June 29, 2015

# Prosecutors as Ministers of Justice?

**By: Alice Woolley**

Three recent cases have brought to light bad behaviour by criminal prosecutors.

In *R v Suarez-Noa*, 2015 ONSC 3823 Justice Reid ordered a mistrial after the prosecutor suggested "to the jury that the accused had behaved like an animal rather than a human being," calling the characterization "highly improper" and incapable of being "erased from the minds of the jurors" (at paras 10-11).

According to the CBC, in the Nuttall/Korody bombing trial British Columbia Supreme Court Justice Catherine Bruce said the prosecutors "took my breath away" with the "impropriety" of their decision to show a video to the jury that contained "footage of an actual pressure-cooker explosion." She further described the prosecutor's decision to ignore her express instruction not to refer to defences of duress and entrapment as "unspeakable" and as something she had "never experienced… before. Ever." The CBC reported that Justice Bruce "said she would have called a mistrial had the proceedings not been so protracted and difficult".

In *R v Delchev*, 2015 ONCA 381,the Ontario Court of Appeal allowed Delchev's appeal of his convictions on 16 counts of firearms and drug related offence and ordered a new trial. It did so on the basis that the trial judge had improperly failed to consider whether the prosecutor's conduct in plea negotiations constituted an abuse of process warranting a stay of proceedings.

The prosecutor in *Delchev* made a settlement offer following a *Charter* motion for the exclusion of evidence. In that motion Delchev testified as to threats made against him by one John Ramsay. In its settlement offer the Crown said that it would "recommend a conditional sentence" if Delchev "would admit that his evidence up to that point in the proceeding regarding duress was false, and that his counsel knew it to be false" (*Delchev*, at para 11). As the Court of Appeal noted, this settlement offer had the "potential to negatively affect the relationship between the appellant and his lawyers" (at para 56). It also did not reflect the legal obligation of defence counsel to "call the accused to testify even if the lawyer's private opinion is that the client will be disbelieved", and to only refuse to call the accused as a witness where "the lawyer *knows* the testimony to be false or fraudulent or believes it to be false by reason of an admission made by the accused" (at para 61). The Crown's settlement offer created the risk that a defence counsel would not offer evidence she ought to because of fear that the Crown will use that implausible or disbelieved evidence to attack defence counsel through a plea offer to that counsel's client.

These three examples are notable but not surprising. While in most cases prosecutors act in accordance with their legal and ethical obligations, bad behaviour by prosecutors is not hard to discover when you look at the case law. Courts and regulators rarely sanction lawyers who engage in it, but examples are easy to find.

At the same time, however, in common law and in accordance with codes of conduct, the prosecutor is said to be a "minister of justice" and "as more a 'part of the court' than an ordinary advocate" (*Delchev*, at paras 64-65). As the Supreme Court put it in *Boucher v The Queen,* [1955] SCR 16, at 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Which leads to this question (which I am exploring in a broader research project): why this gap between prosecutorial aspirations and reality (at least some of the time)? How can lawyers whose legal and ethical duty is to do justice act in ways that work real injustice?

Based on my research so far, my working thesis is that the "do justice" ethic for prosecutors is at best unhelpful in creating ethical conduct, and at worst is toxic for prosecutorial ethics. It does not increase the likelihood of ethical conduct and may in fact be one of the reasons why unethical conduct occurs.

In the first place, the "do justice" ethic lacks specific content. Does it mean that a prosecutor ought to temper his advocacy in the courtroom? If so, when, how and to what extent? Does it impose positive obligations on the prosecutor to, for example, redress injustices in the courtroom (as Fred Zacharias argued)? Does it require a prosecutor not to bring forward a case that is lawfully permitted but morally troubling (e.g., where there is a harsh mandatory minimum and mitigating facts that the law does not take into account)? As a consequence, it is not clear how the exhortation to "do justice" can meaningfully guide prosecutorial decision-making.

Relatedly, the do justice ethic does not necessarily give someone a deep internal commitment to justice from which they can develop sound moral intuitions (which, as I've discussed elsewhere, are important for ethical behaviour). As Abbe Smith has cogently argued, it tends instead to give someone an internal commitment to her power and obligation to create justice, i.e., the belief is in the prosecutor's justice-seeking power, not in justice itself. Being told that she has the unique role to seek and protect justice creates an internal concept for the prosecutor as someone who has a particular capacity to understand what justice requires, and makes that person less inclined to doubt her perceptions or to see the role that ordinary cognitive biases may be playing in her perceptions. When you combine that internal concept with the adversarial nature of the criminal trial, and the ordinary human desire to "win" any particular contest, which competitively inclined lawyers probably have to an above average extent, you have ideal circumstances for poor intuitions about the best answer to an ethical dilemma. The prosecutor believes she has special insight into what justice requires, her desire to win makes anti-justice decisions particularly desirable, her belief in her justice-discerning abilities makes her unaware of the corrupting effect of her desire to win, and her bad decision follows.

Further, the do justice ethic does not easily connect to the prosecutor's adversarial role in a courtroom. How can the Crown act "as a strong advocate within this adversarial process" who "vigorously pursue[s] a legitimate result to the best of its ability" (*R v Cook,* [1997] 1 SCR 1113 at para 21) while simultaneously excluding any idea of winning and losing from her assessments? That inconsistency may lead prosecutors simply to ignore the do justice imperative and to pursue ordinary advocacy without – at the same time – having a strong sense of the limits of that advocacy that apply to ordinary lawyers.

In addition, the do justice ethic arguably distorts the criminal justice system, providing prosecutors with a source of moral authority in the courtroom and in society – the ability to claim implicitly, as the Crown improperly did explicitly in *R v Boucher*, that action by a Crown is entitled to more respect because done by an actor pursuing justice. That may not create bad behaviour by prosecutors, but it may provide more opportunities for its occurrence – i.e., for prosecutors to take advantage of power differentials in an unjust way.

The do justice ethic comes from a high-minded and admirable place. It is designed to capture the indisputably unique and complex aspects of the prosecutorial function in a free and democratic society. The problem is that it does not do so with any degree of insight or sophistication, and it may have the tendency to undermine the ethical discharge of that function.

If there is anything to this argument, the next question to be considered is: how do we capture the special features of the prosecutorial function and articulate the legal and ethical duties attached to that function? Tucker Carrington, founding director of the Mississippi Innocence Project, suggested one answer to this question when he said in response to my critique that the most ethical prosecutors he deals with are those who are "really great lawyers", advocating effectively within the bounds of the law, substantively and procedurally. My hunch is that that account of the prosecutor's role, if coupled with consideration of unique prosecutorial challenges such as the absence of clients, provides a better and richer ethical account of the lawyer's role than does an empty exhortation to do justice.

*This post originally appeared on Slaw.*