

TABLE OF CONTENTS

<i>Preface</i>	iii
<i>Table of Cases</i>	TC-1
CHAPTER 1 – THE ROLE OF THE PROSECUTOR.....	1
1. PURPOSE OF THIS CHAPTER.....	1
2. THE CONSTITUTIONAL PRINCIPLE OF INDEPENDENCE	4
3. INSTITUTIONAL INDEPENDENCE	6
4. INDEPENDENCE AND OBJECTIVITY IN DECISION-MAKING	11
a. Independence from the Police and Others	11
b. Tunnel Vision.....	13
c. The Exercise of a Challenge Function	14
d. Conflict of Interest.....	16
5. PROSECUTORIAL ACCOUNTABILITY	18
CHAPTER 2 – THE CHARGING DECISION	21
1. PURPOSE OF THIS CHAPTER.....	21
2. REVIEWING THE EXERCISE OF PROSECUTORIAL DISCRETION GENERALLY	21
a. What is “Prosecutorial Discretion”?	22
b. Reviewability.....	23
c. The Standard of Review.....	25
3. REVIEW OF THE DECISION TO PROSECUTE.....	26
a. The Nature of the Charging Decision	26
b. Application of the Standard of Review	30
c. Preventing Prosecution	32
d. Diversion	32
e. Refusing to Consent to Prosecution.....	33
f. Reviewing the Decision <i>not</i> to Prosecute	34
g. Procedural Issues in Challenging Charging Decisions	39

PROSECUTORIAL MISCONDUCT

4.	REVIEWING DECISIONS TO TERMINATE PROCEEDINGS.....	43
a.	Staying Private Prosecutions	44
b.	Use of the Power to Stay Generally	47
c.	The Power to Withdraw Charges.....	48
5.	CHALLENGES TO THE SELECTION OF THE ACCUSED	49
a.	Selective Prosecution.....	49
b.	Adherence to Inflexible Prosecution Policies	51
c.	Joinder of Accused	52
d.	Unequal Treatment of Co-accused	54
6.	CHALLENGES TO THE NATURE OF THE CHARGES.....	54
a.	Trivial Cases.....	55
b.	Improper External Influences	57
7.	REVIEWING OTHER CHARGE-RELATED DECISIONS	58
a.	Direct Indictments	58
b.	Electing to Proceed by Indictment Rather than by Summary Conviction	61
c.	Elections and Re-elections.....	63
d.	Requirement for Trial by Jury	66
e.	Dangerous/Long Term Offender Applications	67
f.	Notice to Seek Increased Penalties.....	68
8.	THE CHARGING DECISION AND CONSTITUTIONAL CHALLENGES TO LEGISLATION	69
9.	EXTRADITION CASES.....	70
CHAPTER 3 – DISCLOSURE		73
1.	PURPOSE OF THIS CHAPTER	73
2.	THE NATURE AND SCOPE OF THE CROWN’S DUTIES	74
a.	The General Duty: Promptly Disclose all Information that is not Clearly Irrelevant or Privileged.....	74
b.	The Duty to be Objective	77
c.	The Duty to Preserve Evidence	77
d.	The Duty to Explain Non-Disclosure	81
e.	The Duty to be Transparent	83
f.	The Duty to Inquire/Investigate	84
g.	The Continuing Nature of the Disclosure Obligation.....	87
h.	Disclosure to Unrepresented Accused	90
3.	THIRD PARTY RECORDS	90
a.	Introduction	90

TABLE OF CONTENTS

b.	The Two-Part Test: “Likely Relevance” and “Balancing of Interests”	91
c.	Records of Police Witnesses	93
d.	Challenging Authorizations to Search and Seize.....	94
e.	Procedural Concerns.....	95
4.	EXCEPTIONS AND LIMITATIONS	96
a.	Relevance	96
b.	Privilege	98
i.	Solicitor-client Privilege.....	98
ii.	Litigation Privilege.....	99
iii.	Informer Privilege	101
c.	Statutory Exceptions.....	104
i.	Section 37 of the <i>Canada Evidence Act</i>	104
ii.	Section 38 of the <i>Canada Evidence Act</i>	104
iii.	Sections 278.1-278.91 of the <i>Criminal Code</i>	105
iv.	International Agreements	105
d.	Records Under or Beyond the Crown’s Control: <i>Stinchcombe</i> or <i>O’Connor</i> ?	106
e.	Form of Disclosure	107
f.	Attaching Conditions to Disclosure	109
g.	The Timing of the Disclosure	110
5.	ESTABLISHING A BREACH OF THE RIGHT.....	110
a.	Nature of the Right to Disclosure.....	110
b.	The Persuasive Burden.....	112
c.	The Obligations on the Defence.....	112
d.	Production of the Crown’s Files to the Court.....	114
6.	REMEDIES	116
a.	Generally	116
b.	Timing	117
c.	Adjournments	118
d.	Mistrial	118
e.	Cross-examination.....	119
f.	Exclusion of Evidence	119
g.	Stays of Proceedings	120
h.	Costs.....	122
i.	Sentence Reduction	122
7.	DISCLOSURE IN OTHER CONTEXTS	122
	CHAPTER 4 – ABUSE OF PROCESS	125

PROSECUTORIAL MISCONDUCT

1.	INTRODUCTION	125
2.	THE EMERGENCE OF THE ABUSE OF PROCESS DOCTRINE.....	126
3.	THE APPLICATION OF THE DOCTRINE GENERALLY	129
4.	THE TEST	131
5.	ABUSE OF THE CHARGING DISCRETION	132
a.	Use of the Criminal Process to Collect a Debt.....	133
b.	Delay	135
c.	Re-trials	138
d.	Use of the Direct Indictment	141
e.	Improper Relationship with other Branches of Government	143
f.	Improperly-Motivated Proceedings	144
g.	Double Jeopardy/Re-Litigation.....	147
h.	Lack Of Independence in the Charging Decision	150
i.	Improper Re-Institution of Proceedings/Use of the Power to Stay Proceedings.....	151
j.	Abuse of the Right of Appeal	154
2.	PREJUDICIAL CHANGES IN THE CROWN'S POSITION	157
a.	Introduction	157
b.	Re-electing to Avoid a Limitation Period.....	157
c.	Abusive Conduct in Plea Bargaining.....	162
d.	Repudiation of Immunity Agreements/Agreements not to Prosecute.....	166
e.	Resiling from Positions Taken at Trial on Appeal	169
f.	Circumvention of Court Rulings	171
3.	OTHER CATEGORIES OF CROWN MISCONDUCT	173
a.	Introduction	173
b.	Prosecutorial Statements Outside Court	173
c.	Extradition Cases	175
d.	Jury-related Misconduct	177
e.	Proceeding Against a Person who is Physically or Mentally Ill...	179
f.	Reliance on Perjured Evidence	180
g.	Failure to Protect the Accused's Rights	180
h.	Condoning Police Misconduct.....	181
4.	REMEDIAL AND PROCEDURAL ISSUES.....	181
CHAPTER 5 – THE DUTIES OF CROWN COUNSEL AT TRIAL AND ON APPEAL.....		187
1.	PURPOSE OF THIS CHAPTER.....	187

TABLE OF CONTENTS

2. DUTIES TO THE COURT AND THE ADMINISTRATION OF JUSTICE.....	188
a. The Duty of Civility.....	188
b. The Duty of Candour	189
c. The Duty to Assist the Court.....	191
d. The Duty to Preserve Judicial Independence	192
3. DUTIES ARISING BEFORE, DURING AND AFTER TRIAL...	192
a. Bail Hearings.....	192
b. The Duty to Investigate	192
c. Presentation of the Case at Trial and on Appeal.....	194
4. THE DUTY TO CALL WITNESSES.....	195
a. The Scope of the Duty	195
b. The Impact of the Failure to Call Witnesses	198
c. The Trial Judge's Discretion to Call Witnesses	201
d. Does The Crown Need to Explain Its Decision not to Call Witnesses?	203
5. DUTIES TO DEFENCE COUNSEL AND THE ACCUSED	203
a. The Duty to Prevent Wrongful Convictions	204
b. The Duty to Assist Unrepresented Accused	206
c. The Duty to Minimize Prejudice to the Defence	207
d. The Duty to Respect The Solicitor-Client Relationship	207
e. The Duty not to Interfere with the Defence	208
CHAPTER 6 – IMPROPER CROSS-EXAMINATION	211
1. PURPOSE OF THIS CHAPTER.....	211
2. IMPROPER CROSS-EXAMINATION OF THE ACCUSED	212
a. Subversion of the Accused's Charter Rights.....	212
i. Using the Right to Silence as a Trap	212
ii. Incrimination by Reference to Prior Testimony	215
iii. Using Disclosure as a Trap	216
iv. Right to be Present at Trial.....	217
v. Use of a Translator	218
b. Lying and the Motive for Lying.....	218
c. Assuming Facts not in Evidence	223
d. Bad Character	226
e. Criminal Record.....	228
f. Abusive Language	230
g. The Defence Strategy	232
h. Inflammatory Language	232

PROSECUTORIAL MISCONDUCT

i.	Irrelevant Matters.....	233
j.	Splitting the Crown’s Case	233
k.	Failure to Cross-examine	234
l.	Manner of Questioning	235
3.	IMPROPER CROSS-EXAMINATION OF OTHER DEFENCE WITNESSES	235
a.	Expert Witnesses	235
b.	Character Witnesses.....	236
c.	Other Defence Witnesses.....	237
4.	IMPEACHING THE CROWN’S OWN WITNESSES.....	237
5.	APPELLATE REVIEW OF IMPROPER CROSS-EXAMINATION	240
	CHAPTER 7 – IMPROPER JURY ADDRESSES	245
1.	PURPOSE OF THIS CHAPTER.....	245
2.	OPENING ADDRESSES.....	247
a.	Introduction	247
b.	Referring to Inadmissible or Uncalled Evidence	247
c.	Inflammatory Remarks.....	249
d.	Giving Opinions, Commentary or Evidence	249
3.	CLOSING ADDRESSES	251
a.	Introduction	251
b.	Disrespect for an Accused’s Charter Rights.....	251
i.	Undermining the Presumption of Innocence.....	251
ii.	Infringing the Right to Silence	254
iii.	Using the Right to Disclosure as a Trap	255
c.	Disrespect for the Accused or the Defence	256
i.	The Accused Personally.....	256
ii.	Defence Counsel or the Defence Strategy	257
d.	Expressions of Opinion	259
e.	Giving Evidence	261
f.	Appeals to Emotion – the “Inflammatory” Address	263
g.	Misstating, or Inappropriately Using, the Evidence.....	265
h.	Inviting Speculation	268
i.	Commenting on the Failure to Testify	270
j.	Commenting on the Law.....	272
k.	Inconsistent Presentation of the Case.....	274
l.	Compounding the Prejudice Caused by Improper Cross-examination.....	275

TABLE OF CONTENTS

4. THE APPELLATE RESPONSE TO IMPROPER JURY ADDRESSES.....	276
a. Standard of Review	276
b. Defining a Test	278
i. Seriousness of the Impropriety.....	280
A. What was the nature of the comments?	280
B. How frequent were the improper comments?	280
C. Did it compound other problems in the case?	280
D. What were the issues in the case?.....	280
E. What was the order of the jury addresses?	281
F. Is there evidence that the jury was not misled?	281
ii. The Existence and Effectiveness of Corrective Action	281
A. Was the impropriety corrected?	281
B. How quickly was the corrective action taken?.....	283
C. Was the correction clear, specific and forceful?	283
D. Did Crown counsel take corrective action?	284
CHAPTER 8 – COSTS AGAINST THE CROWN	285
1. PURPOSE OF THIS CHAPTER.....	285
2. HISTORY	286
3. THE JURISDICTION TO AWARD COSTS.....	289
a. The “Functional and Structural” Approach (Charter Jurisdiction).....	289
b. The Inherent Jurisdiction of the Court.....	293
c. Statutory Jurisdiction	294
d. Implied Jurisdiction	294
e. Civil Jurisdiction vs. Criminal Jurisdiction	295
f. Appellate Jurisdiction	300
g. Are Criminal Costs Orders Compensatory or Punitive?	304
h. The Power to Award Costs to Persons other than the Accused ..	306
4. WHEN SHOULD COSTS BE AWARDED AGAINST THE CROWN?	308
a. The “Marked and Unacceptable Departure” Test	308
b. Particular Applications	310
i. Disclosure Cases	310
ii. Abuse of Process	313
iii. Unreasonable Search and Seizure	314
iv. Unreasonable Delay.....	316
v. Right to an Interpreter	317

PROSECUTORIAL MISCONDUCT

vi.	Language Rights	318
vii.	Bail Hearings	318
viii.	Forfeiture Applications	319
5.	QUANTUM.....	319
CHAPTER 9 – MALICIOUS PROSECUTION AND RELATED TORT CLAIMS		323
1.	PURPOSE OF THE CHAPTER.....	323
2.	SUING PROSECUTORS – THE POLICY RATIONALE.....	324
3.	THE NELLES TEST	327
a.	Introduction	327
b.	Step 1 – The Initiation of Proceedings.....	327
i.	The Role of Prosecutors in the Initiation of Proceedings	327
ii.	The “Actively Instrumental” Test	329
iii.	What Kind Of Prosecution?.....	332
c.	Step 2 – Termination of the Proceedings in Favour of the Plaintiff	333
d.	Step 3 – The Absence of Reasonable and Probable Cause.....	335
i.	Introduction	335
ii.	The Subjective Element	336
iii.	The Objective Element	338
e.	Step 4 – Malice	341
i.	Malice Defined	341
ii.	The Relationship Between Malice and Reasonable and Probable Cause	346
f.	Damages	349
7.	OTHER TORTS.....	350
a.	Introduction	350
b.	Abuse of Public Office/Misfeasance in Public Office.....	351
c.	Abuse of Process.....	353
d.	Negligent Prosecution	355
e.	Other Forms of Negligence	356
f.	Conspiracy to Injure	356
g.	Malicious Non-Prosecution.....	357
8.	CHARTER CLAIMS	358
9.	APPLICATIONS FOR MERCY	361
CHAPTER 10 – PROSECUTORIAL STANDARDS		363
1.	PURPOSE OF THIS CHAPTER.....	363

TABLE OF CONTENTS

2. THE STANDARDS SET BY LAW SOCIETIES AND BAR ASSOCIATIONS.....	364
3. CANADIAN PROSECUTION AGENCY STANDARDS	365
4. AMERICAN PROSECUTORIAL STANDARDS	367
5. UNITED KINGDOM PROSECUTORIAL STANDARDS	368
6. INTERNATIONAL PROSECUTORIAL STANDARDS.....	370

