ETHICAL OBLIGATIONS OF THE CROWN ATTORNEY- SOME GUIDING PRINCIPLES AND THOUGHTS

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Introduction

Recent jurisprudence and judicial inquiries have brought into sharp focus the position of the prosecutor who, in Canada, is commonly referred to as the Crown Attorney. The role of Crown Attorney in the criminal justice system is one of the most crucial, yet also one of the most misunderstood.

The Crown Attorney shares certain common duties (to the state, the profession, and the Court) with defence counsel. However, the ethical obligations are much greater and more diverse. This paper will explore those responsibilities from a historical, academic, and practical perspective.

Historical Background - The Crown Attorney and the Attorney General

The prosecutor, by virtue of s. 2 of the *Criminal Code*, is first and foremost the Attorney General or "Counsel acting" for the Attorney General. Thus, counsel is representing the sovereign as agent for the Attorney General. When entering the criminal court, the Crown Attorney is a Minister of Justice and is therefore bound by all constitutional conventions associated with the office of the Attorney General.

Historically, the primary responsibility of the Attorney General was to maintain the sovereign's interest in the royal courts. Over time, this role expanded to general legal advisor to the government and, in many respects, to protector of the public interest. The Attorney General was, and still is, the principal law officer of the Crown and the head of the bar. By tradition, the office of the Attorney General carried much respect and trust. The office holder was to act with dispassion and fairness in the interest of the public and in the administration of justice. Constitutionally, the Attorney General is given primary responsibility for the

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prosecution of criminal charges. By provincial legislation, the Attorney General is appointed and given the authority to deal with provincial and federal offences within the province.[1]

The Attorney General has tremendous authority both to initiate and to discontinue prosecutions which are not in the public interest. Lord Shawcross, in comments to the British House of Commons on the exercise of the proper discretion of the Attorney General, indicated that the decision to prosecute involves a consideration of the relevant facts and public policy and also "applying [a] judicial mind... to be the sole judge of [these] considerations."[2] This *Shawcross* principle has been cited with approval in Canada. For example, former Attorney General of Ontario, Ian Scott characterized it as a benchmark of the administration of justice:

> The public and legal profession should be vigilant to see that the Attorney General pursue its obligations in a manner that respect the fundamental principles of independence and objectivity that have historically guided the exercise of the Attorney General's responsibility.[3]

The Attorney General, therefore, supervises all prosecutions and the Crown Attorney – acting as counsel on behalf of the Attorney General – has actual conduct of the case. Against this background, the ethical obligations of the Crown Attorney will now be examined.

Pronouncements on the Ethical Obligations of the Crown Attorney

Jurisprudence, judicial inquiries and commissions, legal texts, and codes of conduct such as the *C.B.A. Code of Professional Conduct*[4] have thoroughly examined the ethical obligations of crown counsel. The classic statement comes from the Supreme Court of Canada in *R. v. Boucher*,[5] where Rand J. stated:

> 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 the duty to see that

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[1] See for example: *Executive Council Act*, S.N. 1995, c. E-16. For a detailed discussion of these issues, see paper presented by Colin Flynn, "The Role and Function of the Attorney General and His Agents", *Newfoundland Crown Attorneys' Annual Meeting*, August 1998 [unpublished].

[2] J.L.J. Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964) at 223.

[3] I. Scott, "The Role of the Attorney General and the Charter of Rights" (1986-87) 29 C.L.Q. 187.

[4] Chapter IX, Commentary 9.

[5] *Boucher v. The Queen* (1954) 110 C.C.C. 263 (S.C.C.).

> 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 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 performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceeding.[6]

In *R. v. Hillier*,[7] the Newfoundland Court of Appeal endorsed the comments of former Attorney General, W.B. Connor, Q.C. in stating:

> I have already reviewed the function or role of a Crown prosecutor... who is scrupulously impartial and fair, presenting the Crown's case with competence and thoroughness without commenting on personal opinion in an atmosphere void of arrogance or hostility.[8]

The court then held that a Crown Attorney should do such things as present the case for the Crown moderately, call all credible witnesses, conduct cross-examination of defence witnesses fairly, and be scrupulous to adduce evidence only if its probative value outweighs its prejudicial value.[9]

In *Lawyers & Ethics*,[10] Gavin MacKenzie summarized the dual role of a prosecutor:

> ... prosecutors must not allow themselves to be betrayed by feelings of rivalry or competitiveness and should approach their responsibilities with the even handedness of a judge, rather than the partisan spirit of an advocate. The duty of fairness applies even in cases in which the prosecutor believes in good faith that the accused person is guilty."[11]

This is reenforced by the *C.B.A. Code* which advises members of the profession:

> When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, 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.

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[6] *Supra* note 5 at 270. See also comments of Justice Taschereau at 267-68, describing the prosecutors' role as quasi-judicial.

[7] *R. v. Hiller* (1994), 115 Nfld & P.E.I..R. 27 (Nfld C.A.).

[8] *Ibid* at para. 49.

[9] *Ibid.* at para. 49.

[10] G. MacKenzie, *Lawyers & Ethics, Professional Responsibility and Discipline*, 2nd ed. (Scarborough, Ontario: Carswell, 1999).

[11] *Ibid.* at Ch. 6-2.

> 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 extent 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 guilt or innocence, or that would affect the punishment of the accused.[12]

Professor Beverley G. Smith, in *Professional Conduct for Canadian Lawyers*,[13] summarized these words to "comprise objectivity, fairness and a dispassionate search for the truth of the matters charged by the prosecutor so that justice may be done on the merits."[14] Provincial conduct codes dealing with the obligations of a prosecutor generally reflect the views of *Boucher* and the *C.B.A. Code*.

While Crown Attorneys have a duty to see justice done, they still must be effective advocates. L'Heureux-Dubé of the Supreme Court of Canada recently reviewed the Crown's role as advocate:

> Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence [*Boucher v. The Queen*], it is well recognized that the *adversarial process* is an important part of our judicial system and an accepted tool in our search for truth: see, for example, *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) at p. 295 *per* L'Hereux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In this regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a crucial element of this country's criminal law mechanism.[15]

Specific Examples of Ethical Obligations of the Crown Attorney

The Duty to Disclose

The ethical obligation to disclose favourable or unfavourable evidence on a timely basis incorporates themes of fairness and justice over securing a conviction. Thus,

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[12] *Supra* note 4, Chapter IX, Commentary 9. For a recent discussion of the Codes of Conduct; and jurisdiction of the Law Society as it relates to Crown Attorneys see *Kreiger v. Law Society of Alberta* (2000) ABCA 255 (Notice of appeal filed to S.C.C.).

[13] B. Smith, *Professional Conduct for Canadian Lawyers* (Fredericton: Maritime Law Book, 1998).

[14] *Ibid.* at 168.

[15] *R. v. Cook* (1997), 7 C.R. (5th) 51 at 60 (S.C.C.).

the *Murray*[16] dilemma should not present a problem to crown counsel – the Crown's duty to disclose is clear.

The landmark case of *R. v. Stinchcombe*[17] considered the Crown's obligation to disclose. Sopinka J. concluded that all relevant information – whether favourable or not – must be disclosed subject to the reviewable discretion of the Crown. The following comments explain the rationale for the disclosure requirements:

> [T]he fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done...[18]

Crown Attorneys must be scrupulously fair in the exercise of disclosure duties. Once a disclosure request is made, Crown Attorneys should be vigilant to ensure they have received complete materials from the police; and then, that these materials are disclosed on a timely basis. Disclosure is ongoing and not merely limited to election and plea. Therefore, if additional information is received, it must be disclosed. While the obligation to disclose is not absolute and is subject to certain exceptions, disclosure should not be refused if there is a reasonable possibility that the right to full answer and defense would be impaired.

Crown Attorneys and the Police - The charging decision and the decision to proceed

In British Columbia, Quebec, and New Brunswick, Crown Attorneys decide whether charges are laid and prosecutions initiated. In all other provinces, the police lay charges and Crown Attorneys decide whether or not to proceed with the prosecution. The Crown may also provide pre-charge advice to the police, although the police are not bound to follow it.

Jurisprudence is limited on the specific obligations in this area. In a number of provinces, directives issued by the Attorney General suggest prosecutions are

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[16] *R. v. Murray* (2000), 48 O.R. (3d) 544, Ken Murray, upon instructions from client Paul Bernardo located and took possession of graphic and incriminating video tapes that related to murder charges against Karla Homolka and Bernardo. The existence of these tapes was not disclosed to the authorities for 17 months. In the meantime, The Crown had made a plea bargain with Homolka without knowing of the existence of the tapes. Murray was charged with obstruction of justice, but acquitted because of a reasonable doubt as to the intention to obstruct.

[17] (1992), 68 C.C.C. (3d) 1 (S.C.C.).

[18] *Ibid.* at 7.

initiated and continued only if there is a "reasonable or substantial likelihood of conviction" and if to do so serves the public interest. Professional codes of conduct do not deal specifically with these obligations other than to state the prosecutor "must act fairly and dispassionately."

In *R. v. Regan*,[19] the Nova Scotia Court of Appeal examined the distinct roles of police and Crown. Quoting from the *Marshall Report*, the court stated:

> ... co-operative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function - that of investigating and law enforcement - is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.[20]

Thus, where the Crown provides pre-charge advice or makes the charging decision, crown counsel must be removed from the investigation and assume a quasi-judicial role. This will be challenging as the Crown Attorney works closely with the police; however, co-operation cannot become collaboration. The Court in *R. v. Regan* also reviewed the obligations of the Crown both in the charging stage and the decision to proceed stage and stated that,

> [t]here is no specific time limited period in which the Crown must act fairly and in the public interest. It is a continuing obligation not an obligation that is expended once an initial decision has been made at the charging stage...[21]

Similarly, the Crown must act judicially in proceeding with or discontinuing a prosecution.[22]

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[19] (1999), 179 N.S.R. (2d) 45 (N.S.C.A.).

[20] *Ibid.* at 62, para. 34.

[21] *Ibid.* at 98, para. 172.

[22] The *Report of Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen's Press, 1993) [The *Martin Report*], quoted in *Regan, supra* note 19 at 61 states:

> Crown Counsel, whose duty it is to prosecute charges in court are, of course, likewise concerned with the quality of the evidence that supports an allegation of criminal conduct. But their concerns are also somewhat broader. As ministers of justice, their ultimate task is to see that the public interest is served, insofar as it can be, through the use, or non-use, of criminal courts. And, as adversarial counsel for the prosecution, their task is to ensure that there is not only evidence to support a charge, but evidence that will stand up in court. Discharging these responsibilities, therefore, inevitably requires Crown counsel to take into account many factors, discussed above, that may not necessarily have to be considered by even the most conscientious and responsible police officer preparing to swear an information charging someone with a criminal offence.

Plea Bargains

Negotiated pleas and settlements are common place in the criminal justice system and can range from outright guilty pleas to substitution of included offences to agreements on sentencing.

The *C.B.A. Code of Professional Conduct* provides that the public interest must not be compromised by a guilty plea.[23] Therefore, the Crown Attorney has a duty to ensure pleas are not negotiated simply for expediency. On the other hand, the Crown Attorney must also be vigilant to ensure there are no instances of overcharging in order to pressure the accused into a guilty plea to the original charge. For example, a clear case of manslaughter should not be prosecuted as second degree murder (which carries a minimum sentence of 10 years parole ineligibility) in the hope or expectation of a guilty plea to manslaughter. The Crown must ensure that only the appropriate (and not the most severe or maximum) number of charges, are formulated and provable. In describing the model or "magisterial prosecutor", Gavin McKenzie on this issue, has stated:

> A less aggressive formulation of charges reflects not only a policy of leniency but a careful evaluation of the practical likelihood of proving the charges, and of what result is truly warranted on the available and admissible evidence.[24]

Surely, these considerations of "leniency", "careful evaluation" and "what is truly warranted" describe the ethical obligations of Crown Attorneys in plea bargaining. By adopting these considerations, more efficient use could be made of investigative, prosecutorial and court resources.

The Conduct of a Case

The Royal Commissioners who reported matters involving police and prosecutorial misconduct in relation to the wrongful conviction of Donald Marshall, Jr., declared on the subject of prosecutorial discretion in the conduct of a trial:

> While the courtroom setting is adversarial, the Crown prosecutor must make sure the criminal justice system itself functions in a manner that is scrupulously fair. The phrase 'criminal justice system' is not a mistake of history - we do not have a criminal convictions system. Justice is an ideal that requires strict adherence to the

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[23] Ch. 9, Comm. 12.

[24] *Supra* note 10 at Ch. 6-17.

> principles of fairness and impartiality. The Crown prosecutor as the representative of the State is responsible for seeing that the State's system of law enforcement works fairly.[25]

Because of this quasi-judicial role, Crown Attorneys' advocacy must be more restrained than defence, or other counsel or in civil cases. While some excesses are permitted as part of the natural process of advocacy, such conduct must not deprive the accused of a fair trial. For example, Crown Attorneys must not express personal opinions about the credibility of the witnesses or the guilt of the accused. Cross-examination of the accused, though it can be forceful, must be conducted fairly. In closing summation, the Crown Attorney must refrain from prejudicial or inflammatory remarks to the court or jury. Laskin C.J.C., of the Supreme Court of Canada has indicated the closing summation must be confined to the evidence and not irrelevant considerations:

> Over-enthusiasm for the strength of the case for the prosecution, manifested in addressing the jury, may be forgivable, especially when tempered by a proper caution by the trial judge in his charge, where it is in relation to matters properly adduced in evidence. A different situation exists where that enthusiasm is coupled with or consists of putting before the jury, as facts to be considered for conviction, matters of which there is no evidence and which come from Crown counsel's personal experiences or observations. That is the present case.[26]

However, this is does not mean Crown Attorneys cannot be passionate. Doherty J.A. for the Ontario Court of Appeal stated:

> A closing address is an exercise in advocacy. It is a culmination of a hard fought adversarial proceeding. Crown counsel, like any other advocate, is entitled to advance his or her position forcefully and effectively. Juries expect that both counsel will present their positions in that manner and no doubt expect and accept a degree of rhetorical passion in that presentation.[27]

Conclusion

The Crown Attorney is not simply the lawyer for the police and/or victim of crime. Nor is the Crown Attorney the prosecutor who is only "out for a conviction." Conversely, the Crown's quasi-judicial role is not some impossible or theoretical

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[25] *Report of the Royal Commissioners on the Donald Marshall, Jr. Prosecution*, Province of Nova Scotia, 1989, at Vol I, 238.

[26] *Pisani v. The Queen* (1971), 1 C.C.C. (2d) 477 at 478 (S.C.C.).

[27] *R. v. Daly* (1992), 57 O.A.C. 70 at 76 (Ont. C.A.).

ideal. J.B. Dangerfield, Q.C. provides a Crown's perspective:

> When one hears such high flying expressions as minister of justice or quasi-judicial figure, one wonders how one can ever act as prosecuting counsel effectively and yet behave in the manner suggested by those oft-quoted descriptions. The fact is that they are aimed at the concept of fairness and they have nothing to do with forcefulness or cogency. Thus, prosecuting counsel need not feel intimidated by them. They are not meant to reduce counsel's speeches to mindless pap. They are merely guides so that what is said is said fairly.[28]

Crown Attorneys should not be expected to be robots devoid of emotion. Like all advocates, they bring their own experiences and expectations to the role. However, if Crown Attorneys, as advocates, exercise professional judgment and discretion wisely – by putting the concepts of justice and fairness over personal and other considerations – ethical obligations will be easily fulfilled.

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[28] J.G.B. Dangerfield, Q.C. "The Closing Address of Crown Counsel", (National Criminal Law Program, July 1992) [unpublished].