Introduction and Professional Practice

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Learning Outcomes

After reading this chapter, you should be able to:

- Distinguish between federal and provincial law-making authority
- Outline the structure and levels of courts in the Canadian criminal justice system
- Understand the layout of the *Criminal Code*
- Explain the duties and scope of practice of a paralegal defence agent
- Discuss the ethical obligations of the paralegal to the client and to the administration of justice
- Distinguish between the roles and responsibilities of the Crown and the police

Introduction

Summary Conviction Law for Paralegals is written for paralegal students and licensed paralegals practising in criminal law. As licensed paralegals in Ontario are governed by the Law Society of Ontario, this text is intended to cover the criminal law educational requirements for paralegal programs across Ontario. This text is intended to serve as a comprehensive resource that covers the *Criminal Code*,[1] the *Canadian Charter of Rights and Freedoms*,[2] the *Paralegal Rules of Conduct*,[3] and the *Criminal Rules of the Ontario Court of Justice*,[4] as well as explanations of common law precedents and authorities on various issues of criminal law. Both substantive and procedural laws are covered with a practical approach to all aspects of a summary conviction proceeding. The focus of *Summary Conviction Law for Paralegals* is to follow the steps of a criminal prosecution chronologically—from pre-arrest to sentencing—from both a defence and Crown perspective.

In Chapter 1, we look at where criminal law comes from and the division of powers between the federal and provincial levels of government. A brief overview of the Canadian court system is provided, followed by a detailed look at the layout of the Code. The role and scope of the defence paralegal in representing a client in a criminal matter is discussed with specific reference to the ethical rules that apply. Finally, the roles of the police and the Crown are examined.

common law
a legal system developed from judicial decisions

precedent
principle or rule established in a previous legal case that is binding or persuasive on other courts in deciding similar cases

stare decisis
a legal principle that requires judges to follow previous rulings made by other judges in higher courts within the same province or territory and rulings of the Supreme Court of Canada on the same issue

statutory law
written law passed by Parliament; takes precedence over common law

Origins of Criminal Law

Canada's criminal law is based on common law and statutory law. **Common law** is based on judicial decisions, or **precedents**. Precedents from higher levels of court are more influential than those from lower courts. If we think of the levels of court as the rungs of a ladder, starting with the trial courts, rising through the provincial courts of appeal, and ending with the Supreme Court of Canada at the top, the binding power of an individual decision becomes clear: the judge of a court is bound by the decisions of all courts within the province that are at a higher level and by the decisions of the Supreme Court. For example, a Supreme Court decision carries more weight than a decision from the Ontario Superior Court of Justice. Decisions of the Supreme Court are binding on all other Canadian courts unless they are distinguishable on the facts of the case.

According to the principle of ***stare decisis***, all Ontario provincial courts must follow a decision of the Ontario Court of Appeal. However, all Ontario provincial courts are not bound by the decisions of appellate courts of other provinces or by decisions of the Federal Court of Appeal. The common law has evolved over many years and reflects changes in society.

Laws, which are created at either the federal or provincial level of government, are called "statutes," "legislation," or "acts." They are referred to as **statutory law**.

1 RSC 1985, c C-46 [the Code].

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter].

3 Law Society of Ontario, *Paralegal Rules of Conduct* (1 May 2007; amendments current to 27 February 2020), online: <https://www.lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct> [the Rules].

4 SI/2012-30 [Criminal Rules].

Parliament may create laws for the entire country, but only for matters over which the federal government has jurisdiction. Similarly, a province or territory may only create laws for matters over which it has jurisdiction. If one level of government encroaches on the jurisdiction of another level of government, then the law is said to be ***ultra vires***, or beyond the powers of that level of government. A law that exceeds the scope of its jurisdiction is unconstitutional. If the law is within the powers of the level of government that created it, it is said to be ***intra vires***.

ultra vires
beyond the legal authority of a level of government to create a law

intra vires
within the legal authority of a level of government to create a law

EXAMPLE

Ultra Vires

If the federal government were to pass a law regulating the order in which cases are to be tried within provincial courts on a daily basis, this law would be *ultra vires*. Although the federal government has the power to create criminal laws, the authority over the administration of justice lies with the provinces.

Section 91 of the *Constitution Act, 1867*[5] establishes the jurisdiction of the federal government to pass laws relating to matters of national concern, such as criminal law, trade and commerce, banking, immigration, and national security. Section 92 of the *Constitution Act, 1867* establishes the power of the provinces and territories to regulate matters of local concern, such as health care, energy and natural resources, civil rights, and property laws. Although the federal government has the power to create criminal laws and procedures, the provinces and territories regulate the administration of justice, as well as the procedural rules of the provincial courts. This means that offences under the *Criminal Code* are dealt with at the provincial level of government.

Constitutional law is the highest form of written law, as it governs and shapes statutory laws created and passed by the legislature. The *Constitution Act, 1867* and the *Constitution Act, 1982*[6] determine whether or not a law is valid. The Charter guarantees certain political and civil rights and legal protections to people in Canada from the policies and actions of all levels of government (federal, provincial, and municipal), subject only to reasonable limits prescribed by law.

The Canadian Court System

There are four levels of court in Canada that address criminal matters. At the lowest level are the provincial courts, which deal with the vast majority of criminal cases. In Ontario, the provincial courts are called the Ontario Courts of Justice and are composed of provincially appointed judges and justices of the peace. The Ontario Courts of Justice are located both in major cities and in remote locations across the province. As will be discussed in greater detail in Chapter 2, paralegals may only appear on summary conviction matters in provincial court.

5 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

6 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

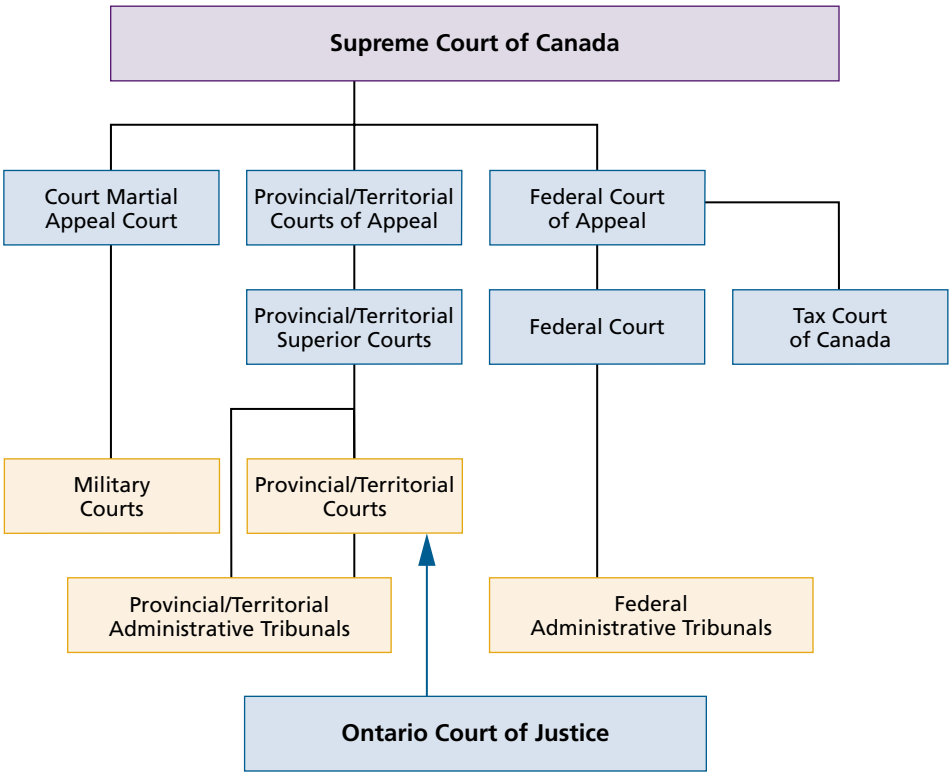
inherent jurisdiction a concept based on the common law doctrine that a superior court has the authority to hear any matter that appears before it; may be overridden by statute or legislation

The second level of court are the superior courts, which have **inherent jurisdiction**, or the jurisdiction to hear cases in any area except those limited to a particular level of court. Superior courts are divided into special divisions, such as the criminal division and the family division. More serious criminal cases are dealt with in superior courts, either before a judge and jury or before a judge alone. In Ontario, the superior court is called the Superior Court of Justice and is composed of federally appointed judges.

The third level of court is the provincial appellate court, which hears appeals from provincial courts and superior courts. The name of this court in Ontario is the Ontario Court of Appeal, and it consists of a panel of three judges who are federally appointed. Leave to appeal (permission) is required if an appeal to the Superior Court of Justice has already been dismissed.

The last and highest level of court in Canada is the Supreme Court of Canada. It is the final court of appeal from all other courts in Canada. Leave to appeal is not given routinely. It is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the Supreme Court. Figure 1.1 shows an outline of Canada's court system.

FIGURE 1.1 Outline of Canada's Court System



Source: Adapted from Department of Justice, *Canada's Court System* (Ottawa: Government of Canada, 2014), online: <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html>. © Department of Justice Canada, 2005. Adapted with the permission of the Minister of Public Works and Government Services, Canada, 2021.

Federal Court matters are mostly immigration, taxation, administrative law, and public law cases. The Federal Court does not hear criminal cases or appeals.

Basic Structure of the Criminal Code

The *Criminal Code* is a federal statute that sets out criminal offences and penalties. Since it is federal legislation, criminal law is the same across all of the provinces and territories of Canada. All persons in Canada are subject to the Code regardless of whether or not they are Canadian citizens. The Code also contains procedures for dealing with criminal offences and sets out the powers of the various levels of criminal courts within Canada.

It is easy to become lost in the maze that is the Code. Even without annotations, it is a long statute with more than 849 numbered sections, many of which have numerous subsections. To make navigation easier, publications of the Code generally include a detailed table of contents and index.

The Code is divided into various components or parts, which can be found in the table of contents. Each part deals with specific types of offences, procedures, and forms. For example, part II.1 of the Code deals with terrorism; therefore, any offences related to terrorism would be found in this part. New offences are placed in the part in which they belong. As of the current date, there are 28 parts in the Code, as well as nine additional point parts. There are also forms included in the Code, which are templates for various documents used in criminal proceedings.

Parts II through XIII either create offences or deal with subtypes of offences (such as attempts and conspiracies to commit offences). The name of each section helps the reader determine under which part an offence falls; for example, Firearms and Other Weapons (part III) deals with how the use of a gun affects an offence or an offender, and Offences Against Rights of Property (part IX) deals with offences such as theft and robbery.

Parts XIV through XXVII are procedural in nature. They set out the rules for how offences are to be investigated, prosecuted, tried, and, if necessary, appealed. Parts XIX, XX, and XXVII establish the different types of offences (indictable, hybrid, and summary conviction offences, respectively, which will be discussed in more detail in Chapter 2). Part XXIII deals with sentencing, while part XXI covers appeals of indictable offences.

Part XX.1 sets out the rules for accused persons suffering from mental disorders. Part XXI.1 creates a procedure by which an accused whose normal rights of appeal have been exhausted can apply to the minister of justice to consider their conviction or their designation as a dangerous or long-term offender on the grounds that the court decision being complained of constitutes a "miscarriage of justice." Part XXIV deals with dangerous offenders. Part XXVI deals with extraordinary remedies. The final part, XXVIII, contains the various forms used in investigating and trying criminal offences.

COMMON SUMMARY CONVICTION AND HYBRID OFFENCES

You should become familiar with the most common offences that are relevant to the chapters that follow. Of the offences listed here, causing a disturbance and trespassing at night are summary conviction offences, while the others are hybrid offences (meaning they could be prosecuted as a summary or an indictable offence). The section of the *Criminal Code* where each offence is defined is also noted.

Causing a disturbance, s 175(1)

Often referred to as "disorderly conduct," this offence involves disturbing the peace and order in or near a public place, especially with conduct that is loud or unruly. Section 175(1) of the Code acknowledges that causing a disturbance involves a wide range of disorderly conduct, including fighting, shouting, swearing, using obscene language, loitering, or being drunk. It also includes any unreasonably loud commotion that causes an interruption, such as discharging firearms. To make a case, the Crown must prove that the offender was in or near a public place, was wilfully or deliberately engaging in one or more of the aforementioned disruptive acts, and that someone was actually disturbed, harassed, or molested.

Trespassing at night, s 177

This offence occurs when a person, without lawful excuse, loiters or prowls at night on another person's property near a residence. The Code defines nighttime as the hours between 9:00 p.m. and 6:00 a.m. Trespassing at night is a criminal offence that is punishable on summary conviction. The maximum penalty for trespassing at night is a period of incarceration of two years less a day and/or a fine of up to $5,000.

Assault, s 265(1)

Assault is an act that involves deliberately inflicting physical harm or unwanted physical contact on another person, either directly or indirectly. It also includes an attempt or threat to inflict physical harm or unwanted physical contact on another person without their permission or consent. The Code acknowledges that assault encompasses a wide range of threatening and violent conduct, including (but not limited to) punching, kicking, pushing, and slapping. Assault is a hybrid offence that can be prosecuted as either a summary or indictable offence.

Criminal harassment, s 264(1)

Also known as "stalking," this offence occurs when someone repeatedly engages in predatory, threatening, or unwelcome behaviour toward a person (usually over an extended period of time) that causes them to reasonably fear for their safety or the safety of anyone known to them. Some examples of this harassing behaviour include repeatedly following or contacting the victim, or watching their home, workplace, or other places they frequent. Criminal harassment is a hybrid offence that can be prosecuted as either a summary or indictable offence. If the Crown decides to proceed by summary conviction, the maximum penalty is a period of incarceration of two years less a day and/or a fine of up to $5,000.

Indecent communications, s 372(2) and harassing communications, s 372(3)

Indecent communications occur when a person, with the intent to deliberately alarm or annoy, makes an indecent communication to another person by means of telecommunications. Telecommunications is defined as any transmission of signs, signals, writing, images, sounds, or intelligence of any nature by any electromagnetic system. An example of an indecent communication is using the Internet or a text message to send a vulgar or indecent image to another person without their permission or consent. Harassing communications is a criminal offence that occurs when a person, without lawful excuse and with the intent to deliberately harass, repeatedly communicates with another person by means of telecommunications. An example of a harassing communication is cyberbullying. The offences under subsections 372(2) and 372(3) are hybrid offences.

Operation of a conveyance while prohibited, s 320.18(1)

This offence occurs when a person operates any motor vehicle, vessel, aircraft, or railway equipment while prohibited from doing so. To make a case, the Crown must prove that the offender knew about the prohibition and deliberately chose to ignore it. Operation of a conveyance while prohibited is a hybrid offence that can be prosecuted as either a summary or indictable offence.

Fraud under $5,000, s 380(1)(b)

Fraud involves two distinct elements: deception and deprivation. Fraud involves the intentional use of dishonest conduct (such as deception, falsehood, or misrepresentation) to obtain unlawful gain, such as money, property, or a service. This conduct illegally deprives another person or entity of assets. The Code acknowledges that fraud encompasses an extremely wide range of criminal behaviour. Some examples of fraud include (but are not limited to) telemarketing scams, identity theft, or mortgage fraud. Fraud is a hybrid offence that is separated into two subsections: 380(1)(a) fraud over $5,000 and 380(1)(b) fraud under $5,000. If the value of the stolen assets is under $5,000, the Crown can prosecute the crime as either a summary or indictable offence.

Identity theft, s 402.2

This offence occurs when a person illegally obtains another person's identity information (such as their name, social insurance number, credit card number, passport, citizenship certificate, or any forgery of these items) without permission and with the intent to use it to commit an indictable offence (involving but not limited to fraud, deceit, or falsehood). It is typically committed for monetary gain. For example, the offender may use another person's identity information to open a new credit card in the victim's name. Subsection 402.2(2) of the Code also includes anyone who distributes, sells, or offers for sale another person's identity information, or has it in their possession for any of these purposes. The offences under subsections 402.2(1) and 402.2(2) are hybrid offences.

Indecent act, s 173(1)

An indecent act is committed when a person wilfully or deliberately performs an obscene act in a public place in the presence of one or more people with the intent to insult or offend any person. The Code acknowledges that an indecent act encompasses a wide range of indecent behaviour, including public nudity, urination, defecation, or the performance of sexual acts. An indecent act is a hybrid offence that can be prosecuted as either a summary or indictable offence.

Mischief under $5,000, s 430(1)

Mischief occurs when a person intentionally damages, obstructs, or interferes with another person's property without the permission or consent of the rightful owner. The Code acknowledges that mischief encompasses a wide range of criminal behaviour, including any act that renders the property dangerous, useless, ineffective, or interferes with its operation. A common example of criminal mischief is vandalism. In section 430 of the Code, mischief is a hybrid offence that is separated into two subsections: 430(3) mischief over $5,000 and 430(4) mischief under $5,000. If the property damage is under $5,000, the Crown can prosecute the crime as either a summary or indictable offence.

Possession of property obtained by crime under $5,000, s 354(1)

Possession of property obtained by crime is a criminal offence that occurs when a person is knowingly in the possession of stolen property (or any proceeds of stolen property). A common example of this offence is when a person is found in the possession of a car that has been stolen. To make a case, the Crown must prove that the accused was aware the property (or proceeds) had been obtained either directly or indirectly from the commission of an indictable offence. If the value of the stolen property or proceeds is worth less than $5,000, the Crown can prosecute the crime as either a summary or indictable offence.

Theft under $5,000, s 334(b)

Theft involves deliberately taking another person's property or services without that person's permission or consent. To make a case, the Crown must prove that the offender deliberately intended to deprive the rightful owner of the aforementioned property or services without paying for them. In section 334 of the Code, theft is a hybrid offence that is separated into two subsections: 334(a) theft over $5,000 and 334(b) theft under $5,000. An example of theft under $5,000 is shoplifting a sweater at a retail establishment. When the value of what is stolen is less than $5,000, the Crown can prosecute the crime as either a summary or indictable offence.

PRACTICE TIP

Buy a commercial edition of the *Criminal Code*. Commercial editions contain annotations to the text of the Code, including cross-references and leading cases that interpret each section. They may also include other relevant legislation, such as the Charter or the *Canada Evidence Act*.[7] Other standard features include a table of cases, offence tables, and forms of charges.

Tables of cases list the cases used in the annotations, providing a convenient reference list. Offence tables set out offences under the Code along with information as to whether the offence is indictable, summary, or hybrid; whether an offence is an absolute jurisdiction offence; the maximum and minimum sentence; available sentencing options; and mandatory and discretionary orders that the court may make. It is important to note that there are different commercial versions of the Code, and the layout may differ according to the version used. Forms of charges contain the proper wording of various offences, which are followed by police officers when swearing out the information (see Chapter 2).

Use caution when referring to the offence tables, as the circumstances of the case will dictate the availability of sentencing options and orders made by the court. Furthermore, statutory conditions must be satisfied, and exceptions may apply. It is important to discuss all possible sentencing options with your client before entering a plea.

PROPER STATUTORY CITATION

As a primary source of law, the *Criminal Code* must be cited using the proper statutory citation. The proper citation for the Code is:

Criminal Code, RSC 1985, c C-46

Criminal Code	=	name of the statute
RSC	=	the name of the statute series in which the legislation appears (Revised Statutes of Canada)
1985	=	the year in which the statute was last published in a revised volume
c C-46	=	chapter "C-46" (Note: the letter "C" makes reference to the first letter of the name of the legislation—"*Criminal Code*")

Statutes and Acts Related to the Criminal Code

Offences under the Code are prosecuted pursuant to the procedures set out therein. Other federal statutes that follow the procedures set out in the Code include the *Youth Criminal Justice Act*;[8] the *Controlled Drugs and Substances Act*;[9] and the *Firearms Act*.[10] It is important to note that these statutes are not part of the Code but are

7 RSC 1985, c C-5.

8 SC 2002, c 1.

9 SC 1996, c 19.

10 SC 1995, c 39.

separate statutes that may also contain criminal offences or procedures for dealing with criminal offences. Likewise, the *Constitution Act, 1982* and the Charter are often included in commercial publications of the Code, but they do not form part of it.

Paralegal Authority to Appear as Defence Agent

Paralegals in Ontario are licensed by a governing body. The Law Society of Ontario (LSO) regulates the paralegal profession. In Ontario, licensed paralegals may appear before the Ontario Court of Justice, in Small Claims Court, and before many administrative tribunals.

In June 2019, Bill C-75[11] received royal assent, which introduced several important changes to the *Criminal Code*. These changes included reclassification of offences, modernization of bail provisions, creation of measures intended to better address intimate partner violence, and other amendments designed to reduce delays in the criminal justice system. One of the key amendments was an increase to the maximum penalty of imprisonment for summary conviction offences. These changes came into effect in three stages: June 2019, September 2019, and December 2019.

Section 787(1) of the Code sets out the general penalty for summary conviction offences and indicates that "unless otherwise provided by law, every person who is convicted of an offence punishable on summary conviction is liable to a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or to both."

Both the Code and the Rules make reference to the scope of a paralegal's authority to represent someone charged with a criminal offence.

Section 802.1 of the Code refers to the limitation of the use of agents:

> 802.1. Despite subsections 800(2) and 802(2), a defendant may not appear or examine or cross-examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless
>
> (a) the defendant is an organization;
>
> (b) the defendant is appearing to request an adjournment of the proceedings; or
>
> (c) the agent is authorized to do so under a program approved—or criteria established—by the lieutenant governor in council of the province.

In Ontario, the *Law Society Act*[12] further defines the scope of activities for a paralegal licensee. Under By-Law 4, a paralegal can be a defence agent in

> a proceeding or intended proceeding … in a summary conviction court under the *Criminal Code* (Canada), (i) where under the *Criminal Code* (Canada) immediately before the amendment day an accused was permitted to appear or examine or cross-examine witnesses by agent, or (ii) in respect of an offence under

11 *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25.

12 RSO 1990, c L.8.

subsection 320.13 (1), subsection 320.16 (1), section 320.17 or subsection 320.18 (1) of the *Criminal Code* (Canada).[13]

How do we reconcile the six-month limitation for an agent set out in section 802.1 of the Code with By-Law 4 of the LSO, which refers to the Code definition of "summary conviction" under section 787(1)? On August 15, 2019, the Government of Ontario signed Order in Council 1115/2019, which states:

> For the purposes of section 802.1 of the *Criminal Code* (Canada), the regulation of persons authorized to practice law or provide legal services by the Law Society of Ontario under the *Law Society Act*, including its determination of who may appear or examine or cross examine witnesses as an agent on summary conviction offences, is an approved program.[14]

In September 2019, the LSO almost unanimously passed a motion by the Paralegal Standing Committee[15] at Convocation with the following criteria:

1. There is an established scope for paralegals to act as agents in criminal matters for all offences that were punishable by a maximum penalty of six months' imprisonment when proceeding by summary conviction at the time that Bill C-75 was enacted.
2. There are four offences that were originally within the scope of practice of paralegals prior to the passage of Bill C-46[16] on December 17, 2018, specifically, sections 320.13(1), 320.16(1), 320.17, 320.18(1) of the Code. Due to the increase in the maximum penalty for summary conviction, the LSO has deemed these four offences to continue to fall within the scope of practice of paralegals.

In summary, paralegals may appear on Code summary conviction offences where the offence was punishable by a maximum of six months' jail time prior to the enactment of relevant provisions of Bill C-75. Paralegals may appear on Code hybrid offences where the Crown is proceeding by summary conviction and where the offence was punishable by a maximum of six months' jail time prior to the enactment of relevant provisions of Bill C-75. Finally, paralegals may appear on the following offences under the Code (Bill C-46 offences): sections 320.13(1), 320.16(1), 320.17, and 320.18(1), even though they now carry a maximum penalty of two years less one day. It is important to note that with the changes to penalties imposed by Bill C-75, paralegals are now able to represent clients who are charged with some offences that are currently punishable by up to two years less one day in jail. Figure 1.2 shows the Code summary conviction offences within the paralegal scope of practice.

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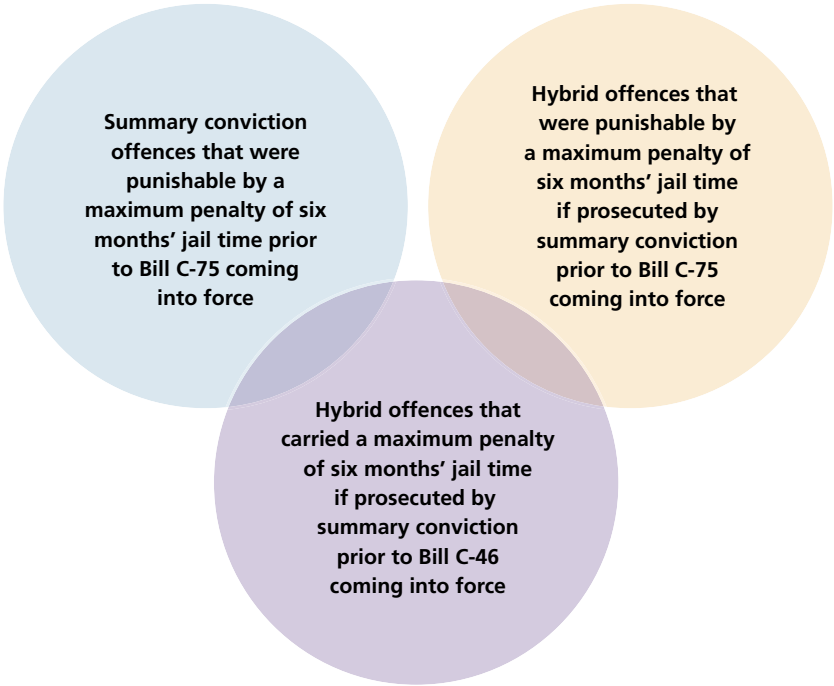
13 Law Society of Ontario, By-Law 4 (amendments current to 2 March 2021), online: <https://lso.ca/about-lso/legislation-rules/by-laws/by-law-4>, s 6(1)(c).

14 © Queen's Printer for Ontario, 2019. This is not an official copy. Current as of August 15, 2019. The most current copy of the order is available at <https://www.ontario.ca/orders-in-council/oc-11152019>.

15 Law Society of Ontario, Paralegal Standing Committee Bill C-75 Response (Toronto: LSO, 2019), online (pdf): <https://s3.amazonaws.com/tld-documents.llnassets.com/0015000/15178/convocation-september-2019-paralegal-standing-committee-report.pdf>.

16 *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, SC 2018, c 21.

FIGURE 1.2 Criminal Code Summary Conviction Offences Within the Paralegal Scope of Practice



A licensed paralegal is authorized to conduct a number of activities with respect to summary conviction matters (see Appendix B).

Roles and Responsibilities of the Defence Paralegal

To the Client

The Rules apply to a defence paralegal practising in the area of summary convictions. Rule 3 deals with duties owed to the client. In the context of criminal law, the rules that will be discussed here with particular relevance to a defence paralegal are:

- Rule 3.01 Competence
- Rule 3.02 Advising Clients
- Rule 3.03 Confidentiality
- Rule 3.04 Conflicts of Interest—General
- Rule 3.05 Conflicts of Interest—Transfers
- Rule 3.06 Transactions with Clients
- Rule 3.07 Client Property
- Rule 3.08 Withdrawal from Representation

Rule 3.01 Competence

Before agreeing to act for a client in a criminal matter, the defence paralegal must first be satisfied that they are competent in that area of law. Competency is not limited to subject matter knowledge but also refers to the ability to identify legal issues and potential defences, advising the client of the possible options and outcomes, implementing a chosen course of action, and advocating on behalf of the client. Rule 4.01 deals with the paralegal's duties as an advocate to the client and to the court. Specifically, rule 4.01(4)(a) states that the paralegal must raise every issue and advance every argument that would assist in the client's defence.

Since there are significant liberty interests at stake in a criminal matter, the paralegal must be vigilant in ensuring that their client's legal rights are not placed in jeopardy. Once a course of action is chosen, the paralegal must identify which procedural steps must be followed. For example, if the chosen course of action is to file an application for judicial stay of proceedings due to non-disclosure, the paralegal must identify what items have not been disclosed, that letters have been sent to the Crown requesting disclosure, that the Crown has failed to respond to the request, that the Criminal Rules have been followed regarding filing and service of the appropriate application form, and that a hearing date is set for the application.

Even when there is no readily apparent defence available to the client, the client is still entitled to have a trial on the charge, as the burden of proof is on the Crown to prove the case beyond a reasonable doubt. In certain situations, a defence to the charge may only come to light once the trial has started. Often, evidence at a trial may emerge in a different manner than what is expected by Crown counsel or by the defence paralegal. It is therefore important to always be fully prepared for a trial. Once a paralegal has appeared as a representative for the client, they are officially on the record and may not withdraw from the case without certain exceptions as set out in the Rules.

Rule 3.02 Advising Clients

In the context of criminal law, a paralegal must take care not to knowingly assist or encourage dishonesty, fraud, or illegal or criminal conduct on behalf of the client, as set out in rule 3.02(4) of the Rules. This rule applies to individual clients as well as organizations. A paralegal must also refrain from advising a client on how to violate the law and avoid punishment. It is advisable for the paralegal to discuss the nature of the paralegal–client relationship at the outset when discussing the scope of the retainer. Clients may be unaware of the legal and ethical boundaries of a paralegal's duty to the client; therefore, it is best to raise this at the beginning of the relationship.

When advising clients, the paralegal also has a duty to provide honest and candid advice, as set out in rule 3.02(2). The client may wish to know how likely it is that they will be convicted or acquitted. The paralegal must provide advice that is based on a thorough review of the evidence. It is also important to note that trials are based on the credibility and reliability of witnesses, which is impossible to gauge beforehand. What appears to be a relatively strong case for the Crown may not turn out to be the same at trial. Similarly, what appears to be a strong case for the accused may be fraught with challenges at trial. When giving advice to the client, it is important to avoid providing any guarantees of the outcome of a case.

Rule 3.02(11) indicates that a paralegal should advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis. Plea negotiations form an important function in the criminal justice system and are discussed in more detail in Chapter 6 and Chapter 8.

One of a paralegal's core responsibilities is to provide honest, candid advice to clients, which may include suggesting a compromise or other options to settle a dispute.

Rule 3.03 Confidentiality

A distinction must be made between the duty of confidentiality and solicitor–client privilege. The duty of confidentiality to the client (and potential clients) extends to all information gathered during the course of a retainer, regardless of whether the information itself is confidential. It is a statutory duty that paralegals must abide by, as set out by the LSO. Solicitor–client privilege, which extends to licensed paralegals, is a common law doctrine that applies to communications between a licensee and the client for the purpose of legal advice. Communications also include documents or any records that fall on the continuum of legal advice.

A defence paralegal must be aware of the limited circumstances in which they are permitted to disclose information provided by the client. When there is a clear, serious, and imminent threat to public safety, solicitor–client privilege will be set aside. This is known as the public safety exception to solicitor–client privilege. Similarly, rule 3.03(5) permits a paralegal to disclose confidential information where the paralegal has reasonable grounds to believe that there is an imminent risk of death or serious bodily harm and disclosure is necessary to prevent the death or harm.

Even when appearing before a judge and seeking to withdraw, the paralegal shall only provide the minimal amount of information necessary to avoid prejudicing the client and breaching their obligations with respect to confidentiality. Indicating that there has been a "breakdown in the paralegal–client relationship" indicates to the

court that the paralegal must withdraw for reasons that may not be stated on the record due to obligations of confidentiality.

In the context of representing a client in a criminal matter, what happens when the client discloses evidence indicating involvement in a criminal offence? What are the paralegal's legal and ethical obligations? This issue was considered in one of the most sensational criminal cases in Canadian history (see the Case in Point: *R v Murray*).

CASE *in* POINT

HOW FAR DOES SOLICITOR–CLIENT PRIVILEGE GO IN PROTECTING CLIENT CONFIDENTIALITY?

R v Murray, 2000 CanLII 22378, 48 OR (3d) 544 (Supt Ct J)

Facts

In 1993, Paul Bernardo retained defence counsel Ken Murray to represent him on charges of domestic assault and a number of sexual assaults that took place in Scarborough, Ontario. During this time, police were investigating Mr Bernardo for the murders of Leslie Mahaffy and Kristen French. Police had executed a search warrant at the residence of Mr Bernardo and his wife, Karla Homolka, but had not found anything connecting him to the murders.

Mr Bernardo instructed Mr Murray to attend his residence and retrieve six videotapes from the bathroom ceiling on the second floor of the house. Mr Murray, along with a junior lawyer and his law clerk, found the tapes and made a pact not to reveal the findings to anyone.

Mr Murray made copies of the tapes and kept them locked in his office safe. He did not immediately view the videotapes at the time, on the instructions of Mr Bernardo. The videotapes contained evidence of sexual assaults against Ms Mahaffy, Ms French, and two other victims. The tapes clearly depicted Mr Bernardo as the main culprit and Ms Homolka as an active and willing participant in those horrific acts.

In May 1993, Ms Homolka negotiated and struck a plea agreement whereby she would plead guilty to manslaughter with respect to the deaths of Ms Mahaffy and Ms French in exchange for a 12-year sentence of imprisonment. As part of this agreement, Ms Homolka agreed to testify against Mr Bernardo at his trial. Mr Murray was aware that Ms Homolka was involved in a plea agreement with the Crown, but he did not notify anyone of the videotapes. Mr Murray held onto the tapes for 17 months to attempt to arrange for a plea agreement for Mr Bernardo. Mr Murray's intention was to show that Ms Homolka was the actual killer of the two girls.

In August 1994, Mr Bernardo instructed Mr Murray to suppress the videotapes to argue that he did not know Ms Mahaffy and Ms French. At this point, Mr Murray arranged for a new defence lawyer to represent Mr Bernardo and applied to withdraw as counsel. Mr Murray also sought instructions from the Law Society as to what he should do with the tapes. He was advised to turn the tapes over to the presiding judge at Mr Bernardo's trial. However, the tapes were turned over to Mr Bernardo's new counsel, John Rosen, with the Court's approval. Twelve days after reviewing them, Mr Rosen turned them over to police. Mr Bernardo was subsequently convicted of two counts of first-degree murder in the deaths of Ms Mahaffy and Ms French.

Mr Murray was charged with attempting to obstruct justice for hiding the tapes, as they contained evidence that incriminated Mr Bernardo for the murders. Moreover, the defence had no legal right to conceal them in the months preceding the trial. Furthermore, Mr Murray came into possession of the tapes prior to Mr Bernardo being charged with the murders. Mr Murray took the position that he was legally entitled to retain the tapes to use at trial in his client's defence.

Decision

Justice Gravely held that although it was reasonable for Mr Murray to view the tapes first, he had no right to conceal them for as long as he did. However, Gravely J ruled that although the *actus reus* of the offence of obstructing justice was proved, there was no evidence of wilful intent on Mr Murray's part to obstruct justice, as he may well have believed there was no obligation to

disclose the tapes. Accordingly, Mr Murray was found not guilty. In the reasons for his decision, Gravely J noted that there was a lack of legal authority on the ethical obligations of lawyers regarding incriminating evidence.

Six months later, the Law Society withdrew charges of professional misconduct against Mr Murray, and he escaped from the Bernardo fiasco without any sanctions. Had Mr Murray not hidden the tapes, Ms Homolka would likely have been charged with two counts of first-degree murder, not manslaughter. Unfortunately, little has changed with respect to Ontario's professional conduct guidelines for criminal defence lawyers who come into possession of incriminating physical evidence. Thus, the balance between competing duties to the client and to the administration of justice is left up to individual lawyers to resolve.

Discussion Questions

Do you think the duty to one's client should rank above other ethical obligations? Should it be left to individual practitioners to decide how to resolve any ethical dilemmas that may arise?

Rule 3.04 Conflicts of Interest—General

A defence paralegal must be careful to avoid a conflict of interest, which may arise in a number of scenarios when defending a client in a summary conviction matter. Typically, conflicts may arise when representing more than one client on a matter as part of a **joint retainer** or acting against a former client in an unrelated matter when the paralegal has previously obtained confidential information from the former client. To avoid this, a joint retainer agreement should specify that if a conflict of interest arises, the paralegal must withdraw from representing both clients. Rule 3.04(6) deals specifically with joint retainers.

joint retainer
contractual relationship in which the paralegal represents more than one client in the same matter

Similarly, defence paralegals must avoid acting in situations where a former client is a witness for the Crown in a different case. Rule 3.04(4) prohibits paralegals from acting against former clients in any similar, related, or new matter if the paralegal has confidential information arising from their representation of the client that may prejudice the client.

EXAMPLE

Joint Retainers

Client A and Client B have been charged with theft under $5,000 for stealing candy bars together from a convenience store. Both have asked you to represent them and allege that they did not steal from the store. A few months later, Client A tells you that Client B is the one who stole the candy bars and that she was not aware of this until after they were charged. Can you continue to represent both of them? Can you choose to represent one client?

Rule 3.05 Conflicts of Interest—Transfers

This rule applies to conflicts that arise when a paralegal transfers to a new law firm, where the new and former firms represent different clients in the same or related matter, and where the interests of those clients are in conflict. This rule may be

relevant where the new firm and former firm both have clients who are co-accused in a criminal matter. In such a situation, the paralegal must be careful to follow confidentiality rules and procedures in place at the firm.

Rule 3.06 Transactions with Clients

Rule 3.06(10) specifically prohibits a paralegal from acting as a surety for their client or providing any monetary deposit or other valuable security to arrange for their client's release on bail. The only exception to this rule is if the paralegal is in a familial relationship with the accused and the accused is represented by the paralegal's partner or associate.

Rule 3.07 Client Property

There may be situations where the client turns over property to the paralegal for safekeeping until the trial takes place. Rule 3.07 deals with the duty of a paralegal to preserve the client's property. However, the paralegal must distinguish between what is the client's property and what constitutes incriminating physical evidence. Rule 4.01(5.2) specifically states that a paralegal must not participate in or counsel the client on concealment, destruction, or alteration of incriminating physical evidence or otherwise act so as to obstruct the course of justice. The physical evidence may consist of documents, electronic information, objects, or substances relevant to a crime, criminal investigation, or criminal prosecution.

PRACTICE TIP

A paralegal who comes into possession of incriminating physical evidence must carefully consider their options, which may include consulting with a lawyer to obtain legal advice. The paralegal must balance their ethical obligations with their duty of confidentiality to the client. Decisions will need to be made as to whether to disclose this evidence to law enforcement, under what conditions (directly or anonymously), and by whom (the paralegal or a lawyer). In some cases, the evidence may have to be delivered to the prosecution or the court. The paralegal must take care to not participate in the concealment, destruction, or alteration of the evidence.

Rule 3.08 Withdrawal from Representation

Special rules apply for a paralegal who wishes to withdraw from representing a client in a criminal matter. In certain cases, withdrawal is optional for the paralegal. An example of a situation in which withdrawal is optional—meaning that the paralegal may choose whether to withdraw or not—is when there has been a serious loss of confidence between the paralegal and the client (rule 3.08(2)). Even in situations in which withdrawal is optional, the paralegal may not use the threat of withdrawal to force the client to act in a certain way (rule 3.08(4)). Furthermore, there must be good cause for the withdrawal, and reasonable notice must be given to the client (rule 3.08(1)). In other situations, withdrawal is mandatory, meaning that the paralegal has no choice but to withdraw. An example of a situation where the paralegal must withdraw is where the client instructs the paralegal to act contrary to the Rules.

EXAMPLE

Mandatory Withdrawal

Your client asks you to represent her for a charge of making harassing telephone calls. The complainant is your client's cousin. Prior to the trial, your client tells you that she wants you to prolong your cross-examination in such a manner as to harass the complainant, thereby ensuring that she is unable to testify.

Rules 3.08(7)-(9) deal with withdrawal in criminal and quasi-criminal cases. Since the jeopardy faced by a client in a criminal or quasi-criminal matter is much greater than in any other type of case, a paralegal must withdraw far in advance of any approaching trial date to enable the client to obtain other representation and to allow that licensee sufficient time to prepare. This means that even in situations in which the client has not paid the paralegal's fees, the paralegal must apply to withdraw well in advance of the trial date so as not to adversely affect the client's rights. For all other situations, if the paralegal is justified in withdrawing from representation but cannot do so with sufficient notice, they must bring the application to withdraw immediately prior to the commencement of the trial.

A question that often arises is how much information the court is entitled to receive regarding the reasons for withdrawal. On the one hand, the paralegal is bound by a duty of confidentiality to the client, yet on the other hand, the paralegal must be careful not to deceive the court or assist in dishonesty. How does the paralegal reconcile these obligations if a conflict arises with respect to withdrawal? The case of *R v Cunningham* sheds some light on this issue.

CASE *in* POINT

HOW MUCH INFORMATION IS THE COURT ENTITLED TO?

R v Cunningham, 2010 SCC 10

Facts

Jennie Cunningham was a criminal defence lawyer appointed by Yukon Legal Aid to act as counsel for a defendant charged with sexual offences. Prior to the preliminary inquiry, Yukon Legal Aid notified the accused that his funding would be suspended unless he updated his financial information. When he failed to respond, Ms Cunningham brought an application before the Court to withdraw as counsel based on the suspended funding. She indicated that she would be willing to represent him if the funding were reinstated. The lower courts refused her application, but the Court of Appeal allowed her appeal. The matter was then appealed to the Supreme Court of Canada.

Decision

The Supreme Court established some guidelines regarding applications to withdraw as counsel prior to trial. In situations where counsel seeks to withdraw far enough in advance of the trial date that an adjournment of the trial will not be necessary, the court will not inquire further into the reasons for withdrawal.

If, however, the timing of withdrawal is at issue, the court is entitled to inquire further. If counsel seeks to withdraw for ethical reasons, this means that an issue has arisen in the solicitor–client relationship that makes it impossible for counsel to continue to represent the accused in good conscience. An example of this is when the client instructs the paralegal to lie to the court.

When the reason for withdrawal is based on ethical grounds, the court must grant withdrawal, as it would be inappropriate to force counsel to continue to act in violation of their ethical responsibilities.

If the paralegal seeks to withdraw because of non-payment of fees, then the paralegal must be forthcoming with the court about the reason for withdrawal. It is at the court's discretion as to whether to permit counsel to withdraw for non-payment of fees when the timing of the withdrawal is at issue. In either case, the court must accept counsel's answer at face value and not delve any further so as to avoid encroaching on issues of solicitor–client privilege and confidentiality.

The Court went on to outline a number of factors that judges ought to consider when exercising discretion in deciding whether or not to allow the withdrawal application (para 50):

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

The Supreme Court noted that as these factors are independent of the solicitor–client relationship, no privilege should be violated when engaging in this analysis.

PRACTICE TIP

To avoid the situation of having to withdraw for non-payment of fees close to the trial date, the defence paralegal should diarize regular reviews of the file to ensure that billing is complete and there are enough funds in the trust account to pay for disbursements. Client expectations should be managed at the outset by way of a detailed retainer agreement.

To the Administration of Justice

Rule 6 deals with a paralegal's duty to the administration of justice and to the courts. Generally, a paralegal has a duty to encourage public respect for the administration of justice.

Often, the issue arises as to whether the defence paralegal ought to make statements to the media about a criminal case. The obligation to the client, to the administration of justice, and to the courts comes first. However, as long as there is no infringement of this obligation and as long as the communications will not materially prejudice a party's right to a fair trial or hearing, a paralegal may make public appearances and provide statements to the media (rules 6.01(4) and (4.1)).

While a criminal defence paralegal must be a vigilant advocate for the client, they must also treat the court and other licensees and lawyers with candour, fairness,

courtesy, and respect (rule 4.01(1)). While the Rules appear to be clear in terms of which activities are prohibited, in practice, there are situations in which the ethical lines are blurred. For example, rule 4.01(4)(d) states that a paralegal may not attempt to gain advantage from mistakes or oversights not going to the merits of the case. On the other hand, rule 4.01(4)(b) encourages the paralegal to take advantage of every remedy and defence available in law. It may not be clear whether a particular oversight made by a Crown attorney is a potential benefit in the client's case. Is the paralegal in breach of the Rules if they do not bring the oversight to the attention of the Crown? Is the paralegal justified in waiting to see if the oversight provides a potential defence in the client's case? These questions must be answered in the context of each individual case.

What is clear is that a paralegal may not become a tool or dupe of the client by assisting the client in deceiving the court or misstating facts or the law. The Rules go as far as to indicate that if the paralegal is aware of any binding authority directly on point, they must inform the court if the opponent does not mention it, even if the decision does not assist the paralegal's case (rule 4.01(5)(d)).

A paralegal must encourage public respect for, and take care not to weaken public confidence in, the administration of justice, specifically with respect to commenting on judges or decisions made by judges (rule 6.01). This should be kept in mind particularly in situations in which a ruling is made or a decision is rendered against the client.

EXAMPLE

Rule 6.01 of the *Paralegal Rules of Conduct*

You are having lunch with two defence paralegals. You are all discussing the topic of appearing in front of Judge Smith, a judge who has a reputation for deciding more cases in the Crown's favour. At one point, you mention the sentencing that took place last week before Judge Smith. Your colleague says, "As soon as you walk in and see Judge Smith, forget about case law—he'll just do what he wants anyway!" What are the implications of this comment?

Roles and Responsibilities of the Police

The role of the police is to maintain order, enforce the law, and prevent and investigate crime. A police officer or a police agency is responsible for investigating, charging, gathering evidence, and presenting that evidence in court.

Although the Crown and the police work closely together, the roles of each are separate and distinct. Police officers are not agents or employees of the Crown attorney. The police and the Crown have independent roles and responsibilities. While the police investigate and lay charges, Crown counsel will only proceed with those offences when there is a reasonable likelihood of conviction and when it is in the public interest to prosecute the accused. The decision as to whether or not to proceed with an offence is at the sole discretion of the Crown. Once a charge is laid, an investigating police officer cannot tell a Crown attorney what position to take on that charge. A police officer cannot force the Crown to withdraw the charge, refuse to negotiate a plea, or accept a plea.

Although the police may recommend to the Crown a specific course of action, the Crown does not have to follow the recommendation. However, the Crown attorney conducting a particular case may ask the investigating officer for their opinion on a plea offer. In larger and more complex prosecutions, the police often consult the Crown on a regular basis, as legal advice from the Crown may be necessary when gathering evidence.

In the recent case of *Ontario (AG) v Clark*,[17] three police officers arrested two individuals for armed robbery and forcible confinement. A confession was obtained from these two suspects, but the Crown believed that the confession would be inadmissible based on allegations that the officers beat the suspects and caused serious injuries. At the suspects' trial, the Crown did not call these officers as witnesses but conceded that the assaults occurred. The trial judge convicted the two accused, but handed down a lighter sentence, referring to the officers' conduct as police brutality. The Ontario Court of Appeal entered a stay of proceedings and strongly criticized the officers' conduct. The officers filed a lawsuit against the attorney general, claiming that they suffered irreparable harm to their reputations and credibility due to the Crown not calling them as witnesses at the trial. The majority of the Supreme Court stated that prosecutors do not owe legal duties to the police with respect to how they carry out a prosecution. To protect the Crown's independence and integrity in pursuit of a fair trial for the accused, the Crown rightfully holds prosecutorial immunity and generally cannot be sued for actions they take in performing their public duties.

Roles and Responsibilities of the Crown

Crown attorneys or prosecutors in Canada prosecute offences under the *Criminal Code* and other statutes such as the *Youth Criminal Justice Act* and the *Controlled Drugs and Substances Act*. Crown attorneys in Ontario represent the Ontario Ministry of Justice, Criminal Law Division under the direct supervision of the assistant deputy attorney general. Ultimately, the attorney general is a representative of the Queen. The attorney general has the authority to deal with matters relating to criminal prosecutions.

For charges pursuant to federal legislation, such as drug charges under the *Controlled Drugs and Substances Act* or the *Firearms Act*, federal Crown attorneys would have jurisdiction to prosecute. For all other offences, provincial Crown attorneys would have jurisdiction to prosecute. Within each local Crown attorney office, there is typically one Crown attorney, one or two deputy Crown attorneys, and several assistant Crown attorneys who report to the Crown attorney. In Canada, unlike the judicial system in the United States, Crown attorneys are not elected. However, Crown attorneys must not be politically influenced and are granted broad decision-making latitude. In a criminal trial, the burden of proof rests with the prosecution to prove the case beyond a reasonable doubt.

The Crown attorney chooses the appropriate charge on which to proceed, considers the release of accused persons pending trial, and conducts trials at all levels of court. Additional responsibilities of a Crown attorney include acting as counsel to the coroner during inquests and advising police, lawyers, and the public on general

17 2021 SCC 18.

matters related to the administration of justice. A Crown attorney does not seek to win cases but rather fairly presents all of the evidence to arrive at the truth. Crown counsel have a duty to ensure that the criminal justice system operates fairly to the accused, to victims of crime, and to the public. The Supreme Court of Canada outlined the role of a Crown attorney in the case of *R v Boucher*,[18] saying that Crown 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."[19]

Crown attorneys should be professional in their demeanour and act fairly and dispassionately without personalizing their role in court. Of particular importance, especially with regard to recent legal history in Canada, is the duty of prosecutors to be open to the possibility of the innocence of accused persons and to avoid **tunnel vision**. Tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to that information.[20]

tunnel vision
a situation in which a particular suspect is believed by investigators to be guilty of an offence and any evidence inconsistent with this theory is dismissed as irrelevant, incredible, or unreliable; may result in the elimination of other suspects who should be investigated

To ensure that a consistent approach is taken in prosecutions across the province, Crown attorneys follow the Crown Policy Manual, which not only conveys the attorney general's instructions, priorities, and rationale behind these policies but also provides the public with information on the guiding principles that Crown attorneys must follow, thereby enhancing public accountability. However, the manual is not intended to replace the discretion exercised by Crown counsel in making decisions on a daily basis.

18 [1955] SCR 16.

19 *Ibid* at 24.

20 The Honourable Fred Kaufman, CM, QC, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (Ottawa: Publications Ontario, 1998), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.html>.

CHAPTER SUMMARY

The federal government has the power to create laws only on matters over which it has jurisdiction. Similarly, the provincial and territorial governments may only enact laws that fall within provincial or territorial jurisdiction.

There are four levels of court in the Canadian criminal justice system: provincial courts, superior courts, provincial appellate courts, and the Supreme Court of Canada. Currently, paralegals may only appear on summary conviction matters in provincial court.

Most criminal offences and penalties are set out in federal statutes such as the *Criminal Code*. The Code also contains procedures for the disposition of criminal offences and forms related to criminal matters.

The scope of practice of a criminal defence paralegal is to represent clients on summary conviction offences or hybrid offences where the Crown is proceeding by way of summary conviction, where the maximum penalty was no more than six months' jail time prior to the enactment of relevant provisions of Bill C-75.

A criminal defence paralegal may represent clients on summary conviction matters in the Ontario Court of Justice. A defence paralegal has several responsibilities to the client, which include competence; advising on procedures, legal issues, and potential defences; maintaining confidentiality; avoiding conflicts of interest; and advocacy. These rules and responsibilities are set out in the *Paralegal Rules of Conduct*. A defence agent also has duties to the administration of justice and to other licensees and lawyers.

The roles and responsibilities of the Crown and of the police are separate and distinct in relation to a criminal prosecution. While the police are responsible for maintaining order, enforcing the law, gathering evidence, and investigating crimes, the function of Crown attorneys is different. Crown attorneys represent the attorney general and have a duty to fairly present all of the evidence before the court to arrive at the truth.

KEY TERMS

common law, 2
inherent jurisdiction, 4
intra vires, 3
joint retainer, 15
precedent, 2
stare decisis, 2
statutory law, 2
tunnel vision, 21
ultra vires, 3

REVIEW QUESTIONS

Short Answer

1. Distinguish between common law and statutory law.
2. Which level of court hears summary conviction matters?
3. What is the scope of a paralegal's authority to represent someone charged with a criminal offence?
4. What specific considerations apply when a paralegal wishes to withdraw from representation in a criminal or quasi-criminal matter?
5. Summarize the roles and responsibilities of a Crown attorney.

Apply Your Knowledge

1. Identify which level of government has law-making authority over the following laws:
   a. a law that prevents drivers from using any hand-held devices while driving
   b. a law that prevents passengers on an aircraft from transporting hazardous materials
   c. a law that changes current immigration policies
   d. a law that bans the sale of junk food in schools
   e. a law that changes the current policies on agricultural trade
2. Identify what parts and sections of the *Criminal Code* these offences and topics may be found under:
   a. commencement of proceedings of a summary conviction matter
   b. fraudulently obtaining food
   c. issue of appearance notice by a peace officer
   d. careless use of a firearm

e. mailing obscene matter
f. fine option program
g. abandoning a child
h. counterfeiting stamp

3. On the morning of trial, a client asks you if you are familiar with the particular judge who will be hearing his case. He asks you whether this judge is more likely to believe him or the Crown's witnesses. He also wants to know which route he should take (what to say on the stand) in order to be found not guilty. He tells you that he is thinking of lying about his actions in order to avoid being convicted. Can you still represent him? Can you allow him to testify? How would you advise your client?
4. In preparation for a trial, the investigating police officer tells you that she is okay with a guilty plea to a lesser charge. Two weeks later, you walk into the courtroom on the trial date, expecting that this matter will plead out and that there will not be a trial. The Crown informs you that they are not willing to take a plea to a lesser charge and that they are prepared to proceed to trial. Should you make a motion for abuse of process? Should you complain to the Crown attorney? Should you complain to the investigating officer's sergeant? How could this situation have been avoided?
5. Your 19-year-old client is charged with dangerous operation of a motor vehicle, and the Crown has elected to proceed summarily given that your client has no previous criminal record. Your client has advised you that they wish to plead guilty to the charge. The Crown's position, as disclosed on the particulars, is a 60-day jail sentence. Based on your research, this is a harsh position on sentencing under the circumstances. You have made attempts to meet with an assistant Crown attorney to discuss the matter, but since it has not yet been set for trial, no one has been assigned to the case. Should you set the matter down for trial? Should you convince your client to plead not guilty based on what the Crown is seeking in terms of a sentence? What should you do?