Duties and Responsibilities of Crown Attorneys

Introduction

This section of the Guide Book describes the duties and responsibilities of Crown Attorneys during the conduct of criminal litigation. The term "*Crown Attorney*" as used in this part and throughout the Guide Book, is meant to refer to lawyers employed by the Department of Justice and private practice lawyers employed as agents acting on behalf of the Attorney General of Newfoundland and Labrador.[1]

Obligations during the Conduct of Criminal Litigation

The responsibilities placed on Crown Attorneys as legal officers of the Crown flow from the special obligations of the Attorney General. As a result, Crown Attorneys are subject to certain ethical obligations which may differ from those of defence counsel.[2] The Crown Attorney occupies a dual role as minister of justice and advocate. There is a tension between these two roles which, at first blush, is difficult to accommodate in an adversarial system. However our constitution has long granted prosecutors a special status distinct from that of a mere opponent at trial.[3]

The Attorney General and his or her agents are vested with very substantial discretionary powers.[4] Public interest considerations require Crown Attorneys to exercise judgment and discretion which go beyond functioning simply as advocates.[5] Counsel appearing for the Attorney General are considered "*ministers of justice*"; functioning more as a part of the judicial system than as proponents of a cause.[6] Fairness, moderation, and dignity should

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[1] The policies, procedure and directives set out in the Guide Book apply equally to lawyers in private practice who are employed as agents to act as Crown Attorneys.

[2] See also: Marc Rosenberg, *The Ethical Prosecutor*, a paper presented at the 1991 Federal Prosecutors' Conference, and *Re Skogman and The Queen* (1984), 13 C.C.C. (3d) 161 (S.C.C.), which holds that Crown counsel are in a different position from the ordinary litigant, for they represent the public interest in the community at large. See also the section in this Guide Book related specifically to the subject of the "Conduct of Criminal Litigation".

[3] M Proulx & D. Layton, *The Prosecutor*: in Ethics and Canadial Criminal Law.

[4] See *The Ethical Prosecutor*, note 2.

[5] *Re Skogman and The Queen*, note 2.

[6] *Boucher v The Queen* (1954), 110 C.C.C. 263 at 270 (S.C.C.): "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

characterize the conduct of Crown Attorneys during criminal litigation.[7] This does not mean that counsel cannot conduct vigorous and thorough prosecutions.[8] Indeed, vigour and thoroughness are important qualities in Crown Attorneys. Criminal litigation on the part of the Crown, however, should not become a personal contest of skill or professional pre-eminence.[9]

The conduct of criminal litigation is not restricted to trial in open court. It also encompasses the prosecutorial authority exercised by Crown Attorneys in all of their duties. This includes, for example: the decision to prosecute, referring an alleged offender to an alternative measures program,[10] disclosure, the right to stay or terminate proceedings, electing the mode of trial, granting immunity to a witness, preferring indictments, joining charges and accused, consenting to re-elections, and consenting to the transfer of charges between jurisdictions. A Crown Attorney's obligation to ensure the integrity of the prosecution continues throughout the litigation process.[11]

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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 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 proceedings." See also the the discussion of role of Crown counsel by former Supreme Court Justice Peter de C. Cory, in The Inquiry Regarding Thomas Sophonow (2001), at p.39. See as well the *Lamer Report (2006)* Office of The Queen's Printer NL, for an important application of this principle to three cases in this province.

[7] *Ibid.*

[8] The Supreme Court has said that vigorous Crown advocacy is "a critical element of this country's criminal law mechanism": *R. v. Cook* , [1997] 1 S.C.R. 1113 at para.21; 114 C.C.C. (3d) 481 at 489 (S.C.C.). Note however the comments and recommendations of Commissioner Lamer in his Inquiry pertaining to three cases (*Lamer Report (2006)*) regarding the proper limits of Crown Advocacy and attendant dangers of overzealousness.

[9] *Boucher v The Queen,* [1955] S.C.R. 16 at 23-24; 110 C.C.C. 263 at 270 (S.C.C.); *R.* v. *Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 at 289 (Ont. C.A.): "By reason of the nature of the adversary system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill, and vigour. Indeed, the public is entitled to expect excellence in a Crown prosecutor... But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice..."

[10] See also in this Guide Book materials related to "Youth Diversion".

[11] See, for example, *R.* v. *Ahluwalia* (2000), 149 C.C.C.(3d) 193 (Ont. C.A.), where Crown counsel was criticized for having failed to investigate an allegation that a Crown witness had committed perjury at the trial.

Both in and out of court, Crown Attorneys exercise broad discretionary powers. Courts generally do not interfere with this discretion unless it has been exercised for an oblique motive, offends the right to a fair trial or amounts to an abuse of process. Accordingly, counsel must exercise this discretion fairly, impartially, in good faith and according to the highest ethical standards. This is particularly so where decisions are made outside the public forum, as they often have far greater practical effect on the administration of justice than the public conduct of Crown Attorneys in open court.[12]

In the conduct of criminal prosecutions, Crown Attorneys have many responsibilities. The following are among the most important:

The duty to ensure that the responsibilities of the Attorney General are carried out with integrity and dignity

Crown Attorneys can discharge this duty:

- by complying with applicable rules of ethics established by the Law Society;
- by exercising careful judgment in presenting the case for the Crown, deciding which witnesses to call, and what evidence to tender;
- by acting with moderation, fairness, and impartiality;
- by not discriminating on any basis prohibited by s. 15 of the *Charter*;
- by adequately preparing for each case;
- by maintaining an appropriate, arms-length relationship with government departments and investigative agencies (such as the RNC or RCMP);[13] and

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[12] See *The Ethical Prosecutor*, note 2. See also: *Cunliffe and Bledsoe* v. *Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560 (B.C.C.A.): It is extremely important to the proper administration of justice that Crown Attorneys be aware of and fulfill their duty to be fair. See also *Lamer Report (2006)*, Office of the Queen's Printer NL.

[13] See also in this Guide Book materials related to "The Independence of the Attorney General in Criminal Matters" (Chapter 2) and "The Relationship between Crown Attorneys and the Police"(Chapter 5).

- by conducting plea and sentence negotiations in a manner consistent with the policies and procedures set out in this Guide Book.[14]

The duty to be fair and to appear to be fair

Crown Attorneys can discharge this duty:

- by not discussing matters relating to a case with the presiding judge without the participation of defence counsel;

- by not dealing with matters in chambers that should properly be dealt with in open court;

- by avoiding personal or private discussions with a judge in chambers while presenting a case before that judge;

- by refraining from appearing before a judge on a contentious matter when a personal friendship exists between a Crown Attorney and the judge.

- by preparing disclosure in accordance with the policy set out in this Guide Book;[15]

- by bringing all relevant cases and authorities known to Crown Attorneys to the attention of the court, even if they may be contrary to the Crown's position;

- by refraining from expressing personal opinions on the evidence, including the credibility of witnesses, in court or in public;

- by being conscious of the factors that can lead to wrongful convictions, such as false confessions and mistaken eyewitness identification;

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[14] See also Chapter 13 Guide Book "Resolution Discussions" as well as an important discussion of this concept as it has been applied to the policies in this Guide Book related to the "Termination of Proceedings" in **Directive #4** of "Conduct of Criminal Litigation". This procedure was recommended by the *Lamer Report (2006)*, Office of the Queen's Printer NL.

[15] See also Chapter 10 of this Guide Book "Disclosure".

- by carefully guarding against tunnel vision, overzealous/overreaching advocacy by maintaining professional and objective relationships with investigative agencies, victims, the media and/or special interest groups. [16]

- by remaining open to alternative theories put forward by the defence;

- by not expressing personal opinions on the guilt or innocence of the accused in court or in public;

- by asking relevant and proper questions during the examination of a witness and by not asking questions designed solely to embarrass, insult, abuse, belittle, or demean the witness. Cross examination can be skillful and probing, yet still show respect for the witness;

- by respecting the court, defence counsel, the accused, and the proceedings while vigorously asserting the Crown's position; and

- by never permitting personal interests or partisan political considerations to interfere with the proper exercise of prosecutorial discretion.

Inflammatory Remarks and Conduct

As part of the duty to be fair, Crown Attorneys are obliged to ensure that any comments made during jury addresses are not inflammatory. Whether an address will be held to be inflammatory is determined by looking at the number and nature of the comments, and the tone of the address. While ultimately, the test (on appeal) is whether the objectionable comments are seen to have deprived the accused of his or her right to a fair trial, Crown Attorneys are held to a higher standard.

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[16] "Tunnel vision" has been defined as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information." Ontario. Commission of Proceedings Involving Guy Paul Morin. Toronto: Queen's Printer, 1998, Vol.1, p.601. (The "Kaufman Report.") See also the *Lamer Report (2006)*, Office of The Queen's Printer NL and notes 6 and 8.

The Attorney General of Newfoundland and Labrador and his or her agents have very substantial discretionary powers. Crown Attorneys must bear in mind that the opportunity to damage the reputation of the administration of justice is always present[17].

The general principles governing Crown jury addresses have been referred to by Fish J.A. (as he then was) of the Québec Court of Appeal in *R.* v. *Charest* (1990), 76 C.R.(3d) 63:

> *The principles which emerge from Boucher, Vallières and other leading cases ... may be summarized as follows. Crown counsel's duty is not to obtain a conviction, but "to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime" ... The Crown should press fully and firmly every legitimate argument tending to establish guilt, but must be "accurate, fair and dispassionate in conducting the prosecution and in addressing the jury" ... It is improper for Crown counsel to express his or her opinion as to the guilt or innocence of the accused ... or as to the credibility of any witness. Such expressions of opinion are objectionable not only because of their partisan nature, but also because they amount to testimony which likely would be inadmissible even if Crown counsel had been sworn as a witness ... Crown counsel should not advert to any unproven facts, even if they are material and could have been admitted as evidence. Applicable principles of law should be left for the judge to explain; when reference to the law is necessary for the purpose of making an argument, the law should be accurately stated.*
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> *The principles are well known. Their application, of course, is a function of the nature and number of comments made in each case, of the specific language used and of the overall tone of counsel's address. The likely effect of any corrective action taken by the trial judge must also be considered. Ultimately, the conclusive test is whether the objectionable comments are seen to have deprived the accused of his right to a fair hearing on the evidence presented at trial.* [citations omitted throughout]

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[17] See *The Ethical Prosecutor*, note 2.

The kinds of comments and conduct that have been found to be "inflammatory" (and thus render the trial unfair) can be divided into six categories:

- Expressions of personal opinion
  - including opinions on: issues in the case; on the honesty and integrity of police witnesses; that he or she does not believe the accused; or that the accused is guilty.[18]

- Negative comments about the accused's or a witness's credibility or character
  - Such comments may include excessive reference to the accused's criminal record, native country, likelihood of being a liar, excessive use of sarcasm or exaggeration in referring to the accused or defence witnesses.[19]

- Observations or statements of fact not supported by the evidence
  - These situations tend to be ones in which a Crown Attorney misstates the evidence in a way which impugns the accused's character.[20]

- Appeals to fear, emotion, prejudice or religious belief
  - These comments are often *in terrorem*[21] arguments in which Crown Attorneys urge a jury to protect society from the accused,

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[18] See, for example: *R.* v. *Michaud*, [1996] 3 S.C.R. 3; *R.* v. *McDonald* (1958), 120 C.C.C. 209 (Ont.C.A.); *R.* v. *Murphy* (1981), 43 N.S.R. (2d) 676 (C.A.); *Moubarak* v. *R.; Elzein* v. *R.*, [1982] Que.C.A. 454; *R.* v. *B. (R.B.)* (2001), 152 C.C.C. (3d) 437 (B.C.C.A.); *R.* v. *Swietlinski*, [1994] 3 S.C.R. 481.

[19] See, for example: *Pisani* v. *The Queen*, [1971] S.C.R. 738; *Tremblay* v. *The Queen* (1963), 40 C.R. 303 (Que.C.A.); *R.* v. *Romeo*, [1991] 1 S.C.R. 86; *R.* v. *Charest* (1990), 76 C.R.(3d) 63 (Que.C.A.); *R.* v. *C. (R.)* (1999), 137 C.C.C. (3d) 87 (B.C.C.A.); *R.* v. *Davis* (1995) 108 W.A.C. 81 (B.C.C.A.); *R.* v. *Sheri* (2004), 185 C.C.C.(3d) 155 (Ont.C.A.).

[20] See, for example: *Grabowski* v. *The Queen*, [1971] S.C.R. 738; *Emkeit* v. *The Queen*, [1974] S.C.R. 133; *R.* v. *Huback* (1966), 48 C.R. 252 (Alta. C.A.); *R.* v. *Sutherland* (1996), 112 C.C.C.(3d) 454 (Sask.C.A.); *R.* v. *Peavoy* (1997), 34 O.R.(3d) 620 (C.A.); *R.* v. *Khan* (1998), 126 C.C.C.(3d) 353 (Man. C.A.).

[21] *In terrorem* is loosely translatd to mean "in fear" or "by way of threat"

who is portrayed in very unflattering terms.[22]

- Negative comments about counsel for the accused
  - On occasion, Crown Attorneys have suggested that defence counsel have used improper tactics, presented illegal evidence or made other comments designed to portray defence counsel as being untrustworthy.[23]

- Inappropriate language, tactics, and conduct in general

  - Characterizations of the accused as a liar, excessive use of sarcasm, ridicule or derision, use of biblical references and irrelevant authority, are proscribed.[24] Inappropriate tactics include:

    - Failing to disclose to the court all the circumstances surrounding the obtaining of statements from the accused;

    - eliciting through a friendly witness a remark that is unsupported by any evidence and continuing to press the point in the presence of the jury during a discussion with the judge;

    - in cross-examination of the accused, while professing to test their credibility, bringing various matters before the jury which have no direct relation to the question of the accused's guilt;

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[22] See, for example: *R.* v. *Labarre* (1978), 45 C.C.C. (2d) 171 (Que.C.A.); *R.* v. *Gratton* (1985), 18 C.C.C.(3d) 462 (Ont.C.A.); *Moubarak*, note 30; *R.* v. *Munroe* (1995), 96 C.C.C.(3d) 431 (Ont. C.A.) aff'd 102 C.C.C.(3d) 383 (S.C.C.); *R.* v. *Pitt* (1996), 109 C.C.C. (3d) 488 (N.B.C.A.), leave to S.C.C. dismissed 112 C.C.C.(3d) vii.

[23] See *Moubarak*, note 30. R. v. *Shchavinsky* (2000), 148 C.C.C. (3d0 400 (Ont.C.A.); *R.* v. *D.(C.)* (2000), 145 C.C.C.(3d) 290 (Ont.C.A.); *R.* v *Siu* (1998), 124 C.C.C. (3d) 301 (B.C.C.A.).

[24] See *R.* v. *Gilling* (1997), 117 C.C.C.(3d) 444 (Ont.C.A.); *Provencher* v. *The Queen* (1955), 114 C.C.C. 100 (S.C.C.); *Richard* v. *The Queen* (1957), 126 C.C.C. 255 (N.B.C.A.); *R* v. *R.R.I.* (1997), 112 C.C.C.(3d) 367 (S.C.C.); [1996] 3 S.C.R. 1124; *R.* v. *Swietlinski*, [1994] 3 S.C.R. 481; *R.* v. *Khan* (1998), 126 C.C.C. (3d) 523 (B.C.C.A.); *R.* v. *Ballony-Reeder* (2001), 153 C.C.C.(3d) 511 (B.C.C.A.) *R v. Drover [2001]N.J. #36(CA), R.v. Bradbury* (2004), 243 Nfld.&P.E.I.R. 1 (NLCA)

- at the conclusion of the evidence given by the accused in his defence, stating in the presence of the jury that the accused will be arrested for perjury;

- improperly presenting evidence to the jury by reading from judgments of the Supreme Court of Canada; and

- raising a "*concoction theory*" with respect to disclosure for the first time in the closing address[25].

Mentoring and Guidance

A dynamic criminal law system which is responsive to the needs of the people of Newfoundland and Labrador requires a professional prosecution service. This can only be achieved if all Crown Attorneys, Senior Crown Attorneys and support staff receive proper resources and training. It is the responsibility of the Director of Public Prosecutions to ensure that these are made available. Mentoring is also important so that less experienced and junior Crown Attorneys can access guidance and assistance in carrying out their vital functions. This is especially so in the critical assessment of cases and observing the proper limits of crown advocacy. Senior Crown Attorneys should establish practices within each office to ensure that this is achieved.[26]

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[25] See *R.* v. *Gilling* (1997), 117 C.C.C.(3d) 444 (Ont.C.A.); *Provencher* v. *The Queen* (1995), 114 C.C.C. 100 (S.C.C.); *Richard* v. *The Queen* (1960), 126 C.C.C. 255 (N.B.C.A.); *R.* v. *R.R.I.* (1997), 112 C.C.C.(3d) 367 (B.C.C.A.).

[26] See *Lamer Report (2006)*, Office of the Queen's Printer NL at p.328 recommendation #11(e).

Summary References on Crown Attorneys' Duties and Responsibilities

Re: Skogman and The Queen, [1984] 2 S.C.R. 93; 13 C.C.C. (3d) 161 (S.C.C.): Crown counsel are in a different position from the ordinary litigant, for they represent the public interest in the community at large.

Boucher v. The Queen, [1955] S.C.R. 16; 110 C.C.C. 263 (S.C.C.): "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 so 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 a 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. Stinchcombe, [1991] 3 S.C.R. 326; 68 C.C.C. (3d) 1 (S.C.C): The Crown is under a duty at common law to disclose to the defence all material evidence, whether favourable to the accused or not. Transgressions with respect to this duty constitute a very serious breach of legal ethics.

Lemay v. The King, [1952] 1 S.C.R. 232; 102 C.C.C. 1 (S.C.C.): There is a long established rule that the prosecutor has discretion to determine who are material witnesses, and this discretion will not be interfered with unless it was exercised for an oblique motive.

Cunliffe and Bledsoe v. Law Society of British Columbia (1984), 13 C.C.C. (3d) 560 (B.C.C.A.): It is extremely important to the proper administration of justice that Crown counsel be aware of and fulfil their duty to be fair.

R. v. Lalonde (1971), 5 C.C.C. (2d) 168 (Ont. H.C.): The Crown Attorney must be firm while being fair in prosecuting the accused so that the Court will not be duped by defences which are not thoroughly examined in Court. The criminal law leaves to the Crown Attorney many discretions as to whom and what to prosecute, and the conduct of the Crown's case. Our law does not equate a good and fair Crown Attorney with a weak lawyer.

R v. Sugarman (1935), 25 Cr. App. R. 109: It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit

all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done.

R. v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.): The Attorney General reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "*second-guess*" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then and only then should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

CBA Code of Professional Conduct, Chap. VIII, page 29 commentary 7: 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 on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. He should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and to the extent required by law and accepted practice, he should make timely disclosure to the accused or his counsel (or to the court if the accused is unrepresented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence. The *CBA Code of Professional Conduct* has been adopted by the Law Society of Newfoundland and Labrador.