

NOT IN MY COURT YOU DON'T!!

The Right of Audience and the Enforcement of Ethical Conduct

Introduction

The role of the criminal lawyer in society is, and always has been, difficult. On one hand, counsel are expected to champion fearlessly the cause of the client, raising every defence, however distasteful. It is accepted in our profession, if not amongst the general public, that it is always better that a guilty person go free rather than an innocent one be punished. We are required to ensure that the rule of law is not only upheld but applied to all, even if that law may conflict with popular concepts of morality. The result of this duty has often been that lawyers are treated as some form of vermin, or in the words of Shakespeare in another context, a “serviceable villain”¹. Too often, the public sees the words of Dick the Butcher in Henry VI, Part II, “The first thing we do, let’s kill all the lawyers”² as a call to arms rather than an invitation to the destruction of their precious liberties.

On the other hand, we are by history and statute declared to be officers of the court. We

¹Shakespeare, King Lear, Act IV, Scene VI

²Henry VI, Part, II, Act IV, Scene II. Dick the Butcher was part of Cade’s rebellion, which sought to overthrow the King and establish Cade as a dictator. The concept of killing the lawyers was designed as a way of eliminating those who would stand up for the rights of the populace and the rule of law. Cade’s response was “Nay, that I mean to do...”.

must ensure that we act honourably, never misleading another party, ensuring that the rights of the individual are vindicated and that independent courts will function to protect the weak against the strong and the state itself. Lawyers are part of the court system and have to uphold its integrity against attack. Similarly, they must carry out the orders of the courts. Counsel's assurances of integrity are basic to the functioning of the courts and as lawyers protect the courts, the courts must protect lawyers to ensure that counsel can function and that the public's right to access to justice is upheld.

Today, in Canada, ensuring that lawyers meet their ethical duties is usually left to independent law societies.³ The regulation of the profession is independent of government and

³These are created by statute in each province; Alberta: *Legal Profession Act*, R.S.A. 2000, c. L-8; British Columbia: *Legal Profession Act*, S.B.C. 1998, c. 9; Manitoba: *Legal Profession Act*, C.C.S.M., c. L-107; New Brunswick: *Law Society Act*, 1996, S.N.B. 1996, c. 89; Newfoundland: *Law Society Act*, 1999, S.N.L. 1999, c. L-9.1; Nova Scotia: *Legal Profession Act*, S.N.S. 2004, c. 28; Ontario: *Law Society Act*, R.S.O. 1990, c.L-8, as am.; Prince Edward Island: *Legal Profession Act*, R.S.P.E.I. 1988, c. L-6.1; Quebec: *An Act respecting the Barreau du Québec*, R.S.Q., c. B-1; Saskatchewan: *Legal Profession Act*, 1990, S.S. 1990-91, c. L-10.1, as am.

both governing bodies and lawyers' associations, such as the Canadian Bar Association, have promulgated codes of conduct by which lawyers should or must abide.⁴ Yet, the central body in which lawyers serve, the courts, has little to do with the preservation of the integrity of the profession. The courts can play a pivotal role in policing the ethical conduct of counsel by using the right of audience to ensure that only counsel who maintain high ethical standards may appear before them. Those who do not comply with those standards may be banished. Not permitting those who fall below the necessary standards to act as barristers would create a strong incentive to integrity, enforceable by an independent body, free of influence or favour. This can create a better bar and, in doing so, ensure that justice is better served and that the public is protected from those who fail to meet ethical standards.

The Right of Audience

An examination of the meaning and historical development of the right of audience may be helpful. In its simplest form, the right of audience refers to who may appear before courts or tribunals. This is now regulated by statute in Canada, often with federal and provincial statutes intersecting to form the basis for who may appear before Courts or tribunals. In Ontario, the *Law Society Act*⁵, and the *Solicitors Act*⁶, determine who may practice law. Provincial law determines

⁴The CBA Code of Professional Conduct can be found at:

<http://www.cba.org/CBA/activities/code/>.

⁵ R.S.O. 1990, Chap. L-8

who may be a barrister or solicitor. This is built upon by the *Criminal Code*⁷, which defines “counsel” as

“a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings”;

An agent is not defined in the Code, but has limited standing under certain circumstances.⁸ While an examination of current statutes demonstrates who may appear before a court, it does nothing to assist in determining when an otherwise qualified individual may be denied standing before a court.

We must look to the development of English law in order to see how this right came about. In England the origins of the defence bar have been lost in time. Prior to C. E. 1200 there is no indication of a professional body of people who acted as lawyers. However, under the expansion of the common law rules in the era of Henry III and the legislation of Edward I, it

⁶R.S.O. 1990, Chap. L-15,

⁷R.S.C. 1985, Chap. C-46., section 2.

⁸S. 800 and 802.1 of the Code. For a review of the status of agents and the then lack of regulation faced by them, see: *R. v. Romanowicz*, 138 C.C.C. (3d) 225 (Ont. C.A.)

became clear that people not skilled in the law could not hope to represent any other person.⁹ As well, as pointed out by Professor Ogilvie, procedure was becoming more technical. In the first part of the thirteenth century, a group of what we would now call barristers was developing. By the end of the 13th century, it appears that lawyers were well established as part of the King's courts. They were regarded as officers of the court. Civil law appeared to develop more quickly than criminal law. It would seem that even at this early time, lawyers had questionable reputations. The Statute of Westminster I, 1275, c. 29 enacted punishment for lawyers guilty of fraud.¹⁰

The bar developed as a result of a determined effort by Edward I. He ordered that pleaders and attorneys be trained by justices.¹¹ This, together with the common lodgings of practitioners and judges, led to the development of the Inns of Court, the forebears of modern law societies. A division between barristers, who advocated on behalf of the individual, and solicitors was apparent by the beginning of the sixteenth century (The names of the parties may have been slightly different than that which would be used today¹²). Barristers had the right of

⁹Professor M. H. Ogilvie of Carleton University has written on the development of the bar in *Historical Introduction to Legal Studies* by M. H. Ogilvie, (Carswell: Toronto: 1982).

¹⁰Ogilvie, (supra) at pages 99 - 103.

¹¹Ibid, page 103.

¹²Ibid, page 337.

audience to appear before the Supreme Court of Judicature. In 1729, due to an Act of Parliament, judges were granted authority to admit to practice only those who were found acceptable to them.¹³ However, it was the Inns of Court that were primarily responsible for disciplining counsel.

Nonetheless, the Courts asserted the right to determine who might act as a barrister before them. In 1741, it was determined that the Statute of Westminster gave the courts authority that “attornies and serjeant counters who have been guilty of any male-practices, and have acted unbecoming their profession, may be silenced, and not allowed to be heard anymore in the way of the profession”.¹⁴ Importantly, the court held that there was a difference between how a solicitor and a barrister should be treated. The solicitor could be struck from the rolls. The court did not determine that the accused who was a lawyer should be removed from acting as a barrister. It did, however, decide that the court would not hear him or allow him to appear as a barrister before it. The result was that the accused was denied the right of audience. He could not appear as an advocate due to his unethical conduct. The court was, in effect, asserting the right to control its own process and determine who could appear before it.

The right of audience has been recognized in both academic writings and in case law. In

¹³Ibid, page 341.

¹⁴*Mitchell's Case*, 2 Atk. 173, 26 E.R. 508.

“The Inherent Jurisdiction of the Court”¹⁵, Professor Jacob stated that

“... the right of audience before the superior courts. This derives from the inherent jurisdiction of the judges to regulate the proceedings and practice of their own courts. The superior courts of common law conferred the privilege of acting as advocates in proceedings before them to barristers only and did not allow attorneys to appear before them as advocates.”

This capacity has been re-affirmed in case law. For example, in *Re: S (a barrister)*,¹⁶

Paull, J. made it clear that, as far back as 1627

“... one dealt with the quality of the persons who were allowed to be students. It is clear that the judges never passed over the whole control of the Inns. They kept quite a tight rein on the internal affairs of the Inns, particularly insofar as such affairs related to those who might practise before them.”¹⁷

The judges, sitting as visitors to the Inns of Court, stated that they never gave up the right to determine who may appear before them “nor could they ever do so.”¹⁸ The right of the Inns of Court to discipline a member, although recognized, was always subject to the supervisory jurisdiction of the court to determine who may appear before it. An analogy can be drawn between this situation and that of a law society and a court in modern day Canada.

¹⁵(1970) Curr. Legal Probs. 23.

¹⁶[1969] 1 All E.R. 949.

¹⁷At 954, All E.R.

These were not isolated examples. In *Cox v. Coleridge*¹⁹ it was determined that magistrates had a discretion to determine who would be allowed to appear before them to represent an accused person. The right to be represented by counsel did not necessarily mean the right to be represented by a particular counsel. The right of magistrates to regulate the proceedings of their own courts permitted them to determine who could appear before them as advocates. This was viewed as a power to be exercised only when necessary for the proper administration of justice and as part of the inherent right of a magistrate to regulate proceedings in the court. In *O'Toole v. Scott*²⁰, the Privy Council went so far as to say that this discretion could be exercised “to secure or promote convenience and expedition and efficiency in the administration of justice”. For the purposes of this discussion, it is important to recognize the wide ranging right of the courts to control their own process and that the right of audience has been held to be a part of that.

This does not, however, determine how a court in Canada may use the right of audience to enforce ethical standards. It is to this issue that we will soon turn.

The Inherent Jurisdiction of the Court

¹⁸At 955, All E.R.

¹⁹(1822) 1 B. & C. 37, quoted in *O'Toole v. Scott*, [1965] A.C.939 at 952.

It is beyond dispute that the provincial superior courts in Canada possess inherent jurisdiction. The nature and extent of that jurisdiction has been the subject of much debate.

Jacob has noted that

“The superior courts of common law have exercised the power which has come to be called “inherent jurisdiction” from the earliest times, and that the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process”²¹

This view was adopted by the Supreme Court of Canada. In *British Columbia Government Employees’ Union v. Attorney General of British Columbia*,²² Chief Justice Dickson, speaking for the Court, quoted Jacob, stating:

“For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and

²⁰[1965] A.C.939

²¹Jacob, *supra*, at p. 25.

²²(1988) 44 C.C.C.C (3d) 289 (S.C.C.)

effective manner.”²³

In *R. v. MacMillan Bloedel Ltd, et al*,²⁴ Chief Justice Lamer, for the majority, stated that

“the core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law...the superior court must not be put in a position of relying on either the provincial attorney general or an inferior court acting at its own instance to enforce its orders.”²⁵

Similarly, a court could insist that its ability to control who appears before it must be an inherent power or part of its core jurisdiction and that while provincial law societies have a great role to play in the determination of who may act, they cannot displace the right of a court to make a final determination of the issue²⁶. To do otherwise would permit foreign bodies to have a

²³At p. 307 C.C.C.

²⁴(1995) 103 C.C.C. 93d) 225 (S.C.C.)

²⁵At para. 38.

²⁶The courts have not delegated to law societies the powers of admission, regulation and discipline. In Canada, these have come about by statute. There is no conflict between a law society exercising a statutory power in determining who may be called to the provincial bar and a court determining that a person called to the bar may not appear before it due to misconduct. The delegation argument may have more force in England, and was attempted in *Re: S (A Barrister)*, see note 16, above. The court held that the right of audience had never been given up, nor could a court ever do so.

mastery over the who may be an officer of the court.

While the concept of inherent jurisdiction may give superior courts a basis for controlling who may appear before them, this does not assist statutory or inferior courts which possess no inherent jurisdiction.²⁷ They do, however, have not only the powers expressly prescribed, but also those that arise from “necessary implication” of those powers. In essence, the powers of inferior courts have been interpreted to mean the right to control their own process. This is narrower than inherent jurisdiction as it must be founded in an enabling statute or be allied closely with the powers granted by statute.²⁸ Inherent jurisdiction has the widest scope. For example, as will be discussed below, the contempt powers of inferior courts are far narrower than those of superior courts. The necessary implication doctrine has been interpreted to permit

²⁷*R. v. Doyle* (1977) 29 C.C.C. (2d) 177 (S.C.C.). Interestingly, and in contrast to the Canadian experience, it would appear that in Australia inferior courts are considered to possess inherent jurisdiction; “Keith Mason, *The Inherent Jurisdiction of the Court*”, (1983) 57 A.L.J. 449.

²⁸In *Doyle* (supra), the Supreme Court specifically overruled the Court of Appeal for Ontario’s decision in *R. v. Keating*, (1973) 11 C.C.C. (2d) 133 which held that the provincial court had an “inherent jurisdiction... to control its own process and proceedings in any manner not contrary to the provisions of the Criminal Code or any other statute...” holding instead that the powers of a magistrate on a preliminary inquiry were “entirely statutory”.

the removal of counsel at a preliminary inquiry so as to avoid a conflict of interest arising.²⁹ This may be seen as a wide interpretation of the provisions of S. 537 of the *Criminal Code*.

Statutory courts, which include the Court of Appeal and the Supreme Court of Canada, are limited by the fact that they have no inherent jurisdiction. The Supreme Court Act³⁰ determines who may appear as counsel before the Court. It would be a strange anomaly, however, if both our highest and lowest courts could not prevent a person appearing before them while the superior trial court could do so. The concept of necessarily incidental powers can allow all courts to control who may attend before them. This power can be used to ensure that justice is properly administered and that ethical standards are enforceable.

The Ethical Standards of Counsel

Both by statute and custom, lawyers have high ethical duties. The Rules of Professional Conduct promulgated by the Law Society of Upper Canada contain many provisions to ensure that counsel act honourably. It is appropriate to reproduce several extracts here:

Rule 1

"conduct unbecoming a barrister or solicitor" means conduct in a lawyer's personal or private capacity that tends to bring discredit upon the legal profession including, for

²⁹*Re: Regina and Robillard*, (1986) 28 C.C.C. (3d) 22 (Ont. C.A.)

³⁰R.S.C. 1985, chap. S-26, sections 22 - 24.

example:

- (a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- (b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another; or
- (c) engaging in conduct involving dishonesty;

“*professional misconduct*” means conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession including:

- (a) violating or attempting to violate one of the rules in the *Rules of Professional Conduct*...
- (b) knowingly assisting or inducing another licensee to violate or attempt to violate the ... *Rules of Professional Conduct, the Paralegal Rules of Conduct*...;
- (c) knowingly assisting or inducing a non-lawyer partner or associate of a multi-discipline practice to violate or attempt to violate the rules in the *Rules of Professional Conduct*...;
- (d) misappropriating or otherwise dealing dishonestly with a client's or a third party's money or property;
- (e) engaging in conduct... prejudicial to the administration of justice;
- (f) stating or implying an ability to influence improperly a government agency or official; or
- (g) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

1.03 (1) These rules shall be interpreted in a way that recognizes that:

- (a) a lawyer has a duty to carry on the practice of law and discharge all responsibilities... honourably and with integrity;

(d) the rules are intended to express to the profession and to the public the high ethical ideals of the legal profession;

(e) the rules are intended to specify the bases on which lawyers may be disciplined; and

The lawyer also has a duty to the court or tribunal before whom he or she appears:

Rule 4

Advocacy

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

4.01 (2) When acting as an advocate, a lawyer shall not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which... are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer...;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority;

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(h) deliberately refrain from informing the tribunal of any binding authority...;

- (i) dissuade a witness from giving evidence or advise a witness to be absent;
- (j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
- (k) needlessly abuse, hector, or harass a witness;

There are also responsibilities to the profession in general

Rule 6

Integrity

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.³¹

The Canadian Bar Association's Code of Professional Conduct also spells out the duties placed upon counsel. These two documents reveal that lawyers are expected to abide by the highest standards and treat all courts with respect and candour. What if counsel fails to do so? A law society may discipline a person for a breach of professional conduct, and knowingly misleading a court would unquestionably fall into this category. However, it cannot be that only a law society has the power to deal with improper actions by counsel. If that were the case, then the court would have lost control over at least one important aspect of its core being. A court must always remain a place of integrity. It cannot allow itself to be misled by the unscrupulous. Its goal must always be the determination of a just result in any case before it.

³¹Similar provisions can be found in the other codes of conduct of other law societies and the CBA. See footnotes 1 and 2, above for references to the legislation and the CBA Code of Professional Conduct.

A court must ensure that it has enforcement powers to defend itself and its integrity. If it does not, then just as would be the case if it cannot enforce its orders, it will become a court in form but not in substance. As was stated in *MacMillan Bloedel*, the court cannot rely on a third party to enforce its orders³². Thus, a court cannot entrust a law society with the sole authority to discipline counsel who have acted improperly. Nor can it rely on the remedy of criminal contempt to protect itself. Both of these remedies are inadequate for reasons which we will now examine.

Other Remedies

A complaint to a law society is, for good reason, a time consuming process. The complaint is initiated by a party. The lawyer involved is given a chance to respond. This is a vital aspect of the rules of procedural fairness. This response may be sent to the complaining party. If the complaint is regarded as substantiated, then it can be sent to a discipline panel. A full hearing may be conducted and both parties have the right to be heard. Procedural protections demanded by the principles of natural justice are in place. There is an appeal process and further

³²This is not to say that a court cannot employ third parties to enforce its orders. The sheriff of the county will carry out a court order or a police service may do so. The difference is in one case the third party is acting as a servant of the court and enforcing the court's will. In the other, the third party is determining if the court can enforce its will. The role of master and servant would have been reversed in the latter situation.

recourse may be had to the courts. It may well be that the complaint procedure is a model of fairness. There are, however, practical difficulties with relying solely on the law society complaint mechanism.

For one, is it likely that a judge will make a complaint? Even though a jurist has seen what he or she may think is unethical behaviour, the length of time that it takes a complaint to be considered may present a barrier to using this process. Judges have many duties and to add the carriage of a complaint to them may be unrealistic. Most importantly, to rely upon the law society to take action lessens the ability of the court to control its own process whether by inherent jurisdiction or necessarily incidental powers. In order for a court to be completely independent and set standards that counsel are expected to follow, the court itself must be able to act whether or not a third party will do so.

Another difficulty is the range of penalty that may be available. A law society may impose the mildest reprimand or the most extreme form of discipline, disbarment (now known in Ontario as a licence revocation). But the court before which the questioned conduct took place may see the matter very differently than the governing body and know precisely what penalty should arise from proven misconduct. The court can be expected to understand exactly how the conduct in question affected the case before it and no other party is likely to be in a better position to decide what action, if any, is needed to deal with counsel³³. Is it necessary to

³³Some may argue that a judge may be too close to the matter to deal with it and a law

duplicate this determination through a trial before a professional tribunal?

The court may, in deciding that the promotion of ethics is of vital concern, decide that a different standard than that which a law society imposes is the bench mark against which counsel's conduct will be measured. For example, the rules cited above refer in several places to "knowingly" doing an act. It is not suggested that this is an inappropriate standard for discipline or that it was not open to the Law Society of Upper Canada to invoke it. However, a court may decide that the more appropriate standard is one of unacceptable negligence, gross negligence, wilful blindness or recklessness. If a court is determined to enforce ethical standards, is it not at least open to that body to employ a different standard than that provided for by a law society's rules of conduct?

The sanction of criminal contempt is also inadequate to deal with issues of ethical behaviour. First, only superior courts have inherent jurisdiction and thus are able to punish for

society's discipline regime is better situated to deal with counsel. This is not sound. A judge is expected to exercise restraint here, as in a contempt proceeding (to which the judge is equally close). A judge must act fairly, give all parties a chance to be heard, follow a judicial code of conduct and apply relevant case law. In no way would this invite an arbitrary exercise of power. To argue that law societies are better situated to deal with these issues ignores the safeguards that would be in place in any proceeding. These are further developed later in the paper.

contemptuous behaviour both before the court (in facie) and outside the court (ex facie)³⁴.

Inferior courts do not have this power at common law, but can only punish contempt committed in the face of the court.³⁵ If a contempt is committed ex facie an inferior court, it will be necessary to conduct a trial for contempt before the superior court. Another judge of the inferior court does not have jurisdiction to hear the matter, even where the contempt is committed in the face of the same level of court.

Criminal contempt powers are to be exercised with significant restraint. A person cited for contempt has the right of full answer and defence. This is undoubtably proper, considering that the consequences of conviction may include incarceration. It is considered to be a very serious matter to threaten contempt proceedings, particularly against officers of the court³⁶. As well, contempt should only be considered if there is a flagrant and continuing breach of a court's order. It is not to be used unless truly necessary.³⁷

³⁴*CBC v. Cordeau*, [1979] 2 S.C.R. 618.

³⁵*CBC v. Cordeau*, (supra). See also: *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 dealing with the ability to confer contempt powers on an administrative tribunal; *R. v. Doz*, (1987) 38 C.C.C. (3d) 479 (S.C.C.); *R. v. Glasner*, (1994) 93 C.C.C. (3d) 226 (Ont. C.A.).

³⁶*R. v. Elliott* (2003) 181 C.C.C. (3d) 118 (Ont. C.A.) at para. 144.

³⁷*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901;

There have been many instances of counsel being cited for contempt, but this harsh measure has not often been found to be warranted. A court is required to respect the right of counsel to vigorously advocate for a client and to recognize that discourtesy and tactics of which the court does not approve (or even most would not approve) are not contemptuous.³⁸ A lawyer who fails to attend court may be in contempt,³⁹ but the reasons for failure to attend and the effect on the administration of justice must be considered before contempt could be found to exist.⁴⁰

³⁸*R. v. Roy*, (1992) 44 Q.A.C. 118 (C.A.).

³⁹*R. v. McCallen*, (1999) 131 C.C.C. (3d) 518 (Ont. C.A.).

⁴⁰*R. v. Jones*, (1978) 42 C.C.C. (2d) 192 (Ont. C.A.); *R. v. Glasner* (1994) 93 C.C.C. (3d) 226 (Ont. C.A.). The instances of contempt in both *Jones* and *Glasner* took place before the inferior court and were punishable as in facie contempt.

In “*Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System*” (2007) 11 Can. Crim. L. R. 97, at p. 126 and footnote 87, Prof. Michael Code of the Faculty of Law at the University of Toronto argues that trial courts have an inherent power to control their own process. To the extent that he relies upon in facie contempt in support of his argument it should be noted that S. 9 of the *Criminal Code* specifically preserves the power of courts to punish for contempt. Thus, rather than an inherent right, it is submitted that statutory courts are exercising a statutory right only, expressly granted by the *Criminal Code*. The ability

Even in flagrant cases of failure to act in accordance with the duties of counsel, contempt proceedings may not be brought or even contemplated. In *R. v. O'Connor*⁴¹, the British Columbia Court of Appeal described actions by Crown counsel which were well below the standards expected of a minister of justice. There were instances of failure to disclose material to the defence and failure to comply with an order of the Associate Chief Justice of the Supreme Court of British Columbia. The Crown told therapists whose records were the subject of production orders that they should not produce their full records as required⁴². She claimed that the order of the Court needed clarification, but took no steps to bring an application for directions.⁴³ The Crown stated that she must have dreamed that she complied with the

to take steps beyond punishing for contempt is (in the writer's opinion) better seen as a "necessarily incidental" power instead of an inherent one. In this way the division between superior court inherent powers and the narrower powers of inferior courts may be maintained. It is recognized that some will consider this to be only a semantic difference. Respectfully, that would only be accurate if the powers of the two levels of court were congruent. While there is some overlap, there is not identical capacity.

⁴¹(1994) 89 C.C.C. (3d) 109 (B.C.C.A.); affd. 103 C.C.C. (3d) 1 (S.C.C.)

⁴²At page 122 C.C.C.

⁴³*Ibid.*

disclosure request.⁴⁴ She also claimed that the order of the Associate Chief Justice was the result of gender bias and the counsel seeking to enforce the order was motivated by this.⁴⁵ The trial court stated that the Crown had “graphically demonstrated that in this case she is incapable of distinguishing between her personal objectives and her professional responsibilities.”⁴⁶ The charges against the accused were stayed at trial, but the stay was overturned on appeal. The Court of Appeal viewed the conduct of the Crown as unacceptable, but also looked at her motivations for her acts and held that her acts did not warrant a stay of proceedings.

In the Supreme Court, the accused’s appeal was dismissed. In the reasons of L’Heureaux-Dube, J., the Crown’s conduct was described as “shoddy and inappropriate”⁴⁷ and her efforts to deal with complainant’s privacy issues were called “inept and ineffective”.⁴⁸ Cory, J. described the Crown’s actions as “extremely high-handed and thoroughly reprehensible”.⁴⁹ Despite this improper conduct, the Court refused to stay proceedings and

⁴⁴Page 123, C.C.C.

⁴⁵Page 124, C.C.C.

⁴⁶At. p. 125 C.C.C.

⁴⁷At p. 46, C.C.C.

⁴⁸At p. 47, C.C.C.

⁴⁹At p. 78, C.C.C.

ordered the trial to go ahead. It balanced the right of the public to a trial on the merits and the fair trial interest of the accused. It also considered the motivation of the Crown for her actions. It must be asked whether there is a remedy to deal with conduct by counsel such as this which is consistent with fundamental principles of justice. The right of audience provides a just solution in such a case.

If a court is to control its own process and ensure that its officers act in accordance with their professional responsibilities, then conduct such as occurred in this case cannot be condoned. But if the Crown's acts were not contemptuous but only very poor judgement (which should not reach the level of criminal contempt) what can a court do? It has been conclusively determined that Crown counsel are subject to discipline by the provincial law society⁵⁰. A law society complaint may receive no attention and leaves it to others to decide if the lawyer will be subject to discipline. Yet this still does not permit the court to maintain control of its own process and officers. An order of costs against the Crown can be used to discipline and discourage

⁵⁰ *R. v. Krieger* (2002) 168 C.C.C. (3d) 97 (S.C.C.). This was not always certain, but prior to the *Krieger* decision the law was moving toward this conclusion. See: Former Rule 4.01 (3) of the Rules of Professional Conduct, Law Society of Upper Canada; Practice Direction of W.G.C. Howland, Chief Justice of Ontario, Reproduced in *R. v. Danson*, [1981] O.J. No. 4 (O.C.A.); *Re: Cunliffe and Law Society of British Columbia*, *Re: Bledsoe and Law Society of British Columbia*; (19) 13 C.C.C. (3d) 560 (B.C.C.A.); *Re: Holm et al and Law Society of British Columbia*, (19)20 D.L.R. (4th) 433 (B.C.C.A.).

improper conduct.⁵¹ However, costs are only to be awarded in cases of a marked and unacceptable departure from the reasonable standards demanded of the Crown.⁵² and are unlikely in the criminal context to be awarded against a Crown personally. The state will pay for the errors of its servant⁵³. If there is to be an effective remedy to deal with unacceptable conduct

⁵¹*R. v. 974649 Ontario Ltd.* (2001) 159 C.C.C. (3d) 321 (S.C.C.), at 354.

⁵²At. p. 356, C.C.C.

⁵³The writer is unaware of any case in Canada where a Crown has been personally ordered to pay costs. In *R. v. Gunn*, [2003] A.J. No. 467 (Q.B.), a Provincial Judge's order of costs made against defence counsel for inappropriate conduct was quashed on the basis that the inferior court had no jurisdiction to make such an order. The necessarily incidental powers of the Provincial Judge were contrasted to the inherent jurisdiction of a superior court judge (this case is also relevant to Prof. Code's statement on inherent jurisdiction, see footnote 37, above). Langston, J. was critical of the effect such orders might have upon the right to a zealous defence. In Ontario, the Court of Appeal quashed an order of costs made against the defence for bringing a third party records application on several bases, including that there was no statutory authority in a trial judge to order costs and that no costs order should be made in the absence of a finding of fault (*R.v. Chapman*, [2006] O.J. No. 186(C.A.)).

Interestingly, in the civil context, the Ontario Rules of Civil Procedure provide that costs may be awarded against a solicitor, personally. The rule is set out below:

by counsel, there must be a direct, perhaps a personal, consequence to that person, not simply something which has an incidental or indirect effect. The use of the right of audience to remove counsel can achieve this goal.

LIABILITY OF SOLICITOR FOR COSTS

57.07 (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between the solicitor and client or directing the solicitor to repay to the client money paid on account of costs;

(b) directing the solicitor to reimburse the client for any costs that the client has been ordered to pay to any other party; and

(c) requiring the solicitor personally to pay the costs of any party. R.R.O. 1990, Reg. 194, r. 57.07 (1).

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the solicitor is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2).

(3) The court may direct that notice of an order against a solicitor under subrule (1) be given to the client in the manner specified in the order. R.R.O. 1990, Reg. 194, r. 57.07 (3).

What of the case where the Crown or the defence has, by its failure to act in accordance with the high standards expected of counsel, created an unfair trial or at least the appearance of unfairness?⁵⁴ Should a court be powerless to stop counsel from continuing to engage in such tactics, or should the court be able to take some step to ensure that a fair trial is conducted? It may well be that admonishing counsel is not enough to correct any damage that may have been done before a jury. The trial in one instance may have been compromised, but what of the next

⁵⁴To take an example, the unfair cross-examination of an accused person has been the basis for a number of appeals. It has been found that that the Crown must conduct a cross-examination of an accused person fairly. It cannot engage in demeaning or sarcastic conduct, make unfounded suggestions, accuse a person of tailoring evidence due to having disclosure or suggest guilt due to association. New trials have been ordered a number of times due to these improper Crown practices: *R. v. Bouhsass*, (2002) 169 C.C.C. (3d) 444 (Ont. C.A.); *R. v. Rose*, 153 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Henderson* 134 C.C.C. (3d) 131 (Ont. C.A.); *R. v. Peavoy*, 117 C.C.C. (3d) 226 (Ont. C.A.); *R. v. A.J.R.*, 94 C.C.C. (3d) 168 (Ont. C.A.); *R. v. Schell*, 148 C.C.C. (3d) 219 (Ont. C.A.); *R. v. Ejiofor*, 5 C.R. (6th) 197 (Ont. C.A.)). It is not suggested that an improper cross-examination will or should necessarily lead a court to invoke the right of audience to recuse counsel. The degree of impropriety and unfairness must be assessed. The level of misconduct and the intention of counsel should be considered. A mere slip is certainly not enough to remove counsel, deliberately provocative conduct is quite another matter.

trial?

What is the purpose of denying audience? It is not necessarily to punish the lawyer, although it may have that effect; rather it is to promote the proper administration of justice by ensuring that the accused has a fair trial, has proper disclosure, (for example), and that the Crown and defence are made to live up to their obligations. It is not designed to duplicate a contempt proceeding or the penalties available under that sanction. Like a probation order, it is designed to be rehabilitative rather than retributive⁵⁵. A probation order is an enforceable court order. A person violating it may be sent to prison. But, punishment is not its primary purpose. The fact that there are consequences to disobeying an order of probation does not alter its fundamental nature. Denying the right of audience may have practical consequences, such as costs involved in obtaining new counsel, delaying a trial and the denial of promotion in the Crown's office. However, in denying the right of audience, the court is saying that counsel have breached their duties to the court. They have not acted to administer justice. They are officers of the court and while independent of that body, they must act within certain boundaries. If they do not, they cannot be a part of the court and cannot have the honour of participating in the justice system.

Canadian Cases

The issue of the right of audience, or excluding counsel from participating in a case, has

⁵⁵See the comments of Lamer, C.J.C. in *R. v Proulx* (2000) 140 C.C.C. (3d) 449 (S.C.C.) in regard to probation orders.

arisen in a number of cases in Canada. There have been two main areas of concern. The first is that of excluding defence counsel based on a purported conflict of interest. The second is the exclusion of Crown counsel based on a failure to act in accordance with constitutional duties.

It is interesting that in *Re: Milligan*⁵⁶ Justice Dilks ruled that:

“The inherent right of a trial judge to control his own court process does not carry with it the right to choose which counsel are to appear before him. He must take them as they come; the good with the bad; the competent with the incompetent; the articulate with the inarticulate; the polite with the impolite; the succinct with the prolix. The luxury of picking and choosing is not his to enjoy.”

In *R. v. Romanowicz*,⁵⁷ the Court of Appeal noted that they “should not be taken as agreeing with Dilk(s), J.’s observation that trial judges are powerless to prevent representation by incompetent counsel”. The words of the Court of Appeal are very much in line with the bulk of historical authority. The Court continued:

“The power to refuse audience to an agent must be invoked whenever it is necessary to do so to protect the proper administration of justice. The proper administration of justice requires that an accused’s constitutional rights, particularly the right to a fair trial, be protected. It also requires the fair treatment of other participants in the process (eg. witnesses) and that the proceedings be conducted in a manner that will command the respect of the community.”

The Court spoke very strongly about to the need to ensure that agents meet proper standards of ethics and competence. The focus of their reasons was that the proper administration of justice must be the goal of any court. To allow the untrained, incompetent or unethical agent

⁵⁶[1991] O. J. No. 1414 (G. D.).

⁵⁷Supra, noted at para. 72

to represent a person was inconsistent with that goal. The same can be said of counsel. There may be instances where counsel do not meet the standards expected of them and it would do harm to the proper administration of justice for a court to allow them to act for an accused. The focus of the court must be on ensuring the rights of the accused, protecting fair trials and guaranteeing the administration of justice. To create a distinction between agents and counsel simply based on the status of the person is to ignore the greater needs of justice.

The greater needs of justice have been recognized in a number of cases decided by Canadian courts. For example, a real or apparent conflict of interest between the duty to the client and the administration of justice may result in counsel's removal. In *Re: Regina and Spied*,⁵⁸ Dubin, J.A. stated:

“Mr. Spied has a right to counsel. He has a right to professional advice, but he has no right to counsel who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if a lawyer so acts, the client is denied professional services. In the case of *United States of America v. Dolan* (1978) 570 F. 2d 1177 at p. 1184, the court stated: Accordingly, we hold that when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation...constitutes a breach of professional ethics and invites disrespect for the integrity of the court... Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline representation.”

While Canadian law societies and American bars are organized along different lines, the comments of the Court of Appeal for Ontario, adopting American authority, are fully applicable

⁵⁸(1983) 8 C.C.C. (3d) 18 (Ont. C. A.).

to Canadian lawyers. The main focus of the court must be the integrity of the administration of justice.

The right to representation free of conflict or apparent conflict has also been recognized in cases such as *R. v. Silvini*,⁵⁹ *R. v. Qiang*,⁶⁰ *R. v. Brown*⁶¹ and *R. v. Bilmez*.⁶² The courts have also recognized an ability to recuse a person appearing before them for past actions found to be dishonest. In *Kopyto v. Ontario (Attorney General)*,⁶³ O'Driscoll J. upheld the refusal of Bean, Prov. J. to allow a disbarred lawyer to appear as an agent in family court.

The ability to exclude counsel for a conflict of interest is not found in statute, but is simply a part of the right of audience, which allows the court to control its own process. The

⁵⁹(1991) 68 C.C.C. (3d) 251 (Ont. C.A.).

⁶⁰[2001] O. J. No. 589 (S.C.J.).

⁶¹[1998] O. J. No. 6270 (G. D.)

⁶²(1995) 101 C.C.C (3d) 123 (Ont. C. A.).

⁶³[1997] O. J. No. 3935 (O.C.J. - G. D. - Div. Ct.). See also *Kopyto v. Ontario (Court of Justice (Provincial Division))* [1995] O. J. No. 601 (O.C.J. - G. D. - Sm. Cl. Ct.) and *Kopyto v. Ontario (Court of Justice (Provincial Division))* [1997] O. J. No. 3283 (O. C. J. - G. D. - Div. Ct.)

courts have recognized this power in both the superior courts and the provincial court.⁶⁴

The same power has been recognized in applications to remove Crown counsel for failure to act in accordance with constitutional or ministerial duties. For example, in *R. v. Khan*, [2002] O. J. No. 3623 (S.C.J.), Justice Hill stated that:

“... the threshold for disqualification by the court is necessarily high. Recusal is steeped in necessity - the court may, in its discretion to control its process (at common law or pursuant to s. 24(1) of the Charter) and to ensure a fair trial, remove an assigned prosecutor in a criminal case to ensure the appearance of fairness and integrity in the trial and otherwise maintain public trust and confidence in the administration of criminal justice: *R. v. Brown* [1996] O. J. No. 5319 (Gen. Div) at para. 2 per Trafford J.; *Regina v. Colson* [2002] O. J. No. 1576 (S.C.J.) at para 4, 5 per Archibald, J. An aspect of trial fairness and the appearance of fairness is that there not be an apprehension that the prosecutor is biased for or against the accused person. A recusal order is not directly compensatory or disciplinary in nature.”

However, His Honour cautioned that even a “marked and unacceptable departure from the reasonable standards expected of the prosecution” may not lead to recusal. The key to considering recusal was whether there was an interference with fair trial interests or the administration of justice.⁶⁵

For our purposes, what is important is that Canadian law has shown a willingness to build upon the common law of England in recognizing that the courts have the jurisdiction to control

⁶⁴*R. v. Robillard*, supra.

⁶⁵See also: *R. v. Okafor*, [2006] O. J. No. 2716 (S.C.J.); *R. v. Newsham* [2002] O. J. No. 2739 (C.J.).

their own process and this includes the ability to remove either Crown or defence counsel in certain cases where their presence would represent a real or apparent interference with the administration of justice. There can be no definitive list of instances where removal may be appropriate. It is likely to be fact specific. The unacceptable failure to carry out the duties of office, a history of ethical misconduct or placing oneself in a position of conflict are examples where the courts have shown a willingness to exercise this jurisdiction. In each of these cases the courts have demonstrated a willingness to enforce the ethical standards of the bar.

Practical Considerations

The mere suggestion that counsel have not acted in accordance with the ethical standards of the bar is not enough to remove either Crown or defence counsel. Such a low standard would be open to abuse. In order to ensure that counsel are held to proper ethical standards, it is suggested that certain guidelines be followed⁶⁶. For example:

- ! the party seeking removal of opposing counsel should prepare a formal application stating the basis for removal of counsel; if a judge initiates the procedure, counsel should be put on notice that the judge is considering recusal and given an opportunity to respond to the particular allegations;

⁶⁶These are not meant to be exhaustive, but must be developed on a case by case basis.

- ! the application should be supported by affidavit or similar materials to allow the court to determine whether an arguable point is being raised; the moving party need not show that there is a reasonable prospect of success, but only that a triable issue is being raised. As well, a judge may act upon his or her own observations and actions in the trial or appeal. Each court could develop a more formal method of exercising this function as it sees fit;

- ! upon the court determining that a triable issue is being raised, the court should hold a voir dire to decide whether the allegations have been made out on the balance of probabilities. Each party is entitled to counsel, present evidence and cross-examine. The rules of evidence would not apply to this proceeding as the process is inquisitorial in nature rather than strictly adversarial. The focus on the voir dire should be whether the administration of justice is better served by the removal of impugned counsel;⁶⁷

- ! if a finding is made against counsel, the presiding judge may remove the counsel and make an order that the counsel not appear in that particular judge's court until the counsel can demonstrate to the judge's satisfaction that counsel has taken steps to conform to proper ethical standards;

⁶⁷Counsel who have been appearing at the trial should be able to appear on the voir dire without concern that they would be excluded from the trial by that reason alone (See: *Imperial Oil v. Grabarchuk*, (1974) 3 O.R. (2d) 783 (C.A.) and *R. v. Leduc* (2003) 176 C.C.C. (3d) 321 (Ont. C.A.), leave to appeal refused 179 C.C.C. (3d) vi.

- ! a finding should only be made if the actions of counsel represent at least an unacceptable departure from professional standards (whether based on unacceptable negligence in the performance of duty or a higher standard such as recklessness or willful blindness) and the failure of counsel has had or is likely to have an adverse effect on the administration of justice, a term which should be broadly construed;

- ! the finding of one judge is not binding upon any other judge, even of the same level of court, but other judges may take such findings into account in determining if counsel may appear before them in other proceedings;

- ! a right of appeal must be provided⁶⁸;

- ! an order denying audience is not binding upon a professional body and any such body

⁶⁸Appeals in contempt proceedings are to the Court of Appeal of the province, as per S. 10 of the *Criminal Code*. A finding of exclusion under the right of audience should be treated similarly. Although there are no rules in place to deal with this, the same avenue of appeal would avoid the difficulty that has arisen in publication ban cases where the trial court's order was a final order from a court of last resort in a province, thus necessitating an appeal to the Supreme Court of Canada under S. 40 of the *Supreme Court Act* (See: *R. v. Mentuck*, (2001) 158 C.C.C. (3d) 449, [2001] 3 S.C.R. 442; *Dagenais v. C.B.C.* [1994] 3 S.C.R. 835).

must use its own procedures to determine if other proceedings are justified.

Conclusion

What is the purpose of ensuring the independence of the courts? If it is to ensure that justice is done in all cases without fear or favour, then the courts must have the ability to control their own process consistent with statute law and the principles of fundamental justice. We also must consider the privileged position of counsel in the courts. Lawyers are independent of them, but are sworn to uphold the rule of law. The courts are vital to this goal. Counsel are part of the court process and must act within ethical boundaries to ensure that justice is done and that all are treated fairly. We cannot accept the risk that a person in society would be subjected to an unfair trial due to the improper acts of counsel. To do so attacks the very basis of the rule of law, its impartiality and independence.

In order to support the courts we cannot allow them to be beholden to third parties to enforce orders. The court must be able to act on its own. It is not to be subject to government, a law society or some other powerful interest. To help ensure that the courts have the independence needed, we must recognize that they possess the right to, in special circumstances where the integrity of the administration of justice is called into question, remove counsel who have acted contrary to a lawyer's sworn duties. To have this power enhances the administration of justice. It is to be recognized and supported.

October, 2007

Paul Calarco
Barrister & Solicitor
Suite 405 (Box 144)
700 Bay Street
Toronto, Ontario
M5G 1Z6

(416) 598-1948
(fax) 416 924-9973
E-mail: pcalarco@on.aibn.com