LEGAL ETHICS FOR CROWN ATTORNEYS ON APPEAL

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While there is extensive legal literature and case law addressing the role and ethical responsibilities of Crown attorneys, questions about that role and those responsibilities at the appellate stage are largely absent from the literature and somewhat scattered across the case law. In this article, the authors seek to address this gap by answering four key questions. The first is whether the ethical obligations of the Crown, as expressed in R. v. Boucher*, apply at the appellate stage. Against the backdrop of this first question, the authors discuss when an appellate Crown may bring an appeal from an acquittal or from a sentence, when an appellate Crown may make concessions or abandon an appeal, and when an appellate Crown may take a different position than the Crown attorney at trial or upon sentence. The answers to these questions are important, though not especially surprising. The authors argue that both Boucher and prosecutorial discretion require appellate Crowns to resolutely — but fairly — seek justice on appeal, as at trial, even when this means taking a different position than the trial Crown or conceding an error by the trial Crown or the trial judge.*

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I. INTRODUCTION

Crown attorneys wield immense powers in the Canadian criminal law system. As observed by the Supreme Court of Canada in *Nelles v. Ontario*, these include "the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, … the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal."[1] Moreover, insofar as these powers fall within prosecutorial discretion, with few exceptions, their exercise will not be reviewed by courts or by law societies as regulators of the legal profession.[2] Those powers and responsibilities rightly come with high expectations — not only by the courts but by the public at large. Indeed, in *R. v. Bain* the Supreme Court recognized that "[s]ince Crown prosecutors play a central role in the proper functioning of

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1 [1989] 2 SCR 170 at 192. We have omitted from this list "the power of disclosure/non-disclosure of evidence before trial," as it was essentially removed by *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*].

2 *Krieger v Law Society of Alberta*, 2002 SCC 65 [*Krieger*].

our judicial system, and since they are vested with much discretion and subject to few controls, their duties can never be too often reaffirmed."[3] The expectations of Crown attorneys have, by and large, been clearly identified in the case law and legal literature. However, one area has been notably overlooked: Crown attorneys' duties at the appellate stage.

Indeed, there is extensive Canadian legal literature about the role and ethical responsibilities of Crown attorneys.[4] There has been a particular focus on prosecutions and plea bargaining, as well as some consideration of the charging decision and the pre-charge stage.[5] In contrast, however, questions about that role and those responsibilities at the appellate stage are largely absent from the Canadian legal literature and are somewhat scattered across the case law. In this article, we endeavour to fill this gap by examining the ethical duties of Crown attorneys on appeal. Specifically, we address four key questions:

1. What is the appropriate role of the Crown in criminal appeals?

2. When may an appellate Crown bring an appeal from an acquittal or from a sentence?

3. When may an appellate Crown make concessions or abandon an appeal?

4. When may an appellate Crown take a different position than the Crown attorney at trial or upon sentence?

Law society disciplinary decisions provide little guidance with respect to these questions, especially since professional discipline of Crown attorneys is rare.[6] Thus, we draw primarily on case law, supplemented by the instruction provided in the various federal and provincial Crown prosecution manuals. Before tackling these appeal-related questions, we begin with a concise overview of the standards governing Crown attorneys *generally*, which have, at least to this point, largely been interpreted and applied in the trial context.

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3 *R v Bain*, [1992] 1 SCR 91 at 118 [*Bain*].

4 See e.g. John D Brooks, "Ethical Obligations of the Crown Attorney: Some Guiding Principles and Thoughts" (2001) 50 UNB LJ 229; Deborah MacNair, "Crown Prosecutors and Conflict of Interest: A Canadian Perspective" (2002) 7 Can Crim L Rev 257; David Layton, "The Prosecutorial Charging Decision" (2002) 46:3&4 Crim LQ 447; Stuart J Whitley, "Prosecution Ethics: A Proposal for Formalizing Rules of Conduct" (2010) 55:4 Crim LQ 508; Alice Woolley, "Reconceiving the Standard Conception of the Prosecutor's Role" (2017) 95:3 Can Bar Rev 795.

5 See e.g. Michael Code, "Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage" (1998) 40:3&4 Crim LQ 326; Layton, *ibid*; Mary Lou Dickie, "Through the Looking Glass: Ethical Responsibilities of the Crown in Resolution Discussions in Ontario" (2005) 50:1&2 Crim LQ 128; Zina Lu Burke Scott, "An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada" (2018) 81:1 Sask L Rev 53; Marie Manikis & Peter Grbac, "Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process" (2017) 40:3 Man LJ 85; Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining" (2017) 63:1 McGill LJ 45; Ari Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v Nixon*" (2012) 38:1 Queen's LJ 295.

6 Andrew Flavelle Martin, "Twenty Years After *Krieger v. Law Society of Alberta*: Law Society Discipline of Crown Prosecutors and Government Lawyers" (2023) 61:1 Alta L Rev 37.

II. THE ROLE OF CROWN ATTORNEYS IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

The case law is clear that the Crown attorney, as prosecutor, embodies an important tension. The classic judicial statement on the role of the Canadian prosecutor comes from the reasons of Justice Rand in *Boucher v. The Queen*:

> 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.[7]

Justice Taschereau, in his dissenting judgment, also provided useful commentary on the Crown's role:

> The position of Crown counsel is not that of counsel in a civil matter. His functions are quasi-judicial. He must not so much try to obtain a conviction as assist the judge and jury so that justice will be fully done. Moderation and impartiality must always characterize his conduct in court. He will have honestly carried out his duty and will be beyond reproach if, putting aside any appeal to the passions, in a dignified manner appropriate to his role, he presents the evidence to the jury without going beyond what it has revealed.[8]

Boucher has since become the quintessential statement with respect to Crown obligations, widely endorsed and relied upon by trial and appellate courts across the country,[9] including the Supreme Court of Canada in subsequent decisions.[10] Indeed, Justice Rand's articulation of the Crown's role in *Boucher* remains the "seminal pronouncement" on the subject.[11] This, as pointed out by Robert J. Frater, is largely due to "its ability to capture succinctly a number of essential prosecutorial attributes: the overriding commitment to fairness; the need to maintain a sense of professional detachment from the result of cases; the recognition of the gravity of prosecutorial authority; and the importance of presenting the

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7 *Boucher v The Queen*, 1954 CanLII 3 at 23–24 (SCC) [*Boucher*]. But see e.g. Woolley, *supra* note 4 at 800 ("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").

8 *Boucher*, *ibid* at 21 (translated and quoted in other cases, e.g. *Bain*, supra note 3 at 118).

9 See e.g. *R v Savion*, 1980 CanLII 2875 at 289 (ONCA) [*Savion*]; *R v Charest*, 1990 CanLII 3425 at 80 (QCCA) [*Charest*] (describing *Boucher* as "now classic"); *R v Wilder*, 2001 BCSC 1634 at paras 10–11 [*Wilder*] ("[i]t is trite law that Crown Counsel should not be concerned with getting a conviction"); *R v Fashoranti*, 2022 NSPC 36 at para 34, aff'd 2023 NSCA 78; *R v Mugodo*, 2023 ABKB 728 at para 21; *R v AB*, 2024 ONCA 111 at para 71.

10 See e.g. *Nelles v Ontario*, *supra* note 1 at 191–92 ("[a]s regards the proper role of the Crown Attorney, perhaps no more often quoted statement is that of Rand J. in *Boucher v. The Queen*"); *Stinchcombe*, *supra* note 1; *R v Cook*, 1997 CanLII 392 at para 21 (SCC) [*Cook*] ("it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence"); *Proulx v Quebec (Attorney General)*, 2001 SCC 66 at para 31 [*Proulx*] ("the prosecutor's role as a public officer charged with ensuring justice is respected and pursued"); *R v Brown*, 2002 SCC 32 at para 78 [*Brown*] ("the long-standing principle that the Crown's role is not to gain a conviction at all costs, but to seek the truth and present all relevant evidence to the trier of fact"); *Miazga v Kvello Estate*, 2009 SCC 51 at para 47 [*Miazga*].

11 *Bain*, *supra* note 3 at 117. See also *R v Regan*, 2002 SCC 12 at para 65 [*Regan*].

Crown's case in its best light."[12] What *Boucher* amounts to, in essence, is an instruction that, above all, prosecutors must "seek justice."[13]

However, case law post-*Boucher* is clear that the Crown attorney, while "not an ordinary litigant,"[14] and though it "performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence,"[15] nonetheless operates within an adversarial system and, thus, should advocate "vigorously."[16] This duality is often expressed in the Crown's dual role as both "minister of justice"[17] and "advocate."[18] In their minister of justice role, Crown prosecutors adopt a "quasi-judicial" position[19] consistent with their "role as a public officer charged with ensuring justice is respected and pursued."[20] Indeed, it has been remarked that prosecutors "ought to regard [themselves] as part of the Court."[21]

As noted by Justice Binnie in *R. v. Regan*, the "[m]inister of [j]ustice" role is comprised of at least three components. The first is objectivity, meaning that Crown attorneys have a "duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices."[22] The second component is "independence from all other interests that may have a bearing on the prosecution," including those of police and defence counsel.[23] The third component requires prosecutors to act even-handedly or, in other words, with a "lack of animus — either negative or positive — towards the suspect or accused."[24] Together, these obligations make it such that the Crown is required to seek the truth and pursue a just outcome, not to blindly pursue a conviction at all costs, nor necessarily the most punitive sentence.[25] It is in this sense that the Crown is not an "ordinary" litigant — their

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12 Robert J Frater, *Prosecutorial Misconduct,* 2nd ed (Toronto: Thomson Reuters, 2017) at 2.

13 See e.g. William C Gourlie, "Role of the Prosecutor: Fair Minister of Justice with Firm Convictions" (1981) 46:2 Sask L Rev 293 at 294 ("the prosecutor's duty is to seek justice").

14 *R v McNeil*, 2009 SCC 3 at para 49 [*McNeil*].

15 *Cook*, *supra* note 10 at para 21. Justice L'Heureux-Dubé goes on to say: "Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability" (*ibid*).

16 *Ibid* at para 21. See also Gourlie, *supra* note 13 at 294 ("[i]n principle, the exercise of prosecutorial discretion should call into play all the leniency and fairness of a minister of justice. Thus the prosecutor's duty is to seek justice. Yet the ends of justice often demand of the prosecutor a firm adversarial stance").

17 *McNeil*, *supra* note 14 at para 49.

18 *Ibid* at para 51.

19 See e.g. *Boucher*, *supra* note 7 at 21 (Taschereau J, dissenting); *Miazga*, *supra* note 10 at para 47; *R v Forrester*, 1976 CanLII 271 at para 18 (ABKB).

20 *Proulx*, *supra* note 10 at para 31. See also *Bain*, *supra* note 3 at 116–117.

21 Morris Manning, "Abuse of Power by Crown Attorneys" in (1979) Spec Lect LSUC 571 at 580 (as quoted in *Nelles v Ontario*, *supra* note 1 at 191).

22 *Regan*, *supra* note 11 at para 156.

23 *Ibid*.

24 *Ibid*.

25 See e.g. *Regina v Roberts*, 1973 CanLII 1396 at 370 (ONCA), Martin JA ("[i]t has been said on many occasions that the paramount duty of the Crown prosecutor is to see that justice is done, not to strive for a conviction"); *Bain*, *supra* note 3 at 116 ("[i]n the criminal process, the Crown Attorney is not expected to seek conviction above everything else, just like the accused attempts to avoid conviction"); *Brown*, *supra* note 10 at para 78 ("the Crown's role is not to gain a conviction at all costs, but to seek the truth and present all relevant evidence to the trier of fact"). See also e.g. *Rex v Ferguson*, 1944 CanLII 349 at 771 (ONCA): "No doubt it is the duty of Crown counsel to be fair and not to strain for a conviction beyond what the evidence would fairly warrant…. The Crown counsel may or may not in the particular case perform his duty fully in this regard. I am sorry to say I have seen cases where Crown counsel certainly did not deserve any such commendation but was as anxious to convict as counsel for the defence was to get an acquittal."

unwavering loyalty is not to a particular client or outcome but, instead, "to the proper administration of justice."[26]

And yet, the Canadian criminal law system is adversarial in nature — it demands that all parties "bring forward relevant evidence and argument that can prove the issues while the trial judge presides as an objective decision-maker."[27] For the adversarial system to deliver on its key promise — the discovery of truth[28] — parties must be able "to advance their own position and challenge the case presented by an opposing party through the exercise of adversarial functions."[29] As recently pointed out by Justice Karakatsanis in *R. v. Kahsai*, where there is "an imbalance in the capacity of the parties to bring forward a viable case by performing adversarial functions, 'the adversarial process upon which the strength of our justice system is predicated risks losing much of its force.'"[30]

As a result, it is critical that Crown attorneys be able to act as strong advocates. After all, litigation is not, and is not meant to be, a tea party.[31] Prosecutors are expected to undertake their cases "with industry, skill and vigour"[32] and should "press fully and firmly every legitimate argument tending to establish guilt."[33] Indeed, as was recently observed by Associate Chief Justice Fairburn in *R. v. A.B.*, "[r]obust advocacy is part and parcel of the proper pursuit of justice in criminal law. The public expects and deserves nothing less from prosecutors."[34]

However, the prosecutor's duty as an advocate is tempered by their minister of justice role. In conducting their case, the ethical prosecutor must be "accurate, fair and dispassionate in conducting the prosecution and in addressing the jury."[35] Their loyalty to the proper administration of justice requires them "to rise above the fray and to ensure their communications and conduct are characterized by '[f]airness, moderation, and dignity.'"[36] Put simply, while Crown attorneys "must present the case for the prosecution to the best of their ability," they must always "[act] in furtherance of the duties entrusted to their office."[37]

This minister of justice–vigorous advocate duality is recognized in the rules of professional conduct, which reinforce *Boucher* ("[w]hen engaged as a prosecutor, the

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26 *McNeil*, *supra* note 14 at para 49.

27 *R v Kahsai*, 2023 SCC 20 at para 51 [*Kahsai*].

28 See e.g. *R v Gruenke*, [1991] 3 SCR 263 at 295 ("[o]ne of the primary aims of the adversarial trial process is to find the truth"); *Cook*, *supra* note 10 at para 21 ("it is well recognized that the *adversarial process* is an important part of our judicial system and an accepted tool in our search for the truth" [emphasis in original]).

29 *Kahsai*, *supra* note 27 at para 52.

30 *Ibid*, quoting Fairburn JA in *R v Walker*, 2019 ONCA 765 at para 63.

31 See especially *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 3, Moldaver J ("trials are not — nor are they meant to be — tea parties"). See also *R v Baltrusaitis*, 2002 CanLII 36440 at para 34 (ONCA), Moldaver JA ("[t]his was not a tea party, it was a murder trial. Counsel were entitled to put their best foot forward and they did").

32 *Savion*, *supra* note 9 at 289.

33 *Charest*, *supra* note 9 at 81. See also Bruce A MacFarlane, "Wrongful Convictions: Is It Proper for the Crown to Root Around, Looking for Miscarriages of Justice?" (2012) 36:1 Manitoba LJ 1 at 2–3.

34 *Supra* note 9 at para 71.

35 *Pisani v R*, 1970 CanLII 30 at 740 (SCC).

36 *R v AB*, *supra* note 9 at para 72, citing *Public Prosecution Service of Canada Deskbook*, Catalogue No J79-2/2014E-PDF (Ottawa: PPSC, 2022), s 2.2 at 3, online (pdf): [perma.cc/5UZ6-V94C] [*PPSC Deskbook*].

37 *Bain*, *supra* note 3 at 118.

lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits"),[38] while also emphasizing resolute advocacy ("[w]hen 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").[39] Similarly, provincial and federal Crown manuals and policies highlight the importance of both the prosecutor's overarching obligation to seek justice as well as the expectation that they will act as a strong advocate. Consistent with *Boucher*, such policies tend to emphasize the "minister of justice" role Crown prosecutors embody. Take, for example, the following statement on the role of the Crown from the *Public Prosecution Service of Canada Deskbook* (*PPSC Deskbook*):

> As quasi ministers of justice, Crown counsel's primary interest is not to secure a conviction, rather, it is to pursue justice. In doing so, Crown counsel represent the public interest. They are not lawyers for the police, the victims, or the accused.… Crown counsel are subject to ethical obligations that differ from those of other litigants. Fairness, moderation, and dignity should always characterize Crown counsel's conduct during litigation.[40]

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[38] Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2024), Rule 5.1-3, commentary 1, online (pdf): [perma.cc/Q5H3-5CDM] [*Model Code*].

[39] *Ibid*.

[40] *PPSC Deskbook*, *supra* note 36, s 2.2(2) at 3 [footnote omitted]. See also British Columbia Prosecution Service, *Crown Counsel Policy Manual*, STA-1: Standards of Conduct for BC Prosecution Service Employees (Victoria: BCPS, 18 December 2023) at 1–2, online (pdf): [perma.cc/U7DM-KFW7] (quoting Rand J in *Boucher, supra* note 7 at 23–24); Alberta Crown Prosecution Service, *Crown Prosecutors' Manual: Code of Conduct for Crown Prosecutors* (Edmonton: Alberta Justice, 4 May 2022) at 7 online (pdf): [perma.cc/LT5Y-WE78] [*ABCPS Code*] (also quoting *Boucher*); Ontario, Ministry of the Attorney General, *Crown Prosecution Manual* (Toronto: MAG 2017), Preamble, online (pdf): [perma.cc/2EU6-LVGV] [ON, *Crown Prosecution Manual*]:

> Public confidence in the administration of criminal justice is strengthened by a system where Prosecutors are not only strong and effective advocates for the prosecution but also Ministers of Justice with a duty to ensure that the criminal justice system operates fairly to all: the accused, victims of crime and the public. A Prosecutor's role excludes any notion of winning or losing. A Prosecutor's responsibilities are public in nature. As a Prosecutor and a public representative, demeanor and actions should be fair, dispassionate and moderate; show no signs of bias; and be open to the possibility of the innocence of the accused person.

New Brunswick, Office of the Attorney General, *Public Prosecution Operational Manual*: *Conduct of Crown Prosecutors*, Policy 17 (Fredericton: OAG, 1 September 2015) at 1, online (pdf): [perma.cc/J92U-K45B] (quoting *Boucher*, *ibid*); Nova Scotia Public Prosecution Service, *Preface to Prosecution Policy Section and Commentary on the Role of a Crown Attorney* (Halifax*:* NSPPS, 1 February 2011) at 3, online (pdf): [perma.cc/NMW8-2MWJ] (also quoting *Boucher*); Prince Edward Island, *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island* (Charlottetown: Department of Justice and Public Safety, November 2009) at 6-8, online (pdf): [perma.cc/8873-Y2TD] [PEI, *Guide Book*] (quoting Rand J in *Boucher*, *ibid*); Quebec, Director of Criminal and Penal Prosecutions, *Directives du directeur des poursuites criminelles et pénales*: *Préambule et principes directeurs*, (Quebec City: DPCP) at 9–10, online (pdf): [perma.cc/H6P9-48TP] [QC*, Guiding Principles*] (also quoting *Boucher*):

> On ne saurait trop répéter que le procureur ne doit pas rechercher une condamnation, mais qu'il a plutôt le devoir de s'assurer que justice soit rendue à l'issue d'un procès équitable. Il n'est pas l'avocat de la victime et ne représente pas non plus les policiers, les plaignants ou les témoins. Guidé par l'intérêt public dans l'application de la règle de droit, il n'a pas de cause à gagner, son rôle consistant à présenter au tribunal, au nom de l'État, toute preuve disponible, pertinente et légalement admissible contre un contrevenant.
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> It cannot be overstated that the prosecutor must not seek conviction, but rather has the duty to ensure that justice is done following a fair trial. They are not the victim's lawyer and do not represent the police, the complainants, or the witnesses. Guided by the public interest in respect for the rule of

In addition, the policies tend to highlight the importance of vigorous advocacy. Alberta's *Code of Conduct for Crown Prosecutors*, for instance, confirms that Crown prosecutors "are fully entitled to be strong advocates within the adversarial process," as well as to "press fully, firmly, and to the best of their ability all legitimate arguments tending to establish guilt."[41] However, like in the case law, Crown policies are clear that the prosecutor's duty of resolute advocacy is restrained by their quasi-judicial position. For this reason, prosecutors "should not consider litigation as a personal contest of skill or professional pre-eminence"[42] and, indeed, should always remember that their role, in the language of Justice Rand in *Boucher*, "excludes any notion of winning or losing."[43]

It is important to note that *Boucher* is not merely aspirational, nor does it solely represent a guiding principle informing all aspects of Crown practice. Instead, the delicate balance struck between the pursuit of truth and vigorous advocacy has manifested in specific obligations and limits on prosecutorial conduct at both the pre-trial and trial stages. Indeed, as noted by Alice Woolley, "[t]he 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."[44] These duties have been articulated in case law, the rules of professional conduct, and the various Crown policies and manuals.

At the pre-trial stage, a prosecutor's ethical obligations will, for example, impact the decision whether to move forward with a prosecution. Indeed, in *Proulx v. Quebec (Attorney General)*, Justices Iacobucci and Binnie observed that a relatively high bar for initiating a prosecution (that is, a "reasonable" or "realistic" prospect of conviction) is

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law, they do not have a "case to win". Their role consists of presenting to the adjudicator, in the name of the State, all available evidence against an accused that is relevant and admissible [translated by author].

See also Quebec, Director of Criminal and Penal Prosecutions, *Directives du directeur des poursuites criminelles et pénales*: *Accusation – Décision d'intenter et de continuer une poursuite*, ACC-3 (Quebec City: DPCP, 11 December 2024) at 7, online (pdf): [perma.cc/5MAU-2ZVP] [QC, *Decision to Prosecute*] ([a]vant d'entreprendre une poursuite, le procureur doit être convaincu, sur le fondement de son analyse objective de la preuve, qu'un juge ou un jury impartial et bien instruit en droit pourrait raisonnablement conclure à la culpabilité du suspect à l'égard de l'infraction révélée par la preuve. Il doit conserver cette conviction tout au long des procédures, tant en première instance qu'en appel) ([b]efore launching a prosecution, the prosecutor must be convinced, based on their objective analysis of the evidence, that a judge or an impartial jury properly instructed on the law could reasonably conclude that the accused is guilty of the offence alleged on the evidence. This belief must be upheld throughout the criminal procedure, as much at first instance as on appeal [translated by author]). See also *ibid* at 8 ("[l]orsque le procureur considère qu'il existe une perspective raisonnable de condamnation au sens du paragraphe 9, il doit en principe intenter une poursuite, à moins… qu'il juge inopportun de le faire dans l'intérêt public") ("[o]nce the prosecutor believes that there exists a reasonable likelihood of conviction (as outlined in paragraph 9), they are under a duty to prosecute unless … they find that to proceed would not be in the public interest" [translated by author]).

41 *ABCPS Code*, *ibid* at 8. See also PEI, *Guide Book*, *ibid* at 6-3. See also Newfoundland and Labrador, *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* (St Johns: Department of Justice and Public Safety, 2022) at 3-2, online (pdf): [perma.cc/C3KD-D66H] [NL, *Guide Book*] ("vigour and thoroughness are important qualities in Crown Attorneys").

42 *PPSC Deskbook*, *supra* note 36, s 2.2(2) at 3. See also NL, *Guide Book*, *ibid* at 3-2 ("[c]riminal litigation on the part of the Crown, however, should not become a personal contest of skill or professional pre-eminence" [footnote omitted]).

43 ON, *Crown Prosecution Manual*, *supra* note 40, Preamble.

44 Woolley, *supra* note 4 at 805.

required and that anything less "would be incompatible with the prosecutor's role as a public officer charged with ensuring justice is respected and pursued."[45] For essentially the same reason, a prosecutor may not enter into a resolution agreement "in circumstances where there is no reasonable prospect of conviction"[46] or where "the accused claims to be innocent."[47] Additionally, from the very outset of proceedings, Crown attorneys are required to make timely decisions on files so as not to subject an accused person to significant delay.[48] Another pre-trial obligation that has been recognized as intimately tied to the quasi-judicial role of the Crown is the continuing obligation, as articulated by the Supreme Court in *R. v. Stinchcombe*, to disclose all relevant, non-privileged information to the accused in a timely manner.[49] In that case, Justice Sopinka relied upon the prosecutor's "minister of justice" role in affirming the Crown's obligation to disclose, noting that "the fruits of the investigation which are in the possession of counsel for 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."[50]

There are also specific ethical limitations stemming from *Boucher* placed on Crown attorneys during the trial itself. They are not permitted, for example, to engage in abusive or demeaning cross-examination,[51] nor to express their opinion as to an accused's guilt or innocence or "the credibility of any witness."[52] They must make the appropriate inquiries regarding any potentially relevant evidence,[53] as well as always "[remain] open to theories

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45 *Proulx*, *supra* note 10 at para 31. Contrast with British Columbia, where the test is higher, requiring "a substantial likelihood of conviction": British Columbia Prosecution Service, *Crown Counsel Policy Manual: Charge Assessment Guidelines*, CHA-1 (Victoria: BCPS, 18 December 2023) at 2, online (pdf): [perma.cc/5BZA-C8BC]; *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2010 BCCA 539 at para 53 ("[t]he Crown approval standard in British Columbia is a substantial likelihood of conviction"). Manitoba requires a "reasonable likelihood of conviction": Manitoba Prosecution Service, *Policy Directive: Laying, Staying and Proceeding on Charges*, 2:INI:1.1 (Winnipeg: MPS, June 2017), online (pdf): [perma.cc/YUG8-3T6P].

46 *PPSC Deskbook*, *supra* note 36, s 2.2(3) at 5. See also Nova Scotia Public Prosecution Service, *Resolution Discussions and Agreements*, (Halifax: PPS, 3 February 2021), online (pdf): [perma.cc/2HKN-DZ2V] [NS, *Resolution Discussions*].

47 NS, *Resolution Discussions*, *ibid* at 4. See also PEI, *Guide Book*, *supra* note 40 at 8-5. See conversely *Model Code*, *supra* note 38, Rule 5.1-8(c) (defence counsel can only make a plea agreement with the Crown if, among other things, "the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged"). See also *ibid*, Rule 5.1-8, Commentary 1 ("[t]he public interest in the proper administration of justice should not be sacrificed in the interest of expediency").

48 *PPSC Deskbook*, *supra* note 36, s 2.2(3) at 5.

49 *Stinchcombe*, *supra* note 1 at 339. See also *Model Code*, *supra* note 38, Rule 5.1-3, Commentary 1 ("[t]he prosecutor … 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").

50 *Stinchcombe*, *ibid* at 333.

51 *R v Ahmed*, 2015 ONCA 751 at paras 39, 41. This does not mean, however, that a strong cross-examination is not a tool available to Crown attorneys: see e.g. *Regina v Logiacco*, 1984 CanLII 3459 at 383–384 (ONCA), Cory JA:

> There is no doubt that cross-examination is a very powerful weapon in the hands of a skilled and well-prepared advocate. 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.

52 *Charest*, *supra* note 9 at 81–82; See also *ABCPS Code*, *supra* note 40 at 8 ("[i]t is improper for Crown prosecutors to express personal opinions as to the accused person's guilt or innocence, or as to the credibility of any witness"); PEI, *Guide Book*, *supra* note 40 at 6-4; NL, *Guide Book*, *supra* note 41 at 3-4 to 3-5.

53 *PPSC Deskbook*, *supra* note 36, s 2.2(4) at 7.

put forward by the defence."[54] Moreover, Crown prosecution manuals emphasize the importance of understanding factors that tend to promote wrongful convictions, such as eyewitness misidentification and false convictions. As the *PPSC Deskbook* explains, "[i]t is … crucial that Crown counsel are aware of the factors and circumstances that have been identified as common in wrongful conviction cases, and *take all necessary steps within their mandate* to help ensure that innocent persons are not convicted of crimes they did not commit."[55] As towards the court, prosecutors also have a duty of "candour"[56] in the sense that they must bring all relevant cases and authorities (at least those known to counsel) to the court's attention, even — and perhaps especially — those contrary to the Crown's position.[57] Further, they may not mislead the court, whether purposefully or through their own inadvertence.[58] Frater has directly linked this important responsibility to the Crown attorney's overarching commitment to justice:

> The prosecutor's obligation to the administration of justice in communicating information is best described as a duty of candour. Respecting the duty of candour involves disclosing information to the judge and the defence in a manner that permits them to perform their assigned roles. The prosecutor must strive to communicate clearly with the court, so that the court is not misled through inadvertence. Being overly-selective with the information, or surrendering information only when prompted by specific questions, are not the hallmarks of a candid prosecutor.[59]

In our view, these oft-articulated Crown obligations demonstrate that *Boucher* is not a mere platitude but, instead, an imperative that underlies all stages of a prosecution. Indeed, Justice Rand's classic articulation of the role of the Crown appears to manifest not only in the general approach to be taken by Crown attorneys, in the sense that it demands trial Crowns always act in furtherance of the proper administration of justice, but also in particular and specific duties which tend to ensure fairness and integrity throughout trial proceedings. At both the general and specific levels, *Boucher* not only creates obligations for Crown attorneys but also creates ethical parameters that tend to limit available routes to conviction.

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54 *PPSC Deskbook*, *supra* note 36, s 2.2(3) at 6. See also PEI, *Guide Book*, *supra* note *40* at 6-4; NL, *Guide Book*, *supra* note 41 at 3-3 to 3-4 ("Crown Attorneys can discharge this duty … by remaining open to alternative theories put forward by the defence").

55 *PPSC Deskbook*, *supra* note 36, s 2.4(1) at 2 [emphasis added]. See also British Columbia Prosecution Service, *Crown Counsel Policy Manual*: *Guiding Principles*, GUI-1 (Victoria: BCPS, 20 May 2022) at 6–7, online (pdf): [perma.cc/D2VF-A9XY]; New Brunswick, Office of Attorney General, *Public Prosecutions Operational Manual*: *Case Consultation and Risk Management Committee*, Policy 10 (Fredericton: OAG, 1 September 2015) at 1, online (pdf): [perma.cc/DWE3-X84X] ("[t]he Crown Prosecutor has a responsibility to prevent wrongful convictions"); PEI, *Guide Book*, *supra* note 40 at 6-4 and 6-7 to 6-8. See also NL, *Guide Book*, *supra* note 41 at 3-3 ("Crown Attorneys can discharge [the duty to be fair and to appear to be fair] … by being conscious of the factors that can lead to wrongful convictions, such as false confessions and mistaken eyewitness identification").

56 Frater, *supra* note 12 at 189.

57 See e.g. *PPSC Deskbook*, *supra* note 36, s 2.2(3) at 5 ("[b]ringing all relevant cases and authorities known to counsel to the attention of the court, even if they are contrary to the Crown's position"); PEI, *Guide Book*, *supra* note 40 at 6-4, 6-5. Compare *Model Code*, *supra* note 38, Rule 5.1-2(i) ("[w]hen acting as an advocate, a lawyer must not … deliberately refrain from informing a tribunal of any *binding* authority that the lawyer considers to be directly on point and that has not been mentioned by another party" [emphasis added]).

58 See e.g. *PPSC Deskbook*, *ibid*; *ABCPS Code*, *supra* note 40 at 12.

59 Frater, *supra* note 12 at 189 [footnotes omitted].

III. THE ROLE OF THE CROWN ON APPEAL — DOES *BOUCHER* APPLY?

As demonstrated above, the ethical obligations of Crown prosecutors at both the pre-trial and trial stages have been clearly delineated. Interestingly, however, comparatively little has been written about how these obligations translate in the context of appeals. Indeed, the language from case law and the rules of professional conduct are largely non-specific as to the nature of the Crown's role at the appellate stage.

While it may seem intuitive that the impact of *Boucher* on prosecutions would be substantially undercut if it did not also apply to appeals, the case law is not particularly clear on this point. For example, in *R. v. Regan*, Justice Binnie stated that "[i]t is clear that Crown Attorneys perform an essential '[m]inister of [j]ustice' role *at all stages of their work*"[60] as well as that the responsibility "attaches to the Crown Attorney in *all dealings* in relation to an accused person whether before or after charges are laid."[61] This could be an indication that a prosecutor's *Boucher* obligations extend into the appeal phase. However, these observations were made alongside a reference to the importance of the Crown attorney's "role in considering or carrying forward a prosecution,"[62] which could, alternatively, suggest that the Crown's "minister of justice" obligations end at the conclusion of trial or sentencing. Similarly unclear are the rules of professional conduct specific to Crown attorneys. For instance, the commentary to Rule 5.1-3 of the *Model Code of Professional Conduct*, which elaborates on the duties of a "prosecutor," identifies the prosecutor's "primary duty" as "to see that justice is done through *a fair trial* on the merits,"[63] and omits any mention of obligations arising on appeal.

However, we argue that *Boucher*'s endorsement of the Crown prosecutor as a quasi-judicial "minister of justice" does — and, indeed, *must* — apply with equal force on appeal. In support of this position, we rely in part upon a semi-recent line of appellate cases out of Nova Scotia that explicitly affirm *Boucher*'s application on appeal, as well as case law that appears to implicitly recognize its application. Further, we point to several specific obligations which have been recognized as applying to appellate Crowns. These obligations parallel some of the pre-trial and trial obligations canvassed earlier in this article, which, as discussed, flow directly from the Crown attorney's quasi-judicial role as articulated in *Boucher*.

We begin with the single line of case law that explicitly recognizes *Boucher*'s application on appeal. In the 2010 decision of *R. v. Morton*, Chief Justice MacDonald emphasized that, on appeal, the Crown has a "duty to ensure that the appellant is treated fairly."[64] In doing so, he relied upon Justice Rand's articulation of the role of the Crown in *Boucher* and noted that "[t]his important tradition exists in Nova Scotia and it includes crown attorneys who handle criminal appeals."[65] This statement on appellate Crown obligations has, since *Morton*, been consistently cited by the Nova Scotia Court of

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60 *Regan*, *supra* note 11 at para 151, Binnie J, dissenting [emphasis added]. The majority reasons per Justice Lebel do not appear to disagree on this point and cite *Boucher* approvingly (*ibid* at para 65).

61 *Ibid* at para 155, Binnie J, dissenting [emphasis added].

62 *Ibid* at para 151, Binnie J, dissenting [emphasis added].

63 *Model Code*, *supra* note 38, Rule 5.1-3, commentary 1 [emphasis added].

64 *R v Morton*, 2010 NSCA 103 (in chambers) at para 18 [*Morton*].

65 *Ibid* at para 19.

Appeal.[66] This line of cases, all involving unsuccessful *Rowbotham* applications, clearly affirms a specific duty of fairness in the context of the Crown's obligation to ensure a fair appeal for self-represented litigants. However, it could also be more broadly construed to recognize the application of *Boucher* more generally on appeal — namely, that the principles of fairness and truth-seeking that characterize the Crown's role at trial are equally relevant leading up to and during an appeal. After all, a duty to ensure a fair trial would be undercut if there were no parallel duty to ensure a fair appeal. Unfortunately, *Morton* has not yet been considered by a court outside of Nova Scotia, nor outside the context of a *Rowbotham* application within that province, making it difficult to determine with certainty just how broadly its application can be characterized.

However, a broad application of *Boucher* at the appeal stage is, in our view, consistent with the language used by courts across Canada when discussing the role of the Crown on appeal. Take, for instance, the recent Alberta case of *R. v. Favel*.[67] The appellant, who had been convicted of possessing methamphetamine for purposes of trafficking, appealed his conviction on the ground that the trial judge conducted the trial in a way that gave rise to the appearance of unfairness. Justice Wakeling, in his concurring judgment, commended the appellate Crown for "underst[anding] his role as representative of the Crown and fairly assess[ing] the trial judge's conduct when the panel asked him pointed questions about this."[68] In our view, these cases demonstrate a recognition that the Crown's overarching commitment to justice, as espoused in *Boucher*, must continue into the realm of appellate advocacy.

This position is reinforced by specific duties owed by the Crown on appeal, as recognized in case law and legal ethics literature. These obligations are relevant because they directly parallel certain duties owed by the Crown at the pre-trial and trial stages, which, as discussed above, stem from the Crown's quasi-judicial role as a "minister of justice." The first is the Crown's duty to disclose all relevant information. The case law is explicit that the disclosure obligations of the Crown, as recognized in *Stinchcombe*, continue on appeal.[69] In *R. v. Trotta*, for example, Justice Doherty stated that he saw "no

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[66] See e.g. *R v Frank*, 2012 NSCA 114 at para 26; *R v Thompson*, 2014 NSCA 111 at para 9; *R v Sykes*, 2014 NSCA 4 at para 26; *R v Bou-Daher*, 2014 NSCA 82 at para 34; *R v McKenna*, 2015 NSCA 36 at para 17; *R v Martin*, 2015 NSCA 82 at para 18 [*Martin*]; *R v LEB*, 2016 NSCA 71 at para 6; *R v McPherson*, 2018 NSCA 87 at para 42; *R v Marr*, 2020 NSCA 30 at para 23.

[67] 2024 ABCA 243 [*Favel*].

[68] *Ibid* at para 61. See also e.g. *R v Harrison*, 2009 ONCA 386 at para 1 ("[o]n the conviction appeal, the Crown acknowledges that the trial judge erred in admitting the record of arrest but submits that the error was harmless"). See also *R v Myrden*, 1992 CanLII 2490 (NSCA), erratum ("Crown counsel forthrightly admits that the trial judge erred in his summation of her evidence although the trial judge may simply have confused the name of that witness with another"). See also *R v Caruk*, 2007 ONCA 400 at para 1 ("[t]he Crown rightly concedes that the trial judge erred in admitting the appellant's statement to the police officer without holding a *voir dire* or without a clear waiver"). See e.g. *R v MRH*, 2015 ONCA 853 at para 9 ("[o]n this appeal, the Crown concedes that the trial judge erred in admitting into evidence and relying on the … hearsay statement…. However, the Crown submits that the court should apply the curative proviso … on the basis that the error was harmless and could not have affected the verdict"); *Mayuran c R*, 2011 QCCA 1823 at para 27 (rev'd on other grounds, 2012 SCC 31) ("[t]he Crown admits that the trial judge erred in her instructions on this point. It argues, however, that the error could have had no impact on the verdict, since Appellant testified in her own defence and was obviously not believed by the members of the jury"). See also *R v PN*, 2021 NSCA 68 at para 51 ("[t]he Crown concedes that the trial judge erred in admitting extrinsic misconduct evidence, but it says its introduction had no impact on his decision because he placed no reliance on it").

[69] *McNeil*, *supra* note 14 at para 17; *R v Trotta*, 2004 CanLII 60014 (ONCA) at paras 20–25 [*Trotta*]; *R v James*, 2006 NSCA 57 at para 53; *R v Singh*, 2010 ONCA 11 at paras 36–37; *R v Meer*, 2015 ABCA 163 at para 8 [*Meer*].

reason why the Crown's disclosure obligations should not continue through the appellate process," given that "[t]he protection of the innocent is as important on appeal as it is prior to conviction."[70] Notably, this is true even though, on appeal, the presumption of innocence has often been displaced by a conviction, and the convicted person will have "also exhausted [their] right to make full answer and defence."[71] Disclosure facilitates the statutory measures in the *Criminal Code* that "are all designed to maximize protection against wrongful convictions."[72] Thus, after conviction and during the appeal process, the Crown has a duty to disclose any non-privileged information in its possession that "may assist the appellant in prosecuting an appeal."[73] Notably, as Justice Griffin put it in *R. v. Johnston*, this continuing duty of disclosure "is consistent with the broad duty on the Crown as a faithful officer of the court, entrusted with seeing that justice is served."[74]

Another element of appeal fairness contiguous with Crown duties at trial is the Crown's duty of candour to the court.[75] At the appellate stage, just as at trial, the Crown has a "well-recognized duty to bring relevant authorities to the court's consideration."[76] Perhaps more striking is the Crown's duty "to bring to the attention of an Appeal Court any errors of fact which may be in favour of the accused."[77] Like disclosure, these duties tend to provide at least some protection against wrongful convictions and generally enhance the truth-seeking and error-correcting function of criminal appeals, consistent with the Crown attorney's quasi-judicial role. A similar basis grounds appellate Crowns' duty to assist self-represented appellants in criminal matters. On appeal, at least where the Crown is acting as respondent and the appellant is self-represented, the appellate Crown must "assist the Court in ensuring that the appellant receives a fair appeal."[78] This includes, where the self-represented appellant overlooks an important argument, an obligation to bring that oversight to the court's attention.[79]

Similarly, it is not particularly surprising that state delay on an appeal is generally problematic in the same way as delay in the initial prosecution: the Crown has a "responsibility to prosecute the case *and the appeal* with reasonable dispatch."[80] Indeed,

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70 *Trotta*, *ibid* at para 22.

71 *Ibid* at para 23.

72 *Ibid* at para 24; RSC 1985, c C-46, s 683(1) [*Criminal Code*].

73 *McNeil*, *supra* note 14 at para 17; *Meer*, *supra* note 69 at para 8; *R v Ivezic*, 2020 ONCA 621 at para 8; *R v Schirmer*, 2022 BCCA 214 at para 54.

74 2019 BCCA 107 at para 60.

75 This duty is in addition to the general duty of candour that applies to all lawyers. See e.g. *Model Code*, *supra* note 38, Rule 5.1-1 ("[w]hen 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").

76 *R v Mennes*, 2013 ONCA 567 at para 10, leave to appeal to SCC refused, 35763 (15 May 2014). See also *R v ABC*, 2023 NSCA 39 (in chambers).

77 *R v Rafferty*, 1983 ABCA 106 at para 4 [*Rafferty*].

78 *Morton*, *supra* note 64 at para 19. See also *Martin*, *supra* note 66 at para 28.

79 *R v Publicover*, 2020 NSCA 67 (in chambers) at para 23. This duty may apply even when the appellant is represented. See e.g. *R v Dominic*, 1991 CanLII 331 at 2 (BCCA): "In filing the factum for the respondent counsel for the Crown, with commendable fairness, raised a number of issues which might have been raised by the appellant. As a result, counsel for the appellant filed a supplementary factum which raised those issues of reversible error. They caused us to direct that a new trial be held." See similarly *R v Bush*, 1999 BCCA 428 at para 4: "Shortly before the date set for the hearing of the appeal on 2 June 1999, Mr. W.J. Scott Bell, Crown counsel, drew to the attention of Mr. T.E. La Liberté, the appellant's counsel, the existence of another possibly determinative ground of appeal. In so doing Mr. Bell acted in accordance with the high standard of conduct expected of Crown counsel. He is to be commended for his fairness."

80 *R v Ushkowski*, 1991 CanLII 11757 at 425 (MBCA) [emphasis added].

where the Crown fails to bring an appeal with "reasonable diligence," leave to appeal may be refused where it would otherwise have been granted.[81] Similarly, it has been observed that, due to the "vast array of investigative and administrative machinery" at the Crown's disposal, when compared to the resources of the accused, only rarely will courts exercise their discretion to extend the time for service on a Crown appeal.[82] At the same time, the case law recognizes that the decision to appeal is a serious step that should be taken carefully but not too slowly. For instance, in *R. v. Antonangeli*, Justice MacPherson of the Court of Appeal for Ontario observed that "[t]he Crown should be encouraged not to jump quickly and launch appeals without truly careful reflection. A good, careful decision-making process … will require a few days to produce a considered final decision."[83] Despite this recognition of the importance of a good process, the British Columbia Court of Appeal has been explicit that such processes "cannot be used as an excuse for acting slowly in relation to what must be considered to be a simple appeal."[84]

Together, we argue that the above authorities on Crown attorneys' ethical obligations on appeal, both general and specific, constitute compelling support for the proposition that *Boucher* does indeed extend into the realm of criminal appeals. In a general sense, we mean that Crown attorneys must embody a "quasi-judicial" approach equally to their appellate work, just as they do in preparation for and during trial. In this sense, on appeal, Crown attorneys must carry out their work in furtherance of the proper administration of justice, as opposed to in a purely adversarial, outcome-oriented fashion. As to *specific* ethical requirements, just as the general spirit of *Boucher* has led to the recognition of specific duties at the pre-trial and trial phases, so too, in our view, has it resulted in *Boucher*-like appellate requirements, such as promptly launching Crown appeals, making timely disclosure, and being candid with the appellate court.

Against this general ethical context, however, the answers to further, undoubtedly important questions become less clear or have less often been addressed. In the remainder of this paper, we attempt to provide an answer to three such questions:

When may an appellate Crown bring an appeal from an acquittal or from a sentence?

1. When may an appellate Crown make concessions or abandon an appeal?

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81 *R v Walsh*, 1998 CanLII 5574 at para 2 (ONCA).

82 *R v Finley*, 1995 ABCA 347 at para 1 [*Finley*]. See also para 1: "In the absence of attempts by the accused to evade service or some other circumstance beyond the Crown's control, it will be a rare day (if ever) that this Court will exercise its discretion to extend the time for service on a Crown appeal." But see *R v Chan*, 2012 ABCA 250 (in chambers) at paras 26–27:

> There are some statements in the case law suggesting that the Crown has a very high hurdle to overcome in obtaining an extension of time to appeal.… If the case law is read as a whole, the issue often comes down to whether the record demonstrates reasonable diligence by the Crown in appealing and attempting to serve the respondent. This is essentially a question of fact, which falls to be determined on the efforts made by the Crown, considering the entire context. There are no rules of law that particular facts always disentitle the Crown to an extension.

See also *R v Smart*, 2013 ABCA 442 (in chambers) at para 8: I agree with the decision of my colleague, Slatter JA, in *R. v Chan*, 2012 ABCA 250, and in particular with his observation that the excessive language used in [*Finley*] to the effect that it would be 'a rare day' that the Crown would receive an extension of time to file a Notice of Appeal, is not a correct reflection of the law.

83 2000 CanLII 5721 (in chambers) at para 15 (ONCA).

84 *R v Jordan*, 2014 BCCA 516 (in chambers) at para 16.

2. When may an appellate Crown change position on appeal?

IV. BRINGING A CROWN APPEAL

In Canada, the Crown's authority to launch an appeal is entirely statutory. Specifically, the routes of appeal available to the Crown are contained within the *Criminal Code*. With respect to indictable matters, section 676(1)(a) of the *Criminal Code* provides the Crown with a right to appeal against a judgment or verdict of acquittal on the basis that the trial court made an error of law.[85] As the Supreme Court articulated in *Vézeau v. The Queen*, such Crown appeals will only succeed where "the verdict would not necessarily have been the same if there had been no error in law."[86] The Court further elaborated on this standard in *R. v. Graveline*:

> It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had *a material bearing on the acquittal*. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.[87]

The Crown may also, with leave of the appellate court, launch an appeal against a sentence imposed upon a convicted person.[88] To do so successfully, they must demonstrate that the sentence imposed was either "demonstrably unfit" or based upon an "error in principle."[89]

These *Criminal Code* provisions delineate the scope of the Crown's *authority* to initiate an appeal. However, the case law is explicit that the *decision* to do so falls within prosecutorial discretion.[90] Thus, such decisions will be immune from review by courts or law societies absent "bad faith or dishonesty."[91] This immunity makes it particularly important that the public, the courts, opposing counsel, and especially Crowns themselves have clear direction on the appropriate criteria for making the decision to launch an appeal. However, while the threshold for prosecuting an offence (namely, that such a prosecution has "a reasonable prospect of conviction" and is "in the public interest"[92]) is well-established in the case law, the cases have, to this point, been largely silent on the parallel threshold for bringing a Crown appeal. Indeed, the limited existing instruction on the decision to appeal comes mostly from Crown prosecution manuals. These are, however, instructive, even if not as widely accessible or authoritative as case law. While not

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85 *Supra* note 72, s 676(1)(a).

86 1976 CanLII 7 at 283 (SCC), quoting *Cullen v The King*, 1949 CanLII 7 at 665 (SCC).

87 2006 SCC 16 at para 14 [emphasis added].

88 *Criminal Code*, *supra* note 72, s 676(1)(d).

89 *R v Parranto*, 2021 SCC 46 at para 30.

90 *R v Anderson*, 2014 SCC 41 at para 44 [*Anderson*].

91 *Krieger*, *supra* note 2 at para 51. See e.g. Martin, *supra* note 6.

92 *R v Sciascia*, 2017 SCC 57 at para 31, Moldaver J. See also QC, *Guiding Principles*, *supra* note 40 at 9 ("[l]a norme appliquée par le procureur commande qu'il soit, au terme de son analyse de la preuve, raisonnablement convaincu de pouvoir démontrer hors de tout doute raisonnable la culpabilité du suspect au tribunal. En outre, même lorsqu'il estime la preuve suffisante, le procureur doit aussi évaluer si une poursuite servira l'intérêt public") ("[t]he norm applied by the prosecutor demands that, following their analysis of the evidence, they are reasonably convinced that they can prove the accused's guilt to the adjudicator beyond a reasonable doubt. That said, even if they find the evidence sufficient, the prosecutor must also evaluate if a prosecution serves the public interest" [translated by author]).

amounting to subordinate legislation and lacking independent "force of law,"[93] the Supreme Court has recognized that such manuals "are capable of informing the debate as to whether a Crown prosecutor's conduct was appropriate in the particular circumstances."[94]

It is clear and uncontroversial from these manuals that an appeal may only be brought if it is in the public interest to do so. For example, Ontario's *Crown Prosecution Manual* provides that:

> No Crown appeal may be approved unless it is in the public interest to fix the error *and* the legal basis for an appeal has been satisfied…. Prudence, restraint and a careful attention to the public interest are important principles that guide the Attorney General in reaching a decision whether or not to launch any appeal. Not every unfavourable ruling, judgment or sentence can or should be appealed.[95]

The Manitoba *Public Prosecutions Policy Directive* provides a similar instruction:

> The governing principle in the decision to appeal on behalf of the Crown will be one of restraint. Appeals will only be taken in cases where there is a substantial public interest to be served by bringing the matter before an appellate court. An error of law, in the case of an acquittal, or an unfit sentence will not justify an appeal unless, having regard to the circumstances of the case the public interest requires that an appeal be taken.[96]

These instructions are largely representative of Crown policies across the country. Indeed, virtually all relevant Crown directives emphasize that "[t]he right of the Attorney General to appeal is to be exercised with restraint, in the public interest."[97] Interestingly, the "public interest" comprises one component of the oft-cited two-part test, discussed above, for determining whether the Crown should move forward with a prosecution at the trial level: (1) whether there is a "reasonable" or "realistic" prospect of conviction, and (2) whether prosecution would be in the public interest. However, unlike the test for commencing a

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93 *R v Oland*, 2018 NBQB 253 at para 40.

94 *Anderson*, *supra* note 90 at para 56, Moldaver J for the Court. See also *R v Kocet*, 2015 ONCJ 804 at para 34 ([t]he contents of a Crown policy or guideline may be relevant to consideration of a challenge to the exercise of prosecutorial discretion. While Crown policies and guidelines do not have the force of law, they are capable of informing the debate as to whether a Crown prosecutor's conduct was appropriate in particular circumstances"). But for some cautionary notes, see e.g. *Wilder*, *supra* note 9 at para 8 ("[r]egardless of what the official reasons are for the Crown Counsel Policy Manual, it is my view, that the sections that were referred to me by Mr. Wilder were inserted into the Manual in order to placate the police and the victims of crime").

95 ON, *Crown Prosecution Manual*, *supra* note 40 at D.1 [emphasis added].

96 Manitoba Prosecution Service, *Policy Directive: Appeal Principles and Procedures*, 4:APP:1 (Winnipeg: MPS, 10 October 1990), online (pdf): [perma.cc/Z7SQ-RMTJ] [MB, *Appeals Directive*].

97 Nova Scotia Public Prosecution Service, *Appeals to the Court of Appeal* (Halifax: NSPPS, 4 July 2011) at 1 online (pdf): [perma.cc/F25J-8M2Z] [NS, *Appeals Directive*]. See also e.g. *PPSC Deskbook*, *supra* note 36, s 3.15(2) at 3 ("[o]ver the past 60 years, the courts have signalled the need to show restraint in exercising the right to appeal. Only cases where the public interest is best served by pursuing should be appealed"); British Columbia Prosecution Service, *Crown Counsel Policy Manual*: *Appeal By Crown to the Court of Appeal and the Supreme Court of Canada*, APP-1 (Vancouver: BCPS, 1 March 2018) at 1, online (pdf): [perma.cc/Y5UB-J5YY] [BC, *Appeals Directive*] ("[n]o appeal or application for leave to appeal against acquittal or judicial stay of proceedings will be approved unless … the public interest requires an appeal"); PEI, *Guide Book*, *supra* note 40 at 13-2 ("[i]n most potential appeals, the controlling principle is whether the public interest *requires* an appeal" [emphasis in original]). See also NL, *Guide Book*, *supra* note 41 at 23-2 ("over the past 90 years, the courts have signaled the need to show restraint in exercising the right to appeal. Only cases that the public interest requires pursuing should be appealed").

prosecution, in which a reasonable prospect of conviction is a mandatory, independent requirement, in the case of appeals, the relevance of likely success is not so cut and dried.

In some jurisdictions, the relevant considerations for launching a Crown appeal tend to mirror the test for bringing a prosecution. In Manitoba, for instance, to bring an appeal against either an acquittal or sentence, the Crown must be satisfied both that there is a "substantial public interest to be served by bringing the matter before an appellate court" *and* that there is "a reasonable expectation that [the appeal] will be successful."[98] Similarly, in Prince Edward Island, Crown attorneys contemplating an appeal must consider both whether there is "a proper basis, both in law and on the facts, to believe that the judgment is wrong," as well as whether "the public interest require[s] an appeal."[99] Notably, Prince Edward Island's *Crown Guide Book*, while indicating that these criteria "are similar to those for deciding whether to prosecute," emphasizes that "because of the need to be selective in bringing appeals, the public interest plays a much more important role in the decision to appeal than it does in deciding whether to lay charges."[100] Indeed, it goes as far as to say that, when contemplating launching an appeal, "whether the public interest *requires* an appeal" will be the "controlling principle."[101]

Interestingly, in Quebec, the same test that applies to a reasonable prospect of conviction at trial also applies on appeal :

> Avant d'entreprendre une poursuite, le procureur doit être convaincu, sur le fondement de son analyse objective de la preuve, qu'un juge ou un jury impartial et bien instruit en droit pourrait raisonnablement conclure à la culpabilité du suspect à l'égard de l'infraction révélée par la preuve. Il doit conserver cette conviction tout au long des procédures, *tant en première instance qu'en appel.*[102]

Indeed, the same test explicitly continues to the appeal stage — as does the test for the public interest.[103]

In other jurisdictions, the reasonable prospect of an appeal's success is merely one factor that goes to the public interest inquiry. This is the case in, for instance, Ontario,[104]

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98 MB, *Appeals Directive*, *supra* note 96 at 1.

99 PEI, *Guide Book*, *supra* note 40 at 13-2.

100 *Ibid*.

101 *Ibid* [emphasis in original]. See also NL, *Guide Book*, *supra* note 41 at 23-3 ("the public interest plays a much more important role in the decision to appeal than it does in deciding whether to lay charges. In most potential appeals, the controlling principle is whether the public interest *requires* an appeal" [emphasis in original]).

102 QC, *Decision to Prosecute*, *supra* note 40 at 7 ("[b]efore launching a prosecution, the prosecutor must be convinced, based on their objective analysis of the evidence, that a judge or an impartial jury properly instructed on the law could reasonably conclude that the accused is guilty of the offence alleged on the evidence. This belief must be upheld throughout the criminal procedure, *as much at first instance as on appeal*" [translated by author, emphasis added to original and translation]).

103 *Ibid* at 11 ("[l]'opportunité de continuer une poursuite au regard de l'intérêt public ou de recourir aux mesures de justice alternatives est réévaluée lorsqu'un changement de circonstances le justifie. Dans le cas d'une poursuite, *cette évaluation s'applique tout au long des procédures, tant en première instance qu'en appel*") ("[t]he decision on whether a prosecution is in the public interest or whether alternative measures should be pursued will be re-evaluated whenever justified by changing circumstances. This evaluation continues throughout the proceedings, *as much at first instance as on appeal*" [translated by author, emphasis added]).

104 ON, *Crown Prosecution Manual*, *supra* note 40.

British Columbia,[105] Saskatchewan,[106] and New Brunswick.[107] In these provinces, both "the strength of the Crown's case"[108] and whether there is "a reasonable prospect that the appeal will be successful" are factors that must be considered when determining whether a Crown appeal will be in the public interest.[109] Finally, Crown manuals in certain jurisdictions omit altogether any mention of the prospect of an appeal's success. This is the case in Nova Scotia, for example.[110] The *PPSC Deskbook* is similarly silent as to the relevance of an appeal's likely success in determining whether a potential appeal will be in the public interest.[111]

It is important to note that, regardless of jurisdiction, whether an appeal is likely to be successful is but one of many considerations the Crown must weigh in determining whether bringing an appeal will be in the public interest. Indeed, most provincial Crown manuals provide a list of factors to be considered in each case. Importantly, these factors are different for an appeal from an acquittal than for an appeal from a sentence. When the Crown is seeking to appeal an acquittal, relevant public interest factors include: the seriousness of the alleged error;[112] the gravity of the offence;[113] public safety considerations;[114] any deference owed to a jury verdict;[115] the resources required for an appeal;[116] and the quality of the trial record.[117] The significance of the issue being raised is also an important consideration. When the Crown is considering an appeal, they must consider, for instance, the "potential impact of the decision as a precedent in subsequent prosecutions,"[118] as well as whether courts have differed in their interpretation of the issue at hand.[119] More broadly, they must also consider the impact of the trial decision, if left unchallenged, on the enforcement of criminal law[120] or the administration of "significant government policy initiative[s]"[121] or "systemic racism, systemic discrimination, or the

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105 BC, *Appeals Directive*, *supra* note 97 at 2.

106 Saskatchewan, *Public Prosecutions Policies and Other Documents* (Regina: Justice and Attorney General, 2025) at 3, online (pdf): [perma.cc/XQ4G-MTZ3] [SK, *Appeals Directive*].

107 New Brunswick Office of the Attorney General, *Public Prosecutions Operational Manual: Appeal*s, Policy 31 (Fredericton: OAG, 11 February 2019) at 3-4, online (pdf): [perma.cc/M2LC-CF6H] [*NB, Appeals Directive*].

108 ON, *Crown Prosecution Manual*, *supra* note 40 at 9; SK*, Appeals Directive*, *supra* note 106 at 3, *NB, Appeals Directive*, *ibid* at 4.

109 ON, *Crown Prosecution Manual*, *ibid* at D.1.

110 NS, *Appeals Directive*, *supra* note 97.

111 *PPSC Deskbook*, *supra* note 36, s 3.15.

112 NS, *Appeals Directive*, *supra* note 97 at 1.

113 See e.g. PEI, *Guide Book*, *supra* note 40 at 13-2; ON, *Crown Prosecution Manual*, *supra* note *40* at D.1*; PPSC Deskbook*, *supra* note 36, s 3.15; NL, *Guide Book*, *supra* note 41 at 23-3.

114 See e.g. ON, *Crown Prosecution Manual*, *ibid*; BC, *Appeals Directive*, *supra* note 97 at 2; *NB, Appeals Directive*, *supra* note 107 at 3.

115 See e.g. ON, *Crown Prosecution Manual*, *ibid*; *NB, Appeals Directive*, *ibid* at 4; NL, *Guide Book*, *supra* note 41 at 23-3.

116 See e.g. *PPSC Deskbook*, *supra* note 36*,* s 3.15; PEI, *Guide Book*, *supra* note *40* at 13-2; NL, *Guide Book*, *ibid* at 23-3 ("will the resources required to prepare and present the appeal significantly outweigh the value of pursuing the case further?").

117 See e.g. ON, *Crown Prosecution Manual*, *supra* note 40 at D.1; BC, *Appeals Directive*, *supra* note 97 at 2; NB*, Appeals Directive*, *supra* note 107 at 4.

118 NS, *Appeals Directive*, *supra* note 97 at 1–2. See also *PPSC Deskbook*, *supra* note 36, s 3.15(2.3).

119 See e.g. *PPSC Deskbook*, *ibid*; PEI, *Guide Book*, *supra* note 40 at 13-2; BC, *Appeals Directive*, *supra* note 97 at 2.

120 PEI, *Guide Book*, *supra* note 40 at 13-2; NL, *Guide Book*, *supra* note 41 at 23-3.

121 *PPSC Deskbook*, *supra* note 36, s 3.15(2.3) at 5. See also PEI, *Guide Book*, *supra* note *40* at 13-2; NL, *Guide Book*, *supra* note 41 at 23-3.

overrepresentation of certain groups in the criminal justice system,"[122] as well as "the effect of the legal error on public confidence in the criminal justice system if it is left to stand."[123]

Many of these considerations will apply equally with respect to a potential Crown sentence appeal. However, on the question of initiating a Crown appeal against a sentence, additional public interest considerations arise. These include, for example, the legality of the sentence imposed,[124] as well as whether it was "clearly below the acceptable range of sentence";[125] the position taken by the trial Crown;[126] any sentence imposed upon a co-accused;[127] any time spent in custody pending sentence;[128] whether the sentence was the result of a resolution agreement;[129] and whether the proposed appeal "raises an important question of general application concerning the principles of sentencing."[130]

What does all this mean? While a prosecution is *never* appropriate without a reasonable prospect of conviction, it appears that an appeal can, at least in most jurisdictions, be appropriate without a reasonable prospect of success where other compelling factors exist which favour an appeal, whether from acquittal or sentence. The reasons for this distinction are not immediately obvious — particularly given the explicit recognition in many Crown manuals that not every adverse decision should be appealed and that "restraint" is paramount.[131] Indeed, pursuing a seemingly meritless appeal would seem to contradict the spirit of *Boucher* and its predecessors, which emphasize that the pursuit of truth and justice must remain paramount. Put simply, for a Crown attorney to engage in such an appeal, irrespective of other considerations, raises questions about the Crown's continuing commitment to these fundamental principles.

Thus, we advocate for a departure from this standard. Given the significant basis, canvassed above, that *Boucher* applies with equal force on appeal, the approach to determining whether to launch an appeal must be consistent with the vision of the Crown attorney's role as articulated in that case. In our view, the approach most in keeping with the ethical obligations flowing from *Boucher* is one which considers an appeal's likely success as an independent requirement, as opposed to one subsumed within an analysis of "public interest." In other words, a Crown attorney should decline to proceed with an appeal that does not appear likely to be successful. Where success is unlikely, any "public interest" purpose — signalling or otherwise — is fundamentally weakened and comes at the expense of the acquitted or sentenced person. Where, on the other hand, there is a likelihood of success, the Crown attorney considering launching the appeal should then go on to consider whether, notwithstanding the chance of success, the appeal would be in the public interest.

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122 *PPSC Deskbook*, *ibid*.

123 ON, *Crown Prosecution Manual*, *supra* note 40 at D.1. See also NS, *Appeals Directive*, *supra* note 97 at 2.

124 See e.g. MB, *Appeals Directive*, *supra* note 96 at 2; NS, *Appeals Directive*, *ibid* at 2.

125 PEI, *Guide Book*, *supra* note 40 at 13-3. See also MB, *Appeals Directive*, *ibid* at 2; NS, *Appeals Directive*, *ibid* at 2; NL, *Guide Book*, *supra* note 41 at 23-4.

126 See e.g. MB, *Appeals Directive*, *ibid* at 2; NS, *Appeals Directive*, *ibid* at 2.

127 MB, *Appeals Directive*, *ibid* at 2.

128 *Ibid*.

129 *Ibid*.

130 BC, *Appeals Directive*, *supra* note 97 at 2. See also NS, *Appeals Directive*, *supra* note 97 at 2; NB, *Appeals Directive*, *supra* note 107 at 3.

131 *Supra* notes 95–97 and accompanying text.

Of course, just as the Crown attorney occupies the position of a "minister of justice," we recognize that they also remain a "vigorous advocate" within an adversarial system. Just as it is the responsibility of the trier of fact (whether judge or jury), not the parties, to render a verdict at trial, the proper decision-maker on appeal is the appellate panel. As a result, it would be improper to suggest that Crown attorneys should decline to launch any appeal in which there is a chance they will *not* be successful. This would create too high of a standard, incompatible with the Crown's role and the adversarial process more generally. Instead, we advocate in favour of the approach currently adopted in Manitoba: a requirement, independent of the "public interest" analysis, that there be "a *reasonable expectation* that [the appeal] will be successful."[132] A "reasonable expectation" does not amount to certainty, nor necessarily even confidence. Instead, it requires that Crown appeals be brought in good faith, in circumstances which give rise to a realistic probability of success. This, we argue, is more in keeping with the Crown's *Boucher* obligations, which mandate a balanced approach to justice while acknowledging the adversarial nature of the system.

V. CONCEDING OR ABANDONING AN APPEAL

Against this context of when the Crown can initiate an appeal, we now consider when an appellate Crown can and should concede or abandon an appeal.

The Crown's statutory authority to appeal a trial court outcome is much narrower than that of the accused. Indeed, while the *Criminal Code* permits the Crown to launch an appeal only upon the basis of a question of law or, with leave, the sentence imposed, a convicted person may bring an appeal against conviction surrounding a question of law[133] or, with leave of the appellate court, a question of fact or mixed law and fact[134] or any other "sufficient" ground of appeal.[135] In addition, like the Crown, they can also seek leave to appeal their sentence.[136] As a result, in the vast majority of appeals, the Crown will be the respondent — that is, the party responding to the appeal, as opposed to the party launching one.[137] For this reason, it is equally important that Crown attorneys have clear direction with respect to their authority to *concede* an appeal brought by a convicted person, not just to abandon a Crown appeal.

Surprisingly, the case law appears to be silent as to when the Crown should concede an appeal or a component argument on an appeal. Given that the Crown has a duty to bring factual errors below to the attention of the appellate panel,[138] it would follow that where the convicted person correctly alleges an error by the trial judge, the Crown should concede the error (though not necessarily the impact of that error on the decision below).[139] While there are many reported decisions where the appellate panel commends the Crown's

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132 MB, *Appeals Directive*, *supra* note 96 at 1 [emphasis added].
133 *Criminal Code*, *supra* note 72, s 675(1)(a)(i).
134 *Ibid*, s 675(1)(a)(ii).
135 *Ibid*, s 675(1)(a)(iii). The provision does not elaborate on what a "sufficient ground" means.
136 *Ibid*, s 675(1)(b).
137 *PPSC Deskbook*, *supra* note 36, s 3.15.
138 See *Rafferty*, *supra* note 77 and accompanying text.
139 The same would be true where there is a clear and determinative gap in the evidence. Further discussion on this point will be found at 27, below.

concession of an error by the trial judge,[140] it is unclear when such a concession will be expected or required.

Discussion of the Crown's authority to concede an appeal has largely been confined, as with the Crown's authority to bring an appeal, to Crown manuals and policy documents. Where these documents discuss concessions (and, indeed, several make no mention of them), they are consistent that concessions are *possible*, whether on specific issues or entire appeals. The *PPSC Deskbook*, for instance, notes that appellate Crowns will sometimes be "placed in a situation in which an error of law committed by the trial court is so clear, or the findings of fact so patently unreasonable, that it may raise the possibility that the appeal ought to be conceded."[141]

However, these manuals are also clear that concessions should be rare. Indeed, it has been emphasized that the decision to concede — whether on a particular issue or the appeal as a whole — cannot be "taken lightly."[142] To do so, they instruct, would be inconsistent with the role of the Crown, which is, namely, to "advance all reasonable arguments that may be made to support the decision of the court below, and to leave it to the appellate court to decide whether to allow the appeal."[143] Thus, the test for permitting a Crown concession on appeal appears quite strict. Ontario's *Crown Prosecution Manual*, for example, instructs that an appellate Crown "may concede an appeal only where no reasonable argument can be made to sustain the verdict and/or sentence."[144] Such a

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[140] See e.g. *Adgey v R*, 1973 CanLII 37 at 434 (SCC), Spence and Laskin JJ, dissenting ("[c]ounsel for the Crown very fairly conceded that the trial judge did not deal with the charges *seriatim* and ask [the] accused what he had to say as to each, and also that the entire proceedings were somewhat imperious"). See also e.g. *R v Lifchus*, 1997 CanLII 319 at para 15 (SCC), Cory J for the majority: ("[i]n both its written submissions and during the oral hearing of this appeal, the Crown very fairly and properly conceded that there is good authority for the proposition that Canadian juries should be given a definition of 'reasonable doubt'"). See e.g. *R v Campbell*, 2008 ONCA 199 at para 4, Sharpe, Armstrong & Watt JJA ("[w]ith commendable frankness, Crown counsel has acknowledged that the submission of s. 34(1) [of the *Criminal Code*] to the jury as the sole basis for self-defence, rather than s. 34(2), together with a failure to draw the jury's attention to certain evidence of importance under s. 34(2) but not under s. 34(1), constitutes legal error sufficiently serious to warrant a new trial"). See e.g. *R c Chouinard*, 1992 CanLII 3425 at para 3 (QC CA) ("CONSIDÉRANT que le procureur de la Couronne admet qu'eu égard aux circonstances du présent dossier, la sentence est trop sévère, voire même excessive") ("WHEREAS the Crown prosecutor admits in the present case, the sentence is too severe, and even excessive [translated by author]"). See also *R c Moïse*, 1999 CanLII 13215 at para 79 (QC CA) ("Je rappelle que le juge n'a pas instruit le jury sur cette question parce qu'il était d'avis qu'elle était incompatible avec l'intention de tuer et que le procureur de la Couronne admet qu'il s'agit d'une erreur de droit") ("I am reminded that the judge did not instruct the jury on this question because he believed it was incompatible with intent to kill. The Crown admits that this is an error of law" [translated by author]).

[141] *PPSC Deskbook*, *supra* note 36, s 3.15(4.1) at 6. *S*ee also PEI, *Guide Book*, *supra* note 40 at 13-4. See also NL, *Guide Book*, *supra* note 41 at 23-5 ("[o]n rare occasions, appellate counsel may be placed in a situation in which an error of law committed by the trial court is so clear, or the findings of fact so patently unreasonable, that it may raise the possibility that the appeal ought to be conceded"). See e.g. *R v Labrash*, 2000 ABCA 20 at para 1 ("[t]he Crown concedes this appeal. The trial judge erred in dealing with the prior inconsistent statements of a witness. The verdict, therefore, on this basis alone is clearly unsafe").

[142] *PPSC Deskbook*, *ibid*, s 3.15(4.1) at 6. See also PEI, *Guide Book*, *supra* note 40 at 13-4; NL, *Guide Book*, *supra* note 41 at 23-5 ("[t]he decision to concede an appeal or to concede on a particular issue within the appeal is never one that can be taken lightly" [footnote omitted]).

[143] *PPSC Deskbook*, *ibid*, s 3.15(4.1) at 6. See also PEI, *Guide Book*, *ibid* at 13-4; NL, *Guide Book*, *ibid* at 23-5 to 23-6 ("[a]s a general rule, the Crown Attorney's duty is to advance all reasonable arguments that may be made to support the decision of the court below, and to leave it to the appellate court to decide whether to allow the appeal").

[144] ON, *Crown Prosecution Manual*, *supra* note 40 at D.1. See also NL, *Guide Book*, *ibid* at 23-6: "Generally speaking, it is within the discretion of appellate counsel to concede on a particular issue in

determination can be made only after "a comprehensive and rigorous analysis of the strengths and weaknesses of the case."[145] Further, before making a concession, the appellate Crown "must be satisfied that fairness and the interests of justice are best served by a concession."[146] Similarly, where an appellate Crown seeks to concede a particular issue, they may only do so "where there is no reasonable argument to be made on that issue."[147]

A stringent approach to concessions appears to stem, at least in part, from the Supreme Court of Canada's historic criticism of "improper" concessions. Conceding or withdrawing an appeal, and to a lesser extent conceding a particular issue on an appeal, deprives the court of argument by counsel to assist them in determining the matter. Indeed, Crown manuals often point to *Schachter v. Canada*[148] to justify the narrow, exceptional manner in which concessions must be approached.[149] Interestingly, *Schachter* was not a criminal appeal — instead, it centred upon the equality analysis under section 15(1) of the *Canadian Charter of Rights and Freedoms*.[150] The appeal surrounded an underinclusive maternity benefits scheme which failed to grant natural parents the same benefits as adoptive parents. Chief Justice Lamer began his analysis by emphasizing the Supreme Court's dissatisfaction with the federal Crown's decision to concede a breach of the respondent's equality rights and appeal only the issue of remedy, despite clarifying Supreme Court jurisprudence[151] having been released in the period between the trial and the Crown's appeal.[152] The Chief Justice criticized this choice as "preclud[ing the] Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below," as well as "depriv[ing] the Court of access to the kind of evidence that a s. 1 analysis would have brought to light."[153] According to Chief Justice Lamer, the Crown's concession "essentially le[ft] the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision," placing the Court "in a difficult position in attempting to determine what remedy is appropriate in the present context."[154] This criticism, albeit made outside of the criminal law context, appears to have shaped the cautious stance Crown attorneys are advised to adopt when considering concessions, particularly in complex cases.

It is also worth noting that a Crown attorney's unilateral authority to make a concession appears to depend upon the nature of the concession they seek to make. Generally, it is within the discretion of appellate counsel to concede on a particular *issue* in an appeal without conceding the entire appeal, so long as they are satisfied "there is no reasonable argument to be made on that issue."[155] The exception appears to be where the issue

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an appeal without conceding the appeal itself, where there is no reasonable argument to be made on that issue. Where that issue concerns the constitutional validity of legislation, however, instructions must be sought from the DPP."

145 ON, *Crown Prosecution Manual*, *ibid* at D.1.

146 *Ibid*.

147 *PPSC Deskbook*, *supra* note 36, s 3.15(4.1) at 7; PEI, *Guide Book*, *supra* note 40 at 13-4.

148 [1992] 2 SCR 679 [*Schachter*].

149 See e.g. *PPSC Deskbook*, *supra* note 36, s 3.15; PEI, *Guide Book*, *supra* note 40 at 13-5.

150 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Schachter*, *supra* note 148.

151 The relevant case was *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

152 *Schachter*, *supra* note 148.

153 *Ibid* at 695.

154 *Ibid*.

155 *PPSC Deskbook*, *supra* note 36, s 3.15(4.1); PEI, *Guide Book*, *supra* note 40 at 13-4. See e.g., *R v Ponak*, 1972 CanLII 1540 (in chambers) at 318 (BCCA), Bull JA ("[i]t is clear, and Crown counsel

concerns the constitutional validity of legislation. In such cases, Crown manuals often indicate that consultation with some form of supervisory body will be necessary before an appellate Crown concedes that a statutory provision or common law rule is in some way inconsistent with the Canadian Constitution. For instance, in Prince Edward Island, instructions must be sought from the Director of Prosecutions,[156] whereas, in Ontario, approval must be obtained from the Deputy Attorney General.[157] Where a criminal appeal involves federal charges, before a concession of unconstitutionality can be made, the Public Prosecution Service of Canada requires that instructions be sought from either the Office of the Director of Public Prosecutions (where the constitutionality of *federal* legislation is at issue) or the appropriate Attorney General's office (where the constitutionality of *provincial* legislation is at issue).[158]

Consultation will also be required where appellate counsel is of the view that an appeal should be conceded in its *entirety*. In such cases, Crown manuals suggest that the appellate Crown will generally be required to consult with the original trial Crown and, where appropriate, the police or any other relevant "investigative agency."[159] Further, as with concessions on issues of constitutionality, appellate Crowns seeking to concede an appeal must consult with the appropriate body. Each jurisdiction has its own approach, having designated a specific supervisory body or individual who must be consulted before an appeal may be conceded in its entirety. In Ontario, for example, permission must be sought from the Director of the Crown Law Office – Criminal.[160] Alberta requires that approval be secured from the Deputy Chief Prosecutor of the Appeals Unit,[161] whereas, in Prince Edward Island, consultation with the Director of Prosecutions is required.[162] At the federal level, where a concession is sought in a "significant case," an appellate prosecutor must seek the advice of the corresponding Litigation Committee.[163]

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commendably concedes, that the appeals are not frivolous"). See e.g. *R v Hanemaayer* 2008 ONCA 580 at para 15, Rosenberg JA for the panel:

> With the consent of the Crown, the appellant was granted an extension of time to appeal his conviction. The Crown also agreed that fresh evidence in the form of the results of the police re-investigation and the appellant's affidavit should be admitted into evidence and that the appeal should be allowed. Given the commendable position taken by Crown counsel, these reasons can be brief and need only address two issues: the setting aside of the guilty plea and the identification evidence.

See also e.g. *R v Aikman*, 2019 BCCA 312 (where the appellate Crown conceded that the trial Crown erred in their position that there was no privacy interest under section 8 of the *Charter*, and the trial judge erred by adopting that position, but that the evidence would be admissible under section 24(2)).

156 PEI, *Guide Book*, *supra* note 40 at 13-4.

157 ON, *Crown Prosecution Manual*, *supra* note 40.

158 *PPSC Deskbook*, *supra* note 36, s 3.15(4.1) at 7.

159 *PPSC Deskbook*, *ibid*, s 3.15(4.1) at 7. See also PEI, *Guide Book*, *supra* note 40 at 13-4; ON, *Crown Prosecution Manual*, *supra* note *40*. See also NL, *Guide Book*, *supra* note 41 at 23-6:

> Where a Crown Attorney is of the view that an appeal ought to be conceded, further consultation with the DPP is necessary. Before making such a recommendation, appellate Crown Attorneys should seek the views of the trial Crown Attorney and, where appropriate, the investigative agency. The decision should be discussed with the DPP. Consultation with the Attorney General may be necessary if a concession is considered in a serious and/or high profile case.

160 ON, *Crown Prosecution Manual*, *supra* note 40 at D.1.

161 Alberta Crown Prosecution Service, *Crown Prosecutors' Manual: Appeals*, Practice Protocol (Edmonton: Alberta Justice, 29 January 2024) at 6, online (pdf): [perma.cc/MNJ6-CAVA].

162 PEI, *Guide Book*, *supra* note 40 at 13-4.

163 *PPSC Deskbook*, *supra* note 36, s 3.15(4.1) at 7.

While, as discussed, surprisingly little has been said about concessions, both within and (particularly) outside of Crown manuals and policies, even less guidance has been provided with respect to an appellate Crown's ability to *abandon* their own appeal when it subsequently becomes clear that it lacks merit.[164] What little has been said, however, tends to indicate that the appropriate approach to abandonment largely mirrors that of making concessions. The relevant question when determining whether abandonment would be appropriate appears to be "whether the public interest will best be served by continuing the appeal."[165] Just as with concessions, the abandonment of any appeal must generally be done in consultation with the appropriate designated office. In Nova Scotia, for instance, the appellate Crown must consult with the Chief Crown Attorney (Appeals).[166]

The policies summarized above demonstrate, though perhaps not as clearly as one might hope, when an appellate Crown *can* proceed with a concession or abandonment on appeal. However, what remains less clear, and what we now turn to, is when they *should* or *must* concede or abandon an appeal to comply with their ethical obligations as articulated in *Boucher*. Following *Boucher*, even as narrowed (or clarified) in subsequent case law affirming the importance of vigorous advocacy by the Crown, we argue that Crown attorneys should do so in any situation where conceding or abandoning would further the interests of justice. As at trial, a just outcome on appeal — not victory per se — should be the goal of the Crown.

Such an approach would complement the Crown's obligation, at the pre-trial and trial stages, to continuously assess whether charges should be pursued. For example, a Nova Scotia Trial Directive characterizes the decision whether or not to prosecute as being a "[c]ontinuous [p]rocess":

> Once a decision has been made to prosecute a charge, that decision must be continuously reviewed as new information is received…. If, at any time, a prosecutor concludes that a realistic prospect of conviction no longer exists, or that prosecution is not in the public interest, steps should be taken to discontinue the prosecution as soon as is practicable.[167]

The same logic, in our view, should govern an appellate Crown's decision to abandon or concede an appeal. We would argue that, just as a trial Crown must withdraw charges when

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[164] To date, only Nova Scotia has chosen to include an explicit discussion of abandonment within their Crown policies: see NS, *Appeals Directive*, *supra* note 97 at 3.

[165] NS, *Appeals Directive*, *ibid* at 3. See also *Law Society of Upper Canada v Jonathan Howard Marler*, 2010 ONLSAP 5 at para 17 ("[o]f course, to state the obvious, the Crown … can always abandon an appeal if no appeal is forthcoming from the other party and they decide that a cost-benefit analysis made in the public interest does not compel them to pursue an appeal").

[166] NS, *Appeals Directive*, *ibid* at 3.

[167] Nova Scotia Public Prosecution Service, *The Decision to Prosecute (Charge Screening)*, (Halifax: PPS, 3 February 2021) at 11, online (pdf): [perma.cc/3QPD-ZMFW] [NS, *Decision to Prosecute*]. See e.g. *Law Society of Saskatchewan v Clements*, 2022 SKLSS 1, as discussed in Martin, *supra* note 6 at 48–50, where a Crown attorney committed conduct unbecoming by deliberately failing to seek a stay of charges despite his determination that there was no longer a reasonable prospect of conviction. See also e.g. QC, *Decision to Prosecute*, *supra* note 40 at 11 ("[l]'opportunité de continuer une poursuite au regard de l'intérêt public ou de recourir aux mesures de justice alternatives est réévaluée lorsqu'un changement de circonstances le justifie. Dans le cas d'une poursuite, cette évaluation s'applique tout au long des procédures, tant en première instance qu'en appel") ("[t]he decision on whether a prosecution is in the public interest or whether alternative measures should be pursued will be re-evaluated whenever justified by changing circumstances. This evaluation continues throughout the proceedings, as much at first instance as on appeal" [translated by author]).

the test for prosecution is no longer met,[168] an appellate Crown should abandon a Crown appeal when the test for bringing said appeal can no longer be met. This, as discussed above, comes down — or should come down — to one or both of two distinct considerations. First, where there is no longer a "reasonable" or "realistic" expectation that the appeal (or a particular ground or aspect of the appeal) will be successful, it should be abandoned. Likewise, if the appeal is no longer in the public interest, it should be abandoned. This approach is consistent with the pursuit of justice, as opposed to the pursuit of winning per se.

On appeals other than those initiated by the Crown, we suggest that concessions — on specific issues or on the overall appeal itself — will be required where necessary in the interests of justice. That is, where there is not or is no longer a reasonable prospect of success, a concession should be made. Similarly, where it becomes clear that responding to a particular ground of appeal, or the appeal in its entirety, no longer serves the public interest, a concession will be appropriate. None of that is to say that the Crown should not be a vigorous advocate on appeal, as at trial, but that they should be vigorous in pursuit of a just result, as opposed to simply being vigorous in pursuit of victory. Further, on all appeals, an appellate Crown should be willing to concede clear errors by the trial judge.[169] Where there is genuine or credibly arguable uncertainty over the effect of those errors, that determination should be left to the appeal court. Again, whether or not the Crown could succeed on the point is less important than whether success on that point would contribute to a just result.

In other words, consistent with *Boucher*, the appellate Crown should seek a just and fair result. As amorphous and debatable as those concepts may be, courts routinely and adamantly defer to parallel decisions made by individual Crown attorneys at the pre-trial and trial stages. Declining to defer to parallel decisions by Crown attorneys on appeal would rightly undercut or at least question the deference given to trial Crowns. With respect, we suggest that the current approaches, as embodied in prosecution manuals, are too stringent on making concessions and abandoning appeals. As at trial, although the final outcome and determination is for the trier of fact, the Crown as a minister of justice can identify some cross-section of possible outcomes that will be sufficiently unlikely that they are not appropriate to put before the court.

Indeed, it is intuitively clear that the power to abandon or concede an appeal is as much a part of prosecutorial discretion as "the decision to initiate an appeal"[170] in the first place — especially given that the Supreme Court of Canada in *Krieger* held not only that "what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for" but that one element is "the discretion to withdraw from criminal proceedings altogether."[171] As stated by Justice Moldaver in *R. v. Anderson*, the "fundamental importance" of prosecutorial discretion lies "not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as

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168 NS, *Decision to Prosecute*, *ibid* at 11.

169 For more on conceding appeals, see note 140.

170 *Anderson*, *supra* note 90 at para 44.

171 *Krieger*, *supra* note 2 at paras 46, 47, quoted with approval by Moldaver J in *Anderson*, *supra* note 90 at para 40 [emphasis omitted].

'ministers of justice.'"[172] However, we recognize that there may be many situations in which the just outcome is contested or not immediately clear. It is in these circumstances that the role of the court is paramount, and Crown attorneys best meet their obligations by ensuring that all relevant evidence, law, and arguments are before the court.

VI. CHANGING POSITIONS ON APPEAL

Related to the question of conceding or abandoning an appeal is the question of changing positions on appeal. Practically, the question of "changing positions" raises two distinct issues: (1) whether an appellate Crown can change their *own* position on appeal; and (2) whether an appellate Crown can stray from the trial Crown's position on appeal. We suggest that the answers to both of these questions parallel those we provide with respect to making concessions and abandoning appeals. That is, Crown attorneys should change their position on appeal if and when it is in the interests of justice to do so.

Firstly, we argue that a Crown attorney on appeal should be willing to change their own position where that change would advance the interests of justice — whether because of a change in circumstances or merely a reconsideration of their legal or tactical position. While the various Crown manuals and policies are silent on whether and in what circumstances an appellate Crown may change their own position on appeal, the (albeit scant) case law that engages with this issue appears to support our position. Indeed, it appears that a Crown's decision to change their appeal position to better align with the interests of justice will be celebrated, if not required, by the courts. Consider the Quebec Court of Appeal's decision in *R. c. Fraillon*,[173] a case that involved a Crown appeal from a stay of proceedings. Initially, the appellate Crown argued that a verdict of guilty ought to have been entered. However, at the appeal hearing, the Crown agreed that, on the basis of the evidence, an acquittal would be more appropriate. Justice Vallerand, in response to this shift, praised Crown counsel's "commendable straightforwardness."[174]

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[172] *Anderson*, *ibid* at para 37, quoting from *Miazga*, *supra* note 10 at para 47.

[173] *R c Fraillon*, 1990 CanLII 2828 (QCCA) [in the original French], 62 CCC (3d) 474 [English translation].

[174] *Ibid* at 5 (CCC translation). See also *R v Mosquito*, 2023 SKCA 29 at para 74:

> Nor do I agree that the sentencing judge erred by according too much weight to Mr. Mosquito's guilty pleas because those pleas were juxtaposed with the Crown's submission that nine years would be a fit sentence. Initially, the Crown took the position on this appeal that the Court should discount the mitigating effect of the guilty pleas, as they were the result of a plea bargain. Defence counsel vigorously and understandably objected to that proposition. He correctly pointed out that, even if the sentencing judge could have concluded that there was a plea bargain, he could not have known why the bargain had been struck, as those negotiations were privileged. As he also noted, the Crown's position would tend to undermine the very foundation of plea bargains, which are based on a quid pro quo. Fortunately, Crown counsel abandoned this line of argument at the hearing of the appeal.

See also *R v Panday*, 2007 ONCA 598 at para 76, leave to appeal to SCC refused, 32434 (3 April 2008):

> In oral argument, counsel for the Crown quite properly abandoned the submission that s. 719(2) makes it clear that out-of-custody pre-sentence time 'does not count as part of any term of imprisonment imposed on the person'. Section 719(2) applies to time spent by convicted persons at large on interim release and is directed to the corrections officials charged with the duty of calculating the length of the sentence, not the sentencing judge charged with determining the appropriate sentence. This provision is not relevant at the sentencing stage.

See also *R v Jantuah*, 1993 CanLII 4386 at II (QCCA) ("[a]t the hearing of the appeal, Crown counsel quite properly abandoned ground g), recognizing that it was untenable on the face of the record").

Thus, it appears that, even if not strictly *required*, courts will generally commend an appellate Crown for adjusting their position on appeal in a manner that better aligns with the interests of justice. In our view, an appellate Crown attorney — like a trial Crown attorney — should be *expected* to change their own position whenever such a change would better align with the interests of justice. We nonetheless recognize that that determination may not always be a straightforward one, and so we understand and respect the discretion that the law allows to the Crown in criminal matters. While this discretion must be exercised conscientiously and deliberately, courts will defer to it in the absence of bad faith. In our view, the choices made by Crowns generally do, and generally will, reflect the appropriateness of such deference.

However, there is an important caveat that merits discussion. Unlike conceding or withdrawing an appeal, a change of position by the Crown on appeal may, in some circumstances, be unfair to the accused. Thus, an exception appears to have been carved out in the case law that restricts the Crown from *unfairly* shifting their position on appeal. The leading case on this comes from the Court of Appeal for Ontario: *R. v. Baker*.[175]

In *Baker*, the respondent pled guilty to dangerous driving causing bodily harm and flight from police causing bodily harm. While the facts read in by the Crown to support the guilty plea indicated that the respondent had been drinking, at no point did the respondent admit he had been impaired at the time of the incident. Further, the Crown did not request a hearing to prove impairment beyond a reasonable doubt. The sentencing judge imposed a 15-month conditional sentence. On appeal, the appellate Crown's factum indicated that the Crown was seeking a more serious penalty due to the respondent's impairment. Because impairment had not been proven beyond a reasonable doubt, the respondent factum argued that the Crown was not entitled to make this argument. At the appeal hearing, the appellate Crown made the novel argument, not present in their factum, that the respondent's *lack* of intoxication "underscored the intentional and deliberate nature of this offence."[176] In refusing to interfere with the conditional sentence, the panel cited "the shift in the Crown's argument without notice to the defence" as inappropriate.[177] Importantly, this was despite the fact that, in the panel's view, the respondent's conduct "certainly could have attracted a custodial sentence."[178] Thus, where a change in an appellate Crown's position is adverse to the defence — particularly when that change is made only in oral argument — it seems courts will rightly be sceptical and interpret the interests of justice in a way that emphasizes fairness to the defence.

What appears to be more controversial is an appellate Crown's ability to depart from a trial Crown's position on appeal. Recent case law suggests that it has yet to be decided whether there are issues of fairness when the Crown strays from its trial position on appeal. For example, in 2020, Justice Derrick for the Nova Scotia Court of Appeal made the following comment: "I find I do not need to deal with the broader question of when the Crown is entitled to change tack and resile from concessions made at trial."[179] What is clear from the case law is that a trial Crown's undertaking not to appeal is not binding[180] and that any unfairness is insufficient to constitute an abuse of process.[181] This follows from the

[175] 2004 CanLII 21272 (ONCA) [*Baker*].
[176] *Ibid* at para 6.
[177] *Ibid* at para 7.
[178] *Ibid*.
[179] *R v Ellis*, 2020 NSCA 78 at para 102, leave to appeal to SCC refused, 39564 (27 May 2021).
[180] *R v Ryazanov*, 2008 ONCA 667 at paras 40–55.
[181] *Ibid* at paras 52–54.

responsibilities and duties of the Attorney General in criminal matters.[182] (We do note that, given the rules of professional conduct around undertakings, it is less clear that a trial Crown would not be liable to law society discipline for giving such an undertaking.)[183]

In our view, an appellate Crown should be empowered to change any position taken at trial whenever that change is in the interests of justice. In some situations — like the discovery of new exculpatory evidence or a clear change in the case law by an appellate court — such a change of position seems unavoidable in the pursuit of justice. Further, it will typically be necessary for an appellate Crown to acknowledge, and depart from, mistakes or misconduct committed by the trial Crown. Indeed, just as the Crown on appeal should concede clear errors by the trial judge, they should also concede clear errors by the trial Crown.

Reassuringly, like appeals in which the Crown concedes errors by the trial judge, there are also many appeals in which the courts commend the Crown for taking a position different than that taken by the trial Crown. For example, the appellate Crown in *Monteith v. R*, an appeal from conviction on two counts of unlawful possession of property under $5,000, both "acknowledge[d] that, due to a misunderstanding between trial Crown counsel and the judge regarding procedural matters, there was no evidence properly admitted at the trial in relation to [the first count]" *and* "admit[ted] this error constitutes a question of law alone and encourage[d] this Court to allow the appeal."[184] The panel observed that the appellate Crown "[q]uite rightly" did so.[185] Similarly, the panel in *R. v. R.H.* recognized that "what Crown counsel on appeal properly concedes was improper cross-examination by the trial Crown."[186] These decisions can be read as valuing the general reasonableness of the appellate Crown in admitting clear errors by the trial Crown, but could also be read as implicitly valuing compliance with *Boucher*.

We appreciate that an appellate Crown might face internal or external pressure to avoid or minimize public disagreement with the decisions of the trial Crown for the sake of solidarity or institutional credibility. However, such pressures assume a winning–losing approach that is contrary to the special obligation of Crown attorneys to see that justice is done. An appellate Crown should maintain the position of the trial Crown not for the sake of reputation or continuity, or even predictability, but on the basis that the trial Crown's position was *and continues to be* a reasonable one in pursuit of a just outcome consistent with the evidence and the truth-seeking function of the criminal justice system. Conversely, an appellate Crown should change positions where such a change is consistent with their obligations, including specific obligations mentioned above to be open to defence theories (even new theories on appeal) and to inform the appellate court where there was a factual error below — particularly if that error was caused by the trial Crown.[187]

Just as in situations where an appellate Crown departs from their own position on appeal, we add the following caveat to our assessment. In order to minimize unfairness to

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182 *Ibid* at paras 44–46.

183 See e.g. *Model Code*, *supra* note 38, Rule 5.1-6 ("[a] lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation") and Rule 7.2-11 ("[a] lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted").

184 2012 NBCA 102 at para 4 [*Monteith*].

185 *Ibid* at para 4.

186 2013 ONCA 126 at para 1.

187 See the text accompanying notes 54 and 77.

the accused while recognizing the public interest in criminal proceedings, any change of Crown position between the trial and the appeal that is prejudicial to the convicted person should be made only in compelling circumstances. Consider, for example, the discovery of new inculpatory evidence or, again, a clear change in the case law by an appellate court. Admittedly, the interests of justice may sometimes require an appellate Crown to disassociate itself from a legal error by the trial Crown that happened to favour the accused. For example, the appellate Crown in *R. v. Fuller*, (albeit unsuccessfully) argued that both joint positions on sentencing were so low as to warrant no deference.[188] Likewise, the appellate Crown in *R. v. Berseth* argued that the trial Crown was wrong to characterize self-induced intoxication as a mitigating factor on sentencing.[189] However, even in such circumstances, courts may well be sceptical of such changes in position. Consider, for instance, where an appellate Crown challenges jury instruction language that the trial Crown not only did not object to but, indeed, recommended themselves.[190] In this way, an appeal is not an untrammeled opportunity for the Crown to retry the case.

VII. CONCLUSION

As it turns out, the ethical obligations of Crown attorneys at the appellate stage are not overwhelmingly surprising. While they are not *identical* to the ethical obligations of Crown attorneys at the earlier stages of the criminal process, we have argued here that those two sets of obligations share an overriding concern with the public interest and the interests of justice. This commonality is clearly established in some respects, such as the Crown's duty of disclosure. In other respects, this commonality is less obvious. In particular, on appeal, the Crown attorney must aim not to necessarily maintain or vindicate the positions taken by the trial Crown (or those of the trial judge) but to change — or maintain — these positions as necessary in the face of errors below or changes in circumstances or knowledge accrued over time. Trial Crowns are not infallible. Neither are judges. The statutory appeals in the *Criminal Code* present the Crown with an important opportunity not only to correct errors and re-evaluate the state of the law with the ultimate goal of pursuing justice, but also to demonstrate its commitment to just processes and outcomes over winning or saving face. In this light, consistency and decisiveness in the position of the Crown is less important than advocating for a just result.

While the answers to these questions are not surprising and may, to some extent, have been and continue to be assumed, there is considerable value in making those answers and assumptions about the ethical obligations of Crown attorneys more explicit. Crown prosecution manuals do so to some extent. Until the case law across Canadian jurisdictions addresses these issues, the public should rightly expect Crown attorneys not only to be conscious and deliberate in their conduct on appeal, but also to pursue the interests of justice both in individual matters and cumulatively. There is, likewise, a role for law societies to make these professional obligations clearer in the meantime.

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188 *R v Fuller*, 2020 ONCA 115 at para 15.

189 *R v Berseth*, 2019 ONSC 888 at paras 94–110.

190 *R v Beilhartz*, 2014 ONCA 760 at para 10. See similarly *R v Talbot*, 2007 ONCA 81 at paras 64–65.