

THE “GOOD” CRIMINAL LAW BARRISTER

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The Concept of Professionalism

The Canadian justice system acknowledges the special professional status of barristers who appear in the criminal courts. It requires that they be specially qualified. The qualifications include meeting education and professional standards, and achievement of expertise in their field. Their status entitles members of the defence bar to practice independently from the State in all its pervasive manifestations. That independence is considered one of the hallmarks of a free society. Crown counsel, as public officers, also perform an important role in the administration of justice in the criminal courts.

As a function of their professional status, barristers have a responsibility to practice in a spirit of public service. Professionalism is about dedication to justice and the public good. The commitment to professionalism also infuses two other values: a commitment to competence or learning, and a commitment to ethics or decency. And, integrity is at the heart of every barrister’s function.

See:

- *Attorney-General v. Law Society of B.C.* [1982], S.C.R. 307, *per* Estey J. at 335-336. Referred to recently in *Fortin v. Chretien* [2001], 2 S.C.R. 500 at para. 17.
- D. Mullan, Address (Call to the Bar and Convocation, February 14, 2002), at <http://qsilver.queensu.ca/law/news/inthenews/convocationaddress.htm>

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- Chief Justice Roy McMurtry, *Defining Professionalism* (Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, draft October 2001) at www.oba.org/en/pdf/definingprofessoct2001revdec.pdf.
- Rt. Hon. Beverley McLachlin, C.J.C., *Three Ingredients to Legal Professionalism* (Call to the Bar Convocation in Ottawa, February 2000).
- Hon. Justice Rosalie Silberman Abella, Address (The Law Society of Upper Canada Professionalism Revisted, Opening Address Benchers=Retreat, Hockley Valley Resort, Ontario, October 14, 1999), at http://www.ontariocourts.on.ca/court_of_appeal/speeches/professionalism.htm
- Ontario, Report of the Attorney General's Advisory Committee, *Charge Screening, Disclosure, and Resolution Discussions* (Ontario: Queen's Printer, 1993) at 29. [hereinafter, *The Martin Report*]
- Hon. Justice Frank Iacobucci, *The Practice of Law: Business and Professionalism* (November 1991) 49(6) *The Advocate* 859.

Professional and Judicial Governance.

Beyond the values and commitments inherent in the concept of professionalism, barristers who appear in the criminal courts in Canada are required to observe standards set by the governing law societies of the provinces in which they practice. They may be subject to discipline if they should act contrary to the rules of professional conduct. As well, they are supervised by the judges of the courts before whom they appear. If they act improperly they may be denied an audience, or, in serious cases, may be cited for contempt.

See:

- Law Society of Upper Canada Rules of Professional Conduct (Toronto, Ontario, Law Society of Upper Canada, June 22, 2000, last amended on October 23, 2003).
- *R v. Neil* [2002], 3 S.C.R. 631 at paras. 12-16. This cases addressed the issue of conflicts of interests and the duty of loyalty owed by counsel to a current client.

Ethical and Moral Considerations for Defence Counsel

The question often asked of defence lawyers by those with scant knowledge of the justice system is, "How can you represent someone you know is guilty?" The question expresses concerns about the moral quality of the function of barristers in the criminal justice system. Part of the answer is that defence counsel have a recognized role in that system which society will respect, and in some cases, fund. The answer also involves recognition of the professional responsibility of defence counsel to observe legal and ethical boundaries in exercising their function. The answer may be informed by the knowledge that a barrister may have little sympathy with his client or his cause and will undertake the defence out of a sense of professional obligation. Occasionally, a barrister may choose to reject a retainer, having regard to the criminal offence charged; however, there are commentators that would not allow the barrister that choice.

See:

- Hon. Michel Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at Chapter 2, Choosing and Refusing Clients, Parts E & F.
- A.C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999), Chapter 5, Dealing With Clients - From Start to Finish, Part A: The Choice of Clients.
- Hon. Michel Proulx, "The Defense of the Unpopular or Repugnant Client: Some of the Hardest Questions" (The Annual John Sopinka Advocacy Lecture, Annual Convention & Education Programme of the Ontario Criminal Lawyers Association, November 12, 1999).
- M. Blake and A. Ashworth, "Some Ethical Issues in Prosecuting and Defending Criminal Cases" (1998) *Crim. L. R.* 16.

It is trite law that the Canadian system of criminal justice is based on the presumption that all persons charged with crimes are innocent until proved guilty at a public trial. The trial is conducted before an independent judge pursuant to an adversarial system. The state is represented by counsel who has the

duty to present evidence to establish the guilt of the defendant beyond a reasonable doubt. The evidence may be challenged by the person accused, who must be present at her trial, and who may adduce other evidence to support her innocence. The defendant may conduct her defence by herself, or may choose to retain counsel to conduct it for her. It is to the latter mandate that the concept of professionalism and the morality of defence counsel's role is relevant.

The system of criminal justice promotes the right of defence counsel, to stand in the shoes of defendants, and do for them in preparation for trial and at the trial what defendants would do for themselves if they had the skill and knowledge. Counsel have a duty of loyalty to their clients and a fiduciary duty to serve them conscientiously. They must keep in confidence their clients' communications. They must present to the court every fact and argument that supports the clients' defences, and obtain for them the most favourable results possible.

See:

- *Rondel v. Worsley*, [1969] 1 A.C.191 (H.L.), per Lord Reid at 227: **"Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question . . . which he thinks will help his clients' case."**
- Law Society of Upper Canada, Rules of Professional Conduct **Rule 4.01(1) and commentary; Rule 2.03 and commentary.**

Although some clients may consider their defence counsel unrestricted in their duty to help them establish their innocence, counsel have other obligations that may limit the performance of their mandate.

Beyond their fiduciary duty to their clients, defence counsel, as professionals, have obligations to the administration of justice. These may include the observance of ethical and legal rules laid down by the legislatures, the legal profession, and the courts. Accordingly, the concept of professionalism as applied to defence counsel involves not only the fiduciary obligations to the client, but also the integrity and restraint with which counsel meet their other professional obligations.

On occasion, counsel's recognition of their professional obligations may cause some tension with their clients. In *Rondel v. Worsley*, *supra*, Lord Reid wrote at pages 227: "But, as an officer of the court concerned in the administration of justice, [defence counsel] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests."

See also:

- The Martin Report, *supra* at p.33
- A.C. Hutchinson, *supra*, at Chapter 9: Criminal Lawyers: Putting Up a Defence.
- M. Blake and A. Ashworth, *supra*.

Tension may arise, for example, when a client instructs her counsel to lead evidence at her trial when counsel knows that the evidence is false. Counsel is prohibited from leading such evidence, and must refuse. The client may view the refusal as a breach of counsel's fiduciary duty. However, the court and the Law Society demand that the prohibition be observed.

See:

- Law Society of Upper Canada, Rules of Professional Conduct Rule 4.01(1) and *commentary*; Rule 4.01(2)(b),(e),(f), and (g).
- S. Lubet, S. Block and C. Tape, *Modern Trial Advocacy*, 2nd ed. (Notre Dame, Ind.: National Institute for Trial Advocacy, Notre Dame Law School, 2000), Chapter 1: Case Analysis, Persuasion & Storytelling, Part II *The Ethics of Persuasive Storytelling*.
- The Martin Report, *supra*, at 30-31.
- M. Blake and A. Ashworth, *supra*, at 21.

There is another potential for tension when, during a trial, counsel refers the presiding judge to a binding legal authority that impacts adversely on her client's case. The client may feel that the disclosure undermined his case, and that he was betrayed. But the rules that govern the professional require that she disclose the authority.

See:

- Law Society of Upper Canada, Rules of Professional Conduct, Rule 4.01(2)(h).
- M. Blake and A. Ashworth, *supra*, at 22.

Although defence counsel may interview witnesses, they may not advise them as to what to say, or to change their stories. If they advise them improperly, they are at risk of prosecution for attempting to obstruct justice.

In addition, defence counsel may be under constraints as to the use of physical evidence that they receive from their client or another person. In some circumstances, they may be compelled to act contrary to the instructions of their client in relation to the custody of that evidence.

See:

- *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.).
- A.M. Cooper, "The Ken Murray Case: Defence Counsel's Dilemma" (Mar. 2003) 47 *Crim. L.Q.* 141.
- Criminal Lawyers Association (April 1997 Newsletter) "Smoking Guns, Bloody Shirts, and Videotapes: A Virtual Round Table Discussion" at <http://www.criminallawyers.ca/newslett/apr97/smoke.htm>

It is submitted that the observance of professional and ethical constraints of that nature distinguish counsel from their clients. Our system of justice permits a client who is in fact guilty of a crime to be represented by counsel. However, the same system requires the barrister to observe rules that may conflict with the egocentric interest of their client. Although a client may be guilty of the crime charged, counsel is not entitled to act disreputably in conducting her defence. Society's recognition and support of counsel's mandate to practice within those rules is, perhaps, a further answer to the moral concerns expressed by members of the public as to defence counsel's role.

See:

- A. C. Hutchinson, *supra*, at Chapter 9: Criminal Lawyers: Putting Up A Defence
- S. Lubet, S. Block, and C. Tape, *supra*.
- Hon. Michel Proulx, *supra*.

It is my position, that "good" criminal law barristers will observe such rules despite conflicts they may cause with clients. It is a matter of professionalism. There may be instances where counsel may have to exercise skilful diplomacy to retain the confidence of their clients. In some cases counsel may be discharged by their clients because of such conflicts.

Some Practical Considerations for Defence Counsel

The good defence barrister, rather than the client, should direct the conduct of the defence. However, counsel is responsible to act in good faith and in accordance with reasonable professional standards, including the exercise of skill and judgment. If a client insists on controlling the barrister's management of the defence in a manner that the barrister considers unethical or gravely harmful to the case, the barrister may have to consider whether to continue to act.

See:

- G. A. Martin, "The Role and Responsibility of the Defence Advocate" (1969) 12 Crim. L.Q. 376 at 382 where he wrote: "The defence counsel is not the *alter ego* of the client. The function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his professional skill and judgment in the conduct of the case and not allow himself to be a mere mouthpiece for the client." See also: A. Maloney, Q.C. "The Role of the Independent Bar" (1979) Law Society of Upper Canada Special Lectures 49 at 61-62.
- *R. v. B.(G.D.)* (2000), 143 C.C.C. (3d) 289 (S.C.C.) at paras. 32-35 where Major J., writing for the court, held that the decision by defence counsel not to use the complainant's videotaped statement during the cross-examination of the complainant was made in good faith and in the best interests of the client and therefore there was no miscarriage of justice. Major J. held at para. 34: "Where, in the course of a trial, counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice. While it is not the case that defence lawyers must always obtain express approval for each and every decision made by them in relation to the conduct of the defence, there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions. The failure to do so may in some circumstances raise questions of procedural fairness and the reliability of the result leading to a miscarriage of justice."
- *R.v.Samra* (1998), 129 C.C.C.(3d) 144 (Ont. C.A.), leave to appeal refused (1997) 46 C.R.R. (2d) 276n (S.C.C.) at paras. 31-33 where Rosenberg J.A. held that the fact that counsel made legal submissions at the trial that did not coincide with the accused's views did not place counsel in a disqualifying conflict of interest or compromise the fairness of the trial.
- *R. v. White* (1997), 114 C.C.C. (3d) 225 (Ont. C.A.) at 253 where the court held that "Once a client has pleaded not guilty, apart from a few fundamental decisions such as whether the client should testify, defence counsel decides how a case should be conducted. Defence counsel are not mere mouthpieces for their clients. They conduct the case by exercising their professional skill and judgment in what they consider to be the best interests of their clients. Their control over the conduct of the case ordinarily includes deciding what witnesses to call, what witnesses to cross-examine and how to cross-examine."

See also *R. v. Smith* (1997), 120 C.C.C. (3d) 500 (Ont. C.A.) at 506-508, 510-511.

- *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal refused (1997), 111 C.C.C. (3d) vi (S.C.C.) at 77-79 Austin J.A. held that the client's decision to refuse to follow his counsel's advice to give evidence in his own defence was made with a full appreciation of the likely consequences and therefore counsel did not act improperly.

Contrast with:

- *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.) at 567 where Lacourciere J.A., writing for the court, held that "An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions [namely the decision of the defence to present and to present it as he chooses] and assume the risks involved."

- *R. v. Swain* (1991), 63 C.C.C. (3d) 481 (S.C.C.) at 505-506 Lamer C.J.C., as he then was, held: "Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence ... An accused person has control over the decision of whether to have counsel, whether to testify on his or her own behalf, and what witnesses to call. This is a reflection of our society's traditional respect for individual autonomy within an adversarial system" [emphasis added].

It has been said that the only decisions that the barrister should leave to the client are whether she should plead guilty or not guilty to the offence charged, and whether to give evidence in her defence at the trial. And even if the client has made those decisions, they may be overridden by the barrister in light of facts disclosed by the client. For example, if the client denies that she is guilty, the barrister is precluded from entering a plea of guilty on her behalf regardless of her instructions, and no matter how urgently the client may wish to plead to have the matter resolved. If the client has admitted to her counsel that she has committed the *actus reus* of the offence charged, the barrister may not call her to testify falsely that she did

not do the act charged, and thereby suborn perjury.

See:

- G.A. Martin, *supra*.
- M. Proulx and D. Layton, *supra*, at Chapter 3: Decision Making, Part C: Canadian Case Law and Commentary on Decision-Making Authority and Chapter 8: Plea Discussions, Part K, Duty to Advise Client.
- Law Society of Upper Canada Rules of Professional Conduct, Rule 4.01(8) and (9).

Ethical considerations for Crown Counsel

Crown counsel are officers of the Court. As such they fulfil a public function which must be carried out fairly and in the public interest. They are public officers engaged in the administration of justice. In

Boucher v. The Queen, [1955] S.C.R. 16 Rand J. wrote at 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of 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.

See also:

- *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.) *per* Zuber J.A. at 289.
- A.C. Hutchinson, *supra*, Chapter 9: Criminal Lawyers: Putting Up A Defence, Part E: The Case for the Prosecution.
- Law Society of Upper Canada Rules of Professional Conduct, Rule 4.01(3) and *commentary*.
- The Martin Report, *supra*, at 31-34.
- Ontario: The Commission on Proceedings Involving Guy Paul Morin, Vol. 1-2 (Ontario: Queen's Printer, 1998) at 1040-1042.

Crown counsel have a legal obligation to make disclosure to the defence of evidence in their possession. The legal duty of disclosure may have an ethical component. For example, there is an obligation to disclose to the defendant evidence that may assist the defence. It is a professional obligation, the breach of which may lead to a mistrial or to a stay of the prosecution. In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, Sopinka J. speaking for the Supreme Court of Canada wrote at page 345:

[A]ll statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. When statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. ... If the information is of no use then presumably it is irrelevant and will be excluded in the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor.

See also:

- *R. v. G.G.M.*, [2004] N.S.J. No.8 (N.S.C.A.).
- *R. v. Atikian*, [1992] O.J. No. 3045 (Ont. Gen. Div.).

The prosecutor must not mislead the court. For example, she must not conceal from the court arrangements made with disreputable witnesses for the Crown that might lead the court to more readily accept their credibility, and the revelation of which might detract from their credibility.

See:

- The Commission on Proceedings Involving Guy Paul Morin, *supra*, at 545-556.

- Law Society of Upper Canada Rules of Professional Conduct, Rule 4.01(3) and *commentary*.

The Ontario Crown Policy Manual requires Crown Attorneys to determine whether, based on all the admissible evidence, there is a reasonable prospect of conviction and whether it is in the public interest to continue with a prosecution. If not, they should recommend that the charge(s) not proceed.

See:

- The Martin Report, *supra*, at 65-68.
- *R. v. Laforme*, [2003] O.J. No. 845 (Ont. Sup. Ct. J.) at para. 7. This case involved an application for judicial review of the Crown attorney's decision not to pursue a prosecution. Kent J. held that Crown counsel did not act in bad faith where he reviewed the disclosure materials and applied the threshold test as set out in the Charge Screening section of the Crown Policy Manual when concluding that there was no reasonable prospect of conviction. See also *R. v. Bain*, [2003] O.J. No. 130 (Ont. Sup. Ct. J.) At paras. 7-8.
- *Perks v. Ontario (Attorney General)*, [1998] O.J. No. 421 (Ont. Ct. J. Gen. Div.) at para. 3 where Dambrot J. held that according to the charge screening principles established by the Ontario Crown Policy Manual, before a prosecution goes forward, a prosecutor must first determine that there is a reasonable prospect of conviction, taking into consideration likely defences, and must then decide if the prosecution is in the public interest.®

Crown counsel is not entitled, knowingly to present false evidence to the court. To do so would not only constitute professional misconduct but could also constitute the crime of suborning perjury.

Some Practical Considerations for Crown Counsel

In the interest of a fair trial, decisions of appeal courts have placed limits on how a Crown

prosecutor may cross-examine an accused.

See:

- *R. v. Wojcik* (2002), 166 C.C.C. (3d) 418 (Man. C.A.). In this case, the court held that Crown counsel cannot cross-examine the accused as to his failure to provide the police with an explanation for what occurred or with any other information. Such cross-examination is highly improper as it undermines the presumption of innocence and the right to remain silent.

- *R. v. Bouhass* (2002), 169 C.C.C. (3d) 444 (Ont. C.A.). At para. 11 the court held that the tone of the cross-examination was often sarcastic, personally abusive and derisive. The language used was emotive and it measured the appellant against a severe moralistic standard. The appellant was attacked for his lifestyle ... his sexual activities, his supposed heroin addiction and his "thievery". In addition, Crown counsel repeatedly referred to the appellant as a "bare-faced liar" and regularly injected his personal views and editorial comments into the questions he was asking.

- *R. v. Robinson* (2001), 153 C.C.C. (3d) 398 (Ont. C.A.) at para. 35 Rosenberg J.A. held: "In my view, Crown counsel's cross-examination of the appellant was highly improper. From start to finish, it was designed to demean and denigrate the appellant and portray him as a fraudsman, a freeloader and a demented sexual pervert. Many of the questions posed were laced with sarcasm and framed in a manner that made it apparent that Crown counsel personally held the appellant in utter contempt. In many respects, this was not a cross-examination but an attempt at a character assassination."

- *R. v. Schell* (2000), 148 C.C.C. (3d) 219 (Ont. C.A.): at paras. 46, 64-66 where Rosenberg J.A. held that it is inappropriate to ask an accused questions on his choice to remain silent and his use of the disclosure. See also *R. v. Parrington* (1985), 20 C.C.C. (3d) 184 (Ont. C.A.) at 188.

- *R. v. Henderson* (1999), 134 C.C.C. (3d) 131 (Ont. C.A.): where it was held that cross-examination is improper when questions require the witness to comment upon the complainant's credibility or give an opinion that he was not qualified to give.

- *R. v. Kusk* (1999), 132 C.C.C. (3d) 559 (Alta. C.A.): it is improper to ask the accused whether the complainant has a motive to lie or why other witnesses would lie or falsely implicate the accused. See also: *R. v. N. (P.L.F.)* (1999), 138 C.C.C. (3d) 49 (Man. C.A.); *R. v. Vandenberghe* (1995), 96 C.C.C. (3d) 371 (Ont. C.A.); *R. v. DeFrancesca* (1995), 104 C.C.C. (3d) 189 (Ont. C.A.); leave to appeal refused (1996), 104 C.C.C. (3d) vi (S.C.C.).

- *R. v. Calder* (1996), 105 C.C.C. (3d) 1 (S.C.C.): Crown counsel cannot generally cross-examine an accused as to his prior inconsistent statements to authorities not proven to be voluntary or as to prior inconsistent statements excluded during the Crown's case as violative of the *Charter of Rights and Freedoms*.

- *R. v. Daly* (1992), 57 O.A.C. 70 (Ont. C.A.) at 76. Crown counsel's cross-examination of the appellant was "vigorous" and included sarcasm and editorializing. At times, Crown counsel asked the appellant to comment on the veracity of certain Crown witnesses. The court held that while Crown

counsel's the cross-examination of the appellant was improper it did not occasion a miscarriage of justice.

- *R. v. Kuldip* (1990), 61 C.C.C. (3d) 385 (S.C.C.): **there are limits placed on the Crown regarding cross-examination on the accused's prior testimony. See also: *Noel v. The Queen*, (2002) 168 C.C.C. (3d) 193 (S.C.C.).**

- *R. v. Yakeleya* (1985), 20 C.C.C. (2d) 193 (Ont. C.A.): **it is improper to ask the accused whether the complainant is lying or committing perjury.**

There are also limits on the manner in which a prosecuting barrister may present his or her argument to a jury. They may not appeal to the jury's emotions in an inflammatory way. They may not misstate the evidence adduced at the trial. Failure to observe these limits may lead an appellate court to set aside a conviction.

See:

- *R. v. Munroe* (1995), 96 C.C.C. (3d) 431 (Ont. C.A.) at paras. 36-54. In this case, the court held that while Crown counsel's address to the jury was highly inflammatory, there was no miscarriage of justice because of the judge's charge to the jury.

- *R. v. Charest* (1990), 57 C.C.C. (3d) 312 (Que. C.A.) at p. 331-32 where the court held that Crown counsel expressed, in moralistic and hostile terms, his personal opinion of the appellant's guilt and the appellant's character. He used his oratorical skill to inflame the jury's passion and to appeal to their emotions. As a result, a new trial was ordered.

- *R. v. Labarre* (1978), 45 C.C.C. (2d) 171 (Que. C.A.) at 174-175. This case involved a charge of criminal negligence causing death, resulting from impaired driving. During the closing address to the jury, the Crown made the following statements: "You know, [the deceased] was twenty-three years old; she had the right to return home at night. [The deceased's mother] also had a right to expect that child! Did they deserve that? Would you deserve tomorrow morning to lose one of your children, twenty-three years old, struck by an individual with a brain swimming in fourteen ounces of alcohol." Montgomery J.A. held that the Crown, in making these statements (among others) went too far in appealing to the emotions and fears of the jurors and as such, a new trial was ordered.

- *Pisani v. R.* (1970), 1 C.C.C. (2d) 477 (S.C.C.) at 478 Laskin J., in ordering a new trial, held that "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 ... 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 experience and observations.®

- *Boucher v. R.*, *supra*.

- Hon. Michel Proulx and D. Layton, Chapter 12: The Prosecutor, Part E, Ethical Restraints on Advocacy.

Professionalism and the Desire to Win

Defence counsel are required to use their best efforts to achieve for their clients what they would seek to achieve for themselves. That is the professional mandate assigned to them by the Canadian system of justice. In most cases, that would involve assisting them lawfully to obtain a verdict of not guilty. From the defendant's points of view, they trust counsel to do all in their power to win their cases. If counsel are unenthusiastic about the result of their work, they would not be respecting their fiduciary obligations to their clients.

A good criminal prosecutor should present conscientiously the admissible evidence available to prove the facts supporting the charge. Crown counsel's obligations would appear to be somewhat more narrowly defined than those of defence counsel by the decision in *Boucher v. The Queen*, *supra*., but he or she may prosecute the case firmly so that justice is done. I submit it is proper for a prosecutor to seek a conviction as an aspect of seeking justice in the public interest. However they must act in a manner that strives to ensure that the defendant has a fair trial. The recent decision by the Ontario Superior Court of Justice in *R. v. Felderhof*, [2002] O.J. 4103 addresses this issue. Campbell J. at paras. 22-23, writes:

[22] It is improper for Crown counsel to seek a conviction in the sense of seeking a

conviction at all costs, or breaching the quasi-judicial duty of fairness and evenhandedness. This principle is sometimes expressed by saying that it is not the function of the prosecutor "simply" to seek a conviction, because his or her quasi judicial duties involve much more than simply seeking a conviction. ... In this expression of the principle everything turns on the qualification "simply", because it is appropriate for a Crown prosecutor to seek a conviction so long as he or she does not seek it unfairly or at all costs.

[23] Far from it being improper [for] Crown counsel to seek a conviction, it is appropriate for a prosecutor to seek a conviction as an aspect of seeking justice in the public interest.

See also:

- Hon. Michel Proulx and Layton, *supra*, at 644, 664, 677, 678, and 697.

Accordingly, good criminal law barristers may seek success in the courtroom, provided they practice within the legal and ethical rules which govern their profession. If they triumph by disregarding the rules, they are professionally diminished. It is their professionalism that distinguishes good barristers from the clients they represent or the defendants they prosecute.

Professionalism and Civility

In *Ross v. Lamport*, [1956] 2 D.L.R. (2d) 225 at 234, Rand J., referring to the decision in *Dale v. Toronto R.W. Co.* wrote: A law suit is not a tea party, and except where there has been a clear and objectionable excess, we should hesitate to put shackles on the traditional scope allowed counsel in his plea to the tribunal of his countrymen.®

See also:

- *R. v. Felderhof*, [2002] O.J. No. 4103 (Ont. Sup. Ct. J.), *supra*, at para. 275 where Campbell J. wrote: A To be the subject of professional vilification may not be easy. But a hard fought trial is not a tea party.®
- *Dale v. Toronto R.W. Co.*, [1915] 34 O.L.R. 104 (Ont. Sup. Ct. App. Div.) at 108.

Perhaps because trials are necessarily adversarial and confrontational, barristers are sometimes caricatured as being hired guns with little sense of dignity or honour.

See:

- Hon. Michel Proulx, *supra*.
- A. C. Hutchinson, *supra*, Chapter 2: Traditional Accounts: Contents and Criticism, Part A: Hired Hands.
- R. F. Devlin, Normative, and Somewhere to Go? Reflections on Professional Responsibility (1995) 33(4) Alta. L. Rev. 924 at fn. 72.
- J. Jaffey, Professionalism Served As Theme of Advocates Society Symposium (June 16, 2000) 20(7) The Lawyers Weekly.

Perhaps, in light of the anger and aggression expressed by some defendants in criminal cases, their counsel feel justified in unleashing personal attacks on counsel who oppose them. Perhaps they are concerned that their clients will be disappointed if they do not. It is submitted that counsel have a professional responsibility to respect the personal integrity of opposing counsel. In Britain, the practice whereby barristers refer to opposing counsel as *my friend* reflects the respect of the bar for restraint and dignity, in the trial process. That practice has been imported in some measure into Canada, and, in my view, should be more widely adopted by the bar here.

Counsel have a professional responsibility to preserve the dignity of the forum in which they practice; justice may not be seen to be done if the courtroom is viewed as a vicious arena. Civility on the part of counsel is not inconsistent with the vigour inherent in practice in the criminal courts. Civility is one

of the values that infuses professionalism.

The issue of civility in the courtroom has been addressed recently by members of the bench and bar. For example, the Advocates Society of Ontario has published a pamphlet entitled *Principles of Civility for Advocates*. In it are articulated some core principles of civil conduct for lawyers. In the Introduction, Ontario Chief Justice McMurtry wrote: "The level of civility at the Bar relates directly to the level of professionalism of the legal profession." In the same document he wrote in the Preamble:

Civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system. Civility ensures matters before the Court are resolved in an orderly way and helps preserve the role of Counsel in the justice system as an honourable one.

Litigation, however, whether before a Court or tribunal is not a "team party". Counsel are bound to vigorously advance their client's case, fairly and honourably. Accordingly, Counsel's role is openly and necessarily partisan and nothing which follows is intended to undermine those principles. But Counsel can disagree, even vigorously, without being disagreeable. Whether among Counsel or before the Courts, antagonistic or acrimonious behaviour is not conducive to effective advocacy. Rather, civility is the hallmark of our best Counsel.

See :

- The Advocates Society, *Principles of Civility for Advocates*, at:
http://amigocharts.com/amigo/100_Civility.pdf Also available on the Advocates Society website.
- J.R. Olchowy, "On the Loss of Civility and the Need for A Reinvigorated Professionalism: Objectionable Counsel, Conduct and Its Impact on Trial Fairness" (2002) 26 *Advocates Quarterly* 322.
- D. Stockwood, Q.C. "Advocacy Today: The Decline of Professionalism" (Oct. 1997) 3 *The*

Advocates Soc. J. 1.

In *R. v. Felderhof*, [2003] O.J. No. 4819 (Ont. C.A.) Rosenberg J.A. in the Ontario Court of

Appeal, wrote at paragraph 84:

It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. Morden J.A. of this court expressed the matter this way in a 2001 address to the Call to the Bar: Civility of not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work. Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients. As Kara Anne Nahorney said in her article, *A Noble Profession? A Discussion of Civility Among Lawyers* (1999) 12 *Georgetown Journal of Legal Ethics* 815, at 816-17, Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society. ... Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice. Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.