RE-EVALUATING INDEPENDENCE: THE EMERGING PROBLEM OF CROWN-POLICE ALIGNMENT

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Attorney Generals and Crown prosecutors are endowed with a constitutionally protected role and the quasi-judicial responsibility of handling criminal prosecutions on behalf of the Crown. This includes deciding whether to bring the prosecution of a charge laid by the police, to enter a stay of proceedings, to accept a guilty plea to lesser charge, and to withdraw criminal proceedings in accordance with what the public interest dictates.

While the vast majority of prosecutors are careful to separate their function from that of the police, occasionally police advocacy and the high level of police commitment can lead to accepting police information without appropriate confirmation and turning to the police for guidance in the exercise of prosecutorial functions. This article argues that recent examples of significant partisan advocacy by prosecutors warrant re-evaluating the current effectiveness of institutional accountability in Ontario.

Part II will highlight the separate roles of the police and prosecutors, as well as provide some background to the issue of Crown-police alignment. Part III will examine a number of recent cases where individual prosecutors, and occasionally offices, appear to be acting in the interests of the police, rather than the public interest, in discharging their prosecutorial functions. Finally, because the problem of Crown-police alignment is provincial as well as localized in nature, part IV will attempt to demonstrate the crucial role that Law Societies and other public offices have in monitoring prosecutorial conduct and ensuring that Attorney Generals are in fact seeing that the administration of public affairs is in accordance with the law.

* J.D., LL.M. This article is dedicated to past and present officers of the court committed to the pursuit of justice and improving the administration of justice; in particular, three Ministers of Justice and mentors of mine: Mr. Justice S. Casey Hill, Madam Justice Renee M. Pomerance, and Mr. John D. Scott, Q.C. Additionally, I wish to thank several esteemed reviewers on all sides of the debate for their shared perspectives and comments on earlier drafts. I also wish to also thank the Windsor Yearbook of Access to Justice and Professor Reem Bahdi. An earlier draft of this article was selected for the Osler, Hoskin and Harcourt LLP writing prize. All views expressed and errors are my own.
Les procureurs généraux et les procureurs de la Couronne sont investis d’un rôle protégé par la Constitution et de la responsabilité quasi-judiciaire de s’occuper des poursuites criminelles au nom de l’État, ce qui comprend les fonctions suivantes : décider d’entreprendre une poursuite une fois qu’une accusation a été portée par la police; suspendre une instance; accepter un plaidoyer de culpabilité à une accusation réduite; mettre fin à une poursuite criminelle en raison des conséquences sur l’intérêt public.
Même si la vaste majorité des procureurs prennent soin de ne pas confondre leur rôle avec celui de la police, il peut arriver, à l’occasion, que l’opinion policière et le haut niveau d’engagement de la police amènent des procureurs à accepter des renseignements policiers sans confirmation suffisante et à demander conseil à la police dans l’exercice de leurs fonctions.
Le présent article soutient que des épisodes récents de représentations partisanes significatives par des poursuivants justifient le réexamen des limites de l’indépendance de la Couronne par rapport à la police et la réévaluation de l’efficacité actuelle de la responsabilisation des institutions en Ontario.
La partie II fera ressortir les rôles distincts de la police et des procureurs de la poursuite et fournira quelques renseignements généraux sur la question de l’alignement des fonctions de la Couronne et de la police. La partie III examinera un nombre d’affaires récentes où des bureaux et des procureurs qui exercaient leurs fonctions de poursuivants, semblent avoir agi dans l’intérêt de la police plutôt que dans l’intérêt public. Finalement, parce que le problème de l’alignement des fonctions de la Couronne et la de police est, par nature, provincial et localisé, l’auteur tentera de démontrer, dans la partie IV, le rôle crucial que les barreaux et d’autres administrations publiques jouent lorsqu’il s’agit de surveiller le déroulement des poursuites et de veiller à ce que les procureurs généraux voient effectivement à ce que les affaires publiques soient administrées en conformité avec le droit.

I. INTRODUCTION

Attorney Generals and Crown prosecutors across Canada are tasked with the unique responsibility of ensuring both that the guilty are prosecuted and the innocent are protected. But prosecutorial discretion and independence from the police is part of a much larger system for ensuring that justice is enforced fairly and impartially in accordance with the rule of law and with due regard for the rights of all those involved in the criminal justice system. Until more recently,

1 Hoem v Law Society of British Columbia (1985), 63 BCLR 36 (BCCA) at 254.
prosecutorial independence and immunity from third party review were regarded as the best protections against abuse of the prosecution function and outside interference in order to maintain “the integrity of our system of prosecution”. However, as a former leading prosecutor observed, although the vast majority take care to separate their role from that of the police, occasionally police advocacy and the high level of police commitment can lead to accepting police information without appropriate confirmation and can see prosecutors turning to the police for guidance in exercising their professional judgment. Nothing can guarantee that Attorney Generals and prosecutors will always exercise their powers in the public interest. Consequently, Justice Marc Rosenberg has suggested that it is “necessary to constantly re-evaluate the limits and value of independence”, as “all those concerned with the administration of criminal justice should consider how that independence can be better balanced with greater openness, accountability and transparency”.

In this article, I ultimately argue that a number of recent examples of significant partisan advocacy on the part of Crown prosecutors warrant reconsidering the limits of Crown independence from the police and re-evaluating the current effectiveness of institutional accountability in Ontario. Part II will highlight the separate roles of the police and Crown, as well as provide some background to the issue of Crown-police alignment. Part III will examine a number of recent cases where Crown Attorneys’ offices, and individual prosecutors, appear to be acting in the interests of the police rather than the public interest in discharging their prosecutorial functions. Finally, because the problem of Crown-police alignment is provincial as well as localized in nature, Part IV will attempt to demonstrate the seminal role that Law Societies and other public offices have in monitoring prosecutorial conduct and ensuring that the Attorney General of Ontario is in fact seeing that “the administration of public affairs is in accordance with the law”.

II. IDENTIFYING PROSECUTORIAL INDEPENDENCE AND POLICE ALIGNMENT

A. The Separate Justice Functions of Prosecutors and the Police

It is well documented that the role of prosecutors is not to obtain a conviction, but instead to present in a firm but fair manner to the trier of fact what it considers all credible evidence relevant to the crime that the accused has allegedly

4 A detailed history and discussion of the current application of this constitutional convention is provided in John Edwards, *Ministerial Responsibility for National Security as it Relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada* (Ottawa: Minister of Supply and Services Canada, 1980).
7 Rosenberg, *supra* note 2 at para 77.
8 *Ministry of the Attorney General Act*, RSO 1990, c M17, s 5(b) [*MAG Act*].
Prosecutors are tasked with acting as strong advocates in pursuit of a legitimate result but cannot adopt a purely adversarial role towards the defence. In that pursuit, the Crown, acting through Attorney Generals and their prosecutors, has significant discretion in the carriage of criminal cases that is owed judicial deference. In the same way that police exercise an independent discretion when deciding whether to lay charges, arrest and conduct searches incidental to such arrests, prosecutors exercise an independent discretion when deciding whether or not to commence a prosecution, withdraw a charge, enter a stay, consent to an adjournment or pursue an appeal.

But that discretion is not absolute. The improper exercise of prosecutorial discretion and failure to “guard against illegitimate use of power by the police against members of our society” may engage rights prescribed by the Canadian Charter of Rights and Freedoms and result in a finding of an abuse of process or miscarriage of justice; as conducting a prosecution in a manner that contravenes the community’s sense of dignity and fair play calls into question the very integrity of the criminal justice system.

Ultimately, while prosecutors may adhere to the ideology of “ministering justice”, the value of that ideology depends on whether prosecutors put it into practice. This is particularly true with Crown independence from the police so as not to undermine prosecutors’ quasi-judicial role and the ability of the accused to be tried fairly. The need for separation between police and Crown functions has been reiterated in several Judicial Inquiries resulting from wrongful convictions.

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11. Ibid.
12. MAG Act, supra note 8.
14. R v T (V), [1992] 1 SCR 749, at 758-62. The Supreme Court earlier recognized in R v Harrison, [1977] 1 SCR 238, at 245-46 that Attorney Generals have implied statutory authority to delegate power to individual prosecutors to perform on behalf of the Crown, and that it has become unreasonable in modern times to expect the Minister Crown to personally perform these myriad functions.
15. See e.g. Hon Roy McMurtry, “Police Discretionary Powers in a Democratically Responsive Society” (1978) 41 RCMP Gazette No 12 at 5-6. Police lay charges in all provinces, except British Columbia and Quebec where the Crown makes the decision. Also, in New Brunswick, the decision to charge is made by the police after receiving advice from the Crown. See Department of Justice Canada, “Criminal Harassment: A Handbook for Police and Crown Prosecutors”, 2.9.5 Arrest and Charges (5 December 2011), online: Department of Justice, Canada <http://www.justice.gc.ca/eng/pi/fv-vf/pubhar/part2c.html>.
The Marshall Inquiry provides a stark example of how the system broke down in Nova Scotia because of interference by the Deputy Attorney General in the police charging function. Additionally, Justice Kaufman concluded in the Morin Inquiry that the prosecutors’ relationship with the police blinded them from objectively assessing the “reliability of the evidence, before the charges were laid” and also informed their decision to lead highly suspect evidence.

While the traditional separation between prosecutors and the police can be demarcated according to their respective pre and post-charge functions, there is no doubt that a “natural evolution” of collaboration and function sharing has occurred between the two over the past few decades. Prosecutors and investigative agencies play complementary roles in the criminal justice system. Cooperation and effective consultation is essential to the proper administration of justice, reducing congestion in the system, and in the day-to-day operations of busy, and often inexperienced, Crown Attorneys’ offices. Consequently, prosecutors sometimes rely almost exclusively on the assistance and advice of police officers in performing a wide range of administrative and other duties, which risks police information and fact appraisal dominating the prosecution process. In some instances, this will manifest into an appearance of unfairness.


Rosenberg, supra note 2 at paras 31-32. On the other hand, the prosecution of Dr Henry Morgentaler is generally accepted as one of the best examples of effective independent functioning between the Attorney General and police.


For e.g., determining if it is in the public interest to proceed with or terminate an individual prosecution, electing by indictment or summarily, deciding what witnesses to call, handling disclosure, responding accordingly to illegal investigative procedures by the police, and taking control of a private prosecution.


LeSage-Code Report, supra note 25. Also, the Ontario Justice on Target project has aimed to reduce the average appearances and time needed to complete criminal cases by 30 percent, online: Ontario Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/jot/targets.asp>.

Hunt, supra note 6.

Ibid.

See e.g. Krieger supra note 5. The fundamental tenet of the criminal justice system that “justice should not only be done, but should manifestly and understandably be seen to be done” can be traced back to R v Sussex Justices, [1924] 1 KB 256 at 259. More recently, in R v Hubbert (1975), 11 OR (2d) 464 (CA) at para 18 and R v Latimer, [1997] 1 SCR 217 [Latimer], where Lamer CJ, for the Court, held at para 43 that whether the interference actually influenced the trier of fact was quite beside the point in determining that the Crown’s conduct amounted to a flagrant abuse of process and interference with the administration of justice.
Other times the alignment will transcend optics and reasonably be said to have influenced prosecutorial conduct and decision-making.

**B. Identifying Crown Alignment with the Police**

As a starting point, a glaring example of failure by the Crown to distance itself from police misconduct occurred in the case of *R v Tran.* 31 Two Peel Regional Police officers that were investigating the accused on very serious home invasion charges broke his jaw in several places causing permanent bodily harm, denied him prompt medical attention, attempted to cover up their criminal assault by destroying evidence, lied to fellow officers about the crime and gave perjured evidence during the *voir dire.* 32 Despite these abuses, the Crown prosecutor permitted one of the officers to sit with him and assist with the prosecution until the trial judge ordered otherwise. 33 Yet even after the judge identified the inappropriateness of the officer’s involvement, the prosecutor continued to have the officer help organize and prepare witnesses. On appeal, the Crown conceded the correctness of the trial judge’s finding that Tran’s *Charter* rights had been breached. 34 The only issue on appeal was sentence. In the end, the Court of Appeal ordered a stay of the charges against the accused. Epstein JA, writing for the court, held on the issue of alignment that:

97 [T]he state misconduct [the police causing the accused permanent bodily harm, destroying evidence and perjuring themselves] did not end there. The misconduct continued into the trial and, in my view, implicated trial fairness in the broad sense identified by Deschamps J., in her concurring reasons in *R v Grant,* [2009] 2 SCR 353, at para 207, where she wrote that “trial fairness corresponds to courtroom fairness.”

98 I refer to the Crown’s cavalier attitude toward the seriousness of the police misconduct and abuse to which Tran had been subjected demonstrated by Crown counsel's decision to have Officer Vander Wier sit at the counsel table after the trial judge’s ruling on the *voir dire.* This decision suggested indifference to, if not approbation of, the police

31 *R v Tran,* 2010 ONCA 471, 103 OR (3d) 131 [Tran CA].
33 Tran CA, *supra,* note 31 at para 7.
34 *Ibid* at para 69.
35 At para 96, Epstein JA, for the court, recognized that the police brutality alone would have justified a stay. Other cases where a stay has been entered as a result of police physical or psychological abuse include *R v Belluscii,* 2012 SCC 44, 348 DLR (4th) 569; *R v Richard,* 2012 ONCJ 694, [2012] OJ No 5320, Campbell J; *R v Merrick,* 2007 ONCJ 260, [2007] OJ No 2266, Andre J; *R v Wiscombe,* 2003 BCPC 418, [2003] BCJ No 2858, Walker J; and *R v Gladue,* [1993] AJ No 1045 (Prov Ct Crim Div), LeGrandeur J.
abuse and attempted cover-up. Matters were made even worse when the Crown allowed Officer Vander Wier to have a continuing involvement with witnesses after the trial judge made an order excluding him from the counsel table.

99 The Crown's conduct was evocative of an alignment with the police, notwithstanding the abuse. The Crown's responsibility lies not in securing a conviction but in presenting the case for the prosecution while ensuring a fair trial for the accused: see Boucher v The Queen, [1955] SCR 16. Conduct suggesting that the Crown was condoning egregious police misconduct in violation of its duty of even-handedness would, in my view, cause a reasonable observer informed of the circumstances to question whether Tran could receive a fair trial [...].

100 To make matters still worse, there is no evidence of any effective response to the police brutality here.

The decision in Tran highlights many of the dangers of, and the benchmark for, Crown-police alignment: prosecutors’ conduct is violative of the duty of even-handedness and evocative of alignment with the police if it causes the reasonable observer informed of the circumstances to question whether the accused could receive a fair trial. In Tran, the manner in which the prosecutor performed several of his core prosecutorial functions seriously questioned and undermined the ability of the accused to have a fair trial.

First, although it is not entirely clear what knowledge the Crown had of the police abuse before the matter proceeded to trial, it appears that the prosecutor(s) with carriage of the file, and the Peel Crown Attorney’s Office, failed to objectively assess the evidence to determine if it was in the public interest to proceed with the prosecution, particularly after being advised the accused would be seeking Charter relief as a result of the police brutality. There is no record of any attempt by the prosecution team to verify the police officers’ story that Tran fell while he was handcuffed and left alone in an interview room. 36 Second, after evidence was heard during the voir dire that the officers had destroyed evidence and perjured themselves, the prosecutor and case management team does not appear to have re-assessed whether it was still in the public interest to proceed with the prosecution. 37 Third, rather than distancing itself from the police misconduct undermining the integrity of the judicial process, 38 the prosecutor tacitly approved of the conduct by requesting that the impugned officer be permitted to sit with him at the counsel table to assist with the prosecution. Fourth, after this request was denied and the court expressed concerns, the prosecutor

36 R v Tran, 2010 ONSC 5427, [2010] OJ No 4221 at para 1, Durno J [Tran SC].
37 The majority of the Court confirmed in Regan, supra note 23, at para 89 that “objectivity and fairness is an ongoing responsibility of the Crown, at every stage of the process.”
38 O’Connor, supra note 18 at para 73.
continued to seek and rely on the assistance of that officer with witness preparation. 39

As a result, the Court of Appeal rightly held that this was one of the “clearest of cases” where the prosecution should have been halted. 40 The prosecutorial response clearly affected both the perception of injustice and actual unfairness. 41

Using this framework for identifying alignment, Part III will examine recent cases calling into question how independently and fairly some Crown Attorneys’ offices, and individual Crowns, are performing prosecutorial functions.

III. MEASURING THE VALUE OF PROSECUTORIAL INDEPENDENCE

In Krieger v Law Society of Alberta, the Supreme Court confirmed that where a decision falls within core prosecutorial discretion, judicial review and interference by other arms of government and statutory bodies like Law Societies is highly constrained by the fundamental principle of the rule of law under our Constitution. 42 Without being exhaustive, the Court described the core elements of prosecutorial discretion as deciding whether: (a) to bring the prosecution of a charge laid by police; (b) to enter a stay of proceedings in either a private or public prosecution; (c) to accept a guilty plea to a lesser charge; 43 and (d) to withdraw from criminal proceedings altogether. 44

However, constitutionally protected “core discretionary powers” are distinct from “professional conduct” or “tactical decisions” before the court that are subject to broader review as part of the court’s ability to control its own processes. 45 With core discretion, courts cannot interfere but for circumstances of “flagrant impropriety” or in actions of malicious prosecution. 46 Therefore, it is necessary to look at how discretion is being exercised in order to assess the value of existing deference to the performance of core and non-core prosecutorial functions. 47

39 Even if the reason was scarcity of resources, the Crown should have been alive to the negative impact of continuing to have the officer involved.
40 Tran CA, supra note 31 at para 104.
41 Ibid at paras 106-7. Also, R v Khan, 2001 SCC 66, [2001] 3 SCR 823 at paras 72-73, LeBel J (in dissent, but not on this point); R v Cameron (1991), 2 OR (3d) 633 (CA).
42 Krieger, supra note 5 at para 45.
43 Interesting discussion of the role of the Crown in procuring guilty pleas from the innocent can be found in Christopher Sherrin, “Guilty Pleas from the Innocent” (2011) 30 WRLSI 1.
44 Krieger, supra note 5 at paras 46-47. The Supreme Court recently considered the issue of Crown plea repudiation and the abuse of process doctrine in R v Nixon, 2011 SCC 34, [2011] 2 SCR 566 [Nixon].
45 Ibid at para 22. The Supreme Court discussed the distinction between “prosecutorial discretion” and “professional conduct” in paras 50-54 of the judgment in Krieger, supra note 5.
46 Krieger, supra note 5 at para 49. Also, Campbell v Attorney-General of Ontario (1987), 60 OR (2d) 617 (CA) [Campbell].
47 The Supreme Court clarified the difference between “prosecutorial functions” and “prosecutorial duties”, such as the duty to disclose all relevant evidence, which are not immune from judicial review in Krieger, supra note 5 at paras 54-55. For more discussion of a prosecutor’s decision to delay exculpatory DNA evidence to gain tactical advantage in Krieger, see Glen Luther, “The Frayed and Tarnished Silver Thread: Stinchcombe and the Role of Crown Counsel in Alberta” (2002) 40 Alta L Rev 567. Also, recently in R v Hudson, 2011 ONSC 5176, 107 OR (3d) 568, Justice Trotter scrutinized the constitutional implications of the Toronto Crown Attorney Office’s
A. Pre-charge Involvement

A prosecutor with a personal interest in winning a case cannot remain objective. Equally, a prosecutor who is too close to an investigation may come to have a stake in the conviction of the targets of that investigation, as was evidenced in the prosecution of the former Premier of Nova Scotia, Gerald Regan, when a Senior Crown Attorney came under significant judicial scrutiny for her involvement in the police investigation and “judge shopping” at the prosecution stage. Although the Supreme Court ultimately held that objectivity is not necessarily compromised by pre-charge involvement, the Court also recognized that interpersonal allegiance (friendships, personal relationships and more) and prosecutor embeddedness into police investigations seriously risks tunnel vision and impairment of the Crown’s independent control of a charge and prosecution.

In part to keep the role of Crown prosecutors distinct and independent from the police, as well as to provide an ongoing record of important case discussions, Ministry of the Attorney General Guidelines require that prosecutors take notes when speaking with or advising the police on the lawfulness of intended steps during a police investigation. Interestingly, although prosecutors are expected to operate independent of and not be counsel to the police, or the public, discussions between prosecutors and the police have been asserted as falling under solicitor-client privilege as a result of prosecutors’ constitutional and legislative justice functions.

practice of denying disclosure to accused until they passed through the bail process for administrative convenience.


Reagan, supra note 23. The FPT Heads of Prosecution Committee Working Group recommended in its 2004 Report on the Prevention of Miscarriages of Justice, at 39 that all jurisdictions adopt a “best practice” where the Crown Attorney that provides charging advice or is involved in the investigation does not have carriage of the prosecution. Online: Department of Justice, Canada <http://www.justice.gc.ca/eng/dept-min/pub/pm-jpej/p0.html> [FPT].


See e.g. Chan, supra note 50 and Campbell, supra note 46. Also, in R v Brown, 2002 SCC 32, [2002] 2 SCR 185, the Court provided extensive commentary on the importance of Crown disclosure and exceptions to solicitor-client privilege to prevent miscarriages of justice and unfair trials. Section 11(a) of the Crown Attorneys Act requires prosecutors to review charges laid by the police and communicate with the police for the purpose of having those charges further investigated and additional evidence collected, so that prosecutions do not become unnecessarily
The recent case of *R v Jones* 54 reinforces the importance of independent record-keeping by prosecutors in the course of an advice-giving relationship to both comply with Ministry Guidelines and, more importantly, to avoid the perception of alignment and the need for courts to discourage a cavalier attitude towards police misconduct.

During the course of a computer search for evidence of fraud that was judicially authorized by a warrant, police investigators discovered evidence of child pornography. Uncertain what to do, they contacted an Assistant Crown Attorney recognized for his experience in matters relating to search and seizure, to confirm whether a new warrant was required to separately search the contents of the computer for additional evidence of child pornography.

Despite there being no impediment to obtaining a warrant and uncertainty in the law at the time about whether another warrant was required, neither the Crown prosecutor nor the police officer in charge recorded any notes of their discussion relating to the intended search or the basis upon which the prosecutor instructed the police to unlawfully proceed without a warrant. The prosecutor also indicated in his evidence that his usual practice was not to keep records of “routine” search and seizure requests. Further, he usually assumed that police officers were maintaining a notebook when he provided advice over the telephone, 55 effectively making the police and Crown of one mindset based on the implicit belief that the officers would record the advice accurately. 56

Although the issue of alignment was never directly raised at trial or on appeal, the lack of independent record-keeping and the infringement that resulted in *Jones* reinforces the need for courts to factor into the seriousness of the violation a state actor’s decision not to create a reliable record, and to not otherwise have an independent recollection, of the basis for the state-infringing activity. This is important for determining whether the police were knowingly, recklessly or negligently misadvised, as well as whether there was improper motive on the part of the respective police and/or prosecutors.

In following the line of reasoning in *R v Fliss* 58 and *R v Wilson*, 59 an adverse finding should be made against the accused’s ability to have a fair trial and, where

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55 Ibid at paras 10, 13, 80, 88.
56 As well as contravening the Attorney General’s own policy on appropriate record keeping, the *Morin Inquiry*, supra note 23 and the Inquiry Regarding Thomas Sophonow explicitly noted the frailties and inconsistencies surrounding how police take and keep their notes have contributed to wrongful convictions in Canada. Manitoba, *Sophonow Inquiry, Findings and Recommendations, Police Interviews with Suspects*, (Winnipeg: Manitoba Justice, 2001) online: Manitoba Justice <http://www.gov.mb.ca/justice/publications/sophonow/recommendations/english.html#notebooks> [Sophonow Inquiry].
57 Improper motive or purpose on the part of the Crown, and police, is both relevant to a judicial finding of good or bad faith in the s 24(2) *Charter* analysis, as well as review and discipline by the Law Society of Upper Canada. See infra notes 112-117.
s. 24(2) of the Charter is in play, the seriousness of a Charter violation should increase where no reliable record is made detailing the basis for the exercise of police powers on arrest, detention and seizure, particularly when the tenor and/or the correctness of the advice is in issue.60 This would discourage ignorance of Charter standards while encouraging prosecutors to retain “both the substance and appearance of even-handed independence from the police investigative role.”61 A lack of transparency and accountability are no longer acceptable to the public and the fulfillment of an impartial and independent administration of justice.62 Neither the police nor prosecutors should be able to hide behind their decision to not keep a record of illegal and/or unethical conduct.

B. Charge Screening to Determine if a Prosecution Should Reasonably Proceed

The exercise of prosecutorial discretion is essential to the operation of the criminal justice system.63 However, prosecutors “must act independently of any partisan concerns” when making prosecutorial decisions.64 The more intrinsically involved in the investigation or aligned with the police a prosecutor becomes, the greater risk that she or he will lose objectivity when it comes time to assess the legal strength of the case.

Indeed, the Report of the Kaufman Commission on Proceedings involving Guy Paul Morin found that the prosecution team failed to objectively assess the reliability of the evidence before charges were laid and showed little or no introspection about highly questionable evidence so as to retain the substance and appearance of independence from the police investigative role.65 Attorney Generals and prosecutors must make decisions in an objective and fair manner. Otherwise, as the Court observed in Krieger, “where that objectivity is shown to be lacking, corrective action may be necessary to protect […] ‘the integrity’ of the criminal justice system”.66 Confidence in the justice system is shaken just as much by the suppression of a prosecution for improper motives as by the injudicious pursuit of a prosecution, particularly where it involves the innocent.67 Prosecutors are directed to be “Ministers of Justice” in administrative

62 Regan, supra note 23 at para 137, Binnie J (Iacobucci, Major and Arbour JJ concurring).
63 Rosenberg, supra note 2 at para 77.
64 Proulx v Quebec (Attorney General), 2001 SCC 66, [2001] 3 SCR 9 at para 4, Iacobucci and Binnie JJ (McLachlin CJ and Major J concurring); R v Power, [1994] 1 SCR 601, at 620-23, L’Heureux-Dube (Gonthier and McLachlin JJ, as she then was, concurring) [Power].
65 Krieger, supra note 5 at para 30.
66 Dix, supra note 50 at para 294.
67 Morin Inquiry, supra note 23 at 911.
68 Krieger, supra note 5 at para 48, citing Regan, supra note 23 at para 168.
69 Rosenberg, supra note 2 at para 36.
and trial conduct tasks. Yet, in addition to examples noted by Justice Rosenberg in his article on the *Prosecution Function in the Twenty-First Century*, several recent high-profile cases call into question whether charges and prosecutions are in fact being screened for “reasonable prospect of conviction” and “public interest”, as well as what, if any, action the Attorney General of Ontario is taking internally when breaches of this nature occur.

According to some, the recent prosecution involving Stacy Bonds is perhaps the most egregious example of Crown alignment with the police. In that case, a young woman was arrested for public intoxication and taken to police headquarters by five officers with the Ottawa Police Service after she decided to challenge their rationale for asking her if she was soliciting the occupants of a motor vehicle. The video footage in the booking room and holding cells showed Bonds “not aggressive and not belligerent, but seemingly compliant.” When Ms. Bonds is eventually brought to the search table in the precinct, the court described the exchange as follows:

Special Constable Melanie Morris takes control of the situation [...] in a very forceful and aggressive manner towards Ms Bonds, who is not being one hundred percent compliant, and because of that, receives two extremely violent knee hits in the back [...], and has her hair pulled back and her face shoved forward. We then see that [...] it is quite evident that at that point in time, someone has a hand inside Ms. Bonds' pants, down around her upper leg or hip area. We can see the formation of a fist or hand inside her tight white pants [which is when Ms Bonds defended herself by delivering a mule kick to Morris and was charged with assault]

Ms. Bonds is immediately taken to the ground, and is not resisting with hands flailing or feet flailing, as testified to by both Special Constable Morris and Sergeant Desjourdy [...]

Then Sergeant Desjourdy gets a pair of scissors and cuts the back of Ms. Bonds' shirt and bra. Apparently Special Constable Morris does some inspection at that point in time, of Ms. Bonds' front torso. Ms. Bonds is then taken to the female cell area, her

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72 The Ottawa Citizen acquired a copy of the videotape from the court, which can be found online: Ottawa Citizen <http://www.ottawacitizen.com/news/Stacy+Bonds+police+video/3883-906/story.html?cid=megadrop_story>. Also online: YouTube <http://www.youtube.com/v/qFq06qWajo>. The portions of the video where Ms Bonds was naked are omitted as a result of a publication ban.

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t and bra removed by Special Constable Morris, and she is then put into the cell [...]
The officers have tried to justify their actions on the principles of safety, officer safety and accused's safety, as well as risk of suicide. No inquiry whatsoever was made by the officers prior to their taking action, and that is a common trait that we too often see in the recent past with the influx of a multitude of new recruits, who are often trained by other officers who have one, two, maybe three years of experience.

Justice Lajoie went on to find that in addition to unlawfully arresting Ms Bonds for public intoxication, the police detention and search violated sections 8 and 9 of the Charter. In arriving at that conclusion, the the court was “appalled” that a strip search was undertaken in the presence and with the assistance of at least three male officers, clearly contrary to the Supreme Court of Canada guidelines in R v Golden. Moreover, there was “no reasonable explanation”, “apart from vengeance and malice”, for Sergeant Steve Desjourdy to cut Ms Bonds’ shirt and bra off and leave her in the cell for 3 hours and 15 minutes half naked and soiling herself before she received a change of clothes. Consequently, as a result of the “sheer number of appalling behaviours” and the “extremely serious breach” of Ms Bonds’ rights, the court concluded that the “only possible outcome, and fair outcome” was a stay of proceedings to both denounce the “indignity towards [another] human being” and the “travesty” that would occur if the proceedings were permitted to go on.

In the more than two years between these acts of police brutality and when Ms Bonds’ application to stay the proceedings was heard, the Ottawa Crown Attorney’s Office was aware of the video recording of the humiliation, attack and sexual assault of Stacy Bonds. It was this conduct that eventually resulted in criminal charges being laid by the Special Investigations Unit against Sergeant Desjourdy and the OPP making a finding of misconduct against another of the involved officers. Nevertheless, a case management team and a number of senior prosecutors screened the file and still concluded that there was a reasonable prospect of conviction and public interest in the prosecution.

As noted by David Tanovich, in spite of the highly problematic evidence of Bonds’ unlawful arrest, assault and sexual assault, the deliberate attempt to humiliate her by leaving her half naked in a cell for more than three hours,
available similar fact evidence of abuse involving two of the officers, 79 as well as her legal right to resist and defend herself from police violence, it is hard to imagine that any reasonable prosecutor objectively assessing the reliability of the evidence would conclude that the Attorney General screening standards were met. 80

The prosecutorial decision-making in Bonds raises the very real possibility that the prosecution was continued in the interests of the police, rather than the public, to shield the officers from subsequent civil and/or criminal liability, 81 as well as the possibility that prosecutors and Crown Attorneys’ offices are “condoning egregious police misconduct in violation of its duty of even-handedness” and leaving it for the courts to provide any remedy that might be just and appropriate in the circumstances. 82 Support for possible widespread alignment and the above-mentioned approach to prosecuting is revealed in a number of other recent decisions finding either inadequate response by prosecutors in cases of police misconduct 83 or questionable screening involving highly suspect evidence. 84

C. Jury Selection for an Impartial Trier and Fair Trial

But perhaps the clearest evidence that Crown Attorneys’ offices and prosecutors across Ontario are not always performing their role as Ministers of Justice, or being adequately monitored, is demonstrated through the current litigation involving jury vetting. Although the Supreme Court decisions in R v Emms 85 , R v Yumnu 86 , and R v Davey 87 are at the time of writing on reserve after being heard on March 14-15, 2012, 88 critical findings have already been made by courts and the Ontario Information and Privacy Commissioner about Crown

80 Tanovich, supra note 71 at 149.
81 Ibid at 150.
82 Tran CA, supra note 31 at para 99. It appears that the Attorney General of Ontario has done little to denounce the kind of police brutality that occurred in the Bonds case by either internally disciplining the respective Crowns or even issuing a public statement indicating that the Ministry does not condone the police conduct.
87 R v Davey, 2010 ONCA 818, 103 OR (3d) 161, leave to appeal to SCC granted, [2011] No 148 [Davey].
88 Since this article was submitted for publication, the Supreme Court of Canada has released its unanimous decisions in R v Yumnu, 2012 SCC 73, [2012] SCJ No 73; R v Emms, 2012 SCC 74, [2012] SCJ No 74; and R v Davey, 2012 SCC 75, [2012] SCJ No 75.
prosecutors’ use of illegal background checks for prospective jurors and failure to disclose that information to the defence.

In the specific context of jury selection, the Ontario Court of Appeal recognized in R v Bernardo that a fundamental precept of jury selection in Canada is equal application of the rules and procedural fairness for both the Crown and defence. Additionally, the impermissibility of conducting background checks on prospective jurors, apart from criteria for ineligibility under the Criminal Code and the Juries Act, has been condemned through legislation, at common law and in Ministry of the Attorney General internal policies.

However, in a 2009 Report, the Information and Privacy Commissioner revealed that 18 of 55 Crown Attorneys’ offices in Ontario had “routinely” or “occasionally” collected and used personal information about prospective jurors in the previous three years, notwithstanding an explicit memo in 2006 from the Assistant Deputy Attorney General, and as far back as 1993.

Further, the Commissioner verified that a number of the offices also routinely or occasionally failed to disclose the background information to the defence. This

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89 R v Bernardo (2000), 48 OR (3d) 135 (CA), at paras 54-55. The same principles were noted in R v Bain, [1992] 1 SCR 91 [Bain] and R v Barrow, [1987] 2 SCR 694. More recently, in R v Gayle (2001), 54 OR (3d) 36 (CA), at para 59, leave to appeal to SCC refused, [2001] SCCA No 359, Sharpe JA, for the Court of Appeal, also recognized that an “important part of the jury selection process is the right of both the Crown and the defence to exercise peremptory challenges [which] foster confidence in the jury trial process. A lingering doubt about the juror’s partiality would taint the perception of a fair trial.” Criminal Code, RSC 1985, c C46.

90 According to sections 629 and 638 of the Criminal Code, this includes partiality, fraud and willful misconduct. Sections 3 and 4 of the Juries Act, RSO 1990, c J3 [Juries Act] contain comparable ineligibility provisions.


92 E.g, R v Huard, [2009] OJ No 6220 (SC), Thomas J [Huard]; R v Bradley (14 May 2009), unreported (Ont SC); R v Perlet (1998), 40 WCB (2d) 146 (Ont Gen Div). Platana J; Latimer, supra note 30; R v Fagan (1993), 18 CRR (2d) 191 (Ont Gen Div), Humphrey J [Fagan]; and Bain, supra note 89.


94 Ontario, Information and Privacy Commissioner, Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report, Order PO-2826 (5 October 2009), online: Ontario Information and Privacy Commissioner <http://www.ipc.on.ca/images/Findings/po-2826-cover+toc.pdf> [IPO Report].

95 IPO Report, supra note 95, Results of the Investigation at 78-79, online: IPC <http://www.ipc.on.ca/site_documents/po-2826-chapter_6.0.pdf>. See e.g. Fagan, supra note 93. Key Facts about individual Crown Attorneys’ offices jury vetting practice are recorded online: IPC <http://www.ipc.on.ca/site_documents/PO-2826-KeyFacts.pdf>. The Commissioner found that 53 jury trials in Barrie, and 12 in Sarnia/ Lambton, Thunder Bay and Windsor/Essex, were affected by illegal jury vetting by the Crown.

96 Ibid at 80, 82 and 83. The following Crown Attorneys’ offices admitted that on at least one or more occasions, the results of criminal background checks and/or personal information was not shared with defence counsel: Chatham/Kent; Cornwall/Stormont/Dundas/Glengarry; Cobourg/Northumberland; Bracebridge/Muskoka Woodstock/Oxford County; Windsor/Essex County; Simcoe/Norfolk County; and Barrie/Simcoe County. In R v Huard, supra note 93, Justice
clearly violates the Crown’s fundamental legal and ethical duty to make full disclosure and takes the form of an adversarial role. It is trite law since R v Stinchcombe that the fruits of the investigation in the possession the Crown “are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.” Since the impugned Crown Attorneys’ offices and, in some cases, individual prosecutors were using the same information for jury selection, it was not clearly irrelevant and should have been disclosed, particularly since it might reasonably cause the defence to exercise its peremptory challenges differently.

That the information was repeatedly not disclosed suggests it was being used to gain a tactical advantage and a jury most favourable to the Crown in order to secure a conviction. As a result, in Emms, Rosenberg JA noted how “troubled” the court was over this systematic violation of individual privacy and trial fairness. While the law may not demand perfect justice, it requires fundamentally fair justice. The “use of police resources and attempt to align the Crown with the police is inconsistent with the Crown counsel’s obligation to ensure that the accused receives a fair trial.”

More recently in Spiers, the Court of Appeal found that the Crown’s breaches of its own disclosure and jury vetting policies, the misuse of police databases, and concomitant privacy legislation violations all undermined the appearance and actual fairness of the jury trial process and amounted to a miscarriage of justice warranting a new trial.

Finally, it is important to also note that in the anonymous survey portion of the Commissioner’s investigation, a number of Crown Attorneys’ offices indicated that they believed it was appropriate to have the investigating officer at the counsel

Thomas held that the Windsor Crown Attorney office’s failure to disclose juror background information in a murder trial irreparably prejudiced the accused and necessitated a mistrial. The Martin Report, supra note 69 at 143 unequivocally recognized that full disclosure is essential to ensure a fair trial and enable the accused to make full answer and defence. Also, the Law Society of Upper Canada, Rules of Professional Conduct, Rule 4.01(3) and Commentary [LSUC RPC] makes it an ethical violation for a prosecutor to fail to provide full and timely disclosure.

R v Stinchcombe, [1991] 3 SCR 326, at p 333; R v Egger, [1993] 2 SCR 451. The Court confirmed in R v Chaplin, [1995] 1 SCR 727 at 739 that duty to make full disclosure is an ongoing obligation as new material or information comes to the Crown’s attention or control, and that failure to comply may result in a stay or other redress against the Crown. For an important discussion on the Crown’s seminal role in the disclosure process and the need to take seriously its obligation to prevent wrongful convictions and ensure a fair trial, see Luther, supra note 47.


At paragraphs 36 and 60 in Emms, supra note 85, Rosenberg JA emphasized how “troubled” the court was by the Barrie Crown Attorney’s office’s practice of requesting from the OPP comments “concerning any disreputable persons we would not want as a juror”. Recently, in Spiers, supra note 101 at paras 39 and 43, Rouleau JA, for the Court of Appeal, found more troubling, a Barrie Crown’s expansive request for “comments and details” about disreputable prospective jurors, which led to broader database searches by police and various binders forwarded to the Crown about past criminal convictions, traffic violations, occurrence reports detailing any prior contact with police, and officer opinion about candidates’ general attitude towards the police.

O’Connor, supra note 18 at paras 192-93, McLachlin J, as she then was.

Emms, supra note 85 at para 60.

Spiers, supra note 101 at para 90.
table during the in-court jury selection process. This appears to be at odds with the 2004 FPT Prosecution Committee Report recommendations regarding the appropriate separation of roles and responsibilities between prosecutors and the police in order to avoid tunnel vision and further miscarriages of justice.

Therefore, as recognized by the Commissioner, there appears to be a very apparent misunderstanding on the part of many prosecutors about the appropriate separation between the Crown and the police, as well as a lack of awareness about permissible background checks for jury selection, which calls into question whether, and to what extent, prosecutors are receiving adequate education and training about the delineation of the role of prosecutors and the police. In some cases, prosecutors were not even aware of the 2006 Crown Policy Memorandum on juror background checks. As a result, the Commissioner has ordered all Crown Attorneys’ offices to immediately halt the collection of any personal information for potential jurors. Also, the Ministry of the Attorney General has been directed to implement a centralized juror screening process through the Provincial Jury Centre in order to ensure the privacy of prospective jurors and equal access to relevant information by both the Crown and defence.

It should be noted that the Ontario Crown Attorneys’ Association was given intervenor standing before the Supreme Court to make submissions on the Ministry of the Attorney General’s failure to provide adequate education and training in relation to the collection and use of juror background information. This raises the serious question of what the Attorney General of Ontario is actually doing to prevent illegal jury vetting and ensure citizens receive fair trials before independent and impartial juries as required by law. As will be discussed in part 4, certain actions of the Ministry of the Attorney General raise concerns about whether it is in fact committed to strong and independent accountability of its agents and the police.

Therefore, because the problem of alignment is not confined to a particular office or region, part 4 will discuss the pivotal role that Law Societies and public bodies, such as the Information and Privacy Commissioner and the Ombudsman, have in ensuring that the Ministry of the Attorney General and Crown prosecutors are performing their quasi-judicial role truly independent of the police and other improper motivation.

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106 IPO Report, supra note 95 at 84.
107 FPT, supra note 49 at 147-51.
108 IPO Report, supra note 95, “Recommendations ” at 146-150, online: Ontario Information and Privacy Commissioner <http://www.ipc.on.ca/site_documents/po-2826-chapter_11.0.pdf>.
109 Ibid. The penalty provisions for non-compliance with an order are found in FIPPA, s 61. To date there have been no reports that any fines have been imposed against the Attorney General or Crown offices.
110 This is consistent with the Commissioner’s finding that the Ministry of the Attorney General’s policies on juror background checks lack clarity, and her recommendation for a Directive with clearer instruction, IPO Report, supra note 95 at 146. Also, Christin Smitz, “Clash Pits Crowns vs. Province”, The Lawyers Weekly (9 March 2012) online: Lawyers Weekly <http://www.lawyersweekly.ca/index.php?section=article&articleid=1610>.
IV. STRENGTHENING ETHICAL CONDUCT THROUGH GREATER INSTITUTIONAL ACCOUNTABILITY

To begin, it must be recognized that the most important actors in ensuring adherence to Crown policy and governing law are Attorney Generals and Crown prosecutors. It is also essential to the proper functioning of the criminal justice system that they are able to effectively exercise their discretion in making difficult and often complex decisions without unnecessary outside influence. But where prosecutors engage in misconduct or alignment, a number of remedies including:

(a) Attorney General internal discipline,
(b) judicial review, adverse findings and contempt of court proceedings against Crown counsel,
(c) a stay of proceedings,
and (d) civil action for malicious prosecution112 will continue to provide crucial checks and balances to ensure the highest individual standards of fairness in those prosecutorial functions.113

However, in circumstances of widespread or organizational impropriety, and apparent or actual reluctance on the part of the Attorney General or regional senior Crown Attorneys to superintend ethical conduct through rules and discipline,114 it is imperative that Law Societies and other public bodies fulfill the ir public interest mandates by monitoring individual, and more critically, institutional standards and compliance. The importance of the Privacy Commissioner in this regard has already discussed above.

A. Review for Bad Faith or Improper Purpose by Law Societies

In Ontario, the Law Society of Upper Canada is responsible for regulating the conduct of all lawyers, including prosecutors, as members “in the public interest”.115 In Krieger v Law Society of Alberta, the Supreme Court confirmed that Law Societies have jurisdiction to discipline Crown counsel for matters of professional conduct and ethical violations,116 but that generally matters of core prosecutorial discretion would be left for the respective Attorney General to deal with. The Attorney General of each province has legislative and constitutional authority over the administration of criminal law, and, from a practical standpoint,

112 In Nelless v Ontario, [1989] 2 SCR 170, the Supreme Court held that prosecutors, as an agent of the Attorney General, could be sued for malicious conduct in the course of a public prosecution. As noted in John Sopinka, "Nelless v Ontario: R v Jedy nack: R v Simpson" (1995), 74 Can Bar Rev 366, the rationale of tort action for malicious prosecution is that the court's process has been abused by wrongly invoking the law on a criminal charge.

113 A helpful discussion of the importance of individual remedies in strengthening Crown Attorneys’ commitment to ethical conduct can be found in Rosenberg, supra note 2.

114 Although having confidential prosecutorial guidelines and polices enables flexible enforcement, as was noted by L’Heureux-Dube J in R v Power, supra note 63 at 626, secrecy also promotes inequality, lack of accountability and undermines the Charter. For example, the public has no idea what, if any, action has been taken as a result of the Information and Privacy Commissioner’s Recommendations, or the Bonds prosecution. See Roach, supra note 18 at 30.

115 Law Society of Upper Canada, “About the Society”, online: LSUC <http://www.lsuc.on.ca/with.aspx?id=644>. See also, Law Society Act, RSO 1990, c L8, s 4.2(3). The LSUC may decide that any of the penalties under section 35 are required to deter and repair the offending behaviour.

116 LSUC RPC, Rule 4.01(3) and Commentary, supra note 98 states that prosecutors must act "within the limits of the law", treat courts and tribunals “with candour, fairness, courtesy” and “make timely disclosure to defence coun sel […] or unrepresented accused"
she or he is uniquely positioned to monitor and remedy the conduct of his or her agents.

Nevertheless, the Court created a narrow exception concerning the appropriate involvement of professional regulatory bodies. Law Societies are permitted to review for “bad faith or improper purpose”, since action undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General and, therefore, cannot constitute core prosecutorial discretion. Law Societies have jurisdiction to review the conduct of a single prosecutor and entire offices of prosecutors to determine if, and discipline under the Law Society Act where, they acted dishonestly or in bad faith and breached their professional requirements under the Rules of Professional Conduct.

A finding of bad faith or improper purpose could pertain to failing to properly screen a prosecution according to Attorney General standards or disclose relevant information, such as juror background checks, to an accused in a timely manner. Such conduct also fails to “maintain the integrity of the profession” or “encourage public respect for” and “improve the administration of justice”. Indeed, the Supreme Court granted the Canadian Civil Liberties Association and Ontario Crown Attorney’s Association intervenor standing in the Emms, Yumnu and Davey appeals to argue for and against the remedy of referral of Crown misconduct to the Law Society under s 24(1) of the Charter.

Tanovich points out that there are major advantages for Law Societies, rather than Attorney Generals, review of the conduct of a Crown Attorney’s office or individual prosecutors. First, the confidential professional standards used by an Attorney General may be lower than those mandated by a Law Society. Second, Law Societies generally publicize the results of their investigations and any discipline that follows. The public has a right to know whether and how prosecutors are disciplined, and a public process would likely only occur through Law Society discipline. Therefore, if a Law Society were to take a different view of the pre-charge involvement, policy brutality and/or jury vetting prosecutions and determine that there is a systemic problem of Crown alignment and that the failure to terminate any of these prosecutions was motivated by improper purpose or bad faith, this could lead to a more transparent process, greater accountability and commitment to ethical conduct.

117 Krieger, supra note 5 at paras 51-52.
118 Ibid at paras 4-5, 50-56; Nixon, supra note 44 at paras 3 and 52. According to the Ontario Crown Attorney’s Amended Notice of Motion, the LSUC is intending to investigate a number of prosecutors in relation to juror background checks contravening RPC Rule 4.05, pending the outcome of the Supreme Court decisions in Emms, Yumnu and Davey. The LSUC could rely on section 35 of the Law Society Act to order suspension, restriction of legal services and compliance reports from the offending parties.
119 LSUC, RPC, supra note 98 at Rule 6.01, “Relationship to the Society and Other Lawyers”.
120 Ibid at Rule 4.06(1), “The Lawyer and the Administration of Justice”.
121 The Marshall Inquiry, supra note 21 at 227-28 recognized that “In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public”. For example, the public should know what internal discipline former Crown Attorney Calvin Barry received for his involvement in a corruption scandal and the Attorney General’s rationale for that decision, particularly since Mr Barry is still acting in a position of trust by practicing law and handling client accounts.
122 Tanovich, supra note 71 at 151-52.
B. The Role of Ombudsmen and Moral Suasion in Addressing Potential Abuse

Finally, in the event that no remedy at law is available through the courts or Law Societies to address individual or institutional alignment with the police, the value of other public bodies in drawing attention to the issues and applying pressure on Attorney Generals cannot be understated. The Supreme Court recognized in 1985 that Ombudsmen are uniquely positioned to respond to “problems of potential abuse and of supervision” through “addressing many of the concerns left untouched by the traditional bureaucratic control devices” and “administrative problems that the courts, the legislature and the executive cannot effectively resolve.”

In Ontario, the Ombudsman is appointed to independently investigate any act or decision made or omitted by a governmental organization, including the Ministry of the Attorney General, to determine if it was illegal, unjust or wrong, or alternatively if a discretionary power was exercised for an improper purpose, based on irrelevant grounds or should have been accompanied by reasons. Although the Ombudsman’s Report and recommendations do not have the force of law, their influence or “moral suasion” is amplified through public reporting and general awareness. The Ombudsman is also authorized to report failure to adequately respond to and/or adopt the report and recommendations to the Premier and/or Legislative Assembly for remedial action.

Recently, in a follow up Report to a 2008 investigation finding that the Ministry of the Attorney General needed to enhance the Special Investigations Unit’s [SIU] ability to effectively respond to police misconduct involving serious injury or death, the Ontario Ombudsman publicly excoriated the Attorney General after discovering internal correspondence indicating that the Ministry had no intention of ever complying with the Ombudsman’s recommendations and intended to “wait him out.” The 2011 Report, entitled Oversight Undermined, also exposes occasions where Ministry officials prevented the SIU from publicizing concerns over Ministry policies and handling of police accountability.

Since the Report was released in December 2011, Attorney General John Gerretsen has stated to media that he is “committed to dealing with the issues” that the Ombudsman has raised “with a fresh set of eyes.” One such Ministry

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123 British Columbia Development Corp v British Columbia (Ombudsman), [1984] 2 SCR 447 at 461.
124 Ombudsman Act, RSO 1990, c O6, ss 14(1) and 21(1)(2).
125 Ibid at s 14(2.6). Examples of significant investigations by the Ontario Ombudsman include the Ontario Lottery and Gaming Commission’s protection of the public from fraud and Legal Aid Ontario’s role in funding the defence of Richard Wills. All Reports are available online: Ontario Ombudsman <http://www.ombuds-man.on.ca/Resources/Sort-Reports.aspx>.
126 Ibid at s 21(3)(4)(5).
128 Marin, supra note 111 at paras 159-74.
initiative scheduled to take effect before January 2013 is the mandatory Crown reporting of police officers whose evidence a court finds to be deliberately untruthful, or where the prosecutor has reasonable evidence that the officer was untruthful. However, the success of this policy will largely depend on the willingness of Crown prosecutors to probe, report and possibly give evidence about these incidents, as well as the police force’s decision to ultimately charge or discipline the officer. Meanwhile, some members of the public have demanded the Premier explain the perceived conflict of interest arising from the former Attorney General’s handling of several high-profile investigations of police misconduct and perceived loyalty to police.

Therefore, public interest bodies such as Ombudsmen and Law Societies have a significant role in monitoring individual and institutional conduct as well as raising public awareness, both of which may help the Attorney General ensure a more transparent and effective system of accountability. Additionally, as was the case with the Privacy Commissioner’s intervention in Emms, Yumnu and Davey, their independent investigations and critical perspective can also assist the courts with providing just remedies in the cases before them.

V. CONCLUSION

Discretion in pursuing justice unquestionably remains an indelible part of the Crown prosecutor function in an adversarial criminal justice system. The independence enjoyed by Attorney Generals and prosecutors is vital to ensuring that justice is enforced independently, fairly and vigorously without undue interference.

However, while the vast majority of prosecutors continue to discharge their quasi-judicial role even-handedly, there is evidence that some occasionally, but significantly, act in their own interests or the interests of police rather than the public interest: thus casting a dark shadow over many honourable and tenacious Crown prosecutors and office staff, undermining the integrity of the system, and diluting confidence in the criminal justice system.

Some prosecutors may also not be receiving adequate training to effectively discharge their functions and properly respond to police misconduct by disassociating themselves from it. Where individual or institutional prosecutorial misconduct occurs, the Attorney General must be prepared to discipline those in breach of their legal and ethical duties to ensure the proper administration of justice.

Gerretsen announced that a probe would be launched to investigate more than 100 cases where police officers have been found to engage in courtroom misconduct or deception. David Bruser & Jesse McLean, “Police who lie: Attorney General orders probe of police deception”, Toronto Star (1 May 2012), online: Toronto Star <http://www.thestar.com/news/canada/article/1170785--police-who-lie-attorney-general-orders-probe-of-police-deception>.


Bruser & McLean, ibid.

Cook, supra note 10.
public affairs. An important step in discouraging improper considerations and, at the same time, promoting greater public confidence in the administration of justice would be to make records of misconduct and discipline involving Crown prosecutors accessible to the public just as provincial Law Societies already report disciplinary hearings involving other lawyers and paralegals.

Finally, Canadian courts will continue to play a vital role in checking Crown alignment and malicious prosecution problems through Charter relief, common law remedies, and civil redress. Yet, considering the scope of alignment and problems with improper motivation, other regulators and public offices such as Law Societies, Privacy Commissioners and Ombudsmen will need to play a greater role in maintaining fair and impartial decision-making and ensuring transparency, legitimacy and accountability in the criminal justice system for all those involved.