

CDAS

CRIMINAL DEFENCE ADVOCACY SOCIETY



Ethics in Criminal Practice: Part 2

A PANEL DISCUSSION WITH JUDGE SUTHERLAND, DAVID LAYTON, QC, AND
MICHAEL KLEIN, QC

JUNE 2, 2020

Outline

- Prosecutorial independence and civil liability
- Relationship between Crown and police
- Relationship between defence counsel and their clients
- Inadvertently disclosed information
- Written retainer agreements
- Gatekeeping role of court
- Resources for junior counsel facing an ethical issue

Prosecutorial Independence and Civil Liability

***Clark v. AG Ontario*, 2019 ONCA 311, leave granted to SCC (38687)**

- Constitutionally-protected principle of prosecutorial independence.
- Possible extension of civil liability for Crown counsel to misfeasance in a public office.

Relationship Between Crown & Police – Mutual Independence

- ❑ Police act independently in carrying out criminal investigations (*Smith v. AG Ontario*, 2019 ONCA 651, paras. 38-64).
- ❑ Crown acts independently in prosecuting criminal matters (see previous slide).
- ❑ Police and Crown should cooperate in carrying out their respective functions, but in doing so must always maintain their mutual independence (*Smith v. AG Ontario*, paras. 65-87).

Relationship Between Crown & Police – Solicitor-client privilege

- ❑ Solicitor-client privilege applies to legal advice given by Crown counsel to police: *R. v. Campbell*, [1999] 1 SCR 565, paras. 49-51.
- ❑ But police cannot direct Crown counsel as a private client would direct a lawyer: *Campbell*, paras. 51, 54.
- ❑ In providing police with legal advice, Crown counsel does not owe police the private law duty of care typically owed by a lawyer to a client: *Smith v. Ontario*, 2019 ONCA 651, para. 119-130.

Relationship Between Defence Counsel and Clients

- ❑ Taking instructions regarding potential defences.
- ❑ Providing client with disclosure (in-custody and out of custody).
- ❑ Preparing client to testify.
- ❑ Sharing of client information – what information is privileged?

Inadvertently Disclosed Information

- ❑ What must defence counsel do on receiving disclosure they believe they are not entitled to?
- ❑ What must Crown counsel do when they realize they have improperly disclosed information?

Code of Professional Conduct for British Columbia, rule 7.2-10

R. v. Hirschboltz, 2004 SKQB 17

Celanese Canada Inc. v. Murray Demolition Corp., 2006 SCC 36

R. v. Barros, 2011 SCC 51, para. 37

Written Retainer Agreements

When are they necessary?

Junior Counsel

- ❑ Resources for junior counsel seek assistance regarding ethical issues

QUESTIONS?

Check out our other upcoming webinars:

courthouselibrary.ca/training-professional-development/cpd-training

Or join our email list to receive updates on new CPD opportunities.