MISTAKE OF LAW AND OBSTRUCTION OF JUSTICE: A "BAD EXCUSE"... EVEN FOR A LAWYER!

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Introduction

In *Regina v. Murray*[1], the learned trial judge, Justice Gravely, errs in his interpretation and application of the law of *mens rea* in the offence of wilfully attempting to obstruct justice[2]. In view of his findings of fact and law, including the determination that the accused knowingly and intentionally committed the *actus reus* of the offence and the absence of any suggestion that he lacked awareness of any relevant facts, there is no question in law but that Kenneth Murray was liable to be, and actually should have been, convicted. Nonetheless, the trial judge concluded that Murray's alleged belief, that his actions were required by his duty to his client, raised a reasonable doubt about his intention to obstruct justice and entitled him to be acquitted.

In his reasons for judgment, the trial judge analyzes *mens rea* as if there is a "colour of right" defence to the offence of obstruction of justice. In law, however, no such defence exists to this offence. Consequently, even if Mr. Murray did "honestly believe" that he had a duty to his client not to disclose the existence of the video tapes, that belief could not provide him with an exculpatory defence. In Canada, mistakes of law do not excuse accused persons from responsibility for criminal conduct in the absence of a statutory exception.[3] No exception exists to the offence of obstruction of justice. Yet the Crown did not choose to appeal and thereby signaled its acceptance of the legal analysis adopted by the trial judge. By contrast, if the analysis proposed in this piece had been adopted, the Crown should have prevailed at trial and, if unsuccessful at trial, would have had a right of appeal on a question of law.

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[1] (2000), 186 D.L.R.(4th) 125 (Ont.Sup.Ct.J.).

[2] *Criminal Code*, R.S.C. 1985 c.- C, s.139(2).

[3] *Ibid.*, s.19.

At least two tendencies converge as significant influences shaping the outcome in the *Murray* case. The central tendency, discussed in Part I of this article, is the trial judge's treatment of the accused's alleged mistake about his legal duty *as if* it were a mistake about a question of fact which therefore could give rise to a reasonable doubt about intention or culpable awareness. This approach to mistaken beliefs ignores the distinction between mistakes of law and mistakes of fact. Here, all mistakes are characterized as mistakes of fact. Unfortunately, this is not uncommon in the case law. In recent years, however, the judiciary has rejected that approach in a number of leading cases and ruled that mistakes which are actually mistakes about the meaning, scope, or application of the law are subject to the general rule and do not provide an accused with an exculpatory defence.[4] The relationship between mistake of law and *mens rea* in Canadian criminal law has also been the subject of critical scholarly comment in Canada in recent years.[5] The *Murray* decision provides evidence that, despite clarification by the Supreme Court, in some lower courts the unrefined approach to mistaken belief continues to shape the legal analysis of criminal culpability; even when the mistaken belief is overtly a belief about the law. This will not change until the proper characterization of mistaken beliefs as legal or factual becomes a deliberate and common-place aspect of case analysis at the trial court level.

The other tendency, discussed in Part III of this article, is one that often appears as a companion to the first---the judicial tendency to perceive and invoke analytical legal ambiguity in favour of accuseds more readily in cases in which the impugned conduct involves the discretionary exercise of authority which, when used appropriately, is fully legitimate and essential to the normal functioning of the

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[4]See *Molis v. The Queen* (1980), 55 C.C.C. (2d) 558 (S.C.C.), *Forster v. The Queen* (1992), 70 C.C.C. (3d) 59 (S.C.C.), and *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 (S.C.C.) per Major, J., at paragraph 51, for example. The Supreme Court of Canada has also held that an accused's belief that his or her conduct is not "wrong" or does not violate an objective standard is not a defence---see *R. v. Théroux* [1993] 2 S.C.R. 5 and *Jorgensen and 913719 Ontario Limited v. The Queen* (1996), 102 C.C.C. (3d) 97 (S.C.C.). Such beliefs are beliefs about norms not beliefs about facts, and, of the two, only beliefs about facts are relevant to *mens rea*. Therefore although an accused's belief that his or her conduct did not violate the legal standard may have some bearing on sentence following conviction, this belief is not an element of the case to be proven by the Crown and cannot provide the basis for a defence of mistake (save in those limited instances in which Parliament has enacted an exemption, as explained below).

[5]For example, H. Dumont, "Étude sur L'Igorance de la Loi" (1978) 13 *La Revue Juridique Thémis* 665.; D. Doherty, "The Mens Rea of Fraud" (1983) 25 Crim. L. Q. 348.; L. Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-1988) 2 Can. J. of Women and the Law 233.; H. Stewart, "Mistake of Law Under the Charter" (1998) 40 Crim.l L. Q. 476.

existing socio-legal order. Of course, courts are strongly influenced by the arguments put to them by counsel. And counsel, acting on behalf of client groups with particular group interests may, consciously or unconsciously, favour the development of those lines of analysis which are protective of that interest or associated institutional interests. One of the reasons for scrutinizing the *Murray* case is that it provides a concrete context discussion of to discuss those issues in relation to an actual decision made by Crown prosecutors. The case provides an occasion to examine a specific example of the exercise of prosecutorial discretion, its implications for the administration of criminal justice, and its broader potential impact on the public interest.

Part I. Analysis of the Law

At the very outset of his analysis of the law and the issues in part three of the judgment[6], the trial judge emphasizes that his task as he understands it is to determine whether the accused committed the crime with which he was charged; not to sit in judgment on the accused's ethics. He then states:

> While ethics may integrate with the issue of *mens rea*, ethical duties do not automatically translate into legal obligations.[7]

What the trial judge *omits* to say, and arguably should have gone on to say (although in view of the balance of his judgment, he probably would not concur), is:

> Conversely, ethical dilemmas, although they may give rise to ethical uncertainty, especially in the face of what may appear to an accused to be an intractable conflict between duties, cannot be said to automatically translate into a legal excuse for an accused who in all other respects acted with *mens rea* and is therefore criminally responsible in the ordinary sense.

Nor does the trial judge proceed to dissect the elements of opposition and allegiance between law, ethics, and morality; criminal law and civil law; or the duty to the state, to clients, and to other persons who may be affected by the actions of legal professionals. Instead he turns firmly away from these normative questions of justice and politics and immediately adopts a step-by-step analysis of the legal

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[6] The trial judgment in *Murray* is divided into four parts: the charge, the facts, the law and the issues, and the conclusion. Three paragraphs deal with the charge, eighty-two with the facts, sixty-seven with the law and the facts, and four form the conclusion. These proportions are not unusual for a trial judgment. The detailed account of the evidence on which the trial judge based his findings of fact is fully appropriate in a trial judgment.

[7] *Ibid.* at para. 87.

elements of the offence of obstruction of justice.

In point of fact, however, the outcome of the case is arguably pre-figured in Justice Gravely's comment that ethical duties do not translate into legal obligations. From the outset it is clear that he is not prepared to grant that there is a legal obligation created by the offence of obstruction of justice which can ground culpability in the absence of belief by an accused that his conduct is contrary to a legal duty as opposed to an ethical duty. But this may be to make far too much of his comment. He may have simply intended to invoke the distinction between law and ethics to underscore his assertion that his task was limited to an analysis of whether the accused was liable to conviction within a strictly legal framework. That may have been the full extent of his intention. The decision and judgment are fundamentally flawed, however, and ironically the source of the flaw lies in his blatant violation of the very admonition with which he commences his analysis of the legal issues.

The legal analysis consists of a painstaking examination of the facts in view of the leading interpretations of the law. There is no consideration of the potentially significant legal and political consequences that may flow from adoption of the analysis of obstruction of justice which Justice Gravely uses to acquit the accused. But to be fair, this is a trial judgment, not an appeal or a legal treatise. The primary objective of a trial judge in drafting a judgment is to provide a record of the findings of fact and law that form the basis for the decision. This the judgment does. A decision on appeal would typically include a more comprehensive analysis of the law and at least some discussion of the issues within a legal and political framework. But there is, and apparently will not be, any appeal in this case.[8] The decision nonetheless raises some legal and political issues that merit fuller analysis and discussion.

A. The Actus Reus of Obstruction of Justice.

Justice Gravely concludes that the *actus reus* of the offence of "wilfully attempting to obstruct justice" is established when it is shown that the accused's conduct "had a tendency to obstruct the course of justice". The phrase "course of justice" is understood to have a broad meaning encompassing all aspects of the functioning of the justice system. The trial judge applies this test to Mr. Murray's decision not to

[8] There is to be a disciplinary hearing for Mr. Murray before a panel of the Disciplinary Committee of the Law Society of Upper Canada on October 30, 2000.

disclose the existence of the video-tapes to the Court, the police, or the prosecutors, and easily concludes that this non-disclosure affected the ordinary functioning of the justice system, impacting both the investigation by police and the prosecutorial decision-making about the conduct of the cases against both Karla Homolka and Paul Bernardo.

Justice Gravely states that:

> The impact of the absence of the tapes flowed through into the ability of the Crown to conduct its case throughout."[9].... It would be difficult to overestimate the evidentiary significance of these tapes. The making of them formed an integral part of the crimes."[10]

Hence his conclusion that "[c]oncealment of the tapes had the potential to infect all aspects of the criminal justice system."[11]

Gravely J. then turns to the question of whether there was legal justification for concealing the tapes. Solicitor-client privilege provided no justification because the tapes did not involve solicitor-client communication and had been created independent of any such relationship or communication. Far from being exculpatory evidence of potential value for defence purposes, the tapes were inculpatory. They were best characterized as physical evidence of aspects of the crimes with which Karla Homolka and Paul Bernardo were charged. Although Justice Gravely opines that "it does not follow that because concealment of incriminating physical evidence is forbidden there is always a corresponding positive obligation to disclose,"[12] he acknowledges that in Canada the general view is that, once in possession of incriminating physical evidence, any act of concealment places defence counsel at risk of liability as an accessory after the fact. Accordingly, Gravely J. holds that once Kenneth Murray was in possession of the tapes---which he could not return to the place where he obtained them, he had only three options: (1) deliver the tapes to the prosecution; (2) deposit them with the trial judge, or (3) disclose the existence of the tapes to the prosecution and defend retention of them before the court.[13] Over a period in excess of sixteen months Mr. Murray pursued none of these courses of action. Justice Gravely therefore concludes that the *actus reus* of the offence is

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[9] *Supra* note 1 at para. 108.

[10] *Ibid.* at para. 109.

[11] *Ibid.* at para. 111.

[12] *Ibid.* at para. 120.

[13] *Ibid.* at para. 124.

complete beyond question. Kenneth Murray's concealment of the video-tapes tended to pervert or obstruct the course of justice and was not legally justified.[14]

B. Mens Rea and the Obstruction of Justice

The approach taken to the analysis of *mens rea* in the offence of obstruction of justice is crucial to the specific outcome in this case. It is also of more general significance insofar as it may have a crucial role in shaping public and professional attitudes and conduct related to the handling of incriminating physical evidence, as well as other matters, in criminal cases. Part III of this article discusses the general implications of these issues for Canadian legal and political culture, especially as it relates to the design and operation of controls on the exercise of legal authority in the administration of justice. First, however, we must consider the problem in the context of the *Murray* case itself.

As stated, Justice Gravely errs in his analysis of *mens rea* in the offence of obstruction of justice. He takes the position that for this offence, culpable awareness requires an appreciation that what one does, and knows one is doing, is "unlawful". In other words, Gravely J. holds that to be convicted of obstruction of justice, an accused must have been aware that his or her acts were illegal. The acquittal flows from reasonable doubt that Kenneth Murray knew that concealment of the tapes was not legally justified. It is not suggested that he was unaware that he was in possession of the tapes or that they were physical evidence material to the charges against Karla Homolka and Paul Bernardo. Nor is it suggested that he was unaware that the police and the prosecution had had no access to the tapes. Indeed, Justice Gravely notes that it is clear that Mr. Murray, in retaining the tapes and not disclosing their existence, "intended to impede the prosecution of the case against Bernardo."[15] Hence, there is no doubt as to any aspect of the accused's intention or knowledge except whether he was aware that what he was doing, for the purpose of impeding the investigation and the prosecution, thereby assisting his client, was illegal. That doubt sufficed to provide grounds for acquittal at trial because Justice Gravely construes *mens rea* in the offence of obstruction of justice to require that the purposeful intention to do the prohibited act be accompanied by the knowledge that the act in question is not legally justified.

With all due respect, this is clearly an instance in which section 19 of the

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[14] *Supra* note 1 at para. 125.

[15] *Ibid.* at para. 127.

Criminal Code applies.[16] Mr. Murray's intention to do what he did for the purposes for which he did it, is no less "specific" merely because he is barred by statute from raising his alleged ignorance of the law as an excuse. Mr. Murray is in no different position from any other accused. Everyone is presumed to know the law just as, in the absence of evidence to the contrary, everyone is presumed to be sane, conscious, and to act as a voluntary agent. But unlike the presumptions of sanity, consciousness, and voluntariness, which are all rebuttable, the presumption that everyone knows the law is irrebutable save as provided by strictly limited statutory exceptions. In the absence of such a statutory exception, evidence that an accused was ignorant of the law or mistaken about its meaning, scope, or application does not give rise to a defence.

The general rule against reliance on ignorance of the law as an excuse, codified in section 19 of the *Criminal Code*, is, in effect, a statutory bar. The current exceptions to the general rule under Canadian law fall into three categories: (1) the non-publication of regulations; (2) provisions enacted in the *Criminal Code* (primarily in relation to property offences) which excuse an accused on the basis of his/her belief that his/her conduct is legal; and (3) (in some lower courts) officially induced error of law. Exceptions in the second category are commonly described as "colour of right" defences. Most of the colour of right defences were created to ensure that persons exercising what they believe are "rights" of possession and control over property are not subject to criminal liability as long as they act in good faith even if the belief is based on a mistake of law.[17] This prevents section 19 of the *Criminal Code* from casting what could otherwise be a "chill" on legitimate commercial and non-commercial transactions involving property which are subject to the complexities of private property and contract law. The general rule barring reliance on ignorance or mistake of law as an exculpatory defence in criminal law is widely debated and sometimes criticized as unduly harsh. But the rule does serve important public policy objectives. Knowledge of the law is desirable, especially in a society that purports to govern itself by the rule of law. The general statutory bar against reliance on ignorance of the law as an excuse does encourage such knowledge. The exceptions to the general rule are grounded on the recognition that under clearly defined special circumstances, competing legal and public policy objectives should trump the general rule.

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[16]Section 19 provides: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence."

[17]An accused who seeks to rely more than once on the same mistake about the law in the same circumstances will not be found to have acted in good faith.

Parenthetically, it should be noted that if Parliament had enacted a "colour of right" defence to section 139(2), it is highly doubtful that Mr. Murray could have obtained an acquittal by relying on the defence, properly interpreted and applied. An "*honest* belief" is a belief that is neither reckless nor wilfully blind.[18] Mr. Murray's decision to rely on his "belief," even though he had neither researched the law nor sought legal advice, was at minimum reckless, and indeed could be classified as an instance of wilful blindness on the ground that his failure to seek legal advice over an extended period of time was a deliberate choice not to know what his legal duty was. In Canadian criminal law, wilful blindness is deemed to be equivalent to knowledge. Therefore, that line of defence leads inexorably to the conclusion that even if a "colour of right" defence to the offence of obstruction of justice existed, in Mr. Murray's case it would not have provided him with an exculpatory defence. Similarly, Kenneth Murray's failure to seek advice, or to take any other steps to ascertain what the law required of him, would presumably also bar him from any possibility of relying on a defence of officially induced error--assuming he could have identified an appropriate "official" source.[19]

To date, no exception to the general rule on ignorance of the law as it applies to the offence of obstruction of justice has been enacted. Whether such an exception should be enacted is discussed in Part III of this article with reference to the public policy objectives and concepts of justice that shape legal policy regarding the role and responsibilities of defence counsel in the criminal justice system, and, more generally, of lawyers in the administration of justice.

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[18]*R. v. Esau,* [1997] 2 S.C.R. 777 at para. 70, McLachlin J..

[19]The common law defence of "officially induced error of law" has yet to be approved by a majority of the Supreme Court of Canada and it remains unclear whether the defence exists in Canada. See *Forster v. The Queen* (1992), 70 C.C.C. (3d) 59 (S.C.C.) and *Jorgensen and 913719 Ontario Limited v. The Queen* (1996), 102 C.C.C. (3d) 97 (S.C.C.).

Part II. Administration of Justice and the Institutional Context

Let us assume that my analysis of the law relevant to the *Murray* case is correct. There is no good reason to believe that the Crown prosecutors involved in this case were not aware that this approach was available. As such, it could have been adopted in the Crown's argument and, in the event that Mr. Murray was nonetheless acquitted at trial, it could have been relied on to provide a basis for an appeal. The question then arises, given that this analysis provided the best chance of a conviction, why did the Crown not adopt it? Was this choice made consciously? Unconsciously? Is there an impulse to fumble where the accused is a fellow lawyer? Was the primary objective that the Crown be seen to pursue justice in the public interest, and not that the accused, if guilty, actually be convicted?

These are questions not only for legal sociologists but also for the legal profession. What myriad of factors influence the choices lawyers in general make to shape outcomes by excluding some alternatives and de-emphasizing others? And in this specific case, what influences were at play in shaping the outcome and ensuring that Kenneth Murray would ultimately walk away from the case without a criminal record or even a conviction, even though he was required to participate in a lengthy trial at great time and expense? To what extent did the institutional interest of the Crown Prosecutors' Office influence the approach taken in the *Murray* case?

It is abundantly clear that the Crown found itself tangled in happenstance as events unfolded in the *Homolka*, *Bernardo*, and *Murray* cases. First, acting in ignorance of the existence of the tapes, prosecutors cut a deal with Karla Homolka. In doing so, they appear to have followed conventional plea bargaining practices. When the tapes were later disclosed and examined, a common opinion was that Homolka had hood-winked the Crown. Her twelve year sentence for manslaughter, previously seen as a prudent and quite ordinary arrangement by the Crown in exchange for her cooperation as a witness in its case against Bernardo, suddenly appeared wholly inappropriate. The opinion was widely held that had she been tried, with the tapes in evidence, she probably would have been convicted of murder along with Bernardo, and that, in any event, her sentence would have been considerably more than the twelve years she received as a consequence of her plea bargain with the Crown. And, of course, this sequence of events all occurred as yet another incident in the broader historical context of the long standing debate about the ethical and practical merits of plea bargaining, a practice that continues to play a central though always controversial role in the contemporary administration of criminal justice in Canada. In any event, the bargain with Homolka remains intact

though unpopular in hind-sight.

Following the conclusion of the Bernardo trial, attention turned to Kenneth Murray, Bernardo's former counsel. Murray, following his client's instructions, had obtained the video tapes from behind a pot-light in the bathroom of Bernardo's former home. Murray then retained possession of those tapes without disclosing their existence to either the Crown or the court for more than sixteen months. The Crown's plea bargain with Karla Homolka was signed on May 14, 1993, only eight days after Kenneth Murray obtained possession of the video tapes. Had Mr. Murray taken prompt steps to research the relevant law and act in accordance with it, the bargain with Homolka probably would not have been concluded, and the Crown would have been in a position, a full sixteen months before trial motions began in the Bernardo case, to take the contents of the video tapes into account in developing its theories and assembling related evidence in the case against Bernardo and Homolka.

The Bernardo trial commenced in September of 1994 and finally concluded in 1995. In early 1997, the Crown charged Kenneth Murray with "wilfully attempting to obstruct justice" under section 139(2) of the *Criminal Code*. After lengthy delays, the case went to trial and was heard over twenty-six days from late March through mid June 2000. Judgment was rendered on June 13, 2000 and the accused was acquitted. The Crown did not appeal. The general view was that there was no basis for an appeal, the acquittal having been based on reasonable doubt about a question of "fact", an issue which, in the absence of relevant errors of law, is uniquely within the discretion of the trier of fact, in this case the trial judge.

From an institutional perspective, the decision to prosecute Kenneth Murray, followed by a trial leading to an acquittal, was arguably the sequence of events most likely to benefit the public reputation of the Crown Prosecutors' Office. Charges followed by a conviction, rather than an acquittal, would have been far less effective to blunt public criticism of the Crown's decision to plea bargain with Karla Homolka in return for her testimony at Paul Bernardo's trial for murder. A conviction undoubtably would have strengthened public reservations about whether the typical lawyer has the capacity to recognize the applicability of standards of conduct prescribed by law and the will to adhere to those standards, and whether the heavy reliance generally placed by the Crown on the practice of plea bargaining is actually consistent with a commitment to high standards in administration of justice in the public interest.

Doubts and questions of this nature clearly tend to destabilize public confidence

in the administration of criminal justice. If defence counsel cannot be presumed to be *trying* to act within the law, then the current heavy reliance on plea bargains to dispose of criminal charges, already the subject of public scepticism, would quickly be seen to be totally untenable. Therefore, from an institutional public relations perspective, the combination of charges followed by an acquittal was optimal. Affirmation of the law prohibiting obstruction of justice was achieved through laying the charges and prosecuting the case. The acquittal served to avoid the conclusion that "some lawyers sometimes make choices that have the effect of obstructing justice and they are criminally responsible for those choices." Instead the message conveyed was that, "when faced with 'conflicting' obligations to the public and clients, lawyers sometimes find it difficult to know what their duty is and, however dubious a lawyer's decisions may appear to be in hind-sight and however incredible the explanations for those decisions may be, in the absence of proof beyond a reasonable doubt that the lawyer *actually knew* that those actions were not justified by the lawyer's duty to the client, no lawyer is, or should be, criminally responsible when his or her actions obstruct justice." This message suggests that defence counsel may be presumed to act in good faith as they struggle with difficult and complex decisions and, that, as a matter of law, when defence counsel fail to appreciate what their legal duty is, they cannot be held liable at criminal law even though they obstruct justice. The effect is tantamount to a judge-made exemption from criminal responsibility for the obstruction of justice by lawyers. This approach delegates the matter of clarification and enforcement of the standards of conduct of lawyers to professional regulatory bodies and characterizes the issue, *but only when it arises in relation to the conduct of lawyers,* as one of professionalism, not public law.

Laying the charges against Kenneth Murray and proceeding to trial (no bargains here), functioned as a public denunciation by the Crown of the conduct by defence counsel that had denied the Crown timely access to evidence of crucial value in the *Bernardo* case. The fundamental integrity of the administration of criminal justice was thereby seen to be affirmed by the Crown. At the same time, the charges focused attention on Kenneth Murray's contribution to creating the circumstances that led to the deal with Karla Homolka rather than on the Crown's decision to enter into that deal. The result was a close and highly public examination of what Murray did and did not do. There was no equivalent public examination of why a "thorough" criminal investigation had not led to recovery of the video tapes even though the house in question had been under police control and carefully searched pursuant to a warrant. Nor was there any official public examination of the bargain with Homolka with opportunity for discussion of the hazards for the administration of justice (including those of wrongful convictions and improper acquittals), created

by a prosecutorial approach that relies on incomplete investigations, informants, and plea bargains, to keep criminal cases rolling through the courts.

It is arguable that the public interest in the administration of justice would be better advanced, following a case involving difficulties such as those seen in the Bernardo, Homolka, Murray triad, by the independent and comprehensive examination of all the factors on which the quality of decision-making about the case depended. The consequence would be that issues such as those seen in *Murray*, instead of sinking into oblivion with the verdict, or being deflected into a non-public forum such as the law society disciplinary process, could instead serve to provoke public scrutiny of the weaknesses of specific practices routinely utilized in the criminal justice system.

Part III. The *Murray* Decision: Out of Step with Legal and Political Culture in Canada

Legal and political culture is created incrementally over time as the product of an indeterminate number of actions and decisions by the inhabitants of a jurisdiction. This is an on-going process, in Canada as elsewhere, and it continues to shape and re-shape legal and political consciousness, decision, by decision, by decision. As a consequence of this gradual process, the era is past in which persons in positions of public trust could obtain immunity for criminal conduct by simply asserting that they meant well or that at least they meant no harm and honestly believed that their actions were legitimate.[20] But in *Murray*, the trial judge accepted precisely such a defence. In acquitting Murray, Justice Gravely presumed that Murray's purportedly honest but mistaken understanding of the nature and extent of his legal duties to the client and the court had a bearing on the issue of his criminal responsibility. Because this was the rationale, when Justice Gravely refused to find Murray criminally responsible, and thus avoided applying the law to condemn his actions in violation of the *Criminal Code*, the effect was to extend immunity to him on a basis available only to lawyers. The public interest in prohibiting *any* criminal

[20]An example lies in the enforcement of laws prohibiting influence peddling in government. See *R. v. Barrow* (1984), 14 C.C.C. (3d) 470 (N.S.C.A.) and *R. v. Cogger* [1997] 2 S.C.R. 845 for two examples in which senators accused of influence peddling both enjoyed success at the trial level with a defence based on the honest belief that the practices they were engaged in were legitimate and that they lacked *mens rea* because they were without consciousness of "moral turpitude" or "wrong-doing". In each case, however, the Crown appeal was granted on the ground that the trial judge had erred in his interpretation of the *mens rea* of the offence. In each case the error was that of interpreting *mens rea* as if it encompassed awareness that one's actions were contrary to law.

interference with the administration of justice was thereby compromised. The matter of Murray's violation of the public trust placed in him by virtue of his professional role (a role shared with all other practicing lawyers in Canada, as officers of the court), was then left to be dealt with, if at all, by the law society, not the public courts.

This is a highly inappropriate delegation. Professional discipline is an issue entirely separate from the criminal process. The public interest in the administration of justice in general, and the administration of the criminal justice process in particular, is undermined when regulation of the standards of conduct of lawyers who are charged with offences enacted in the *Criminal Code* to protect the "course of justice" is, in effect, delegated in its entirety to the professional disciplinary process. Lawyers should instead be subject to both regimes; answerable before the courts with respect to the criminal aspects of their conduct like any other citizen, and to the disciplinary committee of the law society with respect to the ethical aspects of their professional conduct. Otherwise, the practice of law confers *de facto* immunity from criminal conviction for obstruction of justice on the practitioner. That is not in the public interest and risks bringing both the administration of justice and the legal profession into contempt.

The judiciary has repeatedly affirmed in recent years that Canada is subject to the rule of law and aspires to egalitarianism in its legal, social, and political arrangements. The exercise of power of many types which were, in practice, previously unregulated is now routinely subject to legal control and scrutiny. The exercise of discretion beyond the bounds permitted in law, partially, or without compliance with the criteria prescribed by law, is therefore less and less the automatic licence of power, privilege, or status. Canadian jurisprudence confirms that the principles of fundamental justice, legality, and equality are now essential and fundamental elements of the theoretical framework that guides judicial deliberations. [21]

The decision in *Murray* is therefore clearly contrary to the general direction of development, or the trajectory, of contemporary legal and political culture in Canada. For some time that trajectory clearly has been towards increased responsibility and accountability by persons and bodies exercising power of a variety

[21] The *Charter of Rights and Freedoms* has been a significant factor in shaping these developments since its adoption in 1982.

of types. There is no sound basis for asserting that there is an exception where powers exercised in contravention of criminal law have been created and delegated in the public interest or for public purposes. In the context of the administration of justice in general, and criminal justice in particular, it should be readily apparent that the objectives of "truth-finding" and "procedural fairness" are paramount, and that these objectives are not served by actions that "pervert" or "obstruct" the justice process. The public interest is not served by the creation of legal rules to excuse the obstruction of justice. It is illogical to suggest that an exception would arise as a consequence of the lawyer-client relationship. Given the central role of lawyers in the legal process, such an exception could only serve to place the integrity of the administration of justice at continual risk and to erode public trust in the legal profession.

The failure to appeal the *Murray* decision may be taken to support the proposition that everyone who exercises legal duties to the public in the administration of justice is excused from criminal responsibility for all acts committed in the exercise of those duties even though the effect is the obstruction of justice as long as they are prepared to assert that they honestly but mistakenly believed their actions were in accordance with their legal duty. Both the rationale used to achieve an acquittal in the *Murray* case and the Crown's acquiescence to that rationale in deciding not to appeal, should therefore be causes for significant consternation among those who expect increased, not decreased, responsibility for those authorized to make decisions affecting the "course of justice" and the administration of laws in the public interest. Public powers are created and conferred for the purpose of ensuring that administrative "duties" are performed, and performed in accordance with legal standards and criteria. If criminal responsibility can be avoided by invoking ignorance and uncertainty as to what actions are consistent with one or more statutory duties, it will be. This will not serve the public interest. It will not raise the level of honesty and integrity in the administration of justice. It will only further affirm the wide-spread public apprehension that decision-makers exercising legal power may often be either above and beyond the law or "lawless". This will not do. The administration of justice must be and be seen to be governed by the rule of law.

Clearly, no exception to the general rule on ignorance of the law as it applies to the offence of obstruction of justice should be enacted. If the approach proposed in the present article had been adopted and Kenneth Murray had been convicted, this question probably would have been debated, at least within the legal profession. However, the approach adopted by Gravely J. ensures that defence counsel are not at significant risk of criminalization as a consequence of mistakes in the choices they

make when faced with an apprehended conflict between their duties to their clients and to the court. Therefore, although the narrowly defined professional self-interest of defence counsel might suggest that they should lobby for the enactment of a legislated exception to the general rule, in view of the outcome in *Murray*, it is improbable that that will be seen by defence counsel to be at all necessary.

Conclusion

The perspectives of law, public administration, and legal and political culture, all point unequivocally to one set of conclusions about the issues arising out of the *Murray* case. First, it is clear that *Murray* was wrongly decided in law. The decision should not be followed as precedent creating a judicial exemption from criminal responsibility for lawyers who obstruct justice. A conviction should have been entered against Kenneth Murray. Second, no legislated exception should be enacted by Parliament to permit a lawyer, who is otherwise liable to be convicted of obstruction of justice, to be excused from criminal responsibility by alleging that he or she "honestly believed" the prohibited conduct to be required by a duty to the client.

The basis for these conclusions is that mistake of law as a defence to the offence of obstruction of justice is a "bad excuse" for lawyers and non-lawyers alike. First, it is a "bad excuse" in that it is not an exculpatory defence within the traditional framework of established principles of criminal law applied to determine *mens rea*. Second, it is completely antithetical to the emerging legal and political culture in Canada. This culture requires that the criminal justice process be "impartial" and "fair" and that the "truth-finding" processes of the law be protected, not compromised. Given that the operation of the justice process requires the impartial determination of "truth" based on the evidence, there can be no justification for excusing obstruction of justice that is consistent with the objective of administrating justice in accordance with the principles of fundamental justice and the rule of law. The impulse to treat lawyers differently out of deference to professionalism is gravely[22] misguided and can only have effects on the administration of justice that are perverse, even though it may appear to serve the short-term institutional convenience of prosecutors by deflecting scrutiny of the exercise of prosecutorial discretion. Professionalism and institutional convenience are not adequate justifications for the abandonment of adherence to a principled approach to the administration of justice in the public interest. The principles of equality and

[22]No pun is intended.

legality are not subject to exceptions in the absence of adequate justification.... not even for lawyers![23]

[23] In the end the Disciplinary Committee of the Law Society of Upper Canada did not proceed with the disciplinary hearing for Kenneth Murray originally scheduled for October 30, 2000. The charges against Murray were withdrawn and on November 29, 2000, a Special Committee was appointed to examine the general question of lawyers' ethical duties with respect to physical evidence relevant to a crime and to formulate a rule to provide direction on the relevant professional conduct issues. On March 22, 2001, the Special Committee on Lawyers' Duties with Respect to Physical Evidence Relevant to a Crime issued a Report to Convocation. The Report proposes a rule and seeks comments from the public and the profession for consideration prior to preparation of the final Report to Convocation. It is my opinion that both this sequence of events and the content of the proposed rule only confirm the views expressed and concerns raised in this article.