

RECONCEIVING THE STANDARD CONCEPTION OF THE PROSECUTOR'S ROLE

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The standard conception of the prosecutor's role requires her to seek justice—to be a “minister of justice” who ensures that an accused receives a fair trial on the merits. This paper challenges the standard conception of the prosecutor's role. It argues that the seek justice ethic undermines judicial decision-making about prosecutorial duties and conduct. It has no evident meaning, is internally contradictory, and incorporates concepts of morality rather than legality, such that it cannot usefully explain a lawyer's duties within a system of law. It fails to describe the work that prosecutors actually do. The paper proposes a redefined standard conception that captures the dual roles that prosecutors play: deciding whether and how to pursue a criminal matter, and acting as an advocate in a criminal trial.

La conception communément acceptée du rôle d'une procureure de la Couronne exige de cette dernière qu'elle œuvre pour obtenir justice—qu'elle soit une « officière de justice » qui veille à ce que l'accusé bénéficie d'un procès équitable sur le fond. Cet article remet en question cette conception traditionnelle du rôle du procureur. Il fait valoir que l'éthique de « recherche de la justice » porte atteinte au processus décisionnel judiciaire relativement aux obligations et à la conduite du procureur. Cette conception est dénuée de sens clair, s'avère intrinsèquement contradictoire, et s'inspire de principes moraux plutôt que juridiques, de manière à ce qu'elle ne puisse expliquer de façon utile les obligations de l'avocat dans le système judiciaire. Elle ne décrit pas le travail qu'accomplissent réellement les procureurs. L'article propose une conception normalisée redéfinie qui illustrerait bien le double rôle que remplissent les procureurs : d'une part, décider s'il y a lieu de poursuivre une affaire criminelle et comment procéder, et d'autre part, agir à titre de défenseur de la règle de droit dans le cadre d'un procès criminel.

Contents

1. Introduction	796
2. Canadian Prosecutors: Obligations	800
3. What's Wrong with the “Seek Justice” Ethic?	811
A) Introduction	811

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B) Case Analyses	811
C) Why Does This Matter?	820
D) The Broader Critique	822
4. Reconceiving the Standard Conception	829
5. Conclusion	833

1. Introduction

Prosecutors must seek justice: “When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits.”¹ Canadian courts, regulators and lawyers accept that the duty to seek justice centrally defines the prosecutor’s role. They use the prosecutor’s obligation to seek justice to generate the prosecutor’s duties when commencing and conducting a criminal trial, and to distinguish good prosecutorial conduct from bad.² While the standard conception of the Canadian lawyer requires her to be a resolute advocate within the bounds of legality,³ the standard conception of the prosecutor requires her to be a minister of justice.⁴

¹ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2016, Rule 5.1-3, commentary 1, online: <flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf> [*Model Code*]. Rule 5.1-3 states: “When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.” This rule is, in substance, identical to Rule 5.1-1, the general rule applicable to lawyers as advocates, except that this rule replaces “client” with “the public and the administration of justice”: “When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.”

² As discussed below, provincial law societies do not articulate duties for prosecutors much beyond the obligation to see that “justice is done”. The Canadian judiciary routinely and uncritically relies on the seek justice obligation when setting out the duties of prosecutors or assessing the conduct of specific prosecutors. And Canadian scholars have only engaged in a limited way with the seek justice ethic. For one of the more comprehensive discussions see David Layton & Michel Proulx, *Ethics and Criminal Law*, 2nd ed (Toronto: Irwin Law, 2015) at 582–93 [Layton & Proulx].

³ See Alice Woolley, *Understanding Lawyers’ Ethics in Canada*, 2nd ed (Markham: LexisNexis Canada, 2016) at 29–62 [Woolley, *Understanding Ethics*]; David M Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28:1 Dal LJ 267 at 271; Trevor CW Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall LJ 51 at 63; Allan C Hutchinson, “Calgary and Everything After: A Postmodern Re-Vision of Lawyering” (1995) 33:4 Alta L Rev 768 at 770.

⁴ *R v Puddick*, (1865) 4 F & F 497, 176 ER 662 at 663 [Puddick]: “the prosecution in such cases are to regard themselves as ministers of justice, and not to struggle for a conviction.”

This paper challenges the standard conception of the prosecutor's role. It argues that in the 60 years since the Supreme Court of Canada first identified the prosecutor's duty as excluding "any notion of winning or losing,"⁵ the exhortation to seek justice undermines judges' analyses of prosecutorial conduct. Judges invoke the duty, but they struggle to articulate what it means beyond stating further platitudes. Their analyses often have significant gaps—the duty to seek justice justifies other duties, but why it does so goes unstated.⁶ Courts frequently invoke the duty as a kind of exclamation mark on conclusions that they reached in other ways.⁷ Courts even use the duty to explain concepts to which it has no obvious analytical relationship.⁸

That the duty to seek justice has undermined effective judicial reasoning is unsurprising. It is inherently vague and, insofar as it is coupled with the prosecutor's duty to be an adversarial advocate, internally inconsistent. It focuses on the prosecutor's character and attitude rather than on what she ought to do. It improperly grounds the prosecutor's obligations in concepts of morality⁹ rather than in the role of lawyers within a system of laws.¹⁰ An accused ought to be subject to the rule of law, not to a prosecutor's beliefs

For a modern statement to the same effect see: *R v Hillis*, 2016 ONSC 451 at para 20, 26 CR (7th) 329 [*Hillis*].

⁵ *Boucher v R*, [1955] SCR 16 at 24, 110 CCC 263 [*Boucher*]. In an earlier decision from 1934, the Ontario Court of Appeal stated that "It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth": *R v Chamandy*, 61 CCC 224 at 227, [1934] OR 208 (CA) [*Chamandy*]. The "do justice" ethics arose in the United States 75 years ago, in the Court's decision in *Berger v United States* (1935), 295 US 78 at 88, 55 S Ct 629, where the Court held that a United States' Attorney "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done" [*Berger* cited to S Ct].

⁶ Discussed below as the "missing link" problem.

⁷ Discussed below as the "exclamation mark" problem.

⁸ Discussed below as the "distraction" problem.

⁹ To be fair, there is some ambiguity in how the duty to seek justice is expressed. To the extent it says that the prosecutor is a "minister of justice" it may be referring to the lawyer playing the type of role within the legal system that the official who is the Minister of Justice plays. But given its origins from 1865 where a minister of justice would be more likely to mean generically a person who administers justice, and that it is as often expressed as a duty to seek justice (see e.g. *Model Code*, *supra* note 1, Rule 5.1-3, commentary 1 ("to see that justice is done")) I think the characterization of it as invoking morality is fair.

¹⁰ Obviously the question of what grounds lawyers' ethics is a subject of debate (see generally Alice Woolley, "The Problem of Disagreement in Legal Ethics Theory" (2013) 26:1 Can JL & Jur 181), but even scholars like David Luban, who see lawyers as having a baseline obligation not to violate serious moral obligations, recognize the role of legality in identifying the lawyer's duties in the standard case; see e.g., Luban's

about what justice requires. The “seek justice” ethic also fails to capture the nature and structure of the prosecutor’s role. It does not accurately reflect either the prosecutor’s exercise of prosecutorial discretion to decide whether and how a criminal case ought to be pursued or the duties owed by a prosecutor due to the distinct legal framework that governs criminal trials. A court and a prosecutor cannot determine how a prosecutor ought to discharge her role from a precept that does not reflect what that role requires.

The seek justice ethic also creates other risks. It communicates to prosecutors that they have a unique ability and capacity to know what justice requires; it may lead prosecutors to rationalize using improper means to achieve “just” ends. It tips the playing field in a criminal trial, with one lawyer viewed as a zealous advocate seeking an acquittal for her client, while the other lawyer pursues justice with impartiality, objectivity and dignity. And it does so despite the norms of criminal law that dictate that benefits of the doubt should operate in favour of the accused, not against him.

This paper argues that the standard conception of the prosecutor’s role ought to be reconceived. It should reflect the prosecutor’s role in the legal system, and the norms that underlie it. Prosecutors serve two distinct and unique functions in the legal system: they exercise prosecutorial discretion about whether and how a case ought to be pursued, and they act as advocates for the Crown in criminal proceedings.¹¹ Prosecutors exercise prosecutorial discretion because, unlike most trial advocates, they do not have clients to decide whether and how a matter ought to proceed. Exercising prosecutorial discretion requires prosecutors to assess the evidence and the substantive criminal law, and to follow guidelines published by provincial and federal ministers of justice, in order to determine whether and how to bring a case forward.¹² Acting as an advocate for the Crown in a criminal trial

discussion of the lawyer’s duty as an advisor in David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 131–61, 162–205.

¹¹ Prosecutorial discretion is the prosecutor’s exercise of the “delegated sovereign authority peculiar to the office of the Attorney General” under which the government decides whether to proceed with, continue or stay a criminal proceeding, and in what way (*Krieger v Law Society of Alberta*, 2002 SCC 65 at para 46, 3 SCR 372 [*Krieger*]). It includes decisions such as whether to: prosecute a charge, accept a guilty plea to a lesser charge, withdraw from criminal proceedings, take control of a private prosecution, repudiate a plea agreement, pursue a dangerous offender application, prefer a direct indictment, proceed summarily or by indictment or initiate an appeal.

¹² The standards governing prosecutorial discretion are discussed below, but in general prosecutors assess whether the evidence presents a sufficient likelihood of conviction of a particular offence, and whether prosecuting the accused for that offence is in the public interest, as those concepts are defined by their departmental guidelines. See Woolley, *Understanding Ethics*, *supra* note 3 at 415–19, §9.31–9.36; Layton & Proulx, *supra* note 2 at 603;

requires prosecutors to pursue their client's interests within the boundaries of legality. The boundaries of legality for a prosecutor are, however, more restrictive than those imposed on other lawyers. In a criminal trial, the accused enjoys a presumption of innocence and the Crown must prove the accused's guilt beyond a reasonable doubt. In addition, the law grants significant constitutional, legal and procedural rights to a criminal accused.

As understood through these two functions and the norms that underlie them, the standard conception of the prosecutor's role requires the prosecutor: 1) to exercise prosecutorial discretion in good faith, based on an impartial, independent, honest assessment of the evidence, the law and the public interest and in a manner consistent with published guidelines issued by her department; and 2) to ensure her conduct of a matter and trial advocacy is consistent with procedural fairness, the law of evidence and all constitutional and legal rights and privileges enjoyed by the accused. These two duties make up the reconceived standard conception of the prosecutor's role, through which courts and law societies ought to identify prosecutorial duties and assess prosecutorial conduct.

To support this argument, the article begins in Part II with a detailed analysis of the seek justice ethic, setting out with more complexity and specificity what that obligation means and how courts have used it to justify particular duties for prosecutors. Part III analyzes the deficiencies of the ethic, both in how it is used in Canadian case law and more generally. Part IV sets out the reconceived standard conception of the prosecutor's role, and how it can be used in case law and codes of conduct to assess and guide prosecutorial conduct. It proposes a revised rule for prosecutors for the Federation of Law Societies' Model Code of Professional Conduct.¹³

Public Prosecution Service of Canada, "Public Prosecution Service of Canada Deskbook", Catalogue No J79-2/2014E-PDF (Ottawa: PPSC, 2014), online: <www.ppsc.gc.ca/eng/pub/fpsd-sfpg/index.html>, s 3(1) [PPS Deskbook]; New Brunswick, Office of the Attorney General, *Public Prosecution Operational Manual*, June 2016 update (Fredericton: Office of the Attorney General, 2015), online: <www2.gnb.ca/content/gnb/en/departments/attorney_general/operational_manual.html> [NB *Prosecution Manual*]; Ontario, Ministry of the Attorney General, *Crown Policy Manual*, 2005 update (Toronto: Ministry of the Attorney General, 2005), online: <www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/>; Alberta, Justice and Solicitor General, *Crown Prosecutor's Manual*, April 2008 update (Edmonton: Justice and Solicitor General, 2008), online: <justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/default.aspx> [AB *Prosecutor's Manual*]; British Columbia, Ministry of Attorney General, *Crown Counsel Policy Manual*, November 2005 update (Victoria: Ministry of Attorney General, 2005), online: <www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual> [BC *Crown Manual*].

¹³ *Model Code*, *supra* note 1.

2. Canadian Prosecutors: Obligations

Canadian prosecutors' obligation to seek justice flows from the judgment of the Supreme Court in *R v Boucher* where, in condemning the Crown's inflammatory address to the jury, Justice Rand emphasized that a prosecutor must be firm but fair, presenting the case for the prosecution but without seeking merely to defeat the accused:

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 personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.¹⁴

Justice Taschereau agreed, invoking the duty of prosecutor to be more like a judge than a lawyer, conducting himself in a way that is moderate, impartial and dignified:

The position held by counsel for the Crown is not that of a lawyer in civil litigation. His functions are quasi-judicial. His duty is not so much to obtain a conviction as to assist the judge and the jury in ensuring that the fullest possible justice is done. His conduct before the Court must always be characterized by moderation and impartiality. He will have properly performed his duty and will be beyond all reproach if, eschewing any appeal to passion, and employing a dignified manner suited to his function, he presents the evidence to the jury without going beyond what it discloses.¹⁵

Canadian courts discussing prosecutorial conduct invoke *Boucher* as a matter of course and uncritically; it is without equal in influencing how Canadian judges and lawyers understand the prosecutor's duties.¹⁶ The

¹⁴ *Boucher*, *supra* note 5 at 23–24.

¹⁵ *Ibid* at 21 (translated and quoted in other cases, e.g. *R v RBB*, 2001 BCCA 14 at para 15, 152 CCC (3d) 437 [*RBB* cited to BCCA]).

¹⁶ The QuickCite database, which mostly includes citations after 1981, includes 508 cases that rely on the *Boucher* decision. Some of those citations refer to the specific conduct by the prosecutor in *Boucher* (an inflammatory address to the jury) and some focus on other aspects of the decision. Most, however, use the decision as authority for the general “seek justice” obligation of prosecutors. For the purposes of this paper, I reviewed cases that cited *Boucher* in the last 25 years as well as prior noteworthy cases. I sorted out the cases that relied on the decision for the seek justice principle and the discussion in this paper is based on the analysis of those cases, of which there were just over 160. For a general discussion of the duty

decision is also consistent with the approach to prosecutorial duties in other common law countries. As David Tanovich has noted, the idea of the prosecutor as a “minister of justice” has been accepted in England from at least 1865, when a trial judge observed that “the prosecutors [in such cases are to] ‘regard themselves as ministers of justice, and not to struggle for a conviction ... nor be betrayed by feelings of professional superiority, and a contest for skill and pre-eminence.’”¹⁷ The United States Supreme Court applied the prosecutor’s duty to seek justice in its oft-cited decision *Berger v United States*—that the prosecutor’s goal is “not that it shall win a case, but that justice shall be done.”¹⁸

In subsequent cases courts have held consistent with the language of *Boucher* that the duty to seek justice should affect the prosecutor’s attitude; a prosecutor ought not to try to win a case or to seek a conviction, but should try to achieve the correct result, which may be acquittal.¹⁹ The obligation to seek justice requires the Crown to act with impartiality, propriety, fairness, objectivity and moderation.²⁰ As stated by Justice Binnie:

to seek justice, see William C Gourlie, “Role of the Prosecutor: Fair Minister of Justice with Firm Convictions” (1982) 12:1 *Man LJ* 31 at 38; Palma Paciocco, “Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing” (2014) 18:3 *Can Crim L Rev* 241 at 253–54.

¹⁷ *Puddick*, *supra* note 4, cited in David M Tanovich, “Ethics in Criminal Law Practice” in Alice Woolley et al, *Lawyers’ Ethics and Professional Regulation*, 3rd ed (Markham: LexisNexis Canada Inc, 2017) 479 at 512, n 53. The direction not to treat the trial as a contest for professional pre-eminence is noted by the PPS Deskbook, *supra* note 12, s 2.2.2.

¹⁸ *Supra* note 5 at 633. The centrality of the seek justice ethic to American law can be seen in Abbe Smith, “Can You be a Good Person and a Good Prosecutor?” (2001) 14:2 *Geo J Leg Ethics* 355 at 376–77 [Smith]; Carolyn B Ramsey, “The Discretionary Power of ‘Public’ Prosecutors in Historical Perspective” (2002) 39:4 *Am Crim L Rev* 1309 (suggesting this concept of the prosecutor is a more recent development); Janet C Hoeffel “Prosecutorial Discretion at the Core: The Good Prosecutor Meets *Brady*” (2005) 109:4 *Penn St L Rev* 1133 at 1135 [Hoeffel]; R Michael Cassidy, “Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to ‘Seek Justice’” (2006) 82:2 *Notre Dame L Rev* 635 at 637.

¹⁹ *Chamandy*, *supra* note 5; *R v Roberts*, 14 CCC (2d) 368, 1973 CarswellOnt 1125 (WL Can) (ONCA); *R v Jackson*, 2002 ABPC 100 at para 56, [2002] 11 WWR 543; *R v Brown*, 2002 SCC 32 at para 78, [2002] 2 SCR 185 [Brown]; *R v Wilder*, 2001 BCSC 1634 at para 11, [2002] 4 CTC 282; *R v GPJ*, 2001 MBCA 18 at para 58, [2001] 6 WWR 734; *R v FS* (2000), 130 OAC 41, 144 CCC (3d) 466 at para 18; *R v Griffin*, [1993] OJ No 2573 (QL), 1993 CarswellOnt 2387 (WL Can) at para 27 (Gen Div); *R v Bain*, [1992] 1 SCR 91 at 116–19, 87 DLR (4th) 449 [Bain].

²⁰ *R v Swietlinski*, [1994] 3 SCR 481 at paras 16, 23, 119 DLR (4th) 309 (“moderation and impartiality”—note that those are also used in *Boucher*, *supra* note 5 at 20, per Taschereau J) [Swietlinski]; *R v John*, 2016 ONCA 615 at para 78, 133 OR (3d) 360 (“propriety and fairness”) [John]; *R v Hurd*, 2014 ONCA 554 at para 34, 312 CCC (3d) 546 (“fairness and integrity”) [Hurd]; *R v Atout*, 2013 ONSC 1312 at para 51, 2013 CarswellOnt 2297 (WL Can) (“Independence and objectivity”); *R v Brown*, 126 CCC (3d) 187, 1998 CarswellOnt 477 (WL

[There are] at least three related but somewhat distinct components to the “Minister of Justice” concept. 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 the 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 Attorney is expected to act in an even-handed way.²¹

Courts acknowledge that what objectivity requires varies with the context,²² but the prosecutor’s general obligation is to “behave in a dispassionate and impartial manner to reduce the emotional level and foster a rational process.”²³ It is “not the Crown’s function ‘to persuade a jury to convict other than by reason.’”²⁴

As a counterpart to requiring a prosecutor to have an appropriate attitude of impartiality and objectivity, courts permit a prosecutor’s conduct to be challenged if the accused demonstrates that the prosecutor had an “improper or oblique motive” for her actions.²⁵ Requiring evidence of an improper motive prior to granting relief against prosecutorial conduct also reflects the courts’ attitude of deference to prosecutorial decision-making, deference that the court justifies in part through the prosecutor’s duty to seek justice. As set out by the Supreme Court in *R v Power*, because the Crown’s job is to “see that justice is properly done,” the Court ought to “be careful

Can) at para 9 (Ont Ct J Gen Div) (“guardian of a fair trial”); *R v Tingley*, [2011] NBJ No 527 (QL) at para 5, 2011 CarswellNB 843 (WL Can) (QB); *New Brunswick v Rothmans Inc*, 2009 NBBR 198 at para 17, 2009 NBQB 198; *R v Melanson*, 2007 NBCA 94 at para 75, 230 CCC (3d) 40 [*Melanson*]; *Reference Re Application Under s 83.28 of the Criminal Code*, 2004 SCC 42 at para 95, [2004] 2 SCR 248 [*Application under s 83.28*]; *R v Napa Valley Private Winery Inc*, (2001) 54 OR (3d) 459 at para 17, 2001 CarswellOnt 3702 (WL Can); *Eckervogt v British Columbia (Minister of Employment and Investment)*, 2004 BCCA 398 at para 44, 241 DLR (4th) 685 (asserting that the Crown is indifferent as to the outcome of a trial).

²¹ *R v Regan*, 2002 SCC 12 at para 155–56, [2002] 1 SCR 297 (per Binnie J, dissenting on other grounds) [*Regan*]. See also *ibid* at para 89 per Lebel J.

²² *Application under s 83.28*, *supra* note 20.

²³ *RBB*, *supra* note 15 at para 15.

²⁴ *R v Trochym*, 2007 SCC 6 at para 79, [2007] 1 SCR 239. See also *R v Assoun*, 2006 NSCA 47 at para 228, 207 CCC (3d) 372 [footnotes omitted] [*Assoun*]: “Counsel for the Crown is entitled to act as an advocate and to vigorously pursue a legitimate result. As stated in *Boucher*, this should not be with the object of winning. Rather, as stated in *R v Cook*, , [1997] 1 SCR 1113, 146 DLR (4th) 437 [*Cook* cited to SCR], it is to see that justice is done within the adversarial process.”

²⁵ *Cook*, *supra* note 24 at para 58; *R v Jolivet*, 2000 SCC 29 at para 21, [2000] 1 SCR 751; *R v Charlton*, 2014 ONSC 7562 at para 76, 2016 CarswellOnt 13011 (WL Can); *Hillis*, *supra* note 4 at para 17; *R v Harris*, 2009 SKCA 96 at para 40, [2010] 2 WWR 477; *Biladeau v Ontario* (AG), 2014 ONCA 848 at para 21, 322 CRR (2d) 354; *R v Caccamo* (1975), [1976] 1 SCR 786 at 810, 54 DLR (3d) 685.

before they attempt to ‘second-guess’ the prosecutor’s motives when he or she makes a decision”; there must be “conspicuous evidence” of improper motives to support judicial interference.²⁶ Prosecutors must have a sphere of independence when making their decisions in order to allow them to fulfill their “quasi-judicial role as ‘ministers of justice.’”²⁷

As part of judicial deference, courts also presume that prosecutors meet the high standards imposed upon them, a presumption they justify in part because of the prosecutor’s public duties.²⁸ A 2014 judgment from the Alberta Court of Queen’s Bench held that a prosecutor had a lower burden when justifying a claim of privilege than a civil litigator because of the Crown’s role as a minister of justice.²⁹

Courts may also use the prosecutor’s role as a minister of justice to justify limits on the procedural rights of an accused. In a series of judgments from the Nova Scotia Court of Appeal, the Court refused applications for assistance of counsel from people appealing their convictions in part because the prosecutor will “assist the Court in ensuring that the appellant receives a fair appeal.”³⁰ In his dissenting judgment in *R v Bain*, Justice Gonthier would have upheld the constitutionality of the *Criminal Code* provision granting the Crown greater peremptory jury challenges in part because a reasonably informed member of the public would see the disparity as reflecting the Crown’s obligation to “conscientiously discharge the quasi-judicial duties incumbent on his or her public office.”³¹

At the same time that they emphasize the prosecutor’s role as a minister of justice, courts also accept that the Crown is an adversarial advocate who may seek to convict, provided that she does not do so unfairly.³² It is “both permissible and desirable” that prosecutors “vigorously pursue a legitimate

²⁶ [1994] 1 SCR 601 at 9, 89 CCC (3d) 1 [*Power*].

²⁷ *Kvello v Miazga*, 2009 SCC 51 at para 47, [2009] 3 SCR 339 [*Miazga*].

²⁸ See *Application under s 83.28*, *supra* note 20 at para 95; *Robertson v Edmonton (City) Police Service*, 2004 ABQB 519 at para 174, [2004] AWLD 478; *Regan*, *supra* note 21 at para 158 (per Binnie J, dissenting on other grounds). Binnie’s claim is more empirical: that most prosecutors in general do act well and so should be presumed to act well.

²⁹ *R v Eddy*, 2014 ABQB 164 at para 91, 2014 DTC 5050 (Eng).

³⁰ *R v Morton*, 2010 NSCA 103 at para 19, 943 APR 65; *R v Buckley*, 2012 NSCA 108 at para 20, 1018 APR 294; *R v Frank*, 2012 NSCA 114 at para 27, 1025 APR 1; *R v Sykes*, 2014 NSCA 4 at para 27, 1073 APR 191; *R v Thompson*, 2014 NSCA 111 at para 9, 2014 CarswellNS 932 (WL Can); *R v Miller*, 2015 NSCA 19 at para 24, 1126 APR 303; *R v McKenna*, 2015 NSCA 36 at para 18, 1131 APR 134; *R v Martin*, 2015 NSCA 82 at para 28, [2016] 5 CTC 182.

³¹ *Bain*, *supra* note 19 at 23–24; *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

³² *R v Felderhof*, [2002] OTC 829 at para 21, 2002 CarswellOnt 5623 (WL Can).

result.”³³ While prosecutors “are expected to be ethical, they are also expected to be adversarial.”³⁴ A prosecutor does not represent the accused.³⁵

To balance advocacy with the duty to seek justice, a prosecutor must advocate, but do so fairly: “as an advocate, Crown counsel is expected to be rigorous but fair, persuasive but responsible. Murder trials are not tea parties. Nor are they unregulated.”³⁶ The prosecutor has an obligation to balance his dual roles as “strong advocate and ... minister of justice,”³⁷ which means that while he “is entitled to act as a strong advocate within the adversarial process, [he] cannot adopt a purely adversarial role towards the defence.”³⁸

Codes of conduct governing Canadian prosecutors reflect the general norms set out in the case law. The *Public Prosecution Service of Canada Deskbook* (“PPS Deskbook”³⁹) emphasizes both the obligation of the prosecutor to be a minister of justice and the legitimate function of the prosecutor as an adversarial advocate, suggesting by way of reconciliation the principle from the old English cases that “Criminal litigation ... should not become a personal contest of skill or professional pre-eminence.”⁴⁰

The PPS Deskbook directs the prosecutor to act with integrity and dignity, maintaining public confidence in prosecutorial fairness and objectivity.⁴¹ This generally requires:

- exercising careful judgment in presenting the case for the Crown, in deciding whether or not to oppose bail, in deciding what witnesses to call, and what evidence to tender;
- acting with moderation, fairness, and impartiality;

³³ *Cook*, *supra* note 24 at para 21; *R v Bialski*, 2017 SKQB 17, 2017 CarswellSask 33 (WL Can) [*Bialski* cited to SKQB].

³⁴ *R v Rose*, [1998] 3 SCR 262, 129 CCC (3d) 449 at 463.

³⁵ 1251553 *Ontario Inc v Ontario (Minister of Health and Long-Term Care)*, 2014 ONSC 4789 at para 23, 2014 CarswellOnt 11218 (WL Can).

³⁶ *R v Manasseri*, 2016 ONCA 703 at para 105, 132 OR (3d) 401 [*Manasseri*]; see also *R v Scott*, 2016 NLCA 16 at para 44, 1170 APR 167; *Hillis*, *supra* note 4 at para 25; *R v Delchev*, 2015 ONCA 381 at para 64, 126 OR (3d) 267 [*Delchev*].

³⁷ *R v Ahmed*, 2015 ONCA 751 at para 39, 330 CCC (3d) 60 [*Ahmed*].

³⁸ *R v Suarez-Noa*, 2015 ONSC 3823 at para 6, 2015 CarswellOnt 8846 (WL Can) [*Suarez-Noa*].

³⁹ The federal and provincial guidelines governing prosecutorial conduct “do not have the force of law” but are “capable of informing the debate as to whether a Crown prosecutor’s conduct was appropriate in the particular circumstances”: *R v Anderson*, 2014 SCC 41 at para 56, [2014] 2 SCR 167.

⁴⁰ PPS Deskbook, *supra* note 12, s 2(2) [footnotes omitted].

⁴¹ PPS Deskbook, *supra* note 12, ss 2(1)–(4). The duties also include the duty to maintain judicial independence.

- conducting oneself with civility;
- not discriminating on any basis prohibited by s. 15 of the *Canadian Charter of Rights and Freedoms* (Charter);
- adequately preparing for each case;
- remaining independent of the police or investigative agency while working closely with it;
- ...
- being aware of the dangers of tunnel vision and ensure they review the evidence in an objective, rigorous and thorough manner in assessing the strength of the evidence emanating from the police investigation throughout the proceedings;
- exercising particular care regarding actual and perceived objectivity when involved in an investigation at the pre-charge stage;
- making all necessary inquiries regarding potentially relevant evidence;
- never permitting personal interests or partisan political considerations to interfere with the proper exercise of prosecutorial discretion.⁴²

Law society codes of conduct note the general obligation of the prosecutor as an advocate—imposing on prosecutors the same duty imposed on all advocates to “act ... resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect”—while also recognizing the prosecutor’s special role: “When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.”⁴³

The prosecutor’s duty to seek justice does not lead only to general obligations on prosecutors to be impartial, objective, rational and fair while also acting as adversarial advocates within a criminal trial. It has additionally been used to support specific duties owed by prosecutors to the accused. For example, in *R v Stinchcombe*, Justice Sopinka justified the prosecution’s duty of disclosure primarily because of its “practical advantages” and its protection of the accused’s ability “to make full answer and defence.”⁴⁴ He

⁴² *Ibid* [footnotes omitted]. The PPS Deskbook also imposes more specific requirements, noted below.

⁴³ *Model Code, supra* note 1, Rule 5.1-3, commentary 1.

also, however, invoked the duty to seek justice to explain why the obligation to disclose only lies with the Crown. Quoting *Boucher*, he said that imposing a mutual obligation to disclose “fails to take account of the fundamental difference in the respective roles of the prosecution and the defence.”⁴⁵

In *Boucher*, the Crown’s obligation to seek justice was used to explain the Crown’s duty not to make inflammatory statements to the jury; Justice Rand’s famous observation was made to explain why the prosecutor was wrong to suggest to the jury that the Crown only proceeded in matters “after every possible investigation,” to refer to the crime as “revolting” and to conclude by saying “for once it will almost be a pleasure for me to ask the death penalty for him.”⁴⁶

In a more recent case, the Ontario Court of Appeal used terms similar to *Boucher* to set out the duties of prosecutors when addressing the jury:

First, Crown counsel is entitled to advance her case forcefully in closing argument in a jury trial. But in doing so, Crown counsel must eschew inflammatory rhetoric, demeaning commentary, sarcasm or legally impermissible submissions that undermine the degree of fairness which is the quintessence of our criminal trial ...

Second, closing addresses are exercises in advocacy. Crown counsel is an advocate, but one who occupies a special position in the prosecution of criminal offences.

⁴⁴ [1991] 3 SCR 326 at para 17, 68 CCC (3d) 1 [*Stinchcombe*].

⁴⁵ *Ibid* at para 11. See also *R v Gordon* (1999), 136 CCC (3d) 64 at para 36, 1999 CarswellOnt 1146 (WL Can) (Ct J Gen Div) (Crown’s discretion re invoking informer privilege must be exercised fairly); *Chaudhary v Ontario (AG)*, 2012 ONSC 5023 at para 60, 266 CRR (2d) 283 [footnotes omitted] (obligation to disclose even after appellate rights have been exhausted “flows from the well-accepted principle that ‘prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates’”); *R v DeRose*, 2000 ABPC 67 at paras 37–38, [2000] 3 CTC 105; *R v Riley* (2008), 172 CRR (2d) 223, 2008 CarswellOnt 1193 (WL Can) (Sup Ct J) (Crown’s duty of disclosure does not include an obligation to indicate to an accused how it will conduct its case).

⁴⁶ *Boucher*, *supra* note 5 at 30–31 [translated by author]. See similarly *John*, *supra* note 20 at para 77; *R v Suarez-Noa*, *supra* note 38 at para 6; *R v AT* 2015 ONCA 65 at paras 26–27, 18 CR (7th) 420 [AT]; *R v Melanson*, *supra* note 20 at paras 57–60; *R v Sun*, [2002] OJ No 2166 (QL) (Sup Ct J) at paras 3–4; *R v Dvorak*, 2001 BCCA 347 at para 32, 156 CCC (3d) 286 [Dvorak]; *R v VRD*, 2000 NFCA 9 at para 8–12, 562 APR 21 [VRD]; *R v FS* (2000), 144 CCC (3d) 466, 31 CR (5th) 159 (Ont CA); *R v Takhar* (1998), 103 BCAC 280 at para 14, 169 WAC 280 [Takhar]; *R v Wilson* (1996), 29 OR (3d) 97 at para 30, 107 CCC (3d) 86 (CA) (appeal abandoned) [Wilson ONCA]; *R v Davis* (1995), 66 BCAC 81 at 26, 108 WAC 81 (the judgment also discusses the importance of avoiding inflammatory addresses to ensure a fair trial); *R v Nugent* (1995), 24 OR (3d) 295, 100 CCC (3d) 89 (CA) [Nugent]; *R v Michaud* (1995), 161 NBR (2d) 215, 98 CCC (3d) 121 (CA) [Michaud]; *R v Smith* (1994), 50 BCAC 277 at para 56, 82 WAC 277 [Smith]; *Canada (AG) v Modern Organics* (1993), 113 Sask R 151 at para 22, 52 WAC 151 (CA) [Modern Organics]; *Pisani v R*, [1971] SCR 738, 15 DLR (3d) 1.

That special position excludes any notion of winning or losing and must always be characterized by moderation and impartiality. The Crown must limit his or her means of persuasion to facts found in the evidence adduced before the jury.⁴⁷

The duty to seek justice also supports the obligation of the Crown not to engage in abusive or demeaning cross-examination; in that context, courts have noted in particular the need for the Crown to balance its obligations as an advocate with its duty to seek justice: “In approaching and conducting the cross-examination of an accused, the Crown must be particularly vigilant about balancing the dual roles of the Crown—strong advocate and quasi-judicial role as minister of justice.”⁴⁸ Courts have suggested that a prosecutor ought to have no difficulty doing so: “There is no reason why a cross-examination cannot be conducted by a Crown prosecutor with some measure of respect for a witness which would not be inconsistent with a skilful, probing and devastating cross-examination.”⁴⁹

Courts have had a more difficult time explaining the relationship between the roles of the prosecutor as a minister of justice and as an advocate with respect to the presentation of evidence. Originally, following the statement in *Boucher* that the Crown should present “credible evidence relevant to what is alleged to be a crime,” courts required prosecutors to present all relevant and material evidence.⁵⁰ The Supreme Court rejected that position in *R v Cook*, holding that the prosecutor’s role as an advocate and the existence of disclosure mean that the prosecutor has no duty to call all material witnesses.⁵¹ Today, despite occasional statements by the court that support the pre-*Cook* approach,⁵² the general rule is that a prosecutor may present a case as he sees fit, except that he may not “curate” evidence,⁵³ must inform the court of evidence “before the court” that is relevant to the question the court is deciding⁵⁴ and in an *ex parte* trial must call evidence that assists the defence.⁵⁵

⁴⁷ *Manasseri*, *supra* note 36 at paras 103–04 [footnotes omitted].

⁴⁸ *Ahmed*, *supra* note 37 at para 39.

⁴⁹ *R v Lagiaco* (1984), 2 OAC 177, 11 CCC (3d) 374 at 383–84. See also *R v Gormley* (1999), 140 CCC (3d) 110, 180 Nfld & PEIR 181 at paras 80–84 (CA) [*Gormley*]; *R v Henderson* (1999), 44 OR (3d) 646 at paras 22–28, 120 OAC 99; *R v Hahn* (1995), 62 BCAC 6 at para 27, 103 WAC 6; *Smith*, *supra* note 46 at para 56; *R v Hillier* (1994), 115 Nfld & PEIR 27 at 24–25, 360 APR 27 (CA); *R v Wilson* (1983), 5 CCC (3d) 61, 1983 CarswellBC 778 (WL Can) at paras 86–87 (CA) [*Wilson BCCA*].

⁵⁰ See e.g. *R v Burns* (1993), 136 NBR (2d) 166, 347 APR 166 (CA) [*Burns*]; *R v Proctor*, 75 Man R (2d) 217, [1992] 2 WWR 289 (CA) [*Proctor*].

⁵¹ *Supra* note 24. Except that if it does not do so it may fail to discharge its burden of proof. See also *Bialski*, *supra* note 33 at para 40; *R v Florence*, 2014 BCCA 288 at para 45, 315 CCC (3d) 98; *R v Harris*, 2009 SKCA 96, 460 WAC 283.

⁵² *R v Stone*, 2016 ONSC 5435 at para 53, 2016 CarswellOnt 13652 (WL Can); *R v Rideout* (1999), 182 Nfld & PEIR 227, 554 APR 227 (CA) (dissenting); *R v Jackson*, 2002

Courts have used the general duty of the prosecutor to seek justice to assess the duties of prosecutors in a range of other contexts, such as the treatment of self-represented accused,⁵⁶ jury selection,⁵⁷ consenting to trial by judge alone,⁵⁸ the handling of witnesses,⁵⁹ the treatment of accused charged from the same incident⁶⁰ and the Crown's defence of a publication ban.⁶¹

The guidelines given to prosecutors by the federal and provincial departments of justice also identify specific obligations flowing from the prosecutor's general duties of fairness and impartiality. For example, the PPS Deskbook provides:

In order to maintain public confidence in the administration of justice, Crown counsel must not only act fairly; their conduct must be seen to be fair. One can act fairly while unintentionally leaving an impression of secrecy, bias or unfairness.

Counsel fulfill this duty by:

- making disclosure in accordance with the law;
- bringing all relevant cases and authorities known to counsel to the attention of the court, even if they may be contrary to the Crown's position;
- not misleading the court;

ABPC 100, [2002] 11 WWR 543 (duty to ensure all relevant evidence is before the court on a show cause hearing). One of the issues may be that courts often unthinkingly paraphrase *Boucher's* position that the prosecutor has a duty to present all relevant evidence, without appreciating that *Cook* renders that statement untrue. See e.g. *Brown*, *supra* note 19 at para 78; *R v Gayle* (2001), 145 OAC 115 at para 61, 54 OR (3d) 36 [*Gayle*]; *R v Franklin*, 2011 BCPC 16 at para 68, 226 CRR (2d) 249 [*Franklin*].

⁵³ *Hillis*, *supra* note 4 at para 24.

⁵⁴ *R v Machnis* (2007), 163 CRR (2d) 111, 2007 CarswellOnt 4770 (WL Can) at para 10 (Sup Ct J) [emphasis in original].

⁵⁵ *R v Zelitt*, 2003 ABPC 2 at paras 2–3, [2003] AWLD 198, citing *R v Skorput* (1992), 72 CCC (3d) 294 at 302, 1992 CarswellOnt 1065 (WL Can) (Prov Ct).

⁵⁶ *Burns*, *supra* note 50; *R v Vu*, [2004] OTC 1196, 2005 GTC 1401 (Eng) (Sup Ct J).

⁵⁷ *R v Biddle*, [1995] 1 SCR 761 at para 50, 123 DLR (4th) 22 (Gonthier J concurring); *Gayle*, *supra* note 52; *Bain*, *supra* note 19.

⁵⁸ *R v Bird* (1996), 39 Alta LR (3d) 128, 185 AR 201 (QB); *R v Effert*, 2008 ABQB 200, 443 AR 196.

⁵⁹ *R v Spackman*, 2009 CarswellOnt 4214 (WL Can), [2009] OJ No 1528 (QL) (Sup Ct J).

⁶⁰ *R v Lacroix*, 2007 ONCJ 540, 164 CRR (2d) 337.

⁶¹ *R v Brown* (1988), 126 CCC (3d) 187, 49 CRR (2d) 343 (Ont Ct J Gen Div).

- not expressing personal opinions on the evidence, including the credibility of witnesses or on the guilt or innocence of the accused in court or in public. Such expressions of opinion are improper;
- not advertng to any unproven facts, even if they are material and could have been admitted as evidence;
- asking relevant and proper questions during the examination of a witness and not asking questions designed solely to embarrass, insult, abuse, belittle, or demean the witness. Cross examination can be skilful and probing, yet still show respect for the witness. The law distinguishes between a cross-examination that is “persistent and exhaustive”, which is proper, and a cross-examination that is “abusive”;
- stating the law accurately in oral pleadings;
- respecting defence counsel, the accused, and the proceedings while vigorously asserting the Crown’s position, and not publicly and improperly criticizing defence strategy;
- respecting the court and judicial decisions and not publicly disparaging judgments; and
- avoiding themselves engaging in active “judge shopping.”⁶²

The PPS Deskbook and its provincial counterparts impose a broad range of other specific duties on prosecutors, notably with respect to the exercise of prosecutorial discretion in deciding when and how to pursue a matter.⁶³ The guidelines require that a prosecutor only pursue a case where there is sufficient evidence to warrant bringing or continuing proceedings, and after consideration of whether doing so is in “the public interest.”⁶⁴ Whether there is a sufficient basis to proceed depends on whether the evidence reveals a “reasonable prospect of conviction,”⁶⁵ a “substantial likelihood of conviction”⁶⁶ or a “reasonable likelihood of conviction,”⁶⁷ taking into account the “availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused.”⁶⁸ Identification of the public interest depends on “whether, in all of the circumstances, a prosecution would best

⁶² PPS Deskbook, *supra* note 12, s 2(2).

⁶³ Because of judicial deference to the exercise of prosecutorial discretion, case law does not speak to the duties of prosecutors in exercising discretion apart from the general duty to seek justice/be impartial and independent.

⁶⁴ PPS Deskbook, *supra* note 12, s 2(2).

⁶⁵ *Ibid*; NB *Prosecution Manual*, *supra* note 12.

serve the public interest,” including factors such as the age, culpability and circumstances of the accused and the consequences for the victim.⁶⁹

The law society codes of conduct address many of the prosecutor’s specific duties in their general rules regarding lawyer conduct—for example, the prohibition on abusive cross-examination and the rule against misleading the court apply to all advocates. They also provide some further, if limited, direction on the specific duties of prosecutors arising from the general duty to seek justice, particularly in relation to not interfering with the accused’s right to counsel and the duty of disclosure:

When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.⁷⁰

This, then, is the general structure of prosecutorial duties in Canada. The standard conception of the prosecutor’s role is one of impartiality, objectivity, rationality and fairness, in which the prosecutor eschews the pursuit of victory for the pursuit of justice, while nonetheless acting as an adversarial advocate in a criminal trial. That standard conception is used to support the prosecutor’s specific responsibilities in relation to the conduct of a trial and the exercise of prosecutorial discretion, but also results in prosecutors receiving a high level of judicial deference for their decisions and a presumption that they act in good faith.

The following section engages with the adequacy of the standard conception for explaining and identifying prosecutorial duties.

⁶⁶ BC *Crown Manual*, *supra* note 12.

⁶⁷ AB *Prosecutor’s Manual*, *supra* note 12.

⁶⁸ PPS Deskbook, *supra* note 12, s 2(3).

⁶⁹ *Ibid*, s 3(2).

⁷⁰ *Model Code*, *supra* note 1, Rule 5.1-3, commentary 1. Somewhat broader direction is given to American prosecutors in the American Bar Association, *Model Rules of Professional Conduct*, Chicago: ABA, 2016, Rule 3(8).

3. What's Wrong with the "Seek Justice" Ethic?

A) Introduction

Given the analysis in the prior section, it may not be apparent why this paper challenges the standard conception. Courts and regulators state the standard conception of the prosecutor's role consistently and clearly, and they use it to justify obligations for prosecutors that seem appropriate and uncontroversial: prosecutors ought not to engage in inflammatory addresses, abusive cross-examination or curation of the evidence and they ought to ensure disclosure to the accused of all relevant evidence.

However, courts' consistency and clarity in stating the standard conception masks the analytical emptiness in how they use it to explain prosecutorial duties. It blurs the extent to which the concept is, at best, irrelevant to how the courts explain what prosecutors ought to do, and at worst undermines judicial analysis of complex issues. A closer review of the case law on the duty to seek justice indicates three recurring problems in the judgments. First, courts often set out the standard conception of the prosecutor's role—quoting from *Boucher*, *Cook* and other key cases—and then state their conclusion regarding the duty or conduct of the prosecutor in the case. They do not, however, provide meaningful analyses or connect the statement of the role to the conclusion regarding the duty or conduct. It may be that the role could explain the duty or conduct, but courts do not provide that explanation. I call this the "missing link" problem.⁷¹ Second, courts set out the standard conception of the prosecutor's role to emphasize or highlight a conclusion that they justify or explain in different ways based on factual analysis, more specifically applicable precedent or principles of trial fairness. I call this the "exclamation mark" problem. Finally, in some cases courts state the principle and employ it in their analyses, but the principle either does not support or is irrelevant to the point the court is making. I call this the "distraction" problem.

This section will give some examples of each problem and then suggest why the seek justice ethic fails in this way. It will also consider other serious problems with the seek justice ethic for guiding judicial analysis and ensuring appropriate prosecutorial conduct.

B) Case Analyses

Judicial decisions cannot be expected to follow precise logic in justifying their conclusions. Often multiple factors justify the existence of a rule or

⁷¹ I also call it the "underwear gnomes" analysis, which will be familiar to fans of South Park.

outcome, a judge may see the conclusion as sufficiently obvious not to require much explanation and the judge may simply have articulated her thoughts imperfectly. In the case of the seek justice ethic, however, logical deficiencies pervade the case law. Courts routinely fail to explain how or why the prosecutor's obligation to seek justice leads to the existence of a particular duty, or to the condemnation of a prosecutor's conduct. It is treated as self-evident.⁷²

For example, in the 2003 Supreme Court decision in *R v Taillefer* the Court considered an argument by the Crown that it could not be treated as violating its duty to disclose because the trial in question occurred prior to *Stinchcombe*.⁷³ As a result, the prosecutor argued, the law was uncertain and the Crown "retained a complete discretion, at that time, as to whether or not to disclose its evidence."⁷⁴ The Court rejected that argument. It disputed the contention that the law was as uncertain as the Crown claimed, but also relied on the Crown's duty to seek justice. The Court quoted *Boucher's* principle that the prosecutor must eschew notions of winning and losing;⁷⁵ it cited case law linking "the duty to disclose and the duties inherent in the functions of the Crown"⁷⁶ and then stated its conclusion: "The Crown cannot rely on uncertainties in the law relating to the disclosure of evidence to justify the failure to disclose."⁷⁷ The Court went on to justify its decision further, but it gave no additional explanation as to why eschewing notions of winning or losing leads to this particular limit on arguments available to the Crown. It did not analytically link its cited authority to its conclusion.

Similarly, in its 2009 judgment in *R v McNeil*, the Supreme Court considered the obligation of the prosecutor to make inquiries when it receives "notice of the existence of relevant information."⁷⁸ The Court said:

⁷² For this paper I reviewed cases citing *Boucher* in the last 25 years, as well as Supreme Court and other frequently cited cases from prior to that time (approximately 160 cases in total). I then categorized the cases into cases that did some analytical work to identify other principles or specific duties, and those that fell into one of the three categories discussed here. Only a charitable interpretation put any of the cases in the analytical work category, and even then the majority were also in one of the categories discussed here, primarily the missing link or the exclamation point category.

⁷³ 2014 ONSC 794, 2014 CarswellOnt 1567 (WL Can) [*Taillefer*]; *Stinchcombe*, *supra* note 44.

⁷⁴ *Taillefer*, *supra* note 73; *R v Duguay*, 2003 SCC 70 at para 63, [2003] 3 SCR 307 [*Duguay*].

⁷⁵ *Duguay*, *supra* note 74 at para 68.

⁷⁶ *Ibid* at para 69.

⁷⁷ *Ibid* at para 70.

⁷⁸ *R v McNeil*, 2009 SCC 3 at para 49, [2009] 1 SCR 66.

The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so.⁷⁹

Again, the Court does not articulate how the prosecutor's "undivided loyalty to the proper administration of justice" in and of itself produces this duty.⁸⁰ The Court may be arguing that the administration of justice requires accurate results, a failure to investigate impedes accuracy and that a prosecutor must therefore disclose. But that result *arises from* the administration of justice itself, not from the prosecutor's *loyalty to* the administration of justice. The prosecutor's duties arise from the administration of justice, not from the prosecutor's attitude toward the administration of justice.⁸¹ The Court asserts the analytical importance of the prosecutor's "undivided loyalty" but does not explain it.

In *R v Gormley* the Prince Edward Island Court of Appeal considered an appeal based on a prosecutor's cross-examination.⁸² The Court rejected the appeal concluding that the prosecutor's conduct did not affect trial fairness.⁸³ To assess the prosecutor's conduct the Court noted the "high standard" imposed on prosecutors, and then had four paragraphs with lengthy quotations from past cases dealing with the general obligations of prosecutor, including *Boucher*.⁸⁴ It then concluded: "I agree with the appellant's submissions that some of the cross-examination conducted by Crown counsel was clearly inappropriate. Some of it was overly aggressive and exceeded the proper bounds of cross-examination in a criminal

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ One could argue that the reasoning here is that: (1) prosecutor has duty of loyalty to administration of justice, (2) administration of justice requires accurate results, (3) a failure to investigation impedes accuracy and, (4) therefore, the prosecutor's loyalty is a necessary step in the analysis. My view, however, would be that the prosecutor's attitudes or feelings about the administration of justice are irrelevant. If the administration of justice requires something, a prosecutor who fails to do that thing has acted wrongfully, whatever the reason for the prosecutor's failure. Conversely, if the prosecutor fulfills the duty disinterestedly, or reluctantly, that is satisfactory. The duty flows from the administration of justice; the prosecutor must fulfill the duty, but why the prosecutor does so (or fails to do so) is not analytically significant.

⁸² *Supra* note 49.

⁸³ *Ibid.*

⁸⁴ *Ibid* at paras 80–84.

trial. Some of it was conducted in an arrogant, argumentative and hostile manner.”⁸⁵

The Court offered no explanation for how the case law it had cited supported these criticisms of the prosecutor—for example, how being arrogant was precluded by the prosecutor’s obligation as a minister of justice. That explanation may be possible, but the Court did not provide it.⁸⁶

In *R v Wilson*, the British Columbia Court of Appeal considered the propriety of a prosecutor putting forward suggestions on a key issue in cases where he knows the sources for those suggestions are unreliable.⁸⁷ The Court quoted *Boucher* as “governing the course of conduct to be followed by Crown counsel in all criminal trials”⁸⁸ and concluded “[i]n my opinion, a prosecutor does not act fairly when he makes a suggestion relating to a vital issue in the case, which he knows is based on an unreliable source.”⁸⁹ The Court did not further explain why fairness imposes that limit on the prosecutor’s conduct. Again, that explanation may be possible, but the Court did not offer it.

In *R v Babos* the Supreme Court held that making threats to induce an accused to plead guilty were improper, even if not sufficient to warrant a stay of proceedings in the circumstances.⁹⁰ Its analysis of the threats drew on *Boucher*:

Without question, the bullying tactic to which Ms. Tremblay resorted was reprehensible and unworthy of the dignity of her office. It should not be repeated by her or any other Crown. In her capacity as a Crown, Ms. Tremblay’s role was that of a quasi-judicial officer. Her function was to be “assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party” (*Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25). In threatening to charge Mr. Piccirilli with more offences if he did not plead guilty, Ms. Tremblay betrayed her role as a Crown. Manifestly it is the type of conduct the court should dissociate itself from.⁹¹

The Court again treated the duty as explaining the breach without further explanation, despite that it is at least arguable that a prosecutor could have a

⁸⁵ *Ibid* at para 86.

⁸⁶ Arguably, *Gormley*, supra note 49, fits better into the exclamation mark category, but the number of judgments cited suggested that it fit here.

⁸⁷ *Supra* note 49.

⁸⁸ *Ibid* at para 86.

⁸⁹ *Ibid* at para 87.

⁹⁰ *R v Babos*, 2014 SCC 16, [2014] 1 SCR 309.

⁹¹ *Ibid* at para 61.

concept of “justice” that supported using the prosecutor’s charging power to ensure an accurate and efficient resolution of a case.⁹²

The courts in these cases employ logic essentially equivalent to the notion that a crown prosecutor ought to be a “good person”, and this is not the sort of thing good people do. The courts do articulate goodness somewhat more specifically—being just, fair, impartial and rational—but they do not explicitly explain why those qualities preclude prosecutors’ actions in these cases.

Yet, that those actions ought to be precluded is not difficult to explain. Requiring prosecutors to inquire when they receive notice that relevant information may exist, preventing aggressive, arrogant or hostile cross-examination, prohibiting the prosecutor from asking questions with no foundation and forbidding prosecutorial threats all follow from the rule of law and the requirements of a criminal trial. In a criminal trial, the state has the burden of proof. It has resources and information that the accused does not. The accused enjoys a presumption of innocence, and the rule of law precludes the state from punishing someone absent factual and legal justification. The rule of law also requires decision-makers to follow procedures that respect the autonomy and dignity of those to whom the law applies.⁹³ A criminal trial endeavours, if not to discover the truth, to at least prevent the prosecution from convicting someone based on false or inaccurate information.

If information that suggests an accused should not be convicted exists, and the state has that information, it should be given to the accused to ensure that the accused can make the best case on the evidence, as the presumption of innocence and proof beyond a reasonable doubt require. It should also be given to the accused to ensure that the accused’s conviction is merited on the facts, as required by the rule of law.

A person ought not to be convicted because the prosecution confuses or rattles him with an abusive or hostile cross-examination, or through such

⁹² Prosecutors in the United States certainly use the charging power for this purpose, and some argue that the severe mandatory minimums in the United States are designed to allow them to do so. While most academic commentators are highly critical of this behaviour, its institutional and practical role in United States’ criminal law at least raises the point that, for some, this is what justice requires. See e.g. Jonathan A Rapping, “Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect” (2012) 51:3 *Washburn LJ* 513 at 545 [Rapping].

⁹³ See Jeremy Waldron, “The Concept and the Rule of Law” (2008) 43:1 *Ga L Rev* 1; Jeremy Waldron, “The Rule of Law and the Importance of Procedure” in James E Fleming, ed, *Getting to the Rule of Law* (New York: New York University Press, 2011) 3; Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

cross-examination communicating to the judge or jury the prosecutor's belief in the accused's guilt. Nor should he be convicted because the prosecutor manages to put forward "facts" that have no evidentiary foundation. Conviction in those cases would potentially arise from something other than the evidence or the law, or be based on falsehoods. The accused would not enjoy the legal process that the law affords.

And an accused who pled guilty because of a prosecutor's threats would have been denied the benefit of the law's procedures and may have been convicted based on nothing more than a raw exercise of prosecutorial power; that sort of conviction would violate the rule of law in the most elemental way possible, given the purpose of law as ensuring social cooperation through democratically enacted norms, not force or fiat.⁹⁴

In short, the duties of prosecutors in each of these instances follow logically from the requirements of the rule of law and a criminal trial. If they also follow logically from the prosecutor's status as a minister of justice, the courts do not explain how that logic operates.⁹⁵ The decisions reveal a consistent analytical gap between the authority they cite and the conclusion they reach.

This gap between the evocation of the seek justice ethic and the outcome in the case broadens in the exclamation mark category of cases. In those cases courts cite the prosecutor's obligation to seek justice in the course of assessing the prosecutor's duties or conduct in a particular case, but connect the two only inferentially. The court's analysis is based in either assessment

⁹⁴ Lon L Fuller, *The Morality of Law: Revised Edition* (New Haven: Yale University Press, 1969).

⁹⁵ The reason for this—the incapacity of concepts like doing justice/impartiality/fairness/reason to generate precise duties in a criminal trial—is discussed further below. Few if any of the cases I reviewed explain how the general duty leads to specific duties, but the cases I saw as most clearly reflecting this trend are: *Manasseri*, *supra* note 36; *R v Gagne*, [2015] OJ No 6344 (QL), 2015WL10527269 (WL Can) (Sup Ct J); *R v Quansah*, 2015 ONCA 237, 323 CCC (3d) 191; *R v Paxton*, 2012 ABQB 96, 531 AR 233; *R v Hawkins*, 2011 NSCA 6, 265 CCC (3d) 472; *Franklin*, *supra* note 52; *R v Rinella*, 2011 ONSC 446, 2011 CarswellOnt 6051 (WL Can); *R v Violette*, 2009 BCSC 813, [2010] BCWLD 1786; *R v Plaunt*, 2007 CarswellOnt 4164 (WL Can), [2007] OJ No 2547 (QL) (Sup Ct J); *Assoun*, *supra* note 24; *R v Payton*, 2003 ABPC 194, [2005] 2 WWR 275; *R v Jackson*, 2002 ABPC 100, [2002] 11 WWR 543; *R v Pilarinos*, 2001 BCSC 1690, 2001 CarswellBC 2685 (WL Can); *R v Larocque*, 18 OTC 297, 1996 CarswellOnt 4775 (WL Can) (Ct J Gen Div) (this case is unusual, in that it emphasizes *Boucher's* requirement that the prosecutor be efficient, rather than the traditional direction not to focus on winning or losing); *R v Davis* (1995), 66 BCAC 81, 108 WAC 81 (the Court cites *Boucher* and cases dealing with inflammatory Crown comments; it then identifies five criteria for identifying when Crown comments will have prejudiced the right to a fair trial, but none link back to *Boucher*); *R v Hahn* (1995), 62 BCAC 6, 103 WAC 6; *R v Raymond*, 131 Nfld & PEIR 155, 408 APR 155 (Prov Ct).

of the prosecutor's conduct on the facts, or through other principles, and the seek justice ethic is invoked only for emphasis.

For example, in *R v Swietlinski*, Chief Justice Lamer found that the prosecutor's submissions were improper because they undermined the proper and fair application of the parole provisions of the *Criminal Code*.⁹⁶ He began his analysis by quoting *Boucher*, and holding that it applied to prosecutorial conduct in a parole hearing, but did not otherwise refer to it or to the duties of a prosecutor to explain the result.⁹⁷

In *R v John*, the Ontario Court of Appeal considered a prosecutor's conduct at trial, both in closing submissions and during cross-examination.⁹⁸ The Court concluded that the prosecutor's conduct was improper, but that it had been sufficiently addressed by the trial judge's corrective instructions.⁹⁹ To assess the prosecutor's conduct the Court noted that the prosecutor's cross-examination "undermined the fundamental principle that there is no onus on the accused to prove his innocence"¹⁰⁰ and that in her closing address "she belittled the beyond a reasonable doubt standard."¹⁰¹ That is, the Court relied on the legal constraints arising in a criminal trial to assess the prosecutor's conduct. It began its analysis, however, by quoting *Boucher*.¹⁰²

In *R v HA*, the trial judge rejected the Crown's argument that the defence witnesses were lying, and also considered the propriety of the prosecutor advancing that argument in her closing submissions.¹⁰³ The judge held that the prosecutor must have a reasonable foundation to impugn the defence witness's credibility, which may include "a need" to make inquiries regarding information that suggests the witnesses were testifying truthfully.¹⁰⁴ The judge concluded his analysis by saying, "The requirement of a foundation [for impugning credibility] is consistent with the crown's role as a quasi-minister of justice," quoting *Boucher*.¹⁰⁵

In these cases the invocation of the seek justice ethic may not do much harm; the decisions generally offer a justification for their assessment of

⁹⁶ *Supra* note 20; *Criminal Code*, *supra* note 31.

⁹⁷ *Swietlinski*, *supra* note 20 at para 14. See similarly, *R v Peavoy* (1997), 34 OR (3d) 620, 101 OAC 304 [*Peavoy*]; *R v RC* 1999 BCCA 411, 137 CCC (3d) 87 [*RC*].

⁹⁸ *John*, *supra* note 20 at para 79.

⁹⁹ *Ibid* at paras 72–73.

¹⁰⁰ *Ibid* at para 53.

¹⁰¹ *Ibid* at para 79.

¹⁰² *Ibid* at para 77.

¹⁰³ 2013 ONSC 5242, 2013 CarswellOnt 11365 (WL Can).

¹⁰⁴ *Ibid* at para 87.

¹⁰⁵ *Ibid* at para 88. From that the Court held that "counsel may have overstepped the limits on Crown advocacy" (at para 90).

the prosecutor's duties or conduct. At the same time, however, that the principle functions as empty rhetoric in these cases may suggest its lack of real analytical usefulness.¹⁰⁶

Judgments falling within the missing link and exclamation mark categories tend to deal with the conduct of prosecutors during the course of a trial. The third category—the distraction problem—arises in relation to the other major prosecutorial activity, the exercise of prosecutorial discretion. As noted in the general summary of the case law, one of the conclusions said to follow from the seek justice ethic is that prosecutors ought to be given deference by the courts with respect to exercises of prosecutorial discretion, and that prosecutors ought to be presumed to act in good faith.

To support these principles, courts rely explicitly on prosecutors' obligations as ministers of justice. In *R v Power*, the Court considered whether it was an abuse of process for a prosecutor to respond to the trial judge's exclusion of evidence by not calling any further evidence so as to generate an acquittal and permit an appeal of the exclusion.¹⁰⁷ In reinforcing the requirement that a stay of proceedings ought to be granted only in the clearest of cases, Justice L'Heureux-Dubé invoked the Crown prosecutor's duty to seek justice:

To conclude that the situation “is tainted to such a degree” and that it amounts to one of the “clearest of cases”, as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. As will be developed in more detail further in these reasons, the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's

¹⁰⁶ Other cases in this category include *R v Fercan Developments Inc*, 2016 ONCA 269, 397 DLR (4th) 534; *R v Ancheril*, 2015 ONCJ 501, 2015 CarswellOnt 14576 (WL Can); *Ahmed*, *supra* note 37; *Suarez-Noa*, *supra* note 38; *Delchev*, *supra* note 36; *AT*, *supra* note 46; *R v IB*, 2014 ONCJ 368, 2014 CarswellOnt 11140 (WL Can); *Hurd*, *supra* note 20; *R v Dexter*, 2013 ONCA 744, 54 MVR (6th) 175; *R v Levers*, 2012 QCCS 6091, EYB 2012-232607; *R v Khairi*, 2012 ONSC 5949, 2012 CarswellOnt 13091 (WL Can); *R v Regis*, 2012 QCCS 4777, EYB 2012-237392; *R v Rodgers*, 2010 QCCQ 12895, EYB 2010-187726; *R v Smith*, 2007 NWTCA 2, 404 AR 393; *Melanson*, *supra* note 20; *R v LA*, 2005 ONCJ 546, 2005 CarswellOnt 10005 (WL Can); *R v BM*, [2003] OTC 331, 105 CRR (2d) 160 (Sup Ct J); *R v Khan*, [2002] OTC 684, 2002 CarswellOnt 3086 (WL Can) (Sup Ct J); *R v Squires*, 2002 NFCA 4, 626 APR 99; *Dvorak*, *supra* note 46; *VRD*, *supra* note 46; *R v Sandhu*, 1999 CarswellBC 2745 (WL Can), [1999] BCJ No 2784 (QL) (Sup Ct J); *RC*, *supra* note 97; *R v Lee* (1989), 106 BCAC 161, 124 CCC (3d) 301; *R v Derksen* (1998), 169 Sask R 251, 126 CCC (3d) 554 (QB); *Takhar*, *supra* note 46; *Peavoy*, *supra* note 97; *Wilson* ONCA, *supra* note 46; *R v Bennett*, [1995] OJ No 4833 (QL) (Ct J); *Nugent*, *supra* note 46; *Michaud*, *supra* note 46; *Modern Organics*, *supra* note 46; *Proctor*, *supra* note 50; *R v Logiaco* (1984), 11 CCC (3d) 374, 2 OAC 177.

¹⁰⁷ *Supra* note 26.

role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.¹⁰⁸

The Court relied on this observation again in *Miazga v Kvello Estate* where it set out a very narrow basis for lawsuits against prosecutors for wrongful prosecution. The Court used *Power* to conclude that "the public good is clearly served by the maintenance of a sphere of unfettered discretion within which Crown attorneys can properly pursue their professional goals."¹⁰⁹

It is not entirely clear, however, why the duty of the Crown to seek justice in itself warrants judicial deference to prosecutorial decisions. Generally speaking, judicial deference flows from 1) the separation of powers; 2) judicial respect for executive or legislative authority, and 3) each institutional actor's relative competence and expertise in relation to the question at issue. Judicial deference to the exercise of prosecutorial discretion—the Crown's decisions about "the nature and extent of the prosecution"—can be justified on these sorts of grounds, particularly prior to a trial on the merits.¹¹⁰ The decision about whether and how to prosecute an offence is an exercise of executive authority and involves matters of public policy unrelated to the law (such as the age of the accused). Courts have relatively less expertise and competence on those questions. In addition, it can typically be characterized as a preliminary decision insofar as the courts retain authority to assess a case on the merits; the exercise of prosecutorial discretion only constrains judicial authority in a limited way.¹¹¹ Indeed, courts may exercise oversight in relation to prosecutorial discretion through the trial itself, and interfering with prosecutorial decisions prior to trial risks undermining the court's own authority to assess the case on its merits.¹¹²

¹⁰⁸ *Ibid* at 9. Note that the Court does not develop this principle further in its reasons, at least insofar as it relates to the Crown's obligations as a minister of justice.

¹⁰⁹ *Miazga, supra* note 27 at para 47. The Court also suggested that an action for wrongful prosecution arises when a prosecutor "steps outside his or her proper role as 'minister of justice'" (at para 49).

¹¹⁰ *Krieger, supra* note 11 at para 47.

¹¹¹ The most significant constraints being where the prosecutor charges on a basis that invokes a mandatory minimum, or where the prosecutor decides not to proceed.

¹¹² This is why the high level of deference given to prosecutorial decisions in wrongful conviction cases is harder to justify; in that case an acquittal or like result will have occurred, and so there is no risk of preempting the trial on the merits, which a stay of proceedings on the grounds of abuse of process can produce.

How, though, does identifying a prosecutorial duty to “honour and express the community’s sense of justice” contribute to the analysis?¹¹³ Courts also have this duty, given that the whole point of legality is to articulate the community’s sense of justice, and the function of courts is to apply the law to particular cases. That a prosecutor must seek justice does not, in and of itself, speak to the relative institutional competence of prosecutors and the court, and nor does it suggest that the courts ought to defer to prosecutorial assessments of what justice requires. Justice L’Heureux-Dubé may have intended to invoke the prosecutor’s extra-legal policy role as warranting deference, but the reference to the “community’s sense of justice” confuses rather than clarifies that point.

Similar problems arise with respect to the presumption that prosecutors act in good faith. As stated by the Supreme Court in *Application re s. 83.28*: “the Crown exercises a ‘public duty ... performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings,’ and accordingly is presumed to act in good faith.”¹¹⁴ That approach does not make obvious sense. The fact that someone has an obligation to do something important does not, without more, suggest that it ought to be presumed that she will do that thing. Indeed, it could equally justify the opposite approach—that the importance of the function assigned to prosecutors warrants greater scrutiny to determine that they have accomplished that function. A party who alleges another person has acted wrongfully must provide an evidentiary and legal basis for that claim. But to further require that person to overcome a presumption that her allegation is false needs some justification beyond the idea that the behaviour alleged is not one that ought to occur.

C) Why Does This Matter?

The argument is, then, that courts use the seek justice ethic without analytical rigour. They cite it but do not use it in a thoughtful or persuasive way to support or analyze the conclusions they reach about a prosecutor’s duties or conduct. One response to that criticism may be, “so what”? As long as courts reach the right answers—and I have largely suggested that they do—what difference does it make if they engage in a little empty rhetoric along the way?

There are two answers to that response. First, the courts do not treat the seek justice ethic as empty rhetoric, or window dressing. They act like it really matters, like it does analytical work and produces insights and outcomes about what prosecutors ought to do, and about the adequacy

¹¹³ *Power*, *supra* note 26.

¹¹⁴ *Application under s 83.28*, *supra* note 20 at para 95.

of what they have done. Courts use it to limit their own oversight over prosecutorial conduct, and to identify the difference between good conduct and bad. They often cite nothing else in support of their conclusions. It is the doctrine on which they rely. As a consequence, the doctrine cannot be treated merely as a rhetorical flourish; so long as the courts treat it as a serious legal concept, it should be analyzed and criticized as one.

Second, the courts' reliance on the doctrine does in fact undermine their ability to provide cogent and nuanced analyses of the difficult issues raised in these cases. Take for example a 2014 decision of the New Brunswick Court of Queen's Bench, *R v Grenier*.¹¹⁵ In that case, the accused had "repeatedly requested" the opportunity to take a polygraph to demonstrate his innocence.¹¹⁶ Eventually, the prosecutor made an offer to the accused that if he took a polygraph and passed, the charges would be withdrawn, but if he failed the polygraph he would be required to either plead guilty or, if he did not plead guilty, his lawyer would be required to withdraw as counsel.¹¹⁷ In rejecting the accused's argument that the prosecutor's conduct was improper, the Court cited *Boucher* and essentially concluded that the accused had voluntarily accepted this agreement and assumed the risk of this outcome.¹¹⁸ The citation of *Boucher* did not do any obvious work to justify the conclusion, but the Court's apparent assumption that it was the relevant analytical principle may well have contributed to it missing the truly significant issues raised by the "deal" struck by the prosecutor: that the prosecutor was willing to have a case determined by evidence that would be inadmissible; the empirical unreliability of polygraph evidence; and the accused's loss of the counsel of his choice (something the Supreme Court has consistently recognized as an outcome to be avoided where possible).¹¹⁹ Presumably, if the prosecutor had made a similar deal based on a coin toss, the Court would not have viewed it as acceptable. In what way was this different (and I ask that non-rhetorically)? Whether or not the Crown's conduct could be defended, the seek justice ethic, even when combined with the accused's voluntary participation in the agreement, apparently left the Court with no analytical tools to allow it to consider the complex issues raised by the prosecutor's conduct.

The reliance on prosecutors' status as ministers of justice also undermines the Supreme Court's reasoning in the context of judicial deference. As noted, the Court applies a high degree of deference to

¹¹⁵ 2014 NBQB 68, 1087 APR 167 [*Grenier*].

¹¹⁶ *Ibid* at para 43.

¹¹⁷ *Ibid* at para 41.

¹¹⁸ *Ibid* at paras 42–44.

¹¹⁹ See e.g. *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39, [2013] 2 SCR 649 at para 22.

prosecutorial decision-making in both the context of deciding whether to grant a stay of proceedings for an abuse of process and in deciding whether to hold a prosecutor accountable for a wrongful prosecution. Deference in both contexts may be warranted, but relying on the prosecutor's need to pursue their professional goals as ministers of justice undermines the ability of the Court to consider important differences between the two contexts. In a wrongful prosecution case, for the plaintiff to succeed, the substantive matter must have already been resolved in the plaintiff's favour. Thus, there is nothing left to adjudicate, and no potential to constrain the resolution of the criminal allegations or the court's jurisdiction if the prosecutor is held accountable for her past incorrect decision. In an abuse of process context, by comparison, the criminal matter has not yet been concluded, and nor has the court's jurisdiction been fully exercised. Holding the prosecutor accountable by staying proceedings has significant consequences for the court's assessment of the underlying criminal case, and for the enforcement of the substantive law. Institutionally the situations are different, and those differences should affect how the courts justify deference to prosecutorial decisions, even if deference results in both contexts.¹²⁰ Focusing on the prosecutor's duty as a minister of justice means those relevant institutional differences are neither discussed nor taken into account.

D) The Broader Critique

The seek justice ethic directs prosecutors to ensure a just outcome in a criminal trial—to “assist the judge and the jury in ensuring that the fullest possible justice is done”¹²¹—and to take the right attitude to a prosecution, one of objectivity, independence and impartiality.¹²² But the seek justice ethic fails. It fails because courts do not use it effectively, but also because of its inherent flaws.¹²³ The seek justice ethic cannot provide clear direction

¹²⁰ Deference in the wrongful prosecution case would be justified on the basis that, even after the fact, accountability would undermine prosecutorial independence in deciding when or whether to pursue a criminal matter.

¹²¹ *Boucher*, *supra* note 5 at 21 (per Taschereau J).

¹²² *Regan*, *supra* note 21.

¹²³ Many American articles have engaged persuasively with prosecutorial ethics in general, and with the seek justice ethic in particular. See e.g. Fred C Zacharias, “Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?” (1991) 44:1 Vand L Rev 45 (perhaps the finest article written on the topic); Bruce A Green & Fred C Zacharias, “Prosecutorial Neutrality” [2004]:3 Wis L Rev 837; Abbe Smith, “Are Prosecutors Born or Made?” (2012) 25:4 Geo J Leg Ethics 943; Peter A Joy, “The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System” [2006]:2 Wis L Rev 399; Erik Luna & Marianne Wade, “Prosecutors as Judges” (2010) 67:4 Wash & Lee L Rev 1413; Jane Campbell Moriarty, “Misconvictions, Science, and the Ministers of Justice” (2007) 86:1 Neb L Rev 1; Melanie D Wilson, “Anti-Justice” (2014) 81:4 Tenn L Rev 699; Eric S Fish, “Prosecutorial Constitutionalism” (2017) 90:2 S Cal L Rev 237; Leslie C Griffin, “The Prudent Prosecutor” (2001) 14:2 Geo J Leg Ethics 259.

to courts or prosecutors, whether one focuses on its invocation of justice or its exhortation for impartiality. The tension between the seek justice ethic and adversarial advocacy cannot be satisfactorily resolved. It does not sufficiently reflect the norms of legality, relying instead on moral concepts that ought not to ground the work of actors within a system of laws. It risks corroding the morality of prosecutors and the fairness of a criminal trial. And, finally, it simply fails to capture accurately or adequately the work that prosecutors do, or the norms underlying that work. This section considers each of these issues, starting with the inability of the seek justice ethic to provide clear direction to courts and prosecutors.

What does it mean to ensure that “justice is done” in a criminal trial?¹²⁴ Does justice mean obtaining a conviction only when the law and evidence, as applied through a fair process, warrant one? Or does justice mean conviction must be warranted in some broader sense, apart from the substance and process of law? The frailties of our legal system are such that a prosecutor who pursues results the law permits may risk participating in injustice. The seek justice ethic could thus reasonably be interpreted as prohibiting that result, as requiring the prosecutor to do the “right thing” apart from legality. That broader interpretation of the seek justice ethic might also permit a prosecutor to take steps she feels necessary to obtain a just conviction of a factually guilty accused the law will otherwise not convict. Conversely, if justice means “consistency” with the substance and procedure of law, a prosecutor might focus on observing the procedural requirements of law, even if as a result a factually guilty accused goes free or it means pursuing a prosecution that seems unjust in a broader sense.

Asking prosecutors to seek “justice” as opposed to “what the law permits” creates uncertainty as to where courts want prosecutors to aim; the direction to see that justice is done is inherently ambiguous.¹²⁵ As Fred Zacharias puts it, “Most prosecutorial tactics can be defended on the ground that the defendant is guilty and conviction would therefore be ‘just.’ Conversely, prosecutors can rationalize most actions that undermine the government’s (or victim’s) case on the basis that they have a responsibility

¹²⁴ This is a question commonly asked in American literature as well: “Yet this conception of the prosecutorial role has problems. For one, the content of the norm is famously hard to pin down. What does it *mean* for a prosecutor to ‘seek justice?’” Daniel Epps, “Adversarial Asymmetry in the Criminal Process” (2016) 91:4 NYU L Rev 762 at 782 [Epps].

¹²⁵ Smith, *supra* note 18 at 377. See also R Michael Cassidy, “Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to ‘Seek Justice’” (2006) 82:2 Notre Dame L Rev 635 at 637–38: “Justice’ is an example of a highly generalized axiom of behavior—it does not set forth permissible and impermissible conduct, and it does not set out criteria for how prosecutors are supposed to determine what is just . . . Justice might mean several overlapping but different things simultaneously.”

to preserve defendants' rights."¹²⁶ Directing prosecutors to see that justice is done does not tell prosecutors what they should try to achieve. It leaves those affected by prosecutorial decisions—the accused, the victim and the state—subject to a prosecutor's own definition of justice.¹²⁷

Emphasizing the importance of objectivity, independence and impartiality provides little additional guidance. Those attitudes cannot guide decision-making unless they are anchored to something—to a goal a prosecution is supposed to achieve. About what, precisely, is the prosecutor supposed to be objective, independent and impartial? If it is justice, the same problems arise as just noted; if it something else, the courts do not say what that might be.

In setting out the duties of prosecutors in an adversarial trial, courts draw a picture of the good prosecutor—the gentlemanly lawyer who is dignified, rational, dispassionate, serious and fair, while pursuing a legitimate result. It is not obvious, however, that the best way to provide ethical guidance to the broad swath of humanity who occupy prosecutorial offices is to tell them to channel their inner Atticus Finch.¹²⁸ Courts and regulators need to provide lawyers with ways to think through ethical problems, and to set out the boundaries that distinguish ethical conduct from unethical conduct. They need to provide guidance with which even an undignified, passionate or unserious prosecutor can comply.

Further, and importantly, even if the attitudes of objectivity, independence and impartiality can play a role—as they should, for example, when a prosecutor decides whether and how to pursue a matter—they do

¹²⁶ Fred C Zacharias, "Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics" (1993) 69:2 *Notre Dame L Rev* 223 at 263 [Zacharias, "Specificity"]. See also Bruce A Green, "Why Should Prosecutors 'Seek Justice'?" (1999) 26:3 *Fordham Urb LJ* 607 at 622 [footnotes omitted]: "Standing alone, the injunction points in many directions. It might be taken to imply a posture of detachment characteristic of that assumed by judges, and quite apart from that ordinarily assumed by advocates, particularly in the trial context. It might imply an obligation of fairness in a procedural sense. Or, it might imply a substantive obligation of fairness—for example, an affirmative duty to ensure that innocent people are not convicted. The injunction may even point in contradictory directions."

¹²⁷ "This imprecision [in the do justice ethic] has left prosecutors to define their role as they see fit." Rapping, *supra* note 92 at 520.

¹²⁸ Amy Salyzyn provides a compelling discussion of the tendency in legal ethics to rely on masculine narratives about lawyer conduct, either positive or negative: Amy Salyzyn, "John Rambo v Atticus Finch: Gender, Diversity and the Civility Movement" 16:1 *Leg Ethics* 97.

not fit with the prosecutor's role as an adversarial advocate.¹²⁹ The adversary system tries to achieve appropriate outcomes through conflicting narratives about the facts and how the law ought to apply to those facts. It makes no sense to suggest that a person ought to construct a narrative of the facts and law that supports conviction while also presenting the facts and law objectively and impartially:

There is an obvious tension between zealously pursuing convictions and leading a disinterested search for truth. It has been suggested that the pressure to maintain these dual but conflicting roles creates an “ongoing schizophrenia” for the prosecutor. Even if it is theoretically possible for a prosecutor to maintain an appropriate balance between the competing identities, it may not be realistic to expect most prosecutors to do so in practice.¹³⁰

The Canadian courts' response to this tension—saying that there is “no reason” why a prosecutor cannot balance the “dual roles of the Crown”—evades the incoherence of asking an adversarial advocate to also be an impartial seeker of justice.¹³¹

The standard conception of the prosecutor's role is thus ambiguous and contradictory. But even if it could be clarified, the standard conception defines the prosecutorial role in the wrong way. Lawyers, including prosecutors, play a central role in ensuring the rule of law. Rule by law allows people to achieve social cooperation, to peacefully settle disagreements about the right way to live, and to create systems to coordinate collective activity (ensuring, for example, that we all drive on the same side of the road when we are going the same direction).¹³² The settlement of law allows people to choose how to live within that social compromise, to avoid restrictions except as the law imposes, and to access what the law permits, enables or requires.¹³³ Rule

¹²⁹ As discussed below, when attached to the guidance given in departmental deskbooks, these attitudes do properly inform the ethical obligations of prosecutors in exercising prosecutorial discretion.

¹³⁰ Epps, *supra* note 124 at 784 [footnotes omitted].

¹³¹ See text accompanying note 49.

¹³² See in general: Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Burlington: Ashgate Publishing Company, 2009); W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) [Wendel, *Lawyers and Fidelity to Law*]; W Bradley Wendel, “Professionalism as Interpretation” (2005) 99:3 *Nw UL Rev* 1167; Charles Fried, “The Lawyer as Friend: The Moral Foundations of the Lawyer–Client Relation” (1976) 85:8 *Yale LJ* 1060; Monroe H Freedman, “Personal Responsibility in a Professional System” (1978) 27:2 *Catholic U L Rev* 191; Stephen L Pepper, “The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities” [1986]:4 *American Bar Foundation Research J* 613.

¹³³ For a discussion of these theories in the Canadian context see Alice Woolley, “The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations” (2015) 65:4 *UTLJ*

by law also respects human autonomy and dignity through adopting fair procedures, in which people not only can resist the law's application, but can shape its interpretation and meaning.¹³⁴ The law accomplishes these things in significant part through the work of lawyers, who help ensure that society is governed by the social settlement of legality rather than by force or fiat.

Giving prosecutors an obligation to seek justice pushes their work outside this structure, framing their obligations not in terms of the rule of law, but rather in terms of "justice". Even if that concept could be given meaning, prosecutors ought not to make decisions on a conceptual basis distinct from other lawyers. If such a distinction is to be made, it needs to be justified and explained, and there is no obvious justification available within the rule of law for having prosecutors seek justice. Indeed, it seems antithetical to the concept of rule by law, in which we settle our disagreements about the right way to live (that is, about the meaning of justice) through the laws we enact. Allowing justice to be determined by the prosecutor's own sense of what justice requires pushes prosecutorial decision-making outside of legality: it is rule by prosecutors, not by law.

More practically, the seek justice ethic risks corroding prosecutorial ethics, and the functioning of the legal system. The seek justice ethic communicates to prosecutors, and to other participants in the legal system, that prosecutors are special. They have a unique duty and capacity to know what justice requires, and they are the only lawyers in court who act with impartiality, objectivity and fairness. The courts presume prosecutors act in good faith and defer to their decisions because of the special role that they play.

The idea, presumably, is that by telling prosecutors they are special, they will take the ethical obligations they have to discharge more seriously. The risk, however, is that prosecutors instead get the message they have special insights and alone can properly determine what justice requires, such that they are blind to the reality of their actions:

Moreover, what prosecutor doesn't think that he or she is "seeking justice," doing "right," or doing "good"? Perhaps this sense of righteousness is a good thing; it might reflect awareness on the part of an individual prosecutor that he or she is *obliged* to be righteous, no matter the competing impulses. But too often righteousness becomes *self*-righteousness. Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they *and only they* know what justice is.

285; Alice Woolley, "The Lawyer as Advisor and the Practice of the Rule of Law" (2014) 47:2 UBC L Rev 743 [Woolley, "Lawyer as Advisor"].

¹³⁴ See Waldron, *supra* note 94; Simmonds, *supra* note 94.

There is an inherent vanity and grandiosity to this aspect of the prosecution role. Many prosecutors genuinely believe they are motivated only by conscience and principle. But many prosecutors come to believe they are the only forces of good in the system.

The reality is that justice is an elusive and difficult concept. Most defenders recognize this on a daily basis. Wise prosecutors do, too. Justice, like many an abstract notion, is in the eye of the beholder. It can mean one thing in one case and something totally different in another. Ethical standards are turned on their heads, however, when prosecutors claim with confidence to have a special understanding of the meaning of justice.¹³⁵

Even if a prosecutor can avoid this trap of arrogance, the seek justice ethic nonetheless means “the public and the courts believe he wears the white hat.”¹³⁶ One actor in the criminal trial is said to be impartial and public-interested, while the other is a (presumptively unscrupulous) zealous advocate on behalf of his client. That labeling risks distorting the criminal process, and in a way that runs counter to the norms of a criminal trial. In a criminal trial, the accused is to be given the benefit of the doubt. Yet the message from the courts is that the prosecution is to be trusted more than the defence; indeed, some prosecutors (improperly) make that very claim.¹³⁷ That message of respect for the prosecutor might be acceptable if it was unavoidable, but a proper understanding of the prosecutor's role suggests that it is not especially sensible.

In fact, the most notable failing of the seek justice ethic is descriptive. Even if the impartial pursuit of a just outcome were a worthy ambition for a prosecutor to have, it fails to reflect what prosecutors actually do. As has been noted, the prosecutor's role has two aspects. The first requires prosecutors to do the job that a client would perform in a typical lawyer-client relationship, which is deciding whether and how to pursue a matter. Prosecutors exercise this function along with the police, as part of the executive branch of government. The departments within which prosecutors work guide prosecutors' exercise of prosecutorial discretion, directing them to take into account whether the evidence creates a sufficient likelihood of conviction under the *Criminal Code* or other legislation, and to consider public interest factors that may suggest that a case ought not to proceed.¹³⁸ Prosecutors in

¹³⁵ Smith, *supra* note 18 at 378–79 [footnotes omitted, emphasis in original]. See also Alafair S Burke, “Prosecutorial Agnosticism” (2010) 8:1 *Ohio State J Criminal L* 79 at 79.

¹³⁶ Hoeffel, *supra* note 18 at 1140.

¹³⁷ This was the claim in *Boucher*, *supra* note 5, for example.

¹³⁸ As noted previously, the provincial and federal guidelines for prosecutors set out these requirements somewhat differently, but in each case the question is whether there is sufficient evidence to proceed and whether doing so is in the public interest (see nn 64–69 and accompanying text).

this role do not adjudicate, in that they do not determine the facts or law, but they do assess the evidence in light of the law. The second aspect of the prosecutor's role is, of course, to prosecute—to seek to prove beyond a reasonable doubt the guilt of the accused in a criminal trial.

The duty to seek justice captures neither of these aspects of the prosecutor's role. In determining whether to bring a case forward, a prosecutor needs to be impartial, objective and independent. But that impartiality attaches to the discharge of a particular function, namely, assessing the evidence to see if it creates a sufficient likelihood of conviction, and whether the prosecution is in the public interest.¹³⁹ Impartiality attaches to the prosecutor's job, but impartiality is not itself the job; the job is to assess the evidence in light of the law. Nor is the prosecutor's job to seek justice. The prosecutor assesses the evidence in light of the legal requirements for conviction, not to determine whether conviction would be just. The public interest factors do bring in criteria that speak to justice beyond legality—in the federal context, for example, a prosecutor may take into account whether the law is “obsolete or obscure,” whether a prosecution would maintain “public confidence in the administration of justice” and whether the sentence would be “disproportionately harsh or oppressive.”¹⁴⁰ But even then, the criteria that make up the public interest are constrained, and the guidelines expressly note that the public interest generally favours enforcement of the criminal law.¹⁴¹ As a consequence, to the extent justice affects the prosecutor's decisions, it does so in the specific and defined way in which that term is used within the prosecutorial guidelines.

The impartial quest to see that justice is done fits equally poorly with the prosecutor's role as an adversarial advocate. As already noted, impartiality conflicts with the partiality necessary to construct a persuasive narrative in an adversarial process. Moreover, when acting as counsel in an adversarial proceeding, the boundaries of advocacy are functionally set by the law of evidence and the rules of procedure that govern a trial, along with the substantive law at issue in a particular proceeding. Directing a prosecutor to seek justice misses that framework; it does not capture the complex and important work of a prosecutor in a criminal trial. At best it uses shorthand to describe the framework, but the shorthand—seek justice—obscures the

¹³⁹ Other aspects of prosecutorial discretion would, of course, reference different criteria, but in those cases, matters of law, evidence and departmental policy direct the decision in a way that justice does not.

¹⁴⁰ PPS Deskbook, *supra* note 12, s 3(2).

¹⁴¹ *Ibid* [footnotes omitted]: “If there is a reasonable prospect of conviction, ‘the public interest in the due enforcement of the criminal law will in most cases, without more, require that the matter be brought before the courts for a decision on the merits.’”

actual framework that constrains what lawyers do.¹⁴² Consider, for example, the issue of cross-examination. A prosecutor determining the permissible boundaries of cross-examination will find meaningful guidance from considering the law of evidence, the rules of procedure and the norms of trial advocacy. Directing the prosecutor to an impartial orientation to justice *could* be said to be a shorthand for those sorts of questions, but it is not a very good shorthand, and looking at the applicable law and principles directly would be considerably more elucidating.

In sum, prosecutors have a special role, one that, if properly understood and articulated, can provide meaningful guidance for prosecutors, the public and courts about prosecutorial duties and obligations. The seek justice ethic does not provide such guidance. Courts do not use it effectively or persuasively. It has no evident meaning. It contradicts itself, in advising a prosecutor to both seek justice and be an adversarial advocate. It incorporates concepts of morality rather than legality, which cannot usefully explain a lawyer's duties within a system of laws. And, fundamentally, it fails to describe the work that prosecutors do, and distracts from the analytical task at hand, which is using the work that prosecutors must do to explain how they ought to do it.

4. Reconceiving the Standard Conception

This paper makes two central claims. It claims, negatively, that the current standard conception of the prosecutor's role as an impartial actor working to see that justice is done is wrong and harmful. It further claims, positively, that the prosecutor's role should be understood through the prosecutor's unique functions in the legal system—that the standard conception should be reconceived to provide more cogent analysis and guidance about prosecutors' duties and conduct. This part sets out the reconceived standard conception of the prosecutor's role.

The proposed standard conception of the prosecutor's role has two distinct parts to reflect the dual nature of the prosecutor's role. When prosecutors decide whether and how to pursue a matter, their decisions are shaped in substance by the evidence available, the applicable law and the direction provided by departmental guidelines. The ethical prosecutor must approach the evidence, the law and the standards imposed in the guidelines honestly and in good faith, interpreting the law and guidelines consistently with the norms of the "interpretive community" to which she belongs.¹⁴³ That is, the prosecutor should strive to approach the law and guidelines in

¹⁴² How that framework can meaningfully inform prosecutors' work is discussed in the following section.

¹⁴³ Wendel, *Lawyers and Fidelity to Law*, *supra* note 132 at 196, 207.

light of how the broader community of lawyers would interpret them, much as a lawyer ought to do when advising a client.¹⁴⁴ The prosecutor must act with fidelity to law, interpreting the legal rules that govern a criminal trial so as to “enhance, rather than undermine, the effective functioning of the legal system.”¹⁴⁵ The prosecutor undertaking these tasks must be impartial, independent and fair, but must be those things within the legal framework that constrains prosecutorial discretion. Her job is to decide whether and in what way to trigger the potential imposition of sanctions in accordance with the rule of law. As a consequence, her obligations are to make that decision in accordance with the norms and practices of rule by law.

Improper conduct by a prosecutor in this role would include making decisions for improper or oblique motives, but would also involve engaging in unsupported or unreasonable interpretations of the law or evidence. It would include, for example, adding charges that the law or evidence do not reasonably justify to encourage an accused to accept a plea agreement. It would include proposing a plea agreement based on inadmissible evidence, and placing the accused’s right to counsel at risk.¹⁴⁶ It would include ignoring factors that the law requires to be taken into account—for example, the *Gladue* factors in relation to an indigenous accused—in making prosecutorial decisions.¹⁴⁷ That conduct might not be subject to judicial intervention given the appropriate deference that arises from the separation of powers and the court’s jurisdiction over the trial of the matter, but the assessment of when intervention is warranted ought to be made in light of the factors relevant to deference and a proper understanding of this aspect of the prosecutor’s role. That different focus could shift aspects of the jurisprudence—particularly with respect to the deference given in wrongful prosecution cases and whether a presumption of good faith is warranted—but it would not necessarily do so. And even if it did not change the approach to deference or the presumption of good faith, the reason for the Court’s approach would be more analytically coherent and the basis for granting the presumption and deference clarified.

Outside the exercise of prosecutorial discretion, a prosecutor’s obligations are the same as those of any other lawyer: to be a resolute advocate

¹⁴⁴ Woolley, “Lawyer as Advisor”, *supra* note 133.

¹⁴⁵ W Bradley Wendel, “Civil Obedience” (2004) 104:2 Colum L Rev 363 at 383. Wendel makes this statement in relation to legal interpretation, but applying it in this context is consistent with his overall theory. For a discussion by Wendel of the ethical duties of prosecutors, see Wendel, *Lawyers and Fidelity to Law*, *supra* note 132 at 121.

¹⁴⁶ *Grenier*, *supra* note 115.

¹⁴⁷ See Marie Manikis, “Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice That Applies to Prosecutors” (2016) 21:1 Can Crim L Rev 173; *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385.

within the boundaries of legality.¹⁴⁸ The difference for the prosecutor is that legality imposes more rigorous constraints on his advocacy than exist for other lawyers. The prosecutor must advocate consistently with the presumption of innocence enjoyed by the accused and the obligation to prove guilt beyond a reasonable doubt. The obligations on a prosecutor with respect to statements to the court, cross-examination and general trial conduct arise from the structure of a criminal trial; they apply to the prosecutor because of his role in that trial. The line between acceptable and unacceptable statements depends on the effect of a statement on the ability of the judge or jury to assess the facts in accordance with the law. The line between appropriate and inappropriate cross-examination depends on whether the cross-examination distorts the evidentiary process, or affronts the witness' dignity contrary to the norms of fair procedure. Does it fit with best trial practices in the prosecutor's legal community? The prosecutor does not need to be impartial, dispassionate or dignified. He does not need to ensure that the trial results in justice writ large. But he must respect the constraints that law and practice impose on the conduct of a criminal trial.

Courts can use this conception of the prosecutor's role to articulate prosecutorial duties, and to assess prosecutorial conduct. To a considerable extent they already do; as noted earlier, in many of the cases courts reference the duty to seek justice as an exclamation mark, but use principles of trial fairness to explain the outcome. Shifting analysis in this way will allow for greater clarity and more nuanced analysis, particularly of complex issues, but it will not generally change how courts identify prosecutorial duties or assess prosecutorial conduct. The one obvious change might be in those cases where the seek justice ethic is used to constrain the procedural rights of an accused; the boundaries on prosecutorial conduct arising from considerations of trial fairness do not support depriving an appellant of counsel if counsel ought otherwise to be provided. In general, however, this shift in direction would change the analytical framework, but would usually be unlikely to change the outcome.

The revised standard conception can also be used to craft rules of professional conduct to guide prosecutorial decision-making. As Fred Zacharias explained, rules of professional conduct often work best when they avoid either meaningless generalities (which is how he characterized the seek justice ethic) or undue specificity.¹⁴⁹ Codes of conduct can instead identify the criteria for making decisions, or suggest the type of result that should be reached. Articulating rules in this way guides lawyers about how

¹⁴⁸ For a general defence of this characterization of the lawyer's duties in Canada, see Woolley, *Understanding Ethics*, *supra* note 3 at 29–62.

¹⁴⁹ Zacharias, "Specificity", *supra* note 126.

they ought to make ethical decisions¹⁵⁰ and encourages introspection about ethical decision-making.¹⁵¹ This is particularly the case in Canada where the prosecutorial guidelines provide meaningful direction to prosecutors on their specific obligations in exercising prosecutorial discretion and conducting a trial. Based on this approach, I would propose the following revision to the Federation of Law Societies' Model Code of Professional Conduct:

5.1-3 When acting as a prosecutor, a lawyer must represent the Crown resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

[1] Prosecutors represent the interests of the Crown. The Crown's interest in prosecution is to enforce criminal law in accordance with fair procedure and the public interest.

[2] Prosecutorial discretion requires prosecutors to determine whether to proceed with, continue or stay a criminal proceeding, and in what way. It includes decisions such as whether to: prosecute a charge, accept a guilty plea to a lesser charge, withdraw from criminal proceedings, take control of a private prosecution, repudiate a plea agreement, pursue a dangerous offender application, prefer a direct indictment, proceed summarily or by indictment or initiate an appeal.

[3] A prosecutor must exercise prosecutorial discretion in good faith, based on an impartial, independent and honest assessment of the evidence, the law and the public interest, and in a manner consistent with published guidelines issued by the prosecutor's department.

¹⁵⁰ *Ibid* at 257.

¹⁵¹ *Ibid* at 264. Zacharias classifies rules on a four-point range of specificity from Point I (the most general) to Point 4 (the most specific). He concludes with respect to the "do justice" rule:

Our analysis of the code drafters' approach to prosecutorial ethics illustrates that the justice provisions serve only the function of defining a role. Yet one comes away with the conclusion that they serve even the role-defining goal badly. The Point I approach contributes to broad coverage; that is, it ostensibly re-quires prosecutors to consider "justice" in a broad spectrum of situations. Together with the few pretrial rules, it highlights prosecutors' obligation to preserve defendants' rights. However, the approach provides little guidance regarding the nature of the rights which should be protected or the emphasis they should receive. A Point II approach would apply just as broadly and could guide prosecutors better. A Point II or Point III approach would provoke more introspection. And, because discipline for violating any Point I rule is unlikely, the justice provisions have minimal direct impact on behavior. If the initial code drafters had analyzed the subject carefully, they probably would have had no choice but to embrace a Point II or III approach to accomplish their role-defining goal. (at 284–85) [footnotes omitted].

[4] The Law Society will not review exercises of prosecutorial discretion absent evidence of serious professional misconduct, such as corruption or bribery.

[5] Respecting “the limits of the law” imposes more onerous obligations on prosecutors than on other advocates because of the presumption of innocence, the burden of proof and the extensive constitutional and legal rights enjoyed by an accused. A prosecutor must ensure their conduct of a matter and trial advocacy is consistent with procedural fairness, the law of evidence, and all constitutional and legal rights and privileges enjoyed by the accused.

5. Conclusion

The seek justice ethic reflects the law’s best impulses. It tries to encapsulate the prosecutor’s special role, to capture our moral intuitions about the importance of that role, to explain why prosecutors have the duties that they do and to distinguish good prosecutorial conduct from bad. The point of this paper has not been to indict the intentions of those relying on the seek justice ethic, or to suggest that in substance courts or regulators have significantly misunderstood what prosecutors ought to do.

The point of the paper is to suggest that the seek justice ethic undermines the accomplishment of courts’ and regulators’ laudable objectives. It is vague, contradictory, improperly incorporates undefined moral concepts into legal duties and does not reflect the work that prosecutors do. It does not provide prosecutors with meaningful guidance, and instead risks contributing to prosecutorial arrogance. It may tip the playing field of a criminal trial in the prosecutor’s favour, which directly opposes the principles of criminal law where the benefit of the doubt ought to run to the accused.

A better approach requires identifying the norms that underlie the two functions that prosecutors play in a criminal trial—the exercise of prosecutorial discretion and the conduct of a matter—and articulating the obligations for prosecutors that flow from those norms. Doing so does not create as eloquent or evocative statement of the prosecutor’s duties as the seek justice ethic, but it does permit a more careful and nuanced analysis of the prosecutor’s duties, and of the difference between proper and improper prosecutorial conduct. And even if less eloquent and evocative, a mandate of respecting substantive law and procedural fairness to ensure the rule of law is a mandate of honour and importance, which any prosecutor ought to feel proud to discharge.