to see that, as far as it is possible for him or her to do so, justice is done, and has appeared to be done.

With Respect to the Public

The Crown Attorney shall:

...foster respect for rights, freedoms, the law and the Constitution of Canada;

...conduct himself or herself in a manner consistent with the public interest;

...attempt to ensure that public money and resources are used in an efficient and economical manner;

With Respect to the Court

The Crown Attorney shall:

...never misrepresent or fail to disclose something that is material to the Court;

...exhibit respect for the Court by:

a) attempting to start on time;
b) having available all relevant information;
c) dressing appropriately for Court;
d) addressing the Bench in a respectful manner;
e) dealing politely and courteously with Court staff;
f) conducting prosecutions in a dignified manner;
g) being as fully prepared for Court as circumstances permit;

...attempt to ensure that Court services are used judiciously, for example: not ordering unnecessary transcripts, notification of court cancellations in advance, et cetera.

With Respect to an Accused Person

The Crown Attorney shall:

...attempt to ensure a fair trial for the accused;

...ensure the accused has an opportunity to have counsel represent them, or is aware of the existence of the Legal Aid scheme in Manitoba if he or she is impecunious;

...proceed with prosecutions as expeditiously as possible;

...respect the confidentiality of information about an accused person received in the course of his or her professional duties;

...not discriminate against an accused person on the basis of race, ethnicity, language, sex, age or religion;

...be conscious of whether an accused person requires an interpreter and facilitate the provision of one if required;

...in dealing with an unrepresented accused, not accept a guilty plea unless confident that the accused understands the implications thereof;

With Respect to Complainants and Witnesses

The Crown Attorney shall:

...prepare witnesses for testifying in Court;

...employ sensitivity in dealing with complainants;

...return telephone calls of complainants and witnesses as promptly as possible;

...endeavor to ensure that witnesses are not kept waiting needlessly or without explanation, and cancelled, in a timely fasion, where not required;

...where appropriate, explain the outcome, or potential outcome, of a prosecution to the complainant if requested; for example, cases including children, family violence, homicide, and so on require extra sensitivity;

...respect the confidentiality of information received from complainants (if the information is not material to the charge against the accused);

With Respect to Defence Counsel

The Crown Attorney shall:

...deal in a courteous, ethical, and professional manner with defence counsel, for example, not take advantage of or consciously attempt to intimidate inexperienced defence counsel;

...not allow personal feelings to interfere in dealings with defence counsel;

...honour all agreements with defence counsel, as well as respect agreements entered into by colleagues; the latter being subject to review by the appropriate Senior Crown Attorney in the event of disagreement;

...return the telephone calls of defence counsel as promptly as possible;

With Respect to the Police

The Crown Attorney shall:

...afford due respect to the recommendations and advice of experienced police officers, but recognize that all legal decisions are solely the independent responsibility of the prosecutor;

...give careful, current and impartial legal advice upon request, in a timely way;

...not become actively involved in the investigation;

...not recommend or authorize charges which have no reasonable expectation of conviction, or which are not in the public interest;

...bring to the attention of the appropriate Senior Crown Attorney, any allegation of wrongdoing or improper conduct on the part of any police officer;

With Respect to Conduct of a Case

In conducting a prosecution, the Crown Attorney shall:

...make full and fair disclosure of all relevant evidence as soon as possible or when requested by defence counsel;

...call, or make defence counsel aware of, all material witnesses to the incident in question;

...disclose all statements, documents and exhibits as required to ensure a fair trial;

...resist pressure to lay more charges than are appropriate or charges more serious than those presented by the facts;

...never offer personal opinion, but rather make submissions based on the evidence before the Court;

...be alert to and report defence counsel to the appropriate Senior Crown Attorney who allow their duty to their client to override their duty to the Court and to the administration of justice;

With Respect to Colleagues

The Crown Attorney shall:

...attempt to foster an atmosphere of collegiality in the workplace that is appreciative of one another's strengths and tolerant of perceived differences;

...honour agreements made by a colleague; and where disagreement cannot be resolved, refer the matter to the appropriate Senior Crown Attorney;

...whenever possible, assist another Crown Attorney or relieve them when requested to do so;

...offer assistance when it appears that a colleague requires such assistance or request it;

...ensure that unfavourable criticism of the professional activity of a colleague is made in confidence to the appropriate sources;

...not speak in a negative fashion about the professional abilities of a colleague to a person inside or outside the department;

...contribute to the education and professional development of more inexperienced colleagues;

...not diminish the offer made by a colleague to defence counsel unless there has been a change in circumstances since the making of the first offer, or unless the matter has been discussed with the colleague and/or referred to the appropriate Senior Crown Attorney in the event of disagreement;

...if unable to attend Court, due to sickness or other like reason, provide supervisors with as much notice as possible;

...ensure that the course of a particular matter be clearly outlined on the file, in a manner that is understandable by colleagues who deal with the matter subsequently;

In Dealing with Public Attention

The Crown Attorney shall:

...take reasonable care to distinguish between public statements made and actions performed as a representative of the Crown and those done as a private citizen;

...not seek out media attention or provide unsolicited comments to the media or publicly express personal views of any verdict;

...never disclose confidential departmental information;

...defer to a supervisor if uncertain how to respond properly to media questions;

Duties to Self and the Profession

The Crown Attorney shall:

...declare any actual or apparent conflict of interest and seek written instructions through the appropriate Senior Crown Attorney, from his or her Director;

...make a continuing effort to improve professionally;

...always conduct himself or herself in an honourable manner in Court as well as out of Court;

...accept that his or her personal life is a private matter unless he or she engages in conduct unbecoming to a representative of the Crown;

...observe not only the specific rules of the code, but shall also observe the spirit of the code.

Relevant Passages from Manitoba Justice website, "Prosecutions: Role of the Manitoba Prosecution Service"

http://www.gov.mb.ca/justice/prosecutions/mbprosecutionservice.html#3

...

The Crown attorney's job

Crown attorneys are prosecutors. In Canadian criminal law, the accused is presumed innocent unless proven guilty beyond a reasonable doubt. In order to convict, there must be evidence to prove beyond a reasonable doubt that the accused committed to offence. The Crown attorney is responsible for presenting evidence before the court for a fair and just determination of the case.

Deciding to prosecute

When a matter goes to trial, the crown attorney's role is to present the evidence fairly. Before that can happen, the Crown attorney, based on the evidence, must consider two important factors: whether there is a reasonable likelihood of conviction and, whether the prosecution is in the public interest. If a Crown attorney does not believe the evidence supports a conviction, he or she will not prosecute. The Crown attorney is not the victim's lawyer nor is he or she the lawyer for the police or complainants. Rather, a Crown attorney's duty is to ensure that justice is served by presenting all available legal proof of the facts to the court.

...

Relevant Passages from the *Inquiry Regarding Thomas Sophonow*, Report (2001), "The Role of Crown Counsel in the Administration of Justice"

The Hon. Mr. Justice Peter Cory (Manitoba, 2001),
http://www.gov.mb.ca/justice/publications/sophonow/crown/index.html

...

The role of Crown Counsel is of great importance to the administration of justice and to the welfare of the community. The Crown prosecutor must proceed with the case against the accused fairly and courageously. Prosecutions must proceed even in the face of threats and attempts at intimidation. These insidious threats can on occasion extend to family members. Despite these threats and the danger in which the Crown and at times the family of the Crown are placed, charges must still be vigorously prosecuted. They must be brought to trial and prosecuted with diligence, dispatch and fairness. Crown Counsel are often overworked and paid less than their contemporaries who are in private practice. Nonetheless, they must be industrious to ensure that all the arduous preparation required for each trial or appeal has been completed before the matter comes to court. Crown Counsel must be of absolute integrity and above all suspicion of favouritism or unfair compromise.

Crown Counsel must be a symbol of fairness, prompt to make all reasonable disclosure. As well, they must be scrupulous in the attention given to the welfare and safety of witnesses. They enjoy the respect of all the members of the judiciary. Much is expected of Crown Counsel by society, their community and by the judiciary. The community looks upon the Crown prosecutor as a symbol of fairness, of authority and as a spokesman for the community.

As a rule, Crown Counsel attain and maintain a very high level of professional excellence and fairness. They fulfil all of society's high expectations. It is truly a high office, honoured by the bench, the bar and the community. They should always have, not only the respect of the public and the legal community, but the resources to handle their ever increasing caseloads and the financial compensation that their important office deserves.

THE LAMER COMMISSION OF INQUIRY INTO THE PROCEEDINGS PERTAINING TO:

RONALD DALTON
GREGORY PARSONS
RANDY DRUKEN

REPORT AND ANNEXES

The Right Honourable Antonio Lamer,
P.C., C.C., C.D., L.L.D., D.U.

The Report of the Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons, Randy Druken may be obtained from:

Office of the Queen's Printer
P.O. Box 8700
St. John's, NL
A1B 4J6

Telephone: (709) 576-3649

ISBN: 1-55146-318-0 Report and Annexes
The Lamer Commission of Inquiry into the Proceedings Pertaining to:
Ronald Dalton
Gregory Parsons
Randy Druken

(b) **Role of the Crown:**

(i) General:

Any discussion of the Role of the Crown counsel in Canada almost inevitably begins with this passage from the Supreme Court of Canada decision in *R. v. Boucher*, [1955] S.C.R. 16, at para 26:

> It cannot be over-emphasized that the purpose of criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it also must 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. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness or judicial proceedings.

In her written submissions, counsel for the Public Prosecutions Division of the Department of Justice (DPP's Office) also quoted from the decision of the same Court in *R. v. Cook*, [1997] 1 S.C.R. 1113, at para. 21, which illustrates that the Crown also must participate as an advocate in an adversarial process:

> It is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability.

The dual responsibility of acting as an advocate in an adversarial process and yet never "winning or losing" appears to be inherently contradictory.

In a paper prepared by the Deputy Attorney General of Manitoba, Bruce MacFarlane, he elaborates on the appropriate "boundaries" for Crown counsel:

> Prosecuting counsel are entitled to press fully and firmly every legitimate argument tending to establish guilt, but must be accurate, fair and dispassionate in the conduct of the case. Tempered advocacy, not unbridled partisanship,

> must guide the prosecutor's actions and words. Moreover, a criminal trial is not a personal contest of skill or professional pre-eminence: prosecuting counsel must resist any notion that the object of the prosecution is to secure a conviction or, put simply "win".

Mr. MacFarlane testified before me and stressed the importance of modifying Crown "culture" or "attitudes". I was impressed by a number of the initiatives taken by his department in this respect.

The emphasis on attitudinal change is well placed and the reference to "culture" properly emphasizes a more systemic approach. The reality is that Crown attorneys are human beings and many criminal trials have stressful and emotional features. Human nature often makes it difficult for professionals working in an adversarial system under such conditions to avoid being "competitive".

James Lockyer, one of the founding members of AIDWYC, also testified before me and elaborated on some of his experiences and observations in relation to "Crown culture". AIDWYC also provided a written brief which referred to some of the literature and pointed to two institutional concerns that can encourage Crown attorneys to depart from their responsibility for achieving justice in favour of the goal of "winning".

The first is the emphasis given to successful prosecutions as a standard for measuring professional performance. Although the study cited for these concerns is American, my own practical experience in a variety of roles within the Canadian criminal justice system affirms that proposition. A prosecutor who is not "winning" a significant number of cases will be viewed as lacking in advocacy skills or exercising poor judgment in proceeding with charges. It is also counter-intuitive to suggest that after all of the time and effort devoted to the preparation and presentation of a case, an attorney would normally be indifferent to the outcome.

The second concern relates to "psychological and personal barriers" that it is suggested are shared by many prosecutors:

> ...a commitment to public service and protection; personal morality; a certain "gung ho", "macho" or crime fighter *persona*; and ideological identification with law enforcement.

Reference is made to a number of factors which have been identified as reinforcing these characteristics. The most prominent is probably the

relationship and reliance upon the police and the teamwork that is necessary for a successful prosecution in major cases.

I am not endorsing the accuracy or prevalence of this description of Crown culture. It does, however, suggest the kind of pressure that Crown attorneys may have to be vigilant to resist. As a practical matter, a Crown attorney may be perceived as "letting down the team" in refusing to proceed with a charge laid in a horrific crime after a lengthy investigation when the police are absolutely confident they have the right person. Potential pressure may be felt not only from the police and Crown colleagues but also from the media and the public.

In other words, a Crown attorney may be susceptible to many of the same systemic factors which lead to tunnel vision on the part of the police. These were canvassed in the Introduction to this chapter, *supra*, at pp. 71-2. As the AIDWYC brief stated:

> ...Crown counsel fall prey to similar temptations in order to shore-up a weak case. Too often, as here, they uncritically inherit the police brief. Rather than scrutinize it carefully because of its evidentiary infirmities, they compensate by pushing the limits, thereby risking what, too often, is a wrongful conviction...The weaker the case, the greater the incentive to overreach.

This danger is compounded by the unique role of the Crown in the criminal justice system. The following passage is from an article by one of the Crown Attorneys in the Parsons' case, Wayne Gorman, written when he was the Director of Public Prosecutions:

> ...Crown prosecutors exercise immense power by the use of discretion throughout the entire trial process. It is one of the hallmarks of our quasi-judicial status and the distinguishing factor that separates them from the judiciary and defence counsel. No other participant in the Canadian criminal trial process wields such immense power.

In addition to this power, the stature of a Crown attorney must be considered. Unlike defence counsel, the Crown is able to say in its opening address to a jury, that the Crown neither wins nor loses but is there to present all of the relevant evidence in a fair manner.

The role of a Crown Attorney requires not only professional skills and judgment but also courage. Often the working conditions include difficult

time pressures and limited resources. It may be particularly difficult for less experienced Crown attorneys to exercise contrarian thinking. Experienced Crown attorneys, in leadership roles must foster critical thinking and independence in their younger counterparts. A Crown attorney, like a judge, must not only exercise good judgment but must also be willing to make unpopular decisions.

ESSENTIALS OF
CANADIAN LAW

ETHICS AND CANADIAN CRIMINAL LAW

HON. MICHEL PROULX
Quebec Court of Appeal

DAVID LAYTON
of the Ontario Bar

IRWIN LAW
A Quicklaw Company

ETHICS AND CANADIAN CRIMINAL LAW

Published in 2001 by
Irwin Law
Suite 930, Box 235
One First Canadian Place
Toronto, Ontario
M5X 1X8

ISBN: 1-55221-044-8

National Library of Canada Cataloguing in Publication Data

Proulx, Michel
Ethics and Canadian criminal law

(Essentials of Canadian Law)
Includes bibliographical references and index.
ISBN 1-55221-044-8

1. Criminal procedure–Moral and ethical aspects–Canada.
I. Layton, David II Title. III. Series.

KE339.P76 2001 174'.3 C2001-901531-3

Printed and bound in Canada

1 2 3 4 5 05 04 03 02 01

B. THE PROSECUTOR'S DUAL ROLE: MINISTER OF JUSTICE AND ADVOCATE

The Canadian tradition, consistent with other Anglo-American countries, sees the prosecutor occupying a dual role of minister of justice and advocate. There is an uneasy tension between these two roles, and the minister of justice function is at first view difficult to accommodate within an adversarial framework. However, our constitution has long granted prosecutors a special status, distinct from that of a mere opponent at trial. The office of the attorney general, which has its beginnings in thirteenth century England, exercises powers derived from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given

---

2 F. Ferguson, "Prosecutorial Assessment of the Case" (1998) National Criminal Law Program, Federation of Law Societies of Canada.

3 See Nova Scotia, *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1 (Halifax: The Cmmission, 1989) (Chair: T.A. Hickman).

4 See *Reference Re Milgaard*, [1992] 1 S.C.R. 866.

5 Ontario, *Report of the Commission on Proceedings Involving Guy Paul Morin* (Toronto: Queen's Printer, 1998) (Chair: F. Kaufman).

6 See *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (Ont. C.A.) [*Aluwalia*]; *R. v. Rose* (2001), 153 C.C.C. (3d) 225 (Ont. C.A.) [*Rose (Ont. C.A.)*]; and *R. v. Robinson* (2001), 153 C.C.C. (3d) 398 (Ont. C.A.) [*Robinson*].

7 See K. Crispin, "Prosecutorial Ethics" in S. Parker & C. Sampford, eds., *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford: Clarendon Press, 1995) 189.

time.[8] As chief law officer of the Crown, the provincial attorneys general head a ministry of the government and are members of the executive that assumes primary responsibility for the administration of the criminal law, in accordance with the separation of powers. At the federal level, the minister of justice is *ex officio* Her Majesty's attorney general.[9] At the same time, the attorney general acts as prosecutor in individual cases, through Crown counsel who are appointed as agents to prosecute on his or her behalf. These Crown counsel are accountable to the provincial attorneys general or federal minister of justice (as the case may be), who in turn are responsible finally to the legislature.[10]

1) Role as Minister of Justice

Because the attorney general is ultimately responsible to the public, and plays a special constitutional role, the lawyers who carry out the day-to-day function of prosecuting cases owe an overarching duty to achieve justice by exercising their powers fairly. The common law has hence long recognized the prosecutor's special duty, in the conduct of a criminal trial, "to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular party or person."[11] A leading exposition of this sentiment remains the classic *dictum* of Mr. Justice Rand in *R. v. Boucher*:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently per-

---

8 See *R. v. Power*, [1994] 1 S.C.R. 601 [*Power*], referring to D. Morgan, "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the *Charter*" (1986-87) 29 Crim. L.Q. 15 at 20–21.

9 See *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 2(2).

10 The situation is somewhat different in Nova Scotia, where a quasi-independent Public Prosecution Service was established following recommendations made by the Marshall Inquiry: see Nova Scotia *Public Prosecutions Act*, S.N.S. 1990, c. 21. See the discussion in P. Stenning, "Independence and the Director of Public Prosecutions: The Marshall Inquiry and Beyond" (2000) 23 Dal. L.J. 385.

11 *R. v. Thursfield* (1838), 173 E.R. 490.

> formed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[12]

In short, the prosecutor does not act in the largely partisan sense usually required of defence counsel by the adversarial system, but as a promoter of the public interest in achieving justice.

This notion that prosecutors must temper partisanship has been expressed by stating that counsel appearing for the prosecution should regard themselves as "ministers of justice."[13] By "minister of justice," we are referring to the role of a public officer engaged in the administration of justice (*not* to the federal cabinet minister who is elected to Parliament and heads the Department of Justice). Our Supreme Court has taken up this language, stating that "the tradition of Crown counsel in this country in carrying out their role as 'ministers of justice' and not as adversaries has generally been high."[14] Similarly, it has been said that prosecutors are "quasi-judicial officers."[15] Others, seeking to emphasize the role and responsibility of the prosecutor as a decision maker on a broad policy level, whose actions shape the character, quality, and efficiency of the criminal justice system, have also termed the prosecutor an "administrator."[16] Still another formulation sees the prosecutor playing a role as a "symbol of authority and spokesperson for the community in criminal matters."[17] Such monikers incorporate several aspects of the prosecutor's role, yet all are accurate insofar as they accord great importance to the linchpin obligation to advance the public interest by seeking a fair and just result in the prosecution of criminal matters.[18]

The public interest in achieving justice demands unwavering fidelity to the truth-seeking function of the criminal justice system. It also necessitates respect for the constitutional rights of the accused, as promoted by our due-process model of justice, allegiance to the con-

---

12 *R.* v. *Boucher* (1954), [1955] S C.R. 16 at 23–24 [*Boucher*]. These sentiments have been repeatedly affirmed in subsequent Supreme Court of Canada cases: see, for example, *Power*, above note 8 at 616; and *R.* v. *Cook*, [1997] 1 S.C.R. 1113 at 1124 [*Cook*].

13 *R.* v. *Puddick* (1865), 176 E.R. 662.

14 See, for example, *Nelles* v. *Ontario*, [1989] 2 S.C.R. 170 at 191; and *Stinchcombe*, above note 1 at 341.

15 See *R.* v. *Logiacco* (1984), 11 C.C.C. (3d) 374 at 379 (Ont. C.A.) [*Logiacco*]; and *R.* v. *Gayle* (2001), 154 C.C.C. (3d) 221 at 250 (Ont. C.A.) [*Gayle*].

16 ABA Prosecution Standard, 3-1.2 (b).

17 *Logiacco*, above note 15 at 379

18 See *R.* v. *Hillier* (1994), 115 Nfld. & P.E.I.R. 27 (Nfld. C.A.). See also *Royal Commission on the Donald Marshall, Jr., Prosecution*, above note 3 at 238.

cept of equality of application, and a keen sense of proportion and substantive justice in pursuing a course of action that can have a significant impact on the liberty and reputation of the accused.[19] The idea that the rights of the accused should somehow bear upon the duties of the Crown is worth stressing. In 1955 the English lawyer Christmas Humphreys stated that the duty of prosecuting counsel is "to assist the defence in every way."[20] In our post-*Stinchcombe* era, where extensive disclosure obligations are well accepted, this opinion is not particularly startling.[21] Nonetheless, Humphrey's comment "offers a useful exhortation for prosecutors to remember that those they prosecute may conceivably be innocent and they should be given every chance to answer the case against them."[22] This approach has relevance at the investigative stage, as well as during the trial itself, for the mere laying of charges can severely effect a person's well being, even if he or she is eventually acquitted.

Another aspect of the prosecutor's role as "minister of justice" that deserves special emphasis is the need for independence.[23] Though accountable to Parliament and the courts, the attorney general and his or her agents are permitted liberal discretion in making decisions affecting the prosecution of criminal cases, and they must be secure from political or social pressures. A guarantee of independence encourages courageous decisions where needed and thus works to safeguard the public interest. Indeed, the principle of independence in the exercise of the prosecution function is an important constitutional convention that infuses the office of attorney general.[24]

Certainly, the prosecutor must consider public needs and community concerns in reaching a decision as to the best course of action to take in any given circumstance. But, in some matters, the prosecutor's duty clearly lies in the defiance of community pressures, though

---

19 See S. Fisher, "In Search of the Virtuous Prosecutor: A Conceptual Framework" (1988) Am. J. Crim. L. 197 at 236–37.

20 C. Humphreys, "The Duties and Responsibilities of Prosecuting Counsel" (1955) Crim. L.R. 739 at 741.

21 Prior to *Stinchcombe*, above note 1, the exhortation to "assist the accused" as an ethical mandate was especially apposite: see *R. v. Lemay* (1951), [1952] 1 S.C.R 232 at 241 [*Lemay*]; as well as the observations of Mr. Justice Binnie in *R. v. Jolivet*, [2000] 1 S.C.R. 751 at 762 [*Jolivet*].

22 Crispin, above note 7 at 189.

23 See *R. v. Smythe* (1971), 3 C.C.C. (2d) 97 at 110 (Ont. C.A.), aff'd (1971), 3 C.C.C. (2d) 366 at 370; *R. v. Saikaly* (1979), 48 C.C.C. (2d) 192 at 196 (Ont. C.A.); and *R. v. Mitchell* (1975), 33 C.C.C. (3d) 98 at 105 (Ont. C.A.).

24 See M. Rosenberg, "The Ethical Prosecutor in the Canadian Context" (1991) Federal Prosecutors' Conference.

always within the confines of the law. As one commentator has noted, the only mind the prosecutor must make up is his or her own.[25] In *R. v. Curragh Inc.*, McLachlin and Major JJ., in their dissenting opinion, remind us that since the Crown is charged with the broad duty to ensure that every accused person is treated fairly, it is "especially in high profile cases, where the justice system will be on display, that counsel must do their utmost to ensure that any resultant convictions are based on facts and not on emotions. When the Crown allows its actions to be influenced by public pressure the essential fairness and legitimacy of our system is lost."[26] More provocatively, it has been observed by a prosecutor that "the change in societal attitudes, principally the abandonment of deference to authority, coupled with the proliferation of vocal, intense interest groups, the advent of political correctness, the directives of zero tolerance and the monster of sensational journalism all conspire to put dangerous pressures on prosecutors, in more and more cases, at many more stages during the process."[27]

Canadian rules of professional conduct affirm that prosecutors play a special, justice-seeking role in the adversarial justice system. The CBA Code states that the prosecutor's prime duty "is not to seek to convict, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits . . . [The prosecutor] must act fairly and dispassionately . . . ."[28] Most provincial codes of professional conduct have adopted the CBA position, in identical or similar terms.[29] The Federal Prosecution Service Deskbook issued by the Department of Justice Canada (hereafter referred to as the "FPS Deskbook") contains language similar to that used in the codes of professional conduct.[30] The FPS Deskbook also mentions the need for prosecutors to undertake their functions with "objectivity" and "impartiality," wording that further underlines the minister of justice role. In the United States, England and Australia, the applicable rules of professional con-

---

25 S. Gillers, *Regulation of Lawyers: Problems of Law and Ethics*, 3d ed. (Boston: Little, Brown, 1992) at 393.

26 *R. v. Curraugh Inc.*, [1997] 1 S.C.R. 537 at 588.

27 J. Walsh, "Ethics and the Investigator" (1999) National Criminal Law Program, Federation of Law Societies of Canada.

28 CBA Code ch. IX, comm. 7

29 See, for example, B.C. ch. 8, r. 18; Ont. r. 4.01(3); N.S. ch. 17; N.B. Part C, r. 12; Alta. ch. 10, r. 28.

30 Department of Justice Canada, *The Federal Prosecution Service Deskbook* (Ottawa: Department of Justice, 2000) [*FPS Deskbook*]

duct apply the same general ethical standards to the prosecutor's function.[31]

We can easily understand that Crown Counsel is not an ordinary advocate, and undertakes special duties as part of his or her role as minister of justice, by looking at the case of *R. v. J.(G.P.)*.[32] There, counsel appeared for the complainant on a third-party production hearing brought pursuant to s. 278.1 of the *Criminal Code*. The accused was acquitted, and the Crown appealed the trial judge's ultimate production ruling. On the appeal, counsel who had acted for the complainant at trial appeared for the Crown. The Manitoba Court of Appeal noted that Crown counsel plays a quasi-judicial role directed towards achieving a just result in the public interest. A complainant's lawyer has no such broad duty, and in the context of a s. 278.1 application may well take a different position from the Crown regarding production. In the view of Mr. Justice Philp, a single counsel could not fulfill both roles, and there was "an appearance of impropriety in counsel's role as Crown counsel on the appeal."[33]

In summary, the prosecutor's linchpin duty is to seek justice in the public interest, which encapsulates several related principles:

1. A prosecutor can seek a conviction but must all the while strive to ensure that the defendant has a fair trial.
2. The prosecutor's goal is not to obtain a conviction at any cost but to assist the court in eliciting truth without infringing upon the legitimate rights of the accused.
3. At each stage of the criminal justice process, the discretion vested in the prosecutor should be exercised with objectivity and impartiality, and not in a purely partisan way.
4. Self-restraint for the sake of fairness requires that the prosecutor resist the unbridled desire to obtain punishment of the accused.[34]

---

31 See, for example, ABA Model Rule 3.8; ABA Prosecution Standards, s. 3-1.2; General Council, *Code of Conduct for the Bar of England and Wales* (London: The Council, 1990) [*Bar Code of Conduct*] (General Standards and Standards Applicable to Criminal Cases, Responsibilities of Prosecuting Counsel) §11; and The Barristers' Rules (New South Wales & Queensland) (ModelRules, r. 17.47–59; and New South Wales, Professional Conduct and Practice Rules, r. 23, A. 62–71.

32 (2001), 151 C.C.C. (3d) 382 (Man. C.A.).

33 *Ibid.* at 400.

34 See Fisher, above note 19 at 204.

2) Role as Advocate

The flip side of the prosecutor's role as a minister of justice is the necessary tempering of the partisan function undertaken by most other lawyers. As the CBA Code states, in adversary proceedings the ordinary lawyer's function as advocate is "openly and necessarily partisan."[35] Accordingly, the lawyer is not normally obliged to assist his or her adversary. But we have seen that the prosecutor, as a "minister of justice," cannot wholeheartedly embrace partisanship.[36] Does this mean, however, that the prosecutor cannot work hard in seeking to secure a conviction? Just how vigorous and zealous can the prosecutor be in presenting a case?

Ultimately, the prosecutor is not only a minister of justice, but also an advocate. As an advocate, he or she is expected to discharge all duties with competence, earnestness and vigour.[37] In *R. v. Cook*, the Supreme Court of Canada affirmed that in the adversarial process the Crown can act as a "strong advocate" and that it is permissible and desirable that prosecutors vigorously pursue a legitimate result to the best of their ability.[38] The Court went so far as to add that the prosecutor as strong advocate is a critical element of this country's criminal law mechanism.[39] As respected English barrister David Pannick says, "the obligation to act fairly does not mean that the prosecuting counsel is compelled to avoid advocacy."[40] The prosecutor's distinct mission thus requires that he or she advance the case as advocate, while at the same time taking measures to protect the opponent's case as well.

Of course, there can be a great difficulty in reconciling the adversarial nature of the prosecutor's role with the non-adversarial duty of a "minister of justice." It has been said that "our adversary system makes it extremely difficult to be a fair prosecutor,"[41] and that "the potential

---

35 CBA Code ch. IX, comm. 15.

36 See *Cook*, above note 12 at 1124.

37 See *Berger v. United States*, 295 U.S. 78 at 88 (1985); *R. v. Chambers* (1990), 59 C.C.C. (3d) 321 [*Chambers*]; and *R. v. Daly* (1992), 57 O.A.C. 70 at 76 (C.A.) [*Daly*]

38 *Cook*, above note 12 at 1124.

39 *Ibid.*

40 D. Pannick, *Advocates* (Oxford: Oxford University Press, 1993) at 115.

41 M. Manning, "Abuse of power by Crown Attorneys" in Law Society of Upper Canada, *The Abuse of Power and the Role of Independent Judicial System in Its Regulation and Control* (Toronto: Law Society of Upper Canada, 1979) 571 at 580.

is there for terrible conflict."[42] Consider, for example, the heavy pressures placed upon Crown counsel to win cases as a means of securing career advancement. "The most idealistic prosecutor would have few illusions about his future prospects if every person he prosecuted were to be acquitted. This is, perhaps, rarely taken into account at a conscious level but it adds to the overall ethos of rivalry and hence the need to win."[43] A special strength of character is thus required if Crown counsel is to resist getting too caught up in a "culture of winning" or a "conviction psychology" and is not to lose sight of the need to make sure that the accused is treated fairly. As we have seen, the comments by Mr. Justice Rand in *Boucher* come close to endorsing the view that the prosecutor must remain entirely oblivious to the prospect of victory or defeat. Certainly, in some cases a prosecutor has to concede either that the Crown's case has not been proven or that an injustice would occur in the case of a conviction. To the extent that we can speak of winning, the victory lies in doing justice, not in gaining a conviction.[44]

Some observers of the criminal justice system fear that vigorous advocacy by the Crown, such as arguing for conviction on the facts of a case, tarnishes the ideal of the prosecutor.[45] On the other hand, some argue that prosecutors must engage in "vigorous partisan advocacy."[46] Neither position is acceptable absent careful qualification. Submissions that call for a conviction are not inconsistent with a prosecutor's duty to the public interest. Assuming that the accused has been given the unfettered opportunity to make full answer and defence, and the prosecutor has no reason to doubt the accuracy of the evidence placed before the trier of fact, the call for a guilty verdict is entirely proper. On the other hand, the prosecutor who acts in an overly vigorous and partisan manner risks subverting the primary duties of fairness, impartiality, and candour in seeking justice.

Another way of posing the same question is to ask whether the prosecutor as minister of justice can act in a zealous manner. The eth-

---

42 G. MacKenzie, *Lawyers and Ethics, Professional Responsibility and Discipline*, looseleaf (Scarborough, Ont.: Carswell, 1993) at 6-16–6-17

43 J. Hunter & K. Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Sydney: Butterworths, 1995) at 187.

44 R. Jackson, "The Federal Prosecutor" (1940) 31 J. Crim. L. & Criminology 2 at 4.

45 L. Sossin, "Crown Prosecutors and Constitutional Facts: The Promise and Politics of *Charter* Damages" (1994) 19 Queen's L.J. 372.

46 D. Butt, "Malicious Prosecution: Rejoinder" (1996) 75 Can. Bar Rev. 335 at 338–39.