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Twenty Years After Krieger v Law Society of Alberta: Law Society Discipline of Crown Prosecutors and Government Lawyers

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**TWENTY YEARS AFTER
KRIEGER V. LAW SOCIETY OF ALBERTA:
LAW SOCIETY DISCIPLINE OF CROWN PROSECUTORS
AND GOVERNMENT LAWYERS**

ANDREW FLAVELLE MARTIN*

Krieger v. Law Society of Alberta held that provincial and territorial law societies have disciplinary jurisdiction over Crown prosecutors for conduct outside of prosecutorial discretion. The reasoning in Krieger would also apply to government lawyers. The apparent consensus is that law societies rarely exercise that jurisdiction. But in those rare instances, what conduct do Canadian law societies discipline Crown prosecutors and government lawyers for? In this article, I canvass reported disciplinary decisions to demonstrate that, while law societies sometimes discipline Crown prosecutors for violations unique to those lawyers, they often do so for violations applicable to all lawyers — particularly extraprofessional misconduct. Further research remains necessary on the patterns and incentives underlying law society discipline of Crown prosecutors and government lawyers. Nonetheless, the relative rarity of disciplinary proceedings involving Crown prosecutors and government lawyers does not necessarily mean that law societies are neglecting their statutory mandate as it applies to those lawyers. At the same time, law societies may indeed be overly reliant not only on internal discipline of these lawyers by governments as their employers, but also on criminal proceedings as prompts for investigation and discipline.

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I. INTRODUCTION

In *Krieger v. Law Society of Alberta*, the Supreme Court of Canada held that provincial and territorial law societies have disciplinary jurisdiction over Crown prosecutors, including federal Crown prosecutors, for all conduct outside of prosecutorial discretion.¹ The reasoning in *Krieger* would also apply by extension to government lawyers, that is, “public servants practising law in the service of the Crown within the federal Department of Justice or within provincial or territorial counterparts or within client departments.”² In the twenty years since *Krieger*, however, the apparent consensus is that law societies rarely and insufficiently exercise that disciplinary jurisdiction.³ Nonetheless, there remains a fundamental gap in the legal literature: in those rare instances, what conduct *do* Canadian law societies discipline Crown prosecutors and government lawyers for or attempt to discipline them for? In this article, I canvass reported disciplinary decisions to answer this question. I then consider what patterns or themes are revealed by that constellation of decisions.

This article is organized in four parts after this introduction. In Part II, I examine and explain the rationale in *Krieger* and three related decisions. In Part III, I turn to the existing legal literature. First, I demonstrate the apparent consensus that Canadian law societies rarely discipline Crown prosecutors or government lawyers. I then canvass the Canadian and US literature proposing why this is so. Then in Part IV, I explore reported disciplinary decisions involving Crown prosecutors or government lawyers. I focus on reported disciplinary decisions because the steps preceding discipline in the regulatory process — complaints, investigations, proceedings authorizations, as well as diversions or other non-disciplinary resolutions — are generally inscrutable.⁴ I provide my analysis of these decisions in Part V before sharing my reflections and conclusions.

Any assessment of law society discipline should be centered around the purpose of such discipline. The classic statement comes from Gavin MacKenzie: “The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather

¹ *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 40–41, 56 [*Krieger*].

² Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis, 2018) at xxiii, quoted in Andrew Flavelle Martin & Leslie Walden, “The Incorporation of Government Lawyering in the Teaching of Legal Ethics in Canadian Law Schools” (2022) 9 Can Leg Education Annual Rev 47 at 49–50.

³ Nick Kaschuk, “Who Will Prosecute the Prosecutors? On the Need for Our Law Societies to Discipline Crown Attorneys, Failing Crown Culture, and Wrongful Convictions” (2022) 70:4 Crim LQ 529 esp at 531; Jennifer Pagliaro & Jayme Poisson, “Crown Attorney Complaints Not Tracked” *The Toronto Star* (16 December 2014) A1; Jacques Gallant, “Crown Disciplinary System at Issue” *The Toronto Star* (24 September 2016) GT1. In the US context, see e.g. Bruce A Green, “Prosecutorial Ethics in Retrospect” (2017) 30:3 Geo J Leg Ethics 461 at 478 [footnotes omitted]: “In the academic literature on the regulation of prosecutors, it is virtually a truism that disciplinary authorities do not take prosecutorial misconduct seriously enough.” For proposed reforms, see e.g. in the US context Thomas P Sullivan & Maurice Possley, “The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform” (2015) 105:4 J Crim L & Criminology 881.

⁴ For a critique in the US context, see Leslie C Levin, “The Case for Less Secrecy in Lawyer Discipline” (2007) 20:1 Geo J Leg Ethics 1.

to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.”⁵ As I will return to below, the protection of the public is a major consideration in law society discipline of Crown prosecutors and government lawyers.⁶

I note at the outset that almost all of the cases that I discuss in this article involve Crown prosecutors and not government lawyers. There are several potential explanations for this apparent differential. There may actually be fewer reported decisions about government lawyers, given that wrongdoing by Crown prosecutors is more visible (including to courts or opposing counsel) than is wrongdoing by government lawyers, many of whom practise outside litigation contexts. As I will discuss below,⁷ Crown prosecutors are also subject to unique duties that may be more likely to give rise to complaints, investigations, and discipline. On the other hand, existing decisions about Crown prosecutors may simply be more readily identifiable than existing decisions about government lawyers. For example, there are relatively few phrases used to refer to Crown prosecutors.⁸ In contrast, the phrase “government lawyers” is not a term of art, and there are many ways to describe such lawyers. I suspect that this apparent differential is a combination of both reality and research challenges. I certainly do not presume or suggest that Crown prosecutors are less ethical than government lawyers, or that either group are less ethical than lawyers generally.

II. LAW SOCIETY JURISDICTION OVER CROWN PROSECUTORS AND GOVERNMENT LAWYERS

In this Part, I examine and explain the rationale in the three leading decisions on law society regulation and discipline of Crown prosecutors and government lawyers — as well as one apparently overlooked decision. I begin with *Krieger*, which holds that law societies have disciplinary jurisdiction over Crown prosecutors, whether provincial or federal. I then turn to the subsequent decision in *Law Society of Upper Canada v. Ontario Public Service Employees Union*, a decision of the Ontario Superior Court of Justice which holds that legislation on the legal profession binds the Crown by necessary implication and so government employees who practise law are subject to law society jurisdiction — largely because such jurisdiction is necessary to protect the public.⁹ I then consider the pre-*Krieger* decision in *Barreau du Québec c. Sansfaçon*, a largely overlooked decision in which a disciplinary panel of the Barreau rejected the argument that Crown immunity removes the jurisdiction of the Barreau over Crown prosecutors.¹⁰ Finally, I turn to *Everingham v.*

⁵ Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters Canada, 1993) (loose-leaf updated 2023, release 2), ch 26, §26.1.

⁶ See notes 21 and 29 and accompanying text. On the protection of the vulnerable more specifically, see notes 74 and 95 and accompanying text.

⁷ See notes 84–91 and accompanying text.

⁸ In English, the most commonly used phrases appear to be “Crown prosecutors,” “Crown attorneys,” and “Crown counsel.” In French, the most commonly used phrases appear to be « substitut(e)(s) du Procureur general, » « procureur(e)(s) du ministère public, » and « procureur(e)(s) de la Couronne. » Consider also the key phrases “public prosecution service” and « Directeur des poursuites criminelles et pénales. »

⁹ 2014 ONSC 270 [*LSUC v OPSEU*].

¹⁰ *Barreau du Québec c. Sansfaçon*, [1992] DDAN no 61 (QC) [*Barreau c Sansfaçon*], aff’d *Sansfaçon c Guimont*, 1992 CanLII 8403 (QCTP) (*sub nom Barreau du Québec c Sansfaçon*), aff’d *Sansfaçon c Tribunal des professions*, 1993 CarswellQue 1676 (SC). An appeal to the Quebec Court of Appeal was filed in 1993, but was withdrawn on 10 October 2008, after the underlying Barreau complaint was withdrawn. See *Barreau du Québec (syndic adjoint) c Sansfaçon*, 2008 QCCDBQ 099 at paras 25–26, 33–34.

Ontario, a decision by the Ontario Divisional Court which holds that government lawyers are held to the same standards of professional conduct as other lawyers.¹¹ While *Everingham* 1992 long pre-dates *Krieger* and *LSUC v. OPSEU*, it provides critical context for my analysis. And while *LSUC v. OPSEU* and *Everingham* 1992 are not binding outside Ontario, their reasoning is compelling in all Canadian jurisdictions.

A. *KRIEGER V. LAW SOCIETY OF ALBERTA*

In *Krieger*, a provincial Crown prosecutor in Alberta sought a pre-emptive declaration that the provincial law society could not discipline him for a failure to provide appropriate disclosure to the defendant in a criminal case or for any other exercise of prosecutorial discretion.¹² Justices Iacobucci and Major held for a unanimous Supreme Court of Canada that Crown prosecutors, being lawyers, were generally within the disciplinary jurisdiction of law societies and were immune to such professional discipline *only* in the exercise of prosecutorial discretion.¹³ Prosecutorial discretion was summarized as comprising “decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it.”¹⁴ However, bad faith would vitiate this immunity.¹⁵ Moreover, disclosure was a legal duty and not an exercise of prosecutorial discretion — and thus the law society could discipline Crown prosecutors for violating that duty.¹⁶ At the same time, Justices Iacobucci and Major emphasized that not every disclosure shortcoming would be blameworthy enough to constitute an ethical violation so as to engage law society jurisdiction.¹⁷ Justices Iacobucci and Major also held that provincial and territorial law societies likewise had disciplinary jurisdiction over federal Crown prosecutors, although that issue would seem to be *obiter* on the facts of *Krieger*.¹⁸

For my purposes, the most important part of the reasoning in *Krieger* was that disciplinary jurisdiction over Crown prosecutors was necessary for law societies to protect the public in a way that the government or the Attorney General cannot.¹⁹ At one level, the Supreme Court’s holding as to disciplinary jurisdiction was in part an exercise in plain-text statutory interpretation. In short, only lawyers can appear in court, so in order to appear in court Crowns prosecutors must be lawyers — and since they are lawyers, Crown prosecutors are within the regulatory and disciplinary jurisdiction of the corresponding provincial and

¹¹ *Everingham v Ontario* (1992), 88 DLR (4th) 755 (Div Ct) [*Everingham* 1992], rev’g 84 DLR 4th 354 (Ont Gen Div) [*Everingham* 1991].

¹² *Krieger*, *supra* note 1 at para 14.

¹³ *Ibid* at para 50.

¹⁴ *Ibid* at para 47. See also *ibid* at para 46 [citations omitted]:

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution...; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether...; and (e) the discretion to take control of a private prosecution.

See also note 65 and accompanying text.

¹⁵ *Ibid* at paras 51–52.

¹⁶ *Ibid* at para 54.

¹⁷ *Ibid* at para 59, quoting with approval from Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 657. See now David Layton & Michel Proulx, *Ethics and Canadian Criminal Law*, 2nd ed (Toronto: Irwin Law, 2015) at 617–18.

¹⁸ *Krieger*, *supra* note 1 at para 56. See e.g. Andrew Flavelle Martin, “The Implications of Federalism for the Regulation of Federal Government Lawyers” (2020) 43:1 Dal LJ 363 at 383–85 (while federal prosecutors are subject to law society jurisdiction if they happen to be members of a provincial or territorial law society, as a result of federalism they cannot be required to be members).

¹⁹ *Krieger*, *supra* note 1 at para 58.

territorial law societies.²⁰ (By extension, since government lawyers are lawyers, they are also subject to the regulatory and disciplinary jurisdiction of the corresponding provincial and territorial law societies.) However, the Supreme Court also emphasized the unique ability of law societies, as opposed to internal governmental disciplinary processes, to fulfill their mandate of public protection through the remedy of disbarment: “A prosecutor whose conduct so contravenes professional ethical standards that the public would be best served by preventing him or her from practising law in any capacity in the province should not be immune from disbarment. Only the Law Society can protect the public in this way.”²¹

The Supreme Court also emphasized that while Crown prosecutors must meet the standards of the Attorney General as their employer, such standards could not be lesser than the standards imposed by the law society.²² The Supreme Court in *Krieger* also rejected other arguments against law society jurisdiction over Crown prosecutors, namely, that such jurisdiction was ultra vires provincial legislatures and that the exercise of that jurisdiction was an improper review of the government’s internal investigative and disciplinary processes.²³

As I will return to below, while *Krieger* was for many years the leading case on the scope of prosecutorial discretion, uncertainty over that scope persisted.²⁴ Whereas there were mixed decisions challenging law society discipline of Crown prosecutors prior to *Krieger*,²⁵ after *Krieger* the narrower issue in such discipline was sometimes the precise scope of prosecutorial discretion.²⁶

While the holding in *Krieger* was limited to Crown prosecutors, the reasoning would clearly apply by extension to government lawyers — without, however, any carve-out parallel to prosecutorial discretion.

In my view, *Krieger* is best understood as expressing a regulatory imperative instead of a regulatory possibility. In other words, *Krieger* holds not only that law societies *can* regulate Crown prosecutors (and by extension, government lawyers), but that they at least sometimes *must* regulate those lawyers to fulfill their mandate to protect the public. In some circumstances, discipline — and specifically disbarment — will be a necessary component of that regulation. Since the unique disciplinary sanction of the law society is disbarment,

²⁰ *Ibid* at paras 40–41, esp 41: “All Alberta lawyers are subject to the rules of the Law Society — Crown prosecutors are no exception.” See also *ibid* at para 4: “Because Crown prosecutors must be members of the Law Society, it thereby follows Crown prosecutors are subject to the Law Society’s code of professional conduct.”

²¹ *Ibid* at para 58.

²² *Ibid* at para 50.

²³ *Ibid* at paras 33–39, 57–59.

²⁴ See note 65 and accompanying text.

²⁵ See e.g. *Cunliffe v Law Society of British Columbia* (1984), 11 DLR (4th) 280 (BCCA) (dismissing appeal against discipline of Crown prosecutor for failure to inform defence counsel of exculpatory witnesses; allowing appeal against discipline of Crown prosecutor for failure to provide defence counsel with those witnesses’ statements and failure to call those witnesses); *Hoem v Law Society of British Columbia* (1984), 52 BCLR 219 (SC), aff’d (1985), 20 DLR (4th) 433 (CA) (quashing ruling by law society disciplinary committee that it had jurisdiction to hear competence allegations against Crown prosecutor for exercise of prosecutorial discretion).

²⁶ See notes 69–82 and accompanying text. But see *Tibbit v Law Society of Saskatchewan*, 2004 SKQB 22 at para 14 (law society can discipline Crown prosecutors for disclosure even absent “dishonesty or bad faith”).

law society discipline will become an imperative as the misconduct approaches the more serious end of the spectrum.

**B. *LAW SOCIETY OF UPPER CANADA
v. ONTARIO PUBLIC SERVICE EMPLOYEES UNION***

While the precise legal question in *LSUC v. OPSEU* was slightly different, and the holding in *Krieger* was limited to Crown prosecutors, the reasoning in *LSUC v. OPSEU* reinforced that law societies necessarily have jurisdiction not only over Crown prosecutors, but also over government lawyers.

In *LSUC v. OPSEU*, the Law Society sought a declaration that legislation on the legal profession (specifically the Ontario *Law Society Act*) binds the Crown, such that government employees who provide legal services must be paralegal licensees of the Law Society.²⁷ While the Government of Ontario supported the position of the Law Society, the corresponding public-sector union opposed the declaration.²⁸ In holding that the *Law Society Act* bound the Crown by necessary implication, the judge in *LSUC v. OPSEU* emphasized that the Law Society could otherwise not fulfill its statutory mandate to protect the public: “Were the *LSA* to be interpreted in such a way as not to bind the Crown, the purpose of the Act, namely, protection of the public with respect to the practice of law and the provision of legal services would, in my view, be totally frustrated. Such an interpretation would result in an anomaly and absurdity, and cannot have been intended.”²⁹ This emphasis on the protection of the public is consistent with the passage on public protection in *Krieger*, from which the judge in *LSUC v. OPSEU* quoted at length.³⁰ Like the Court in *Krieger*, the judge in *LSUC v. OPSEU* also noted that the internal disciplinary powers of the government as the employer were different and more limited than that of the Law Society as the regulator — specifically referring to disbarment.³¹

While there should be no doubt after *Krieger* that law societies have disciplinary jurisdiction over not just Crown prosecutors, but also government lawyers, *LSUC v. OPSEU* eliminates any such doubt by holding that legislation on the legal profession necessarily binds government lawyers.

C. *BARREAU DU QUÉBEC C. SANSFAÇON*

Though largely overlooked in the case law and the legal literature, *Barreau c. Sansfaçon* foreshadowed the later leading decisions in *Krieger* and *LSUC v. OPSEU*. Here the disciplinary panel of the Barreau denied a motion that it lacked jurisdiction over Crown prosecutors.³² The Barreau panel rejected the argument that Crown immunity removed that

²⁷ *LSUC v. OPSEU*, *supra* note 9 at para 1; *Law Society Act*, RSO 1990, c L.8 [*LSA*]. They also sought a related second declaration that an exemption in the licensing regime did not apply to a specific group of government employees.

²⁸ *LSUC v. OPSEU*, *ibid* at paras 2–3.

²⁹ *Ibid* at para 60.

³⁰ *Ibid* at para 54, quoting from *Krieger*, *supra* note 1 at paras 50, 58.

³¹ *LSUC v. OPSEU*, *ibid* at para 62.

³² *Sansfaçon c. Guimont*, *supra* note 10.

jurisdiction, partly because the relevant legislation required Crown prosecutors to be lawyers and partly because their role did not require them to act unethically:

Non seulement peut-on avancer que les fins de la Couronne et plus particulièrement du Ministère de la Justice et du procureur général et ses substituts ne commandent pas que ceux-ci commettent des actes dérogatoires à l'honneur ou à la dignité du Barreau, mais également l'obligation qui est faite au substitut d'être membre du Barreau et par voie de conséquence, d'en respecter les lois et règlements, empêche dans les circonstances alléguées dans la plainte, d'invoquer l'immunité, du moins à ce stade-ci.³³

This passage was quoted with approval by the Superior Court on judicial review.³⁴ The Barreau panel also stated explicitly that « [l]e code de déontologie s'applique à tous les avocats, dont les substituts du procureur général, »³⁵ which foreshadowed the language and the holdings in both *Everingham* and *Krieger*.

While the Tribunal des Professions and the Court on judicial review both held that it was premature and unnecessary to decide the question of Crown immunity, both the Tribunal and the Court nonetheless cast serious doubt on the lawyer's argument. In particular, the Tribunal emphasized that the legislation on Crown prosecutors required them to be lawyers. The Tribunal also quoted with approval from a previous decision of the Quebec Court of Appeal, which in its original English read in part “[i]t seems a curious contention that the Crown has the right apart from its prerogatives to disregard all statutory requirements attaching to certain professions when it wishes to enlist the services of someone in such profession.”³⁶

D. *EVERINGHAM V. ONTARIO*

These cases should be read against the backdrop of *Everingham* 1992,³⁷ which preceded *Krieger* and *LSUC v. OPSEU*, but came after *Barreau c. Sansfaçon*. *Everingham* 1991 involved a litigator for the government of Ontario who spoke to a patient in a mental hospital while on a tour of the facility, even though the lawyer was scheduled to cross-examine the patient on an affidavit the next day and the patient was represented in that matter.³⁸ The motion judge would have removed the lawyer from the record on the basis that although there was no breach of the “spirit” of the rule of professional conduct against such contact

³³ *Barreau c Sansfaçon*, *supra* note 10, quoted with approval in *Sansfaçon c Tribunal des professions*, *supra* note 10 at para 14. *Barreau c Sansfaçon*, *ibid* [translated by author]:

Not only can it be argued that the purposes of the Crown and more particularly of the Department of Justice and the Attorney General and his prosecutors do not require that they commit acts derogatory to the honor or dignity of the Bar, but also the obligation imposed on the delegate to be a member of the Barreau and, consequently, to respect its laws and regulations, prevents, in the circumstances alleged in the complaint, from invoking immunity, at least at this stage here.

The legislation referred to is *Loi sur les substituts du Procureur général*, LRQ c S-35, art 3, as it appeared on 23 January 1992. See also the companion case *Roberge c Guimont*, 1992 CanLII 8401 (QCTP) (*sub nom Barreau du Québec c Robert*).

³⁴ *Sansfaçon c Tribunal des professions*, *ibid*, introducing the quotation with the phrase « Dans le cas de l'immunité de la Couronne qu'il suffise d'ajouter que le Comité de discipline a raison d'écrire » *Sansfaçon c Tribunal des professions*, *ibid* [translated by author]: “In the case of Crown immunity suffice it to add that the Disciplinary Committee is right to write.”

³⁵ *Barreau c Sansfaçon*, *supra* note 10 [emphasis added]. *Barreau c Sansfaçon*, *ibid* [translated by author]: “The code of ethics applies to all lawyers, including prosecutors of the Attorney General.”

³⁶ *Corporation des agronomes de la Province de Québec c Mercier*, [1945] BR 59 at 64, quoted in French in Pierre-André Côté, *Interprétation des lois*, 2nd ed (Cowansville, Québec: Editions Yvon Blais, 1990) at 207, quoted in *Sansfaçon c Guimont*, *supra* note 10.

³⁷ *Supra* note 11.

³⁸ *Supra* note 11 at 356–57.

with a represented person, “one who is a lawyer employed by the government must be particularly sensitive to the rules which govern his or her professional conduct.”³⁹ The Divisional Court emphatically rejected this approach. It held that the regulatory standard for government lawyers is the same as that for lawyers generally:

All lawyers in Ontario are subject to the same single high standard of professional conduct.

...

In respect of their liability under the Rules of Professional Conduct, as opposed to the public interest duties associated with their office, Crown counsel stand on exactly the same footing as every member of the bar.⁴⁰

The Divisional Court also emphasized the distinction between a court having higher expectations of government lawyers and a court applying higher regulatory standards to such lawyers.⁴¹ Nonetheless, the Divisional Court removed counsel from the record in “the interests of justice.”⁴² Neither the motion judge nor the Divisional Court suggested that government lawyers are not bound by the rules of professional conduct.

While *Krieger* did not refer to *Everingham 1992*, *LSUC v. OPSEU* not only cited *Everingham 1992*, but also used some of the same language, explicitly linking that language to the protection of the public: “In the interest of the administration of justice *and the protection of the public*, all persons offering legal services to the public should be on the same footing, and subject to the same regulations, administered by the same regulatory body.”⁴³ With great respect, the very brief reasoning in *Everingham 1992* — “[i]t is not flattering to the lawyers of Ontario to say that most of them are held to a lower standard of professional conduct than government lawyers” — is intuitive but it has never been clear to me as a legal rationale.⁴⁴ Nonetheless, the converse of this proposition is equally intuitive:

³⁹ *Ibid* at 359.

⁴⁰ *Supra* note 11 at 760–61. When read in its context, the sweeping but brief holding in *Everingham 1992*, included Crown prosecutors.

⁴¹ *Ibid* at 760–61:

Because of these public obligations and the traditions associated with the Crown office in this province, the courts have come to expect a particular level of conduct and expertise from Crown counsel in various types of judicial business. It is one thing to say that a particular branch of the Crown law office or a particular law firm or lawyer has earned a reputation for a high standard of professional conduct. It is quite different to say that any lawyer or group of lawyers is subject to a higher standard of liability than that required of every lawyer under the Rules of Professional Conduct.

Compare Adam M Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33:1 Dal LJ 1 at 25: “[I]f we examine the conduct expected of government lawyers, we find that they are already subject to a higher duty than private lawyers. The standards of conduct expected of government lawyers in areas outside of criminal law demonstrate that there are a whole host of areas where a higher duty is expected of government lawyers.”

⁴² *Everingham 1992*, *ibid* at 761. Just as the rules of professional conduct are not exhaustive of the court’s power to remove counsel, so too are they not exhaustive of law society regulation or discipline. See *Stewart v Canadian Broadcasting Corp* (1997), 150 DLR (4th) 24 at 97 (Ont Gen Div): “[T]he Rules of Professional Conduct are not an exhaustive code of lawyer’s professional obligations.”

⁴³ *LSUC v OPSEU*, *supra* note 9 at para 63 [emphasis added]. See also para 56, summarizing *Everingham 1992*, *supra* note 11. *Everingham 1992* was binding on the judge in *LSUC v OPSEU* but obviously not binding on the Supreme Court of Canada in *Krieger*, *supra* note 1.

⁴⁴ *Everingham 1992*, *supra* note 11 at 125–26.

it is not flattering to government lawyers (or Crown prosecutors) to say that they are held to a lower standard of professional conduct than other lawyers.⁴⁵

Before proceeding, I emphasize that while *Everingham* 1992 is clear that the same level of conduct is required of all lawyers, it does not preclude the possibility that the same or similar misconduct by some lawyers may be more serious — and thus more important a disciplinary priority — than when committed by other lawyers.

Together, *Krieger*, *LSUC v. OPSEU*, *Barreau c. Sansfaçon*, and *Everingham* 1992 make it crystal clear that law societies can and should — and, I would argue, in some circumstances *must* — discipline Crown prosecutors and government lawyers in order to fulfill their statutory mandate of regulating the legal profession in the public interest. How then do law societies exercise this disciplinary jurisdiction? This brings me to Part III.

III. THE CONSENSUS: DISCIPLINE OF CROWN PROSECUTORS OR GOVERNMENT LAWYERS IS RARE

Against the background of these four cases, in this Part I consider the limited Canadian literature on law society discipline of Crown prosecutors and government lawyers. I also draw on the more plentiful US literature. While there is apparent agreement that law societies rarely discipline Crown prosecutors and government lawyers, there are several potential explanations for that rarity.

While there is limited Canadian legal literature on law society discipline of Crown prosecutors or government lawyers, the apparent consensus in that literature is that such discipline is rare. For example, Adam Dodek in 2010 observed that “[w]hen we examine the regulation of Government lawyers, we are struck with a paradox. Despite their high percentage in the Canadian legal profession, it is rare for government lawyers to be subject to law society discipline.”⁴⁶ More recently, Nick Kaschuk has not only recognized that law societies rarely discipline Crown prosecutors but also argued that such rarity (or reluctance, which Kaschuk asserts) “makes a mockery of the rule of law” and likely contributes to wrongful convictions.⁴⁷ While it is difficult to quantify this consensus, two reporters in 2014 recounted that, according to the Law Society of Upper Canada, “over the past 23 years only nine of 2,200 disciplinary hearings have involved prosecutors.”⁴⁸

The Canadian literature proposes several possible explanations for this discrepancy. Dodek recognizes three. First, “the law society discipline process may be deficient in failing

⁴⁵ See in the US context Jerry E Norton, “Ethics and the Attorney General” (1991) 74:4 *Judicature* 203 at 207: “There is something very disquieting in what appears to be the emerging notion that attorneys for the government are to be held to a different and lower standard of ethics than are other members of the bar. The deregulation of government attorneys’ ethics does not promise glory either to these attorneys, or to the government that they serve.”

⁴⁶ Dodek, *supra* note 41 at 31–32 [footnotes omitted]. (Dodek appears to include Crown prosecutors within his use of the phrase “government lawyers.”) See also Martin & Walden, *supra* note 2 at 58 (“Government lawyers are rarely the subject of law society discipline”).

⁴⁷ Kaschuk, *supra* note 3 at 530. See similarly Melissa Montana, “Secrecy and Impunity: The Role of Law Societies in Canadian Wrongful Convictions” (2022) 45:5 *Man LJ* 110 at 126–127, 134–135, 137. (Montana focuses specifically on wrongful convictions of Indigenous persons.)

⁴⁸ Pagliaro & Poisson, *supra* note 3. I recognize that these Ontario figures are not necessarily representative of all provincial and territorial law societies.

to investigate and sanction misconduct by government lawyers.⁴⁹ I note here that a complainant cannot challenge the decision of a law society not to initiate disciplinary proceedings against a lawyer.⁵⁰ Kaschuk seems to adopt this first explanation.⁵¹ Second, Dodek recognizes the possibility that government lawyers are more ethical than lawyers generally.⁵² Third, Dodek suggests that perhaps “structural and internal measures ... prevent government lawyers from committing the sorts of misconduct that would attract law society attention.”⁵³ I note that this third possibility is distinct from the point about internal mechanisms in *Krieger*. Dodek suggests that internal mechanisms reduce the need for law society discipline not only because they may play a role equivalent to law society discipline, but also because they are preventative.⁵⁴ Anita Anand has made a similar argument about internal mechanisms in large law firms.⁵⁵ Indeed, law societies themselves appear to recognize that government is one practice setting in which lawyers are less likely to commit misconduct. For example, panels imposing practice restrictions or supervision requirements sometimes include government as a permitted practice context.⁵⁶ In an apparent combination of Dodek’s first and third explanations, two newspaper articles have suggested that the Law Society of Ontario unduly defers to internal Crown prosecutor discipline systems and fails to investigate and discipline those lawyers adequately as compared to the criminal defence bar.⁵⁷ A related issue is that internal Crown discipline is secretive and opaque and thus no

⁴⁹ Dodek, *supra* note 41 at 32.

⁵⁰ *Del Valle v Law Society of the Northwest Territories*, 2017 NWTSC 29 (complainant to law society regarding a government lawyer does not have standing to seek judicial review of the law society’s decision not to initiate disciplinary proceedings); *Davidoff v Law Society of Alberta*, 2014 ABQB 370 (complainant who alleged prosecutorial misconduct had no standing to seek judicial review of the dismissal of his complaint against the prosecutor by the law society).

⁵¹ Kaschuk, *supra* note 3 at 530: “[T]he various Law Societies throughout Canada [should] begin to investigate and discipline Crown Attorneys (and in some cases, Crown law offices), for their ethical and personal failings in the same way they have been holding private counsel, and private law firms to account for their ethical and personal failings.”

⁵² Dodek, *supra* note 41 at 32: “[T]he ethical conduct of government lawyers may be higher than the general legal population so there is a smaller pool of unethical conduct amongst government lawyers that could come to the attention of the law society.”

⁵³ *Ibid* at 32.

⁵⁴ Dodek also reinforces the importance of the internal disciplinary mechanisms identified in *Krieger* — indeed, he appears to emphasize their value and importance as a substitute for law society discipline more than the Court in *Krieger*. See e.g., Dodek, *ibid* at 40 [footnotes omitted]:

While departments of justice have their own discipline and grievance procedures, neither the procedures nor the results are published. This is unfortunate because public service discipline of counsel is likely a significant feature of the regulation of the conduct of government lawyers. It also goes a long way in explaining why law society discipline databases are not filled with reported cases of government lawyers.

⁵⁵ Anita Anand, “Large Law Firms and Capture: Towards a Nuanced Understanding of Self-Regulation” (2013) 92:3 Can Bar Rev 485 at 495–501.

⁵⁶ See e.g. *Law Society of British Columbia v Major*, [1997] LSDD No 199 at paras 8, 19 (BC), ordering that the lawyer

is required to practice law only in the following three capacities. Either, A, as an employee of one or more members; or B, as an employee of a Crown corporation, the Government of British Columbia, or the Legal Services Society; or C, as an employee or associate in a supervised setting which has been approved by resolution of the Discipline Committee of the Law Society of British Columbia. ... [Y]ou have the absolute right to become an employee of a Crown Corporation or the Government of British Columbia or the Legal Services Society.

See also *Re Davies*, 1994 CanLII 3438 (Ont LST), where the lawyer had worked as a part-time Crown prosecutor after the misconduct at issue and the minority recommendation, followed by Convocation, was to order that any practice other than as a Crown prosecutor would require the consent of Convocation: “As a part-time Crown Attorney, Mr. Davies practises law in a structured and supervised setting and does not handle trust funds” (*Re Davies*, *ibid* at 20).

⁵⁷ Pagliaro & Poisson, *supra* note 3; Gallant, *supra* note 3.

substitute for law society discipline — even aside from the comparative penalties available, as emphasized in *Krieger*.⁵⁸

Some of these explanations are consistent with Harry Arthurs' model of ethical economy: "[T]he profession's treatment of discipline reflects a tendency to allocate its scarce resources of staff time, public credibility and internal political consensus to those disciplinary problems whose resolution provides the highest returns to the profession with the least risk of adverse consequences."⁵⁹ If the result in respect of Crown prosecutors and government lawyers is "deficient," it is deficient in an understandable way. In particular, the low level of disciplinary proceedings against Crown prosecutors may be a rational deployment of scarce regulatory resources.⁶⁰ Put otherwise in the US context, "[i]t may be that bar authorities have bigger fish to fry."⁶¹ Other incentives, however, may be rational but undesirable. For example, Jennifer Blair suggests that bar regulators may fear "alienat[ing]" federal prosecutors or even being "seen as a hindrance to law enforcement."⁶² Further upstream, defence counsel may be wary of reporting misconduct by prosecutors because of the potential for practical consequences to their future interactions with prosecutors.⁶³

Another important possibility that seems to be overlooked in the Canadian legal literature, but one flowing directly from *Krieger*, is that law societies may be wary to interfere, or to risk being seen to be interfering, with prosecutorial discretion.⁶⁴ This wariness could be for principled reasons or pragmatic reasons, or both. In particular, this reluctance would be a rational, if risk-averse, response to legal uncertainty over the scope of prosecutorial

⁵⁸ See e.g. "Ontario Prosecutor Disciplined for Mocking Defendant" *The Montreal Gazette* (9 January 1993) B1, 1993 WLNR 3055450: "A crown prosecutor has been disciplined for mocking a woman on trial for killing her husband, the Ontario attorney-general's office said yesterday. But details of Peter Barnes's punishment can't be disclosed under the Privacy Act, said spokesman Barb Krever." See also *Krieger*, *supra* note 1 at para 50, quoted in *LSUC v OPSEU*, *supra* note 9 at para 54: "The remedies available to each entity differ according to their respective function. The Attorney General's office has the ability to discipline a prosecutor for failing to meet the standards set by the Attorney General's office for prosecutors but that is a different function from the ability to discipline the same prosecutor in his or her capacity as a member of the Law Society." See also Dodek, *supra* note 41 at 40 [footnotes omitted]:

Neither the frequency of such complaints [to Crown prosecutors' superiors] nor their disposition is known because there is no public disclosure by government of the existence let alone the disposition of such complaints.... While departments of justice have their own discipline and grievance procedures, neither the procedures nor the results are published. This is unfortunate because public service discipline of counsel is likely a significant feature of the regulation of the conduct of government lawyers.

⁵⁹ Harry Arthurs, "Why Canadian Law Schools Do Not Teach Legal Ethics" in Kim Economides, ed, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart, 1998) 105 at 112, as discussed e.g. in Dodek, *supra* note 41 at 35–36.

⁶⁰ But see in the US context Berk Guler, "Representing the Sovereign Ethically: Increasing Prosecutorial Accountability through Disciplinary System Enhancements" (2020) 33:3 *Geo J Leg Ethics* 575 at 584, referring to this explanation as "the 'resources excuse.'"

⁶¹ Stephanos Bibas, "Prosecutorial Regulation Versus Prosecutorial Accountability" (2009) 157:4 *U Pa L Rev* 959 at 977. See similarly Jennifer Blair, "The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. § 530B and the Reality of Inaction" (2001) 49:2 *UCLA L Rev* 625 at 642.

⁶² Blair, *ibid* at 643–44, "alienate" quoting Bennett L Gershman, "The New Prosecutors" (1992) 53:2 *U Pitt L Rev* 393 at 445.

⁶³ See e.g., Geoffrey S Corn & Adam M Gershowitz, "Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct" (2009) 14:2 *Berkeley J Crim L* 395 at 406–408; Angela J Davis, "The Legal Profession's Failure to Discipline Unethical Prosecutors" (2007) 36:2 *Hofstra L Rev* 275 at 292.

⁶⁴ In the US context, see generally Bruce A Green & Samuel J Levine, "Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis" (2016) 14:1 *Ohio State J Crim L* 143.

discretion. For example, Justice Moldaver for the Supreme Court of Canada in *R v. Anderson* observed that “[u]nfortunately, subsequent to this Court’s decision in [*Krieger*], confusion has arisen as to what is meant by ‘prosecutorial discretion’ and the law has become cloudy.”⁶⁵ This uncertainty would be a rational basis for law societies to limit disciplinary proceedings against Crown prosecutors where there was a potential argument that the conduct in issue fell within the scope of prosecutorial discretion.

The apparent consensus is that law societies rarely discipline Crown prosecutors or government lawyers. There are multiple possible explanations for that rarity. But what conduct is at issue in those few and rare disciplinary decisions? This brings me to Part IV.

IV. REPORTED LAW SOCIETY DISCIPLINE OF CROWN PROSECUTORS AND GOVERNMENT LAWYERS

In this Part, I answer a deceptively simple empirical question: For what kinds of conduct have law societies disciplined or attempted to discipline Crown prosecutors or government lawyers, in the rare instances in which they do so?

At the outset of this Part, I emphasize Dodek’s observation that “whole chapters in the applicable codes of conduct are absolutely irrelevant to government lawyers.”⁶⁶ This reality is necessarily reflected in the kinds of conduct for which law societies discipline Crown prosecutors and government lawyers. Thus regulatory issues like the proper administration of trust accounts are simply not engaged.⁶⁷

I organize the disciplinary decisions concerning Crown prosecutors and government lawyers into four categories. The first two categories are about issues unique to Crown prosecutors. I then turn to criminal conduct and to other issues applicable to all lawyers.

Because my purpose in this article is to explore and assess how law societies discipline or attempt to discipline government lawyers and Crown prosecutors, I have considered only those Quebec matters brought before the Discipline Council by the Syndic of the Barreau and not those brought by private complainants.⁶⁸

A. THE BOUNDARIES OF PROSECUTORIAL DISCRETION

Given the emphasis in *Krieger* on non-interference with prosecutorial discretion, perhaps the most interesting and doctrinally important instance of law society discipline of a Crown

⁶⁵ 2014 SCC 41 at para 38. Justice Moldaver at para 44 added to the examples from *Krieger, supra* note 1 at para 47 (see note 14 and accompanying text) [citations omitted]: “the decision to repudiate a plea agreement...; the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal.”

⁶⁶ Dodek, *supra* note 41 at 11 [footnotes omitted].

⁶⁷ Dodek, *ibid* gives the examples of “marketing, advertising, or solicitation ... attracting and retaining clients ... fees or billing their client and ... handling client money or trust accounts” [footnotes omitted].

⁶⁸ See e.g., *Trudeau c Paradis*, 2019 QCCDBQ 076 (complainant in a criminal case alleged that the Crown prosecutor wrongly withdrew criminal charges; panel considers jurisdiction over prosecutorial discretion at paras 51–57), complaint withdrawn *Trudeau c Paradis*, 2020 QCCDBQ 012; *Nadeau c Vincent*, 2021 QCCDBQ 087 (decision by Crown prosecutor to lay charges is within prosecutorial discretion at paras 107–11).

prosecutor is *Law Society of Saskatchewan v. Clements*.⁶⁹ The lawyer in *Clements* was reprimanded for deliberately failing to stay criminal charges once he determined that there was no longer a reasonable prospect of conviction.⁷⁰ He did this so that the release conditions would continue to apply.⁷¹ While the decision to seek a stay would normally be squarely within prosecutorial discretion,⁷² the lawyer in *Clements* agreed that “[i]n effecting his [the Member’s] own idea of ‘justice’ ... the Member exercised his personal discretion in place of prosecutorial discretion.”⁷³ Indeed, the panel in *Clements* explicitly recognized the importance of deference to prosecutorial discretion while emphasizing the danger of that discretion being abused and the importance of protecting vulnerable persons against such abuse:

The Member, a Crown prosecutor, was in a position of power over ... an accused. It is somewhat trite, but prosecutors have a great deal of independence and discretion within the confines of a prosecution and the justice system. This is an important, essential feature of the justice system and the courts show great deference to prosecutorial discretion.... It is fundamentally important to public confidence in the administration of justice and the proper functioning of the court system that prosecutors act within the confines of the rules.

...

[The accused], a marginalised person, was vulnerable to the Member’s improper exercise of prosecutorial discretion.⁷⁴

The panel in *Clements* specifically emphasized the language of the rules of professional conduct on the role of the prosecutor: “The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.”⁷⁵ It is not particularly surprising that the lawyer in *Clements* admitted that his actions constituted conduct unbecoming.⁷⁶ At the same time, *Clements* is the closest that law society disciplinary

⁶⁹ 2022 SKLSS 1 [*Clements*].

⁷⁰ *Ibid* at paras 9, 27. See e.g. *R v Sciascia*, 2017 SCC 57 at para 31, Moldaver J (“[t]he Crown is entitled to pursue charges with a reasonable prospect of conviction that are in the public interest”); *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 61, Moldaver J (“[a]s described in Crown policy manuals throughout the country, the decision to lay charges is governed by two primary factors: first, whether there is a reasonable prospect of conviction and second, whether the prosecution would be in the public interest”); *Miazga v Kvello Estate*, 2009 SCC 51 at para 64, Charron J (“[i]n Crown policy manuals, the initiation or continuation of a prosecution is generally not recommended unless there exists a reasonable prospect of conviction and it is in the public interest to pursue the criminal proceeding”).

⁷¹ *Clements*, *supra* note 69 at paras 72–73: “The Member was angry and frustrated with what he viewed as a pattern of individuals committing domestic violence offenses and then evading consequences for their actions by pressuring the victim to be uncooperative. The Member’s anger and frustration prompted the Member to make the decision to keep the file alive with the intent of keeping [the accused] on conditions of release longer.”

⁷² See e.g. *Krieger*, *supra* note 1 at paras 46–47.

⁷³ *Clements*, *supra* note 69 at paras 44, 80.

⁷⁴ *Ibid* at paras 41, 47 [citations omitted].

⁷⁵ “Model Code of Professional Conduct,” (2022), r 5.1-3, commentary 1, online (pdf): *Federation of Law Societies of Canada* [perma.cc/KFZ9-R65J] [*Federation Model Code*], quoted with emphasis in *Clements*, *supra* note 69 at para 8.

⁷⁶ *Clements*, *ibid* at para 10. While one could argue that this was professional misconduct as opposed to conduct unbecoming, that distinction is not particularly important for my purposes here. See e.g. *Law Society of Upper Canada v Jonathan Howard Marler*, 2010 ONLSAP 29 at paras 33–34. See also MacKenzie, *supra* note 5, ch 26, §26.8.

decisions have yet come to grappling with the scope of prosecutorial discretion and the kinds and degree of conduct that will vitiate disciplinary immunity for prosecutorial discretion.

Similarly, in *Barreau du Québec (syndic adjoint) c. Tétreault*, a Crown prosecutor admitted that their blanket refusal to refer accused persons to a diversionary program, contrary to a general directive from the provincial Director of Criminal and Penal Prosecutions, constituted misconduct — despite the directive clearly indicating that a referral in any given case was within the discretion of the Crown prosecutor.⁷⁷ In assessing the severity of the misconduct, the Barreau disciplinary panel emphasized the special role of the Crown prosecutor.⁷⁸ That panel also found that the blanket refusal was contrary to the public interest.⁷⁹ Implicit in the reasons of the panel, but explicit in the reasons of the Tribunal des Professions dismissing the lawyer's appeal against the two-month suspension imposed, was the fundamental difference between a blanket refusal and the exercise of prosecutorial discretion.⁸⁰ The Tribunal likewise emphasized the special role of the prosecutor.⁸¹ Indeed, the Tribunal — like the panel in *Clements* — held that compliance with the directive was particularly important because of the « grande indépendance et discrétion » of the Crown prosecutor.⁸²

⁷⁷ *Barreau du Québec (syndic adjoint) c Tétreault*, 2020 QCCDBQ 050 at paras 5, 8, 69 [*Tétreault* 2020], aff'd 2022 QCTP 44 [*Tétreault* 2022]. The Crown prosecutor had initially claimed that their conduct was a protected exercise of prosecutorial discretion. See note 130 below.

⁷⁸ *Tétreault* 2020, *ibid*, at para 75: « À titre de poursuivant devant les cours municipales, le rôle de l'intimé est important et fort différent de celui de l'avocat en pratique privée où ce dernier représente les intérêts d'un client. Il lui incombe de privilégier l'intérêt de la société, des personnes vulnérables et de la population en général qui ne connaît pas l'existence d'un tel programme malgré son caractère public. » *Ibid* [translated by author]: "As a prosecutor before the municipal courts, the role of the respondent is important and very different from that of a lawyer in private practice, where the latter represents the interests of a client. It is his responsibility to prioritize the interests of society, vulnerable people and the general public who are unaware of the existence of such a program despite its public nature."

⁷⁹ *Ibid* at paras 101, 103:

En refusant systématiquement d'appliquer le *Programme de traitement non judiciaire*, l'intimé a privé des dizaines de justiciables de bénéficier d'un traitement non judiciaire pour des infractions mineures... La directive du DPCP permet à tous les citoyens d'y être éligibles. En agissant comme l'intimé l'a fait, l'application de la directive n'était plus équitable face à tous les contrevenants adultes qui pouvaient bénéficier de son application. Le Conseil détermine que l'intimé n'a pas agi dans l'intérêt public, dans l'intérêt de l'administration de la justice et du caractère équitable du processus judiciaire.

Ibid [translated by author]:

By systematically refusing to apply the Non-judicial Treatment Program, the respondent deprived tens of litigants from benefitting from non-judicial treatment for minor offences... The DPCP directive allows all citizens to be eligible. By acting as the respondent did, the application of the directive was no longer fair to all adult offenders who could benefit from its application. The Board finds that the respondent failed to act in the public interest, in the interests of the administration of justice and the fairness of the judicial process.

⁸⁰ *Tétreault* 2022, *supra* note 77 at para 39: « [I]l existe une différence entre l'exercice d'une discrétion qui aurait mérité la déférence du Conseil et le refus systématique d'exercer cette discrétion de la part de l'appelant qui constitue le fondement même de la plainte. » *Tétreault* 2022, *ibid* [translated by author]: "there is a difference between the exercise of a discretion which would have deserved the deference of the Council and the systematic refusal to exercise this discretion on the part of the appellant which constitutes the very basis of the complaint."

⁸¹ *Ibid* at para 35.

⁸² *Ibid* at para 36:

[le procureur] est un officier de justice dans une position d'autorité qui jouit d'une grande indépendance et discrétion dans le cadre d'accusations portées devant les cours municipales. Il est donc essentiel qu'il agisse conformément aux directives applicables dans le traitement de chaque dossier qui lui est soumis afin d'assurer la confiance du public dans l'administration de la justice et le fonctionnement approprié du système judiciaire.

Ibid [translated by author]:

[the prosecutor] is a judicial officer in a position of authority who enjoys a great deal of independence and discretion in connection with charges brought before the municipal courts. It is therefore essential that he act in accordance with the applicable directives in the treatment of

Together, *Clements* and *Tétreault 2022* demonstrate that there are some prosecutorial decisions that are so objectively wrong, or based on reasoning that is so objectively wrong, that they exceed the limits of prosecutorial discretion and thus of prosecutorial immunity to law society discipline. Those limits are important precisely because prosecutorial discretion is so broad and protected.

At the same time, *Tétreault 2022* seems to broaden the statement from *Krieger* that “an official action which is undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General.”⁸³ It is unclear whether a blanket refusal to apply a diversionary program necessarily constitutes bad faith; likewise, there is no indication that *Tétreault* had improper motives in the typical sense. *Clements* and *Tétreault 2022* also demonstrate that there are boundaries to prosecutorial discretion. However, given that in both cases the Crown prosecutor admitted misconduct, it is unclear whether *Clements* and *Tétreault 2022* will reduce any reluctance of law societies to attempt to discipline Crown prosecutors where the conduct at issue may be near those boundaries. Moreover, given the specific conduct at issue in those cases, *Clements* and *Tétreault 2022* have not clarified those boundaries significantly.

B. OTHER NON-CRIMINAL VIOLATIONS UNIQUE TO CROWN PROSECUTORS

As recognized in *Everingham 1992*, Crown prosecutors do have some unique obligations as compared to lawyers generally,⁸⁴ particularly the duty to disclose to the defence “all information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged.”⁸⁵ Given the explicit statement in *Krieger* that disclosure is not within prosecutorial discretion,⁸⁶ it is not surprising that law societies sometimes discipline or attempt to discipline Crown prosecutors for failing to make adequate disclosure or misleading the court or defence counsel about disclosure.⁸⁷ However, where there was uncertainty over disclosure requirements pre-*Krieger*, law societies were not necessarily as strict.⁸⁸

each case submitted to him in order to ensure public confidence in the administration of justice and the appropriate functioning of the judicial system.

83

Krieger, *supra* note 1 at para 51.

84

Supra note 11 at 760: “The unique obligations of Crown counsel in the conduct of public prosecutions are well known.”

85

R v Chaplin, [1995] 1 SCR 727 at para 21, Sopinka J [citations omitted].

86

Krieger, *supra* note 1 at para 5: “As the disclosure of relevant evidence is not a matter of prosecutorial discretion but, rather, is a legal duty, the Law Society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information.”

87

Law Society of Saskatchewan v Cory Bliss, 2010 SKLSS 4 (Crown prosecutor reprimanded for misleading opposing counsel about disclosure); *Law Society of Alberta v Huyser-Wierenga*, [2006] LSDD No 16 (Alta) (Crown prosecutor had not misled defence counsel or the Court). See also, although technically not a discipline decision, *Re David Allen Kidd* (27 May 2020), online: Law Society of British Columbia [perma.cc/W84Q-6LTP] (Rule 4-29 Admission of Misconduct and Undertaking to Discipline Committee, Law Society of British Columbia) (Crown prosecutor admitted failing to inform defence counsel of new written evidence). See also *Barreau du Québec c Roberge*, [1994] DDAN no 114 (Qc Barreau) (no misconduct where Crown prosecutor failed to inform the Court and defence counsel that a witness had requested a pardon).

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See e.g. *Fradette c Barreau du Québec*, [1993] DDAN no 202 (Qc Barreau) (Crown prosecutor’s disclosure shortcomings did not constitute misconduct):

Si cette décision ne s’est pas avérée être la meilleure dans les circonstances de ce dossier, le Comité croit que le requérant a pris une décision éclairée qu’il croyait juste. Il en aurait été autrement si l’on avait démontré la négligence ou insouciance du requérant envers l’intérêt public ou si l’analyse du dossier avait démontré un traitement préférentiel pour une raison inavouable ou

Likewise, given their close and unique relationship with police, Crown prosecutors are sometimes disciplined for failure to disclose police errors or for improperly assisting police.⁸⁹ The highest profile example would be *Law Society of Saskatchewan v. Kirkham*, in which the lawyer prosecuting David Latimer for murder was suspended by the law society for failure to disclose to the Court that, contrary to the Crown prosecutor's instructions, police had contacted potential jurors.⁹⁰ This suspension was imposed even though the lawyer in *Kirkham* had been acquitted of obstruction of justice for the same conduct.⁹¹ However, he had also been fired by his employer.⁹²

C. CRIMINAL CONDUCT (OR PROVINCIAL OFFENCES)

From the perspective of the protection of the public, equally if not more compelling than *Clements* are disciplinary decisions where Crown prosecutors have abused their positions of trust and received criminal convictions for doing so. The most egregious conduct was in *Re Johnston*, where a Crown prosecutor was disbarred after his criminal conviction for sexual abuse, that is, paying an underage person for sexual conduct.⁹³ The person had been the complainant in a sexual assault trial in which the lawyer had been the prosecutor.⁹⁴ The hearing panel emphasized the unique role of the Crown prosecutor as a position of trust:

The fact that the lawyer was a crown attorney is an aggravating factor.... As a crown attorney, he had access to a captive "client" pool. The complainants the crown attorney deals with, unlike a lawyer's clients, cannot simply go to another lawyer to prosecute the case they are involved with. They cannot leave the lawyer they have been assigned.

...

Clients whose money is stolen can be compensated. This misconduct deals with the lives of children. The damage caused by the lawyer's misconduct cannot be compensated.

...

Clients need to be able to trust their lawyers, both as individuals and as members of the legal profession. And young persons need to be able to trust adults and those in positions of trust. The actions and misconduct of

en retour d'une faveur ou d'un bénéfice quelconque ou tout simplement une turpitude morale.
Fradette c Barreau du Québec, ibid [translated by author]:

If this decision did not turn out to be the best in the circumstances of this file, the Committee believes that the [lawyer] made an informed decision that he believed was right. It would have been different if it had been demonstrated that the applicant [lawyer] was negligent or careless with regard to the public interest or if the analysis of the file had demonstrated preferential treatment for an unavowable reason or in return for any favour or benefit or quite simply moral turpitude.

⁸⁹ See *Re Peach*, 1989 CanLII 2881 (NWT LS) (no misconduct or conduct unbecoming when a Crown prosecutor had apparently attempted to purchase hashish to incriminate the seller so as to assist the police).

⁹⁰ *Law Society of Saskatchewan v Kirkham*, [1999] LSDD No 19 (Sask) [*Kirkham*], cited in Dodek, *supra* note 41 at 32, n 117.

⁹¹ *Kirkham, ibid*.

⁹² *Ibid*.

⁹³ 2001 CanLII 21505 (Ont LS Hearing Panel) [*Johnston*], aff'd 2003 CanLII 48924 (Ont LS Appeal Panel).

⁹⁴ *Johnston, ibid* at para 24.

this lawyer strike so strongly to the quick of the essence of the legal profession that no other penalty [than disbarment] is appropriate nor available.⁹⁵

While other lawyers may exploit positions of trust — including as criminal defence counsel — to abuse children or other vulnerable persons,⁹⁶ it is particularly egregious for a Crown prosecutor to do so. The panel’s emphatic denunciation is thus reassuring.

Other than *Johnston*,⁹⁷ the most brazen such abuse is *Comité – avocats – 10*, in which a Crown prosecutor was disbarred for accepting cash bribes.⁹⁸ The panel in *Avocats 10* emphasized the seriousness of the misconduct given the special and vital role of the prosecutor:

Comme substitut du procureur général, l’intimé avait un rôle essentiel à jouer dans l’administration de notre système de justice pénale. Il a commis une faute très grave en recevant et en acceptant des pots-de-vin.

...

[L]es infractions reprochées à l’intimé sont particulièrement sérieuses. Il a manqué à ses obligations les plus élémentaires comme officier public, comme officier de la Cour... [L]es actes malhonnêtes de l’intimé compromettent l’intégrité de notre système d’administration de la justice pénale. C’est véritablement l’intérêt public qui est en cause.

...

L’intimé a commis des actes dérogatoires à l’honneur et à la dignité de la profession qui sont intimement liés à l’exercice de sa profession à *ce mandat très lourd qu’il avait accepté comme substitut du procureur général*.⁹⁹

⁹⁵ *Ibid* at paras 26, 37, 46.

⁹⁶ See e.g. *Law Society of Alberta v Adams*, [1997] LSDD No 157 (Alta) at paras 19–20 (defence counsel disbarred after criminal conviction for soliciting sexual services from client, an underage sex worker) (“[t]he conviction of a Member for any indictable offence has to be viewed seriously. That this involved a 16-year old girl adds to the gravity. That this 16-year old girl was his client and he was her (and her boyfriend’s) solicitor of record makes the facts more egregious still. The majority of the Committee viewed this breach of trust equally with the breach of trust involved in converting trust funds. Perhaps it is even more serious as more clients are vulnerable to it, and in the final analysis money can be restored. Honour cannot”), aff’d *Adams v Law Society of Alberta*, 2000 ABCA 240; *Law Society of Upper Canada v Peter Brian Budd*, 2009 ONLSP 0111, aff’d 2011 ONLSP 0002, aff’d *Budd v Law Society of Upper Canada*, 2012 ONSC 412 (lawyer disbarred after convictions for sexual assaults against young persons for whom he acted as a substitute parent).

⁹⁷ I do not include here the similar case of *Law Society of Upper Canada v Ellis*, 2016 ONLSTH 20, in which the lawyer offered leniency in exchange for a sexual relationship, because the lawyer was an adjudicator and not a Crown prosecutor or government lawyer.

⁹⁸ *Comité – avocats – 10*, [1985] DDCP 225 (Qc Comité des avocats) [*Avocats 10*], aff’d *Tribunal – avocats – 4*, [1986] DDCP 317 (Qc Tribunal des professions). While the reasons refer to discipline of another prosecutor under purportedly similar circumstances (see *Avocats 10*, *ibid* at 226; *Tribunal – avocats – 4*, *ibid* at 331) that disciplinary decision appears to be unreported.

⁹⁹ *Avocats 10*, *ibid* at 226 [emphasis added]. *Avocats 10*, *ibid* [translated by author]:

As a prosecutor for the Attorney General, the respondent had a vital role to play in the administration of our criminal justice system. He committed a very serious wrong by receiving and accepting bribes... [T]he offenses with which the respondent is charged are particularly serious. He failed in his most elementary obligations as a public officer, as an officer of the Court... [T]he respondent’s dishonest acts undermine the integrity of our system of administering criminal justice. It is truly the public interest that is at stake... The respondent has committed acts derogatory to the honour and the dignity of the profession which are intimately linked to the exercise of his profession in this very heavy mandate that he had accepted as a prosecutor.

The Tribunal on appeal also quoted from the reasons of the criminal sentencing judge, which emphasized the harm to the judiciary's trust and confidence in all lawyers and particularly Crown prosecutors.¹⁰⁰ There is little if anything surprising about this reasoning. Nonetheless, like the reasoning in *Johnston*, it is reassuring.

Both *Johnston* and *Avocats 10* are consistent with *Everingham* 1992: while the Crown prosecutor is not held to a higher standard than other lawyers, misconduct directly related to that role is more damaging to the public interest and thus more serious than other kinds of misconduct or misconduct by lawyers in other roles.

Importantly, Crown prosecutors have been criminally convicted for misuse of their powers even without direct financial benefit. The penalties are nonetheless serious given the impact on public confidence in the administration of justice. For example, in *Law Society of Upper Canada v. Bryan Thomas Davies*, the Crown prosecutor was permitted to resign after criminal convictions for, among other things, arranging charge resolutions that required the accused to repay debts to an associate of the Crown prosecutor.¹⁰¹ (The brief reasons in *Davies* focus on mitigating factors and not on the seriousness of the misconduct.) Similarly, in *Law Society of Ontario v. Petrolo*, a paralegal municipal prosecutor arranged lesser dispositions of tickets issued to friends of a police officer with whom the prosecutor was having an affair.¹⁰² The prosecutor's licence was revoked after criminal convictions for breach of trust and attempted obstruction of justice.¹⁰³ The hearing panel in *Petrolo* noted that “[the paralegal’s] misconduct creates the perception that the public administration of justice cannot be relied upon and is corrupt — that a police officer’s friends get a better deal than others.”¹⁰⁴ These types of misconduct, and their corrosive impact on public confidence in the administration of justice, are unique to Crown prosecutors.

Crown prosecutors sometimes commit misconduct similar to that committed by other lawyers. In *Law Society of Ontario v. Ross*, the lawyer was disbarred after their conviction for billing fraud as an agent for the Public Prosecution Service of Canada.¹⁰⁵ While my focus in this article is Crown prosecutors and government lawyers who are full-time employees, *Ross* remains noteworthy given the prevalence of agent and per-diem prosecutors in smaller

¹⁰⁰ *Tribunal – avocats – 4*, *supra* note 98 at 320:

N’ayant pas cru la chose possible, pour n’y avoir jamais vraiment pensé, tant ma confiance était grande dans l’institution, ce fut pour moi un jour bien triste que de réaliser le risque que tout juge peut courir de recevoir de la part des avocats, même s’ils sont du ministère public, des réponses mensongères à des questions fondamentales pour établir des sentences justes. Au risque de paraître bien naïf, j’ajoute que je frémis à cette seule idée. Car, sans la vérité, la justice fout le camp.

Tribunal – avocats – 4, *ibid* [translated by author]:

Having not believed this possible, having never really thought about it, so great was my confidence in the institution, it was a very sad day for me to realize the risk that any judge can run of receiving from lawyers, even if they are of the public ministry, false answers to fundamental questions to establish fair sentences. At the risk of appearing very naive, I add that I shudder at this very idea.

Because, without the truth, justice gets out of the way.

¹⁰¹ 2006 ONLSP 25 at paras 3–4 [*Davies*]. While the reasons in *Davies* are brief, the underlying convictions and particulars of the offences by the Crown Prosecutor *Davies* are detailed in *R v Davies*, 199 CCC (3d) 389 at paras 4–6 (Ont CA).

¹⁰² 2019 ONLSTH 80 (interlocutory practice restrictions), 2023 ONLSTH 76 (merits) [*Petrolo*]. See also *R v Petrolo*, 2020 ONCJ 36 (conviction), 2020 ONCJ 122 (sentencing), aff’d 2021 ONCA 498.

¹⁰³ *Petrolo*, *ibid* at paras 1–2, 62.

¹⁰⁴ *Ibid* at para 45.

¹⁰⁵ 2021 ONLSTH 21 at paras 2, 5–8, 17 [*Ross*].

centres. Such misconduct is not unique to the role of an agent or per-diem prosecutor, as law societies sometimes similarly discipline defence counsel for misbilling legal aid.¹⁰⁶

Like many other lawyers, Crown prosecutors are sometimes disciplined for unlawful or dishonest conduct unconnected to their practice of law.¹⁰⁷ These disciplinary decisions engage the larger debate over law society regulation of extraprofessional conduct.¹⁰⁸ The difference is that the role of Crown prosecutor can make that conduct more problematic, especially to public confidence in the administration of justice. In *Hubley*, for example, where the Crown prosecutor was fined after his arrest by Royal Canadian Mounted Police (RCMP) officers for an assault for which the criminal charge was withdrawn, the decision-maker noted that “the Member has placed himself, his colleagues and the R.C.M.P. members upon whom his prosecutorial role vitally depends, in very difficult circumstances.”¹⁰⁹ There is something intuitively problematic about lawyers who violate the same laws they enforce. For example, where a Crown prosecutor had been convicted of cocaine possession, the disciplinary panel noted that « [l]a gravité de cette faute est encore plus grande lorsque l’intimé fautif occupe une fonction aussi importante que celle de substitut du Procureur général chargé de faire respecter les lois, notamment le *Code criminel* et la *Loi réglementant certaines drogues et autres substances*. »¹¹⁰ While that panel noted that the lawyer had been granted an absolute discharge,¹¹¹ that discharge did not seem to affect their analysis. Similarly, in *Suntok*, where a Crown prosecutor was reprimanded after a conviction for

¹⁰⁶ See most famously *Kopyto v Law Society of Upper Canada* (1993), 107 DLR (4th) 259 (Ont Div Ct), leave to appeal to Ont CA refused (1995), 126 DLR (4th) vii, leave to appeal to SCC refused, [1995] 3 SCR vii. See also e.g. *Law Society of Upper Canada v Massimiliano Pecoraro*, 2011 ONLSHP 11. See esp *Law Society of Upper Canada v Kennedy*, 2014 ONLSTH 227 at paras 3, 12: “Intention is the major consideration in determining penalty”; where “the overbilling was the result of grossly inadequate billing and docketing practices and was not intentional,” that overbilling was still misconduct but the penalty is not necessarily disbarment.

¹⁰⁷ *Re Suntok*, 2005 LSBC 29 [*Suntok*], cited in Dodek, *supra* note 41 at 32, n 117 and in Kaschuk, *supra* note 3 at 531, n 13 (Crown prosecutor reprimanded for conviction for intimate partner assault); *Barreau du Québec (Assistant Syndic) c Grenier*, 2008 QCCDBQ 112 [*Grenier*] (Crown prosecutor suspended after a conviction and absolute discharge for cocaine possession); *Hubley (Re)*, 2007 CanLII 71371 (NWTLS) [*Hubley*] (Crown prosecutor fined for an assault for which the criminal charge was withdrawn); *Law Society of Alberta v Torske*, 2015 ABL 13, costs at 2016 ABL 27, cited in Kaschuk, *supra* note 3 at 531, n 13 (Crown prosecutor suspended for forging opioid prescriptions, for which he had been criminally convicted and received a conditional discharge which was increased on appeal to a conditional sentence); *Law Society of British Columbia v Stevens*, [2001] LSDD No 19 (BC), cited in Kaschuk, *supra* note 3 at 531, n 13 (Crown prosecutor reprimanded after she was convicted of a provincial animal cruelty offence in relation to the farm she co-owned with her spouse); *Law Society of Alberta v Persad*, 2020 ABL 27 [*Persad*] (Crown prosecutor suspended for falsifying a divorce certificate to mislead his girlfriend and impersonating his wife in text messages to his girlfriend). For conduct somewhat similar to the conduct in *Persad* by a lawyer who was not a Crown prosecutor, see *Law Society of Ontario v Morton*, 2022 ONLSTH 29.

¹⁰⁸ See e.g. Alice Woolley, “Legal Ethics and Regulatory Legitimacy: Regulating Lawyers for Personal Misconduct” in Francesca Bartlett, Reid Mortensen & Kieran Tranter, eds, *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (London: Routledge, 2011) 241 [now Justice Woolley of the Alberta Court of King’s Bench]. But see e.g. *Suntok*, *ibid* at para 16: “[T]he duty to regulate lawyers even when they are not engaged in practice is fundamentally because being a lawyer involves more than the practice of a profession.”

¹⁰⁹ *Hubley*, *supra* note 107. The decision-maker further noted that “[the lawyer] was, at the relevant time, a Member of the Public Prosecution Service of Canada, a service dedicated to the protection of the public” (*Hubley*, *ibid* at 6).

¹¹⁰ *Grenier*, *supra* note 107 at para 68. *Grenier*, *ibid* [translated by author]: “The gravity of this wrong is even greater when the offending respondent occupies a function as important as that of an Attorney General’s prosecutor responsible for enforcing the laws, in particular the *Criminal Code* and the *Controlled Drugs and Substances Act*.”

¹¹¹ *Ibid* at para 19.

intimate partner assault, the panel emphasized that the lawyer “was a Crown Counsel whose stock in trade is spousal assault charges.”¹¹²

D. OTHER ISSUES COMMON TO LAWYERS GENERALLY

As with extraprofessional misconduct, Crown prosecutors and government lawyers sometimes face discipline or other regulatory consequences for issues that are not unique to those roles and so could apply to any lawyer. Often, however, their roles make these issues more serious — whether or not a disciplinary panel explicitly recognizes this additional seriousness.

Like all litigators, Crown prosecutors and government lawyers may face discipline for in-courtroom conduct.¹¹³ While they may not be held to a higher standard than other lawyers, such in-courtroom misconduct — like extraprofessional misconduct — is particularly serious because of their role. For example, where the Crown prosecutor in *Law Society of Alberta v. Piragoff* was reckless as to misleading the Court about evidence and subsequently failed to correct the misunderstanding, the panel again emphasized the power and discretion of Crown prosecutors:

[This lawyer’s] role in the administration of justice is one that brings with it great power and great discretion. When that discretion is abused, through recklessness or gross errors in judgment by a senior Crown prosecutor in whom the public has a right to expect exemplary [conduct], the administration of justice and the legal profession as a whole is all the more hurt.¹¹⁴

As for the importance of correcting the misunderstanding of the evidence, the panel noted that “we are very surprised that a prosecutor of [his] standing and experience would have thought differently.”¹¹⁵

Like all lawyers, Crown prosecutors and government lawyers may also violate rules against sexual harassment in the course of their practice. For example, the Crown prosecutor in *Barreau du Québec (syndic adjoint) c. Roy* had sexually harassed defence counsel, who became concerned that their refusals would negatively impact their clients.¹¹⁶ *Roy* is instructive in that, prior to the disciplinary hearing, the Crown prosecutor was fired after an internal investigation and chose to resign his law licence.¹¹⁷ The panel nonetheless accepted the joint submission of a six-month suspension.¹¹⁸ Somewhat surprisingly, the panel in *Roy* did not emphasize the seriousness of such misconduct by a Crown prosecutor as had the panel in *Piragoff*. Indeed, the panel in *Roy* noted that « l’intimé prend cependant bien soin d’affirmer que jamais il n’avait fait prioriser ses intérêts personnels dans la gestion de ses dossiers à ceux d’une saine administration de la Justice » without explicitly or even

¹¹² *Suntok*, *supra* note 107 at para 39.

¹¹³ See e.g. *Barreau du Québec (syndic adjoint) c. Bouthillier*, 2015 QCCDBQ 057 (Crown prosecutor had neither misled the Court about the reason for an adjournment nor improperly referred to evidence prior to a voir dire).

¹¹⁴ *Law Society of Alberta v Piragoff*, [2005] LSDD No 47 (Alta) at para 45.

¹¹⁵ *Ibid* at para 34.

¹¹⁶ 2013 QCCDBQ 044 at para 24 [*Roy*].

¹¹⁷ *Ibid* at paras 42, 45.

¹¹⁸ *Ibid* at paras 62–65.

implicitly questioning that self-serving assertion.¹¹⁹ However, in denying the lawyer's motion that a notice of the decision not be published, the panel in *Roy* emphasized the importance of making the information available to the public: « Le public a droit de savoir. »¹²⁰

Other issues common to lawyers generally do not appear to be considered more serious when they involve Crown prosecutors and government lawyers. Like any lawyers, Crown prosecutors and government lawyers can face proceedings regarding their competence.¹²¹ Another potential violation is practicing outside voluntary restrictions. For example, the government lawyer in *Law Society of Alberta v. Elander* was reprimanded for breaching an undertaking not to practise outside their employment.¹²² Similarly, the Crown prosecutor in *Re Flanagan* continued to purport to provide legal services to a client of her previous private practice but misinformed the law society that she was not doing so.¹²³ These *Elander-* or *Flanagan-type* violations could likewise be committed by any in-house counsel.

Like all lawyers, Crown prosecutors and government lawyers can face discipline for breaching confidentiality. In the pre-*Krieger* case of *Donald v. Law Society of British Columbia*, a Crown prosecutor had revealed instructions from the Deputy Attorney General regarding three criminal prosecutions.¹²⁴ He did so while testifying as a defence witness in defamation proceedings brought by the Deputy Attorney General against the Canadian Broadcasting Corporation (CBC),¹²⁵ but he had also disclosed those instructions to a CBC reporter.¹²⁶ The law society hearing panel vehemently rejected the argument by the Crown prosecutor that their breach of confidentiality to the reporter was justified by allegations of corruption: “It is difficult to conceive of irresponsibility of a more serious nature for any lawyer acting in a professional capacity, *much less one in the position of Mr. Donald*, to make allegations of corruption in high places in the administration of justice without the surest evidentiary foundation.”¹²⁷ (The finding of professional misconduct was quashed on appeal — on an interpretation of the self-incrimination provision of the *Canadian Charter of Rights and Freedoms* that now appears to be incorrect¹²⁸ — and the matter was referred back to the law society.)¹²⁹

¹¹⁹ *Ibid* at para 25. *Ibid* [translated by author]: “the respondent is however careful to affirm that he had never prioritized his personal interests in the management of his files over those of the sound administration of justice.”

¹²⁰ *Ibid* at para 81. *Ibid* [translated by author]: “The public has a right to know.”

¹²¹ See *Gillen v Law Society of British Columbia* (1985), 63 BCLR 1 (CA) (successful appeal against the law society's determination that a Crown prosecutor was incompetent).

¹²² [1999] LSDD No 70 (Alta), cited in Dodek, *supra* note 41 at 32, n 117.

¹²³ (14 June 2001), (PEILS Discipline Committee) [unreported, on file with author]. For my purposes, the specifics of the misconduct by the lawyer in *Flanagan* are not important. I do note that the conduct gave rise to an action in negligence against the lawyer. See *Zenner & Zerd v Flanagan et ors*, 2022 PESC 29, (1983), 48 BCLR 210 at 218–19 (CA) [*Donald*], additional reasons at [1985] 2 WWR 671, leave to appeal to SCC denied, (1985), 55 NR 237, rev'g on other grounds *Re Donald* (11 April 1983), (BCLS Hearing Panel) [unreported, on file with author].

¹²⁵ *Donald*, *ibid* at 212.

¹²⁶ *Re Donald*, *supra* note 124 at 6–7.

¹²⁷ *Ibid* at 16 [emphasis added].

¹²⁸ Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 13. See e.g. *R v Wigglesworth*, [1987] 2 SCR 541, as discussed e.g. in *Re Lawyer 11*, 2007 LSBC 49 at para 23; *McDonald v Law Society (Alberta)*, [1994] 3 WWR 697 at para 17. See also Caroline Murdoch & Joan Brockman, “Who's on First? Disciplinary Proceedings by Self-Regulating Professions and Other Agencies for ‘Criminal’ Behaviour” (2001) 64:1 Sask L Rev 29 esp at 46.

¹²⁹ *Donald*, *supra* note 124 at 218.

Thus, while Crown prosecutors and government lawyers may face discipline for violations that could be committed by any lawyer, the resulting disciplinary decisions only sometimes explicitly recognize that such violations are necessarily more serious when committed by Crown prosecutors and government lawyers.

E. SUMMARY

Crown prosecutors and government lawyers have been disciplined for a broad constellation of conduct. That conduct ranges from outright public corruption to extraprofessional misconduct and from disclosure failures to misleading judges and opposing counsel. Some, but not all, of these decisions emphasize that misconduct by Crown prosecutors is more serious than parallel misconduct by lawyers generally. While I draw no quantitative conclusions or hypotheses from my review of the case law, there seem to be more reported disciplinary decisions about Crown prosecutors and government lawyers than the apparent consensus in the literature might suggest.

V. ANALYSIS

The constellation of disciplinary decisions canvassed above is surprising in some respects but not in others.

The most striking doctrinal or analytical characteristic of these disciplinary decisions is that none of them cite *Krieger* or *LSUC v. OPSEU*, or any other authorities, for the proposition that law societies have disciplinary jurisdiction over Crown prosecutors (except for their exercise of prosecutorial discretion) and government lawyers. Neither do the lawyers involved appear to dispute that proposition, although there is the potential for disagreement over the scope of prosecutorial discretion.¹³⁰ The disciplinary panels, law society counsel, and lawyers all seem to assume or accept that jurisdiction as a given. I do note that in many of these cases the lawyers admit the disciplinary violation and sometimes even self-report to the law society.¹³¹ For this reason, it is not surprising that the decisions tend to lack extensive legal analysis about whether the conduct at issue constitutes a violation and instead focus on the appropriate penalty.

These decisions are consistent with both *Krieger* and *Everingham* 1992. Following *Krieger*, law society discipline is important even where government lawyers or Crown prosecutors have faced internal discipline. Following *Everingham* 1992, government lawyers

¹³⁰ *Krieger*, *supra* note 1; *LSUC v. OPSEU*, *supra* note 9. The Crown prosecutor in *Tétreault* 2020, *supra* note 77, relied on *Krieger* in his unsuccessful application to dismiss, arguing that his conduct fell within prosecutorial discretion and thus beyond the disciplinary jurisdiction of the Barreau: *Barreau du Québec (syndic adjoint) c. Tétreault*, 2019 QCCDBQ 079 at para 5 [*Tétreault* 2019]. The application was rejected on the narrow basis that the complaint was not « abusive, frivole ou manifestement mal fondée » (“excessive, frivolous or clearly unfounded” *Tétreault* 2019, *ibid* at paras 31–35 [translated by author]) as required by *Professional Code*, CQLR c C-26, s 143.1. In other words, the Crown prosecutor accepted the holding in *Krieger* — that Crown prosecutors cannot be disciplined for their exercise of prosecutorial discretion — but disputed the scope of prosecutorial discretion. It is unclear why the Crown prosecutor did not make parallel arguments during the disciplinary hearing itself instead of admitting the misconduct.

¹³¹ See especially *Clements*, *supra* note 69 at paras 9–10. See also *Clements*, *ibid* at para 21: “When the Member recalled having reached the opinion that there was no likelihood of conviction, he immediately self-reported to his employer and the Law Society of Saskatchewan.”

and Crown prosecutors are held to the same standard as other lawyers — but some breaches by these lawyers may be particularly damaging to public confidence in the legal profession and the administration of justice. Criminal or other unlawful conduct by Crown prosecutors, even if superficially unrelated to their practice and even if it does not result in a conviction, is especially problematic because the Crown prosecutor’s official role is to enforce the criminal law. Crown prosecutors also have a unique position of public trust, the abuse of which is especially egregious. The clear recurrent theme is that immense prosecutorial discretion and prosecutorial power requires strong oversight, not only by the government as employer but by law societies as regulators.

The kinds of conduct at issue in these decisions are surprising in some respects but not in others. Given the explicit recognition of Crown disclosure obligations and the importance of adequate disclosure to trial fairness,¹³² it is not surprising that several of the disciplinary decisions about Crown prosecutors involve disclosure.¹³³ These decisions appear to turn on the specific facts and so do not particularly illuminate the disclosure duty itself. The range of conduct at issue in these decisions appears fairly narrow. It is particularly striking that despite a past regulatory emphasis on civility,¹³⁴ law societies appear not to have disciplined Crown prosecutors or government lawyers on that basis. While there is no reason to assume that such lawyers are more likely to violate civility than lawyers generally, neither is there an obvious reason to assume that they are less likely to do so. This lack of civility enforcement is admittedly less surprising, however, in the aftermath of the decision of the Supreme Court of Canada in *Groia v. Law Society of Upper Canada*.¹³⁵

These cases do suggest that perhaps law societies are largely — yet rationally — dependent on criminal proceedings, whether resulting in convictions or acquittals, as a screening tool to identify potential violations by Crown prosecutors and government lawyers.¹³⁶ A conviction in particular leaves few facts in question for a disciplinary panel.

¹³² *Krieger, supra* note 1 at paras 5, 54–55. See also e.g. *Federation Model Code, supra* note 75, r 7.1-3, commentary 1: “The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, 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.”

¹³³ See e.g. *R v Stinchcombe*, [1991] 3 SCR 326 at 339, as quoted in *Krieger, supra* note 1 at para 54: “Transgressions with respect to this duty [of disclosure] constitute a very serious breach of legal ethics.” See in the US context, though dated, Richard A Rosen, “Disciplinary Sanctions against Prosecutors for Brady Violations: A Paper Tiger” (1987) 65:4 NCL Rev 693 at 694:

Whenever a prosecutor suppresses exculpatory evidence or presents false evidence, these actions cast doubt on the integrity of our legal system and the accuracy of the determinations of guilt and punishment. Of course, suppression or falsification of relevant evidence by any lawyer undermines the integrity and accuracy of a legal proceeding, but this effect is compounded in the case of a prosecutor because of the prosecutor’s dominant role in the criminal justice system.

See also Rosen, *ibid* at 695–96: “At the very core of this duty [of fairness] are the aforementioned rules requiring the prosecutor to disclose evidence favorable to the defense and to correct false testimony.”

¹³⁴ See e.g. Alice Woolley, “Did Joe Groia Kill the Civility Movement?” (2018) 21:2 Leg Ethics 159 at 159.
¹³⁵ 2018 SCC 27, Moldaver J, esp at para 3: “trials are not — nor are they meant to be — tea parties.” See e.g. Woolley, *ibid*.

¹³⁶ On the professional duty on lawyers to report criminality by lawyers, see e.g. *Federation Model Code, supra* note 75, r 7.1-3: “Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society ... participation in criminal activity related to a lawyer’s practice”; *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1, s 134(4): “Subject to the lawyer’s duty of confidentiality to a client, the lawyer must inform the syndic of the Barreau about the occurrence of any of the following situations involving another lawyer ... participation in an unlawful act when practising the profession.” See also e.g. Law Society of Ontario, *By-Law 8*, s 2, online: [perma.cc/2Y5S-XXMC] (duty of lawyer to self-report criminal and other charges). See also e.g. *Professional Code, supra* note 130, s 149.1: “A syndic may, by way of a complaint, seize the

Similarly, the publicity or potential publicity stemming from a criminal proceeding may pressure law societies to consider disciplinary proceedings. On the other hand, there is obviously a large range of problematic conduct by lawyers — including but not limited to Crown prosecutors or government lawyers — that does not constitute a criminal offence.

On the whole, these decisions in themselves do not suggest that law societies fail to adequately exercise their regulatory and disciplinary jurisdiction over Crown prosecutors and government lawyers. Indeed, perhaps the most surprising feature overall is that qualitatively this constellation of disciplinary decisions is not dramatically different from disciplinary decisions of lawyers generally — once one recognizes that many rules simply do not apply to the practices of Crown prosecutors and government lawyers and thus cannot be breached by those lawyers.¹³⁷ Almost thirty years ago, Harry Arthurs argued that there was a common quartet of typical lawyer discipline:

Essentially, lawyers in Canada are subject to serious discipline for just four reasons: because they have been guilty of theft, fraud, forgery or some other criminal offence; because they have violated a fiduciary duty imposed on them by law; because they are unable to carry on their practices due to physical or mental disability or serious addiction; or because they have failed to respond to inquiries from their governing body.¹³⁸

While Dodek concludes from this quartet that “[i]t is therefore not surprising that few government lawyers are disciplined by law societies,”¹³⁹ with respect I disagree. Without misappropriation of trust funds as a possibility, the most striking absence is that there appear to be no reported decisions of Crown prosecutors or government lawyers ignoring correspondence from the law society or failing to co-operate with law society investigations. Similarly, there are few reported capacity issues involving Crown prosecutors or government lawyers.¹⁴⁰ But criminal offences, including but not limited to extraprofessional conduct, seem to be a basis for much discipline of those lawyers. While civility may have run its course, newer regulatory priorities like sexual harassment are also being applied to Crown prosecutors and government lawyers.¹⁴¹

There does appear to be an imbalance between Crown prosecutors and government lawyers, with the former appearing to be the subject of many more reported disciplinary decisions than the latter. As I noted at the outset,¹⁴² this apparent imbalance may well be a function of the inherent research challenges. But it also may reflect rational regulatory priorities. I emphasize here that, as the cases have demonstrated, Crown prosecutors have unique obligations and occupy a unique position of trust — and so it would be quite understandable if law societies prioritized discipline of Crown prosecutors over discipline of government lawyers. Moreover, Crown prosecutor conduct and misconduct are more

disciplinary council (1) of any decision of a Canadian court finding a professional guilty of a criminal offence.... The decision referred to in the first paragraph must, in the opinion of the syndic, be related to the practice of the profession.”

¹³⁷ See *supra* note 66 and accompanying text.

¹³⁸ HW Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?” (1995) 33:4 *Alta L Rev* 800 at 802, quoted e.g. in Dodek, *supra* note 41 at 35–36.

¹³⁹ Dodek, *ibid* at 36 [footnotes omitted].

¹⁴⁰ Though beyond the scope of this article, see e.g. *Law Society of Ontario v King*, 2022 ONLSTH 30.

¹⁴¹ See *Roy*, *supra* note 116.

¹⁴² See note 8 and accompanying text.

visible to the public and the media than conduct and misconduct by government lawyers, particularly non-litigators. While I do not suggest that Crown prosecutors are less ethical than government lawyers or than lawyers generally, over-identification with law enforcement or victims' rights could potentially result in more temptation to misconduct by Crown prosecutors relative to government lawyers.¹⁴³ It seems less likely that client-capture, the parallel risk applicable to government lawyers, would create a similar degree of temptation.¹⁴⁴

VI. REFLECTIONS AND CONCLUSIONS

In this article, I have canvassed the constellation of reported law society disciplinary decisions concerning Crown prosecutors and government lawyers. I have demonstrated that, while Crown prosecutors are sometimes disciplined for violating their unique obligations, they and government lawyers are often disciplined for violations similar to those committed by lawyers generally. Law society discipline of these lawyers is rare, but less rare than commentators appear to assume. There appears to be little if any debate or controversy over — or even mention of — the holding in *Krieger*, namely, that Crown prosecutors are immune to law society discipline only in their appropriate exercise of prosecutorial discretion.¹⁴⁵ Nonetheless, if law societies are to continue disciplining Crown prosecutors, they will likely have to grapple with the scope of prosecutorial discretion and the kinds and degree of conduct that will vitiate disciplinary immunity for the exercise of that discretion. Regulatory wariness may thus be a rational response.

My research here addresses a fundamental qualitative gap in existing knowledge about law society discipline of Crown prosecutors and government lawyers. Indeed, many of the recent additions to the legal literature on legal ethics for government lawyers are arguably incomplete and unmoored insofar as they are doctrinal and normative but not descriptive or qualitative.¹⁴⁶ I hope this research will not only help anchor future doctrinal and normative work but also inspire future qualitative work. Insofar as at least some Crown prosecutors and government lawyers are keenly aware of the potential for law society discipline,¹⁴⁷ future

¹⁴³ See e.g. Alice Woolley, "Prosecutorial Accountability?" (12 November 2009), online (blog): *ABlaw* [perma.cc/CTP4-PV25]: "Excessive prosecutorial zeal, and particularly prosecutorial tunnel vision — focusing on a particular suspect such that it becomes difficult to assess information accurately — have been implicated in numerous wrongful convictions in Canada"; Bruce A MacFarlane, "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency" (2001) 45:3 *Crim LQ* 272 at 280; Jeremy Tatum, "Re-Evaluating Independence: The Emerging Problem of Crown-Police Alignment" (2012) 30:2 *Windsor YB Access Just* 225 esp at 242–43. In the US context, see e.g. Rory K Little, "Who Should Regulate the Ethics of Federal Prosecutors?" (1996) 65:1 *Fordham L Rev* 355 at 416, 416, n 330: "[P]rosecutors often accept the federal investigative agencies, or the victims of crime, as a client-surrogate.... That is, they pursue the interests of the investigatory agents with whom they are working ..., or the interests of the parties injured by the crime at issue."

¹⁴⁴ On client capture and government lawyers, see e.g., Dodek, *supra* note 41 at 13–14.

¹⁴⁵ *Krieger*, *supra* note 1.

¹⁴⁶ See e.g. Andrew Flavell Martin, "Legal Ethics for Government Lawyers: Confronting Doctrinal Gaps" (2022) 60:1 *Alta L Rev* 169. But contrast e.g. Sanderson, *supra* note 2.

¹⁴⁷ See e.g. *R v Baasch*, 2023 NUCA 7 [*Baasch CA*], aff'g 2022 NUCJ 47 at paras 30–33 (Crown prosecutor unsuccessfully appeals from decision of trial judge that acquitted that Crown prosecutor of criminal contempt but also chastised that Crown prosecutor for violating their professional duties to the Court). See also *Baasch CA*, *ibid* at para 34: "Whether or not the hearing judge recognized it, characterizing Ms Baasch's conduct as unethical and unprofessional in this way required Ms Baasch to report herself to the Law Society of Nunavut." Thanks to Brandon Trask for bringing *Baasch* to my attention. See Randi Beers, "Iqaluit Lawyer Appeals Contempt of Court Ruling, Calls it 'Miscarriage of Justice'" *Nunatsiaq News* (3 May 2023), online: [perma.cc/AL6F-WLBK] ("[a]lthough she was acquitted, Crown lawyer Emma Baasch argues judgment has put her in 'legal jeopardy' before Nunavut

qualitative research might explore whether and how that potential discipline impacts their professional and extraprofessional conduct as compared to the prospect of internal discipline by their employer. Another important question is the extent to which law societies are dependent on criminal proceedings as a detection mechanism. Future research could also address the role of governments as employers and clients in the overall regulatory scheme.¹⁴⁸

While I have suggested that *Krieger* should be read as a regulatory and disciplinary imperative, I emphasize in closing that the relative rarity of disciplinary proceedings involving Crown prosecutors and government lawyers does not necessarily mean, and should not be assumed to mean, that law societies are not fulfilling their statutory mandate as it applies to those lawyers. Neither does the absence of disciplinary proceedings in any specific case mean that there has been no regulatory action.¹⁴⁹ Law societies presumably make rational incentive-driven determinations about regulatory and disciplinary priorities and resource allocation, both in general and in specific instances. I also note that developing jurisprudence on the scope of prosecutorial discretion and the kinds of factors that vitiate immunity in the exercise of that discretion may continue to reduce uncertainty for law societies and lead to more disciplinary proceedings against Crown prosecutors. Finally, it may very well be true that law societies are overly reliant on internal investigation and discipline of Crown prosecutors and government lawyers by governments as the employers of those lawyers — at least for misconduct at the less serious end of the spectrum. If so, it bears repeating from *Krieger* that internal employer disciplinary processes and law society disciplinary processes have different functions, different tools, and different impacts on the protection of the public.¹⁵⁰ As David Tanovich has argued, there may be more public confidence in investigations and discipline by the law society as regulator than by the government as employer.¹⁵¹ In these several ways, internal discipline of Crown prosecutors and government lawyers is not a true substitute for law society discipline of those lawyers.

Law Society”); Randi Beers, “Nunavut Appeals Court Dismisses Appeal of Contempt of Court Acquittal” *Nunatsiaq News* (22 June 2023), online: [perma.cc/SJ33-9YCT] (lawyer considering further appeal).

¹⁴⁸ See here e.g. Dodek, *supra* note 41 at 48–52, proposing that each government create an “Office of Professional Responsibility” for its government lawyers and Crown prosecutors.

¹⁴⁹ Kaschuk, *supra* note 3 is certainly correct that cumulative inaction across a series of instances of apparent serious misconduct is concerning.

¹⁵⁰ *Krieger*, *supra* note 1 at paras 57–58:

The Law Society and the Attorney General have different mandates and objectives. . . . An inquiry by the Attorney General into whether a prosecutor has failed to meet departmental standards and should be removed from a case may involve different considerations, standards and/or procedures than an inquiry by the Law Society into whether that prosecutor has breached the rules of ethics warranting sanction. The Attorney General is responsible for determining the policies of the Crown prosecutors. The Law Society is responsible for enforcing the ethical standards required of lawyers. Certain aspects of a prosecutor’s conduct may trigger a review by the Attorney General and other aspects, usually ethical conduct considerations, may mean a review by the Law Society. A prosecutor whose conduct so contravenes professional ethical standards that the public would be best served by preventing him or her from practising law in any capacity in the province should not be immune from disbarment. Only the Law Society can protect the public in this way.

¹⁵¹ David M Tanovich, “*Bonds: Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power*” (2011) 79 CR (6th) 132 at 149:

There are a number of advantages to having a Law Society, as opposed to the Attorney General, conduct a review of the conduct of a Crown Attorney. There may be professional standards used by the Attorney General that are, in fact, lower than those required by a Law Society. . . . They may conclude after a full investigation that there is a systemic problem of Crown ‘alignment’ with the police and that the failure to terminate [a specific prosecution] was motivated by this ‘alignment’ or for other improper purposes such as a desire to protect the police officers from possible civil or criminal liability or even discrimination. It is unlikely that an internal evaluation would make such findings. Finally, the public has a right to know whether and how Crown prosecutors are disciplined. This public process would likely only occur through Law Society discipline.

Such internal discipline should indeed prompt, not effectively pre-empt, law society discipline of those lawyers, especially as the underlying conduct approaches the more serious end of the spectrum. If law societies are in fact hesitant to discipline Crown prosecutors and government lawyers as compared to lawyers generally, that hesitancy is problematic and should be addressed.

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