The "Good" Criminal Law Barrister
A Crown Perspective

Christine McGoey
Assistant Crown Attorney
Muskoka

Second Colloquia on the Legal Profession

March, 2004

The "Good" Criminal Law Barrister
A Crown Perspective

Christine McGoey[1]

While I suspect we might vary somewhat on our view of what approach and skills make a 'good' criminal lawyer, it is likely there would be a great deal of consensus, particularly with respect to required qualities of a "good" Crown Attorney. The role of the Crown has evolved along with the criminal trial process to include not just the concept of the Crown as a minister of justice but also as an advocate.[2] Reconciling these sometimes competing aspects of the role of Crown counsel offers both personal and professional challenges. Popular stereotypes of prosecutors include the Crown as a bumbling bureaucrat, an Americanized crusading DA, a cynical self-serving careerist, police lawyer or victim's legal representative. The 'good' Crown Attorney is none of these. He or she is a local Minister of Justice, serving the public interest independently from police, victims and accused, charged with dealing objectively and evenhandedly with facts to obtain justice for all.

In discussing the contemporary "good" Crown Counsel I will touch briefly on our history, the guidance offered by the courts, policy guidelines and the very human aspects of being an advocate.

---

[1] B.Sc., LL.B., (Toronto). Assistant Crown Attorney, Muskoka. I am indebted to John Pearson, Assistant Deputy Attorney General (A), Criminal Law Division, for his generous assistance, expertise and research. This paper does not necessarily reflect the views of the Ontario Ministry of the Attorney General.

[2] Sutherland, John Role of the Prosecutor: A Brief History, Criminal Lawyers' Association Newsletter, Vol. 19, no. 2, p. 17, at 5.

With the passage of the *Upper Canada County Attorney Act* in 1857, Ontario embarked on a full-time professional prosecution service. In 1858 there were nineteen Crown Attorneys in the entire Province. In 1964 Crowns were appointed not only for their County but also 'for the Province' and were given the right (not previously enjoyed) to vote in Provincial elections.[3] In 1972 Barbara Ferns became the first female Crown counsel in the Province. Currently, there are almost 800 Crown Counsel in Ontario, about half of which, are female. The Ontario Crown Attorneys' Association, in cooperation with the Ministry of the Attorney General, provides ongoing education to Crown Counsel at bi-annual conferences and specialized summer sessions. Recent initiatives to publish prosecutorial guidelines provide greater openness, consistency and accountability regarding the exercise of Crown discretion.

Crown Involvement Pre-Charge

In Ontario, police are responsible for the investigation and laying of charges entirely independently of Crown counsel. While the Crown may occasionally be consulted for advice pre-charge, such advice is not binding, the Crown cannot direct the investigation, nor can they make the charging decision.[4] Unlike the American approach, Canadian prosecutors are discouraged from becoming involved in statement taking or attending a fresh crime scene to

[3] Ayre, John, The Crown Attorneys of Ontario, 1857-1957, A Biographical Survey, unpublished manuscript .
[4] Certain sections of the *Criminal Code* require the consent of the Attorney General to the laying of an information. In such cases there will be enhanced involvement of Crown counsel pre-charge.

supervise the gathering of evidence. Such participation may be seen to lead to a blurring of Crown counsel's advisory role and impairment of their ability to independently review a charge after an information is sworn.[5]

The issue of the Crown engaging in pre-charge interviewing of witnesses was canvassed by the Supreme Court in *R. v. Regan*[6]. The evidence before the court indicated that while pre-charge interviewing of witnesses was unusual in Ontario, it did exist. Such interviews were common in Quebec, New Brunswick and British Columbia, especially in sexual assault cases involving historic incidents or young complainants. It is noteworthy that these provinces require Crowns to screen cases before charges are laid.

Mr. Justice LeBel, writing for the majority, was of the view that preventing pre-charge interviews in an effort to maintain Crown objectivity was misguided and potentially harmful. Such interviews might advance the interests of justice for both accused persons and complainants. Making such a distinction might also distract attention from the necessary vigilance required to maintain objectivity throughout the entire proceedings.[7]

Mr. Justice Binnie for the minority wrote as follows:

> I agree with the trial judge as a matter of law that the Crown prosecutors must retain objectivity in their review of charges laid by the police, or their pre-charge involvement, and retain both the substance and appearance of even-handed independence from the police investigative role.[8]

---

[5] Code, Michael, Crown Counsel's Responsibilities When Advising Police at the Pre-Charge Stage, 40 Crim. L.Q. 326, at 336, 338-41. The practice in Quebec, British Columbia and New Brunswick requires Crown approval before a police officer can lay a charge. Pearson, John, The Prosecutor's Role at the Investigative Stage From an Ontario Perspective unpublished manuscript presented June 2000, Mont Sainte-Anne, Quebec, pp. 2-4. p. 12.
[6] (2001), 161 C.C.C. (3d) 97.
[7] *R. v. Regan*, supra at 129-134.
[8] *Ibid*, at para. 137.

Justice Binnie described three related but distinct components to the concept of "Minister of Justice":

> The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including police and the defence. The third, related to the first, is lack of animus—either negative or positive—towards the suspect or accused. The Crown is expected to act in an even-handed way.[9]

His Lordship declined to interfere with the finding of fact by the trial judge that the distinct roles of the Crown Attorney and police became "blurred and homogenized" with the result that the appellant was deprived of the independent review to which he was entitled.[10] Although the dissenting judges were prepared to find an abuse of process largely arising out of improper involvement in the initial charging decision it was noted that "courts are very slow to second-guess the exercise of that discretion and do so only in narrow circumstances...the exercise of prosecutorial discretion is, within broad limits, effectively non-reviewable by the courts."[11]

The basis for such caution has several components: the independence required by the Attorney General and prosecutors fosters and protects the neutrality required to perform their role as minister of justice; review of the charging decision would consume a great deal of time and cost; judges may be ill equipped to address the variety of considerations involved in the decisions to

[9] *Ibid* at para. 156.
[10] *Ibid* at para 161.
[11] *Ibid*, para. 166-168.

charge or prosecute; and excessively close scrutiny by the courts would create a chill in the exercise of discretion in controversial cases.[12]

While there may be benefits to Crown involvement before charges are laid,[13] such involvement should likely be focused on assessing credibility, the strength of the evidence, and explaining the court process to potential witnesses, as opposed to being investigative in nature. In complex and difficult investigations the Martin Committee supported the Ontario practice involving police consultation with Crown counsel at the pre-charge stage.[14]

Crown Discretion

Once a charge has been laid, charge screening is mandated at the federal level, and in most provinces, by ministerial directive. While it is generally recognized across the common law world that the decision to prosecute should take into account the sufficiency of evidence and an assessment of public interest, the standard applied to these elements varies somewhat across Canada.[15]

In Ontario, the decision to prosecute must be based on an assessment of whether there is a reasonable prospect of conviction. This objective standard is higher than a 'prima facie' case which merely requires that there is evidence upon which a reasonable jury, properly instructed, could convict, but it does not

---

[12] Layton, David, The Prosecutorial Charging Decision 46 Crim. L. Q. 447, at 451-453.
[13] Trudell, William, It's Time for Real Screening in Ontario Newsletter, vol. 23, No. 1, p. 44.
[14] Report of the Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Ontario Ministry of the Attorney General, 1993) at 124.
[15] Pearson, John Preserving the Independent and Objective Public Prosecutor , unpublished manuscript presented November 17, 2000, St. John's Newfoundland, at 2: British Columbia has the most onerous prosecution standard, requiring a "substantial likelihood of conviction"; Alberta, Saskatchewan and Manitoba require a "reasonable likelihood of conviction"; Nova Scotia a "reasonable chance of conviction, and Newfoundland and Labrador require termination of the prosecution where there is no "probability of conviction". See also Layton, David The Prosecutorial Charging Decision 46 Crim. L.Q. 447, at 466.

require 'a probability of conviction", that is, a conclusion that a conviction is more likely than not.[16]

The view that a decision to prosecute should focus on objective indicators of guilt or innocence is not universally accepted. Professor Glanville Williams takes the position that no prosecution is justified unless the prosecutor is personally satisfied on the available evidence, that the accused is guilty.[17] Clearly, Crown counsel's personal opinion should never be expressed to the trier of fact.

In *R. v. Elliott*,[18] one of the issues before the court on appeal was a comment that had been made by Crown counsel in response to 'intemperate' remarks by defence counsel (and out of the presence of the jury). The Crown at trial had advised the court that "the Crown was not in the habit of staying proceedings against people who are guilty of murder, and I am confident that I can prove this woman guilty of murder and therefore I would not be staying these proceedings". Rosenberg, J.A., in providing the judgment for the court, held that such a statement was not a breach of the prosecutor's duty. There was no evidence that such a belief had improperly influenced any decision the Crown was called upon to make. While Crown counsel must retain their objectivity, an honest and reasonably held belief that the accused is guilty of the offence being prosecuted is not inconsistent with this duty.[19]

Clearly, whatever Crown counsel's personal view of guilt is, the objective standard must be applied to the decision to prosecute and personal views should not affect the Crown's approach throughout the case. Crown counsel

[16] Crown Policy Manual-Charge Screening.
[17] Pearson, John, Preserving the Independent and Objective Public Prosecutor, supra, footnote 13 at 4.
[18] [2003] O.J. No. 4694 at para. 150-154.
[19] *R. v. Elliott*, ibid, at para. 150-154

must actually believe the applicable standard to prosecute is met. Where there is actual knowledge of innocence, the prosecution cannot continue despite the fact that there is a reasonable prospect of conviction based on admissible evidence.

What is the proper course when a prosecutor has a genuine doubt about the guilt of the accused, yet the objective prosecution standard is met? While the Martin Report[20] took the position that the prosecutors's subjective assessment of guilt should not replace a public determination of guilt by a trier of fact following a fair and open trial (given the broad disclosure duty), many prosecutors would feel uncomfortable proceeding where they had a genuine doubt as to guilt. The Martin Committee recognized the difficulty in such situations and accepted that if any responsible prosecutor would share such doubt perhaps the prosecution should be abandoned despite the existence of a reasonable prospect of conviction. In such cases Crown counsel should meet with experienced colleagues to determine whether the prosecution should proceed.

Finally, of interest on this issue, is the decision of the Supreme Court in *Proulx v. Quebec (Attorney General)*[21]. In the context of a malicious prosecution suit, it was of the majority's view that a prosecutor does not have to be personally convinced beyond a reasonable doubt of an accused person's guilt in order to proceed with a prosecution. The Crown is required to have sufficient evidence to believe guilt could properly be proved beyond a reasonable doubt.

If this threshold test of 'reasonable prospect of conviction' is met, the Crown must go on to consider whether prosecution is in the public interest. This

[20] Report of the Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions supra footnote 14 at 71-74. Also, Layton, David The Prosecutorial Charging Decision 46 Crim. L.Q. 447, at 471-475.
[21] 159 C.C.C. (3d) 225, at para 31.

assessment includes a consideration of the gravity of the incident, the circumstances of its commission, the views of the victim, the age, or health of the accused or witness, the degree of culpability of the accused, the prevalence of the offence, whether the consequences of conviction would be unduly harsh, the strength of the case, whether violence is involved and whether there are reasonable alternatives to prosecution.[22]

An objective prosecution standard does not guarantee that different Crown counsel will always agree or that the decision is free from difficulty. A prosecutor applying the test is engaged in an exercise of judgment. Just as reasonable judges may reasonably differ on whether a finding of fact was unreasonable, reasonable prosecutors may differ about the application of this standard.[23] Crown counsel are expected to vigorously pursue provable charges while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction. The application of the prosecution standard continues throughout the criminal justice process. If information comes to light which impacts on the reasonable prospect of conviction (for example, a recantation, other witnesses, expert evidence or alibi evidence) the case must be reassessed. It may sometimes make sense for the defence to make the Crown aware of such compelling evidence at the time of pretrial or resolution discussions to allow such an assessment to occur. My experience is that this is much more likely to be shared in a smaller jurisdiction, where Crown and defence counsel have greater knowledge of each other. It often serves all involved well. Even if there remains

[22] Crown Policy Manual, Charge Screening.
[23] Pearson, John, Preserving the Independent and Objective Public Prosecutor, supra, footnote 13, at 6.

a reasonable prospect of conviction, such information may impact on the Crown's position on sentence.

Crown guidelines, were developed to encourage 'best practices', consistency, transparency and accountability, and to assist Crown counsel in their role as prosecutor and decision-making. Justice Marc Rosenberg describes the formulation and publication of such guidelines as a 'mixed blessing':

> "On the one hand, making the policies more transparent can help avoid abuses caused by idiosyncratic decision-making where discretion is exercised on the basis of stereotypes and prejudice. Decisions made on the basis of clear and fair guidelines promote equality within the criminal justice system. On the other hand, some of the desirable flexibility has left the system, leaving prosecutors uncertain about the degree to which they can exercise discretion in accordance with compassion and the particular case."[24]

The exercise of Crown discretion (or the lack of it) was the subject of judicial comment by Justice Casey Hill in the context of bail applications:

> "Crown counsel are expected to exercise discretion to consent to bail in appropriate cases and to oppose release where justified. That discretion must be informed, fairly exercised, and respectful of prevailing jurisprudential authorities. Opposing bail in every case, or without exception where a particular crime is charged, or because of a victim's wishes without regard to individual liberty concerns of the arrestee, derogates from the prosecutor's role as a minister of justice and as a guardian of the civil rights of all persons.[25]

Often the most difficult decisions for Crown counsel are those concerning whether to consent to release on bail or to discontinue a prosecution. It may be difficult to assess risk of re-offence at the bail hearing or to determine how a trier of fact will weigh evidence or make findings of credibility. While Crown counsel

[24] Rosenberg, Marc, J.A., The Attorney General and the Administration of Criminal Justice, Attorney General Queen's Symposium, October, 2003 at 35-36.
[25] *R. v. Brooks* (2001), 153 C.C.C. (3d) 533 (Ont. S.C.J.) at para. 22.

may be tempted to seek the comfort of shifting such difficult decisions to the court by running an unmerited bail hearing or trial, such a practice is an abdication of their role. Where merited and fully informed, the 'good' Crown will seek to exercise their discretion in good faith, wisely, fairly, and in a timely fashion. Those who manage prosecutors have the responsibility to create an environment conducive to the fearless and principled exercise of prosecutorial discretion. Prosecutors cannot expect to be exempt from public scrutiny nor to be shielded from public accountability with respect to such decisions.[26] Accountability may require Crown counsel to briefly outline their reasons for such decisions on the record.

The screening process also requires Crown counsel to determine whether the investigation is complete and whether the fruits of that investigation are available to the Crown and defence. At times, it may be necessary to request that police do further investigation. Crown counsel is under a duty to disclose all information in his or her possession that is relevant to the guilt or innocence of the accused unless the information is excluded from disclosure by a legal privilege or is clearly irrelevant (or subject to statutory provisions such as section 278.2 of the *Criminal Code*). Disclosure may be delayed in certain circumstances where it is necessary to protect the safety or security of persons or to complete an investigation. Such decisions are reviewable by the trial judge. This duty to disclose is a continuing one.[27] The shift in Crown practice with regard to disclosure post *Stinchcombe* is perhaps best illustrated by the contrasting

[26] Pearson, John Preserving the Independent and Objective Public Prosecutor, supra, footnote 13, at 8.
[27] Crown Policy Manual-Disclosure; *R. v. Elliott*, supra, at para. 155-163; *R. v. Stinchcombe* [1991] 3 S.C.R. 326

positions of two experienced Crown counsel. In a memorandum of July 27, 1964 to his staff, Crown Attorney Henry Bull, Q.C. wrote:

> It has come to my attention that the practice is growing up of showing defence counsel the dope sheet...there have been instances where confidential information has been passed to defence counsel. I request in the future that no dope sheet be shown to defence counsel.

In July of 2000, John McMahon, Director of Crown Operations, Toronto, advised his staff regarding disclosure in the following terms: "If in doubt, give it out".

The Trial

The classic description of the role of the Crown Attorney is set out in *R. v. Boucher* (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 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 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 greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings.

A more recent pronouncement on the role of the Crown recognizes the demands of this *quasi*-judicial role as well as serving to illustrate the Court of Appeal's increasing willingness to go beyond merely commenting on the inappropriateness of Crown conduct, to ordering a new trial on this basis where such conduct impinges on the fairness of the trial:

> "...the role of the Crown Attorney in the administration of justice is of critical importance to the courts and to the community. The Crown prosecutor must proceed courageously in the face of threats and attempts at intimidation. He must see that all matters deserving of prosecution are brought to trial and prosecuted with diligence and dispatch. He must be industrious to ensure that all the arduous preparation has been completed before the matter is brought before the court. He must be of absolute integrity, above all suspicion of unfair compromise or favouritism. The Crown prosecutor must be a symbol of fairness, prompt to make all reasonable disclosures and yet scrupulous in attention to the welfare and safety of witnesses. The community looks upon the Crown prosecutor as a symbol of authority and as a spokesman for the community in criminal matters."[28]

In remitting the matter back for a retrial due to the irrelevant and abusive cross-examination of the appellant the Court held that the Crown, perhaps, "in the heat of the conflict", fell short of the high standards required of his office.

The Crown is expected to be an effective and vigorous advocate within this framework in the pursuit of a legitimate result:

> "Crown counsel is entitled, indeed, in some cases expected, to conduct a vigorous cross-examination of an accused. Effective cross-examination of an accused serves the truth-finding function as much as does effective cross-examination of a complainant.
>
> There are, however, well-established limits on cross-examination. Some apply to all witnesses, others only to the accused. Isolated transgressions of those limits may be of little consequence on appeal. Repeated improprieties during cross-examination of an accused are, however, a very different matter."[29]

The sometimes conflicting and often challenging demands of this role as "a minister of justice" participating in an adversarial justice system, requires the Crown to find:

---

[28] *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374, at 378-379.
[29] *R. v. R.(A.J.)* (1994), 94 C.C.C. (3d) 168, at 176.

> "the narrow path that separates two unacceptable extremes. To stray too far in one direction is to risk becoming an indifferent bureaucrat who sacrifices public safety in the name of institutional efficiency; to wander too far in the other is to chance becoming a vengeful zealot whose narrow-mindedness may lead to wrongful convictions.[30]

The 'good' Crown counsel must be aware of the parameters set by the courts with respect to the appropriate limits of cross-examination and addressing the jury. While these guidelines apply in most respects to the defence, Crown violations may be viewed as especially serious given the nature of their role and the authority of their office. Areas of repeated concern at the appellate level are the expression of personal opinion; requiring the accused to comment on the veracity of other witnesses or to provide a motive for them to fabricate; asking the accused to explain why a witness was not called by the defence; using the accused's constitutional right to disclosure as a trap to suggest he has scripted his evidence to meet the case against him; making baseless and prejudicial suggestions to witnesses or the accused; and cross-examinations riddled with sarcasm, irrelevancies, or crafted to demean and humiliate. Where such tactics imperil the fairness of the trial the court will intervene.[31] There is no reason why a well-prepared advocate cannot conduct a focused and devastating cross-examination in a civil and respectful manner. Such an approach is also likely to be appreciated by the trier of fact and enhance truth finding.

---

[30] Taylor, Paul, Byrne, Stephen, *Reflections on Crown Attorneys and Cross-Examination* 45 Crim. L. Q. 303, at 304.
[31] *R. v. Logiacco*, supra; *R. v. Bouhsass* (2002), 169 C.C.C. (3d) 444 (OCA); *R. v. Wilson* (1996), 107 C.C.C. (3d) 86 (OCA); *R. v. R. (A.J.)*, supra; *R. v. Lyttle* (2002), 61 O.R. (3d) 97 (OCA).

In *R. v. Clark*[32] Justice Moldaver made the following comments in dealing with a ground of appeal related to cross-examination of the accused and Crown counsel's closing address:

> The cross-examination of the appellant was lengthy and at times somewhat ponderous. For the most part, however, it was fair and relevant. On the odd occasion that it crossed the line, the trial judge quickly intervened and put a halt to it...it does not warrant the sanction of this court, let alone entitle the appellant to a new trial...This was not a tea party. It was a hard-fought murder trial and both sides were entitled to press their case and put their best foot forward. Crown counsel here did just that. Her cross-examination was firm and relentless but fair. When necessary, the learned and experienced trial judge did his job and put a halt to questions which, in his view, were inappropriate. That is how it should be.
>
> The same holds true for the closing address. It was lengthy, hard-hitting and it left no stone uncovered. It was not, however, unfair or inflammatory. On the one occasion that Crown counsel did inadvertently overstep the mark, the trial judge intervened quickly and took corrective steps to remove any potential prejudice.
>
> Allegations of the kind made here against Crown counsel are serious. Care should be taken before they are made. Hard-earned reputations for professionalism and integrity are at stake and they can all too easily be unfairly sullied...Crown counsel in this case acted properly.

The role of the Crown excludes any notion of winning or losing. Crown counsel's duty is to present all available credible and relevant evidence in order that justice may be done through a fair trial on the merits[33]. In the 'heat of conflict' Crown counsel may occasionally lapse into areas that are improper. Such lapses should be acknowledged and immediately corrected. Obviously, the best practice is to canvass areas where there may be some difficulty with the trial

[32] [2004] O.J. No. 195 (OCA) at para. 122-124.
[33] *R. v. Elliott* (2003) supra, at para. 152.

judge beforehand and seek a ruling. Good Crown counsel should learn from such mistakes. Appellate courts will give some leeway for isolated occurrences that have been appropriately dealt with by the trial judge.

As officers of the court, all counsel should act ethically and professionally and with courtesy. It serves all participants of the criminal justice system well when that is the case. It is not always an easy task. An interesting (and perhaps slightly depressing) article appeared in the *Law Times* recently regarding the results of personality testing on American lawyers. As a group, according to personality testing, lawyers differ significantly from members of other professions in a number of personality traits. Apparently, lawyers consistently average around the 90th percentile in the scale measuring skepticism, suggesting they tend to be cynical, judgmental, questioning and argumentative. A similar result was achieved with respect to the scale measuring autonomy (tending to prize independence, and resist being managed), and urgency (tending towards impatience). Lawyers scored low on resilience, suggesting a tendency to be defensive and resistant to feedback and hypersensitive to criticism. Sadly, as a group they also apparently score low on sociability, tending to rely or relationships that already exist and to emphasize intellect as opposed to emotion.[34] Now, I am well aware of many excellent counsel who would challenge the science behind such testing and its application to what are likely to be much more reasonable and well-adjusted Canadian counsel. That being said, ask those who know you well how such a description fits you. Such traits may make

[34] McKenzie, Gavin, Law Times "Lawyers have lots of personality", Sept. 29, 2003.

practicing with civility and in a spirit of collegiality a more challenging goal, although not an impossible one. A little self-awareness might help in achieving these aspects of professionalism.

The Crown does not act in a vacuum and at times the dynamics of a trial involving a particular crime, witnesses, defence counsel and even a Judge may take on a life of its own. It may be tempting to retaliate in proportion to perceived improprieties by opposing counsel. While the American doctrine of "justified response" (or tit for tat) may serve to discount ethical duties ordinarily demanded of counsel in some areas, such is not the case in Canada. Ethical duties do not recede even in the face of such tactics by opposing counsel[35].

An unfortunate and thankfully rare, example of defence strategies run amok and uncontrolled by the trial judge, was the subject of comment by the Court of Appeal in *R. v. Elliott*.[36] In staying charges of second-degree murder and interfering with a dead body as an abuse of process and ordering the Crown to pay legal costs, the trial judge found that police officers, Crown counsel and senior officials of the Ministry of the Attorney General had committed over 150 violations of the accused's rights under the *Charter*. In the course of coming to this conclusion various Crown counsel had been required to testify and some had been removed from the case. On a Crown appeal, the respondent took the position that the trial judge's findings were not sustainable and that the costs award against the Crown was unwarranted. She asked that the court uphold the stay on the basis that her trial counsel was incompetent and his actions led to a

[35] Proulx, Michael; Layton, David, Ethics and Canadian Criminal Law, (Toronto: Irwin Law, 2001) The Prosecutor, Chapt. 12 E.
[36] supra, footnote 18.

violation of her s. 11(b) *Charter* right to a trial within a reasonable time. In holding that reprehensible trial strategy of the defence could not necessarily be equated with incompetence, the Court allowed the appeal, commenting that such unmerited attacks on the police and Crown counsel were deplorable and would normally fail as a defence strategy. They only succeeded at trial because the trial judge had failed in his duty to put a halt to it.[37]

Even where attacks are personal and unwarranted Crown counsel must continue to act professionally and show appropriate restraint, being mindful of their role as minister of justice. It will not always be an easy task and often requires great strength of character. It is clear that the trial judge must play an active role in ensuring that the trial is conducted fairly. Being aware of the limits imposed by courts, reminding ourselves of the importance of our role in ensuring fairness, having access to experienced colleagues to consult on the "difficult calls" or for advice, or seeking direction from the judge out of the presence of the jury if there is an area of potential concern are all aspects of being a "good Crown". Skills may be developed by watching others, attending continuing education, and through seeking out an admired mentor. We are fortunate to have excellent educational programs and instant access to colleagues through email. By the very nature of the job, Crown counsel have the benefit of unparalleled trial experience and exposure to a variety of approaches and styles of defence counsel. Such experience is invaluable in the process of incorporating elements that fit with your own personality and improving skills. Over the course

[37] *R. v. Elliott*, supra, at para. 180.

of their career Crown Counsel, especially in a large jurisdiction, can vary their experience and improve their skills by doing appellate work. They can guard against burnout by seeking secondments in other areas. In a small jurisdiction it may be easier to experience greater collegiality among the bar, which promotes civility and balance. While the rewards are many, the nature of trial work can consume one, particularly lengthy jury trials. We all must seek to balance such demands by enjoying other aspects of life. If you have talent, like the Chief Justice, you might paint. For those of us who don't, being surrounded by natural beauty, such as in Muskoka, works well. Time with family and friends is always recommended.

A Crown has the privilege of meeting people with a wide variety of life experiences. Some have suffered a great loss or injury through a terrible wrong and are facing the stress of a criminal trial. Some victims and witnesses inspire by their courage and resiliency, others may be unable to adequately face the demands of being a witness. There is much that can be done to ease their progress through the criminal justice system with timely information and the support of victim/witness programs. Larger jurisdictions offer the ability to formalize programs in cases with particular challenges, such as those with child witnesses, accused with mental health problems or addictions, and cases of domestic violence. In smaller jurisdictions it may be easier to assign Crown counsel earlier to particular files.

The law is constantly evolving. Creative arguments by Crown counsel based on the reality of a child victim's experience or a reluctant or intimidated witness have lead to developments in the law. There is a role for Crown counsel,

as well as judges and defence counsel, to provide their expertise and input to explore new approaches to the often multi-faceted challenges in such cases.

Finally, a good Crown believes in what they are doing and is willing to meet the challenges of their demanding role. Theodore Roosevelt colourfully described 'life in the arena' in language which captures, to some degree the challenges and satisfactions trials offer to the modern gladiator (which, of course includes women) :

> The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, and comes short again and again, because there is no effort without error and shortcoming, but who does actually strive to do the deeds; who knows the great enthusiasms, the great devotions; who spends himself in a worthy cause..."

The 'good' Crown will do all in their power to represent all participants in the criminal justice system fairly, and with integrity. They will seek to minimize errors and shortcomings in pursuing the worthy duty imposed upon them.