

Role of the Crown Preamble to the Crown Policy Manual

Crown counsel play a pivotal role in the administration of criminal justice. In many respects, the role of the Crown is a cornerstone of the criminal justice system. The Crown Policy Manual facilitates and enhances the performance of that role by communicating the Attorney General’s guidance, in important areas of Crown practice and discretion, to Crown counsel. These policies are accessible to the public on the Attorney General’s website, thus enhancing public confidence in the operation of the criminal justice system.

Public confidence in the administration of criminal justice is bolstered by a system where Crown counsel are not only strong and effective advocates for the prosecution, but also Ministers of Justice with a duty to ensure that the criminal justice system operates fairly to all: the accused, victims of crime, and the public. The role of Crown counsel has been described on many occasions.¹ The following observations from the Supreme Court of Canada provide a summary of our complex function within the criminal justice system:

“It cannot be overemphasized 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 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 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*)

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“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, (cites omitted) 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. Gruenke*, [1991] 3 S.C.R. 263 at 295, 67 C.C.C., (3d) 289; per L’Heureux-Dube, J. 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. Indeed, this is a critical element of this country’s criminal law mechanism: (cites omitted). In this sense, within the boundaries outlined above, the Crown must be allowed to perform the

¹ See, for example: *R. v. Boucher* (1954), 110 C.C.C. 263 (S.C.C.); *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.); *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.) at 289; *R. v. Owen McIntosh*; *R. v. Paul McCarthy* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.); *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.) at 13-16 per L’Heureux-Dube; *R. v. T.(V)*. (1992), 71 C.C.C. (3d) 32 (S.C.C.); *R. v. Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.); *R. v. R.(A.J.)* (1994), 20 O.R. (3d) 405 (Ont. C.A.); *R. v. Bain* (1992), 69 C.C.C. (3d) 481 (S.C.C.); *R. v. Durette* (1992), 9 O.R. (3d) 557 (Ont. C.A.); *R. v. Conway* (1989), 70 C.R. (3d) 209 (S.C.C.) at 255; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 193; *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.).

function with which it has been entrusted; discretion in pursuing justice remains an important part of that function. (*R. v. Cook*)

Constitutional Foundation for the Role of the Crown

It is a fundamental principle that the Attorney General must carry out prosecution responsibilities independent of any partisan political influences. Crown counsel, as agents of the Attorney General, share the Attorney General's independence from partisan political influence but are not independent themselves of the direction of the Attorney General. Because of the potential for suggestions of political influence and, given that there are hundreds of thousands of criminal cases which flow through the courts every year in Ontario, it would be imprudent and impractical for the Attorney General to become involved in individual cases on a routine basis. The common practice is for the Attorney General to grant broad areas of discretion in criminal prosecutions to Crown counsel (except in those few circumstances where the *Criminal Code* requires the Attorney's personal involvement or consent). This granting of decision-making latitude reflects respect for the professional judgment of Crown counsel and is consistent with Crown counsel's Minister of Justice role.

The Attorney General is accountable to the Legislature for the entire process through which justice is administered in the province. Because of this accountability, which includes specific cases, a continuum of responsibility within the Ministry has been established. This continuum extends from Crown counsel at the operational level upward to the Deputy Attorney General and the Attorney General. Each Crown counsel or Assistant Crown Attorney reports to a Crown Attorney or Director. Crown Attorneys in turn report to Directors, while Directors report to the Assistant Deputy Attorney General, who reports to the Deputy Attorney General. The Ministry also employs *per diem* counsel to act as Crown counsel and provincial prosecutors. They are subject to this internal reporting structure. *See also Appendix on page 7.*

Crown Counsel as an Advocate

The role of Crown counsel as an advocate has historically been characterized as more a "part of the court" than an ordinary advocate.

A prosecutor's responsibilities are public in nature. As a prosecutor and public representative, Crown counsel's demeanor and actions should be fair, dispassionate and moderate; show no signs of partisanship²; open to the possibility of the innocence of the accused person and avoid "tunnel vision."³ It is especially important that Crown counsel avoid personalizing their role in court.⁴ Objectionable cross-examination or immoderate jury addresses are the antithesis of the proper role of the Crown.

The adversarial system in which we operate requires our participation as strong advocates, but it also is seriously flawed if the "adversaries" are not evenly matched. We have, therefore, a special duty to the

² *R. v. Henderson* (1999), 44 O.R. (3d) 628 (C.A.); *R. v. Arthur F.* (1996), 30 O.R. (3d) 470; *R. v. Vandenberghe* (1995), 96 C.C.C. (3d) 371 (C.A.); *R. v. Stinchcombe* (1992), 68 C.C.C. (3d) 1 (S.C.C.).

³ "...tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information." *The Commission on Proceedings Involving Guy Paul Morin*, The Hon. Fred Kaufman, Commissioner (Toronto: Queen's Printer, 1998) at p. 1136

⁴ *R. v. F.S.* (2000), 47 O.R. (3d) 349 (Ont. C.A.); *R. v. Chambers* (1990), 59 C.C.C. (3d) 321 (SCC); *R. v. McDonald* (1958), 120 C.C.C. 209.

accused and his counsel so that they may fully and fairly place their evidence and arguments before the courts.

The Role of Crown Counsel in Relation to Victims and Witnesses

Crown counsel owe special duties of candour and respect to all victims. Crown counsel is not and can never function as the victim's lawyer. In circumstances where the fair and impartial exercise of prosecutorial discretion is at odds with the victim's desires, Crown counsel should be sensitive but realistic and candid with victims.

The Role of Crown Counsel in Relation to the Police

Although Crown counsel work closely with the police, the separation between police and Crown roles is of fundamental importance to the proper administration of justice.⁵ The police investigate and lay charges where they believe on reasonable grounds that an offence has been committed. Crown counsel will carefully review all charges to ensure they meet the Ministry's screening standard. Crown counsel proceed only with prosecutions which present a reasonable prospect of conviction and where the prosecution is in the public interest. A distinct line between these two functions, which allows both the police and Crown counsel to exercise discretion independently and objectively, forms part of a system of checks and balances. Given the current reality of large and complex police investigations, access to timely advice from Crown counsel in these cases may be crucially important. Special task forces often include and benefit from both Crown and Police participation, necessitating a close working relationship. The independence of roles and responsibilities, upon which the justice system depends, must be respected in any of these special working relationships.

Crown Counsel's Duty of Fairness to the Public

Crown counsel have a responsibility to ensure that every prosecution is carried out in a manner consistent with the public interest. One aspect of the public interest which bears special mention is the challenge facing government and private sector organizations concerning institutional discrimination. Crown counsel, as key participants in the criminal justice system, play an important role in assisting to overcome any forms of discrimination that deny equal access to the criminal justice system. Crown counsel take a leadership role in ensuring that various forms of discrimination, including homophobia, racism and racial profiling, are not reflected in the criminal justice system. Discrimination against child witnesses and women in the criminal justice system existed until changes in the *Criminal Code* and case law recognized and changed it.⁶

An important aspect of the Crown role relates to community involvement. Crown counsel play an important role in the community as ambassadors for the criminal justice system. Crowns donate generously of their own time and energy to education about the justice system by speaking at schools, to police, at judicial information sessions and to public groups. Crowns participate in mentoring law students and junior Crowns. In performing these activities, Crowns embody the sense of fair play and justice for which they are known in their professional lives.

⁵ *R. v. Regan* (2002), 1 S.C.R. 297 (S.C.C.); *The Royal Commission on the Donald Marshall Jr., Prosecution; The 1998 Report of the Commission on Proceedings Involving Guy Paul Morin*.

⁶ *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 200 (S.C.C.); *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.)

Crown Policy Manual

One of the chief mechanisms by which the Attorney General for the Province of Ontario provides advice and guidance to Crowns on the exercise of prosecutorial discretion is the Crown Policy Manual which sets out the overall philosophy, direction, and priorities of the Ministry. In carrying out the duties of the Crown Attorney, a natural tension exists between prosecutorial discretion exercised in individual cases and general prosecution policy formulated by the Attorney General.

Crown counsel have a broad discretion to conduct cases to ensure that justice is done in individual circumstances. This prosecutorial discretion is necessary to allow Crown counsel to respond to unique circumstances in cases including victims, offenders, and local conditions. Prosecutorial discretion, when exercised fairly and impartially, is an essential component of the criminal justice system.⁷

Notwithstanding the importance of discretion, it is also necessary in the public interest to have uniform prosecution policies applicable across the province.⁸ Policies assist and guide individual prosecutors in exercising their prosecutorial discretion. The policies in this Manual are not intended to replace the sound judgment that Crown counsel exercise. They set out appropriate considerations for prosecutorial decision-making, while supporting flexibility. Crowns are expected to exercise their discretion in accordance with overall priorities in the Manual, keeping in mind the need to see justice done in individual cases. Directives which bind the discretion of Crown counsel in the conduct of individual cases are few and far between.⁹

There are many discretionary decisions made daily by Crown counsel that are not specifically described in these policies. In general, Crown counsel should exercise their discretion in keeping with the spirit of the policies in this Manual.

Purposes of the Crown Policy Manual

The Crown Policy Manual provides consistency of approaches to prosecutions across the province, for example, in such areas as child abuse, sexual assault, and spouse/partner abuse. The Manual conveys the Attorney General's instructions and priorities as well as the rationale for them to Crowns. It provides the public with an indication of the guiding principles for Crowns, thus enhancing public accountability.

Application of the Crown Policy Manual

The Attorney General, Deputy Attorney General, Assistant Deputy Attorney General, Directors, Crown Attorneys, Assistant Crown Attorneys, Crown counsel, *per diem* crowns, provincial prosecutors (governed by the Criminal Law Division) are all subject to the policies and advice provided in the Crown Policy Manual.

⁷ *R. v. Beare*, [1988] 2 S.C.R. 387 at paras. 51-53.

⁸ *The Royal Commission on the Donald Marshall Junior Prosecution*; the Canadian Law Reform Commission Working Paper entitled *Controlling Criminal Prosecutions*; *the Attorney General and the Crown Prosecutor*; The 1998 Report on *Proceedings involving Guy Paul Morin*

⁹ *The Report of the Attorney General's advisory committee on charge screening, disclosure, and resolution discussions (The Martin Committee Report 1993)*

Renewal of the Crown Policy Manual

From time to time, the policies of the Attorney General change or evolve in keeping with current views in our society.¹⁰ It is important that prosecution policies provide leadership as to prevailing concepts of fairness. Examples of policies that changed or evolved in this way to effect significant changes from past policies are Crown policies on child abuse, spouse/partner abuse (domestic violence), drinking/driving offences and in-custody informants. Changes in prosecution policy may lead to changes in the law. Jurisprudence in Canada has responded to our policies and changing social concepts.¹¹

It is also important that the existence of prosecution policies not stifle creativity or cause counsel to fear that the exercise of Crown discretion will not be supported. Lawyers of the Criminal Law Division have a reputation for developing the law through novel arguments that ultimately win support in the Supreme Court of Canada. Creative prosecutorial submissions resulted in watershed cases that fundamentally shifted the law of hearsay.¹² The recent DNA Databank jurisprudence are other examples of Ontario Crowns “pushing the envelope” to achieve clarity in the law.¹³

The policies in this Manual are therefore formulated in recognition of the sometimes conflicting needs for healthy prosecutorial discretion, and the fairness through consistency that guidelines can bring. Individual policies must be read in the context of this preamble.

In order to ensure that information contained in the Crown Policy Manual is current or “evergreen”, the Manual is divided into three portions: Policies, Confidential Legal Memoranda and Practice Memoranda.

Policies provide a brief, clear statement of principle, containing broad general guidance on important areas of Crown practice and discretion. They provide the overall vision and philosophy of the Attorney General on significant prosecution policy and respond to systemic concerns. The policies are publicly available on the Attorney General’s website.

Memoranda address detailed, practical, strategic and legal issues. Some will provide confidential legal advice; others will be available to defence/ victims groups and other members of the public as required. By providing both policies and memoranda, consistency of overall philosophy (policy) with the flexibility to change details (practice/confidential legal memoranda) can be attained.

Conclusion

Diligence and professionalism, which are hallmarks of the Ontario Crown Attorney system, mean that we are a dynamic and integral part of the criminal justice system.

¹⁰ In January 1988, Crown offices were provided with a consolidation of the guidelines and directives that had been issued to Crown counsel over a number of years. On a less formal basis, guidance for prosecutors has been provided by way of various memoranda issued to Crown counsel. In 1994, the first Crown Policy Manual was issued, providing technical, detailed, legal advice as well as overall policies and principles.

¹¹ See for example *R. v. Godoy* (1998), 131 C.C.C. (3d) 129 (S.C.C.)

¹² *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.); *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257 (S.C.C.)

¹³ *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. CA); *R. v. P.R.F.* (2001), 161 C.C.C. (3d) 275 (Ont. CA)

As Crown counsel, we are able and highly motivated people, who embody the following aspects of the Role of the Crown and Crown Attorney System:

- models of fairness and transparency in decisions;
- participants in an organization which provides leadership by taking stands on criminal justice issues such as domestic violence, homophobic and racist crimes;
- advocates who prosecute cases firmly but fairly, according to the highest tradition of the Office of the Crown.

The consistent standard of excellence exhibited by Ontario Crown counsel will allow the Crown Policy Manual to be put into practice effectively and justly.

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Appendix

The role of Crown counsel in Ontario is rooted in the ancient office of the Attorney General in England. While the office has English roots, it has evolved in a distinctly Canadian fashion. In England, the Attorney General is not usually a member of Cabinet; in Canada he or she usually is. Notwithstanding the fact that the Attorney General is a member of Cabinet, he or she is also the Chief Public Prosecutor in the Province. As early as 1701, this aspect of the Attorney General's responsibilities has been recognized by the courts. Nowadays the Attorney General very seldom goes to court or becomes involved in ongoing prosecutions, but remains responsible to the Legislature for every prosecutorial decision made in the province.

Crowns are governed by the provisions in the *Public Services Act*, the *Crown Attorneys Act* which indicates that Crowns act as "directed by the Deputy Attorney General" (s.1(2) *Crown Attorneys Act*, R.S.O. 1990, C. 49) and the *Ministry of the Attorney General Act* R.S.O. Section 5 of *The Ministry of the Attorney General Act* outlines the functions of the Attorney General and provides in part:

(d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the *Constitution Act* 1867 came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature.

Pursuant to s.10 of the *Crown Attorneys Act* every Crown Attorney acts as agent of the Attorney General for the purposes of the *Criminal Code*.