BOOK REVIEW: ROBERT J FRATER QC *PROSECUTORIAL MISCONDUCT* (2ND ED, THOMSON REUTERS, TORONTO, 2017).

DON MATHIAS*

Mr Frater is a highly experienced senior Canadian prosecutor. The negativity of the title of his book is justified by the ease with which the principles of proper conduct can be stated compared with the detail necessary to discuss the case law on when those principles are breached. In any event, impropriety will inevitably be of more interest than its opposite, particularly for people who are not prosecutors. The attraction of the book is in its potential to provide relevant examples of when there may be a remedy, a relevance which comes from the similarity of the requirements of proper prosecutorial conduct among legal systems in the common law tradition. An international perspective has the advantage of revealing many more examples of misconduct than one jurisdiction could ever hope to produce. Mr Frater has achieved his stated aim of writing a book that will be useful to defence counsel, prosecutors and judges throughout the Commonwealth.

To take a snapshot: 16 of the cases most widely referred to in the book include three that have often been cited in New Zealand courts: *Boucher v R* [1955] SCR 16,[1] *R v Stinchcombe* [1991] 3 SCR 326,[2] and *R v O'Connor* [1995] 4 SCR 411.[3] The others are not irrelevant to us. They concern topics such as: abuse of process and the duty of Crown counsel to avoid wrongful convictions and to act to rectify them when they occur, and when there may be a remedy for failure to do that;[4] when the prosecutor has an improper relationship with other branches of government, and when outside counsel should make the decision to bring charges;[5] the need for prosecutorial independence and objectivity and when failure of this can be an abuse of process;[6] the nature and scope of the Crown's duties of disclosure, remedies for failure of this, and the consequences of an attack on the character of Crown counsel;[7] the extent to which the defence has to provide a basis for greater disclosure, particularly in relation to third party records, and when a decision about that can be reviewed;[8] when the prosecutor's conduct can be impugned at trial because of an "oblique motive" for failing to call a witness;[9] when the Crown needs to notify the defence of the potential

*Barrister, Auckland.

[1] See *Manning v R* [2015] NZHC 936 at [5] (with mis-spelling as "Bouchier"), a recent example.

[2] See R *v Sullivan* (No 10) [2014] NZHC 1105 at [34]–[35] per Heath J), a recent example.

[3] For example, *Attorney-General v Otahuhu District Court* [2001] 1 NZLR 737, (2000) 18 CRNZ 105 (HC Hammond and Randerson JJ).

[4] *Hinse v Canada (Attorney General*), [2015] 2 SCR 621, also discussing when there may be a remedy in damages against the Minister for failing to "meaningfully review" an application for the exercise of the prerogative of mercy.

[5] *R v Carriere* 2005 SKQB 471.

[6] *R v Cawthorne* [2016] 1 SCR 983., 2016 SCC 32.

[7] *R v Horan* 2008 ONCA 589.

[8] *R v Jackson* 2015 ONCA 832, (2015) 128 OR (3d) 161 (ONCA).

[9] *R v Jolivet* [2000] 1 SCR 751. An oblique motive is an improper motive, and might be considered to affect the fairness of a trial. Robert J Frater *Prosecutorial Misconduct* (2nd ed, Thomson Reuters, Toronto, 2017) at 196.

destruction of evidence and the consequences of failure to do so;[10] the extent to which a court will defer to the prosecutor's disclosure decisions in the light of the constitutional obligations of the Crown; how the court should receive evidence of counsel's reasoning, and the extent to which defence counsel must be diligent in seeking disclosure, and what remedy should be given for failure of disclosure;[11] when it is proper to bring a prosecution if there is evidence favourable to the defence, and to what extent does the prosecutor have to give reasons for the institution or the termination of proceedings;[12] when a stay of proceedings can be followed by an award of costs and whether the threat of costs would unduly fetter the decision to prosecute;[13] the extent of the Crown's disclosure obligations in the sense of what is relevant when the defence seek to set aside a search warrant obtained in reliance on informer information, and what is permissible in order to protect an informer's identity;[14] the extent of Crown disclosure obligations in the context of appeals;[15] when failure of disclosure prior to a guilty plea may justify withdrawal of the plea on appeal, and what the remedy should be, taking account of whether a retrial for a serious offence would be an abuse of process, particularly where the defendant has served part of a sentence.[16]

But this is just a glimpse of the book's compass, a glimpse highlighting the prosecutor's concern with disclosure, a topic given a 50-page chapter, and the overlap of that with abuse of process, which itself has a chapter of 60 pages. Our first point of research on disclosure is the Criminal Disclosure Act 2008.[17] A recent case on interpreting its s16[18] cites, and is consistent with, Canadian authority.[19] Much of the disclosure chapter is relevant to applying our legislation.

Overall, chapters are devoted to the role of the prosecutor, the charging decision, disclosure, abuse of process, the duties of Crown counsel at trial and on appeal, improper cross-examination, improper jury addresses, costs against the Crown, malicious prosecutions and related tort claims, and prosecutorial standards as set out

[10] *R v Knox* (2006) 209 CCC (3d) 76, (2006) 80 OR (3d) 515 (ONCA).
[11] *R v Leduc* (2003) 176 CCC (3d) 321, (2003) 66 OR (3d) 1 (ONCA).
[12] *R v Light* (1993) 78 CCC (3d) 221 (BCCA); and *R v Anderson* [2014] 2 SCR 167.
[13] *R v Martin* 2016 ONCA 840, (2016) 134 OR (3d) 781 (ONCA).
[14] *R v McKay* 2016 BCCA 391.
[15] *R v McNeil* 2009 SCC 3 (SCC), [2009] 1 SCR 66 (*McNeil*).
[16] *R v Taillefer* (2003) 179 CCC (3d) 353 (SCC), [2003] SCR 307.
[17] See (19 June 2008) 647 NZPD 16770, one of the purposes of this legislation was to keep pace with reforms in other common law countries: Hon Annette King (Minister of Justice). See also Law Commission *Criminal Procedure: Part One Disclosure and Committal* (NZLC R14, 1990) at [30], that pilot disclosure schemes in Canada and England had led to an increase in early guilty pleas.
[18] *Ministry of Business, Innovation and Employment v Centreport Ltd* [2014] NZHC 2751 at [69].
[19] *Toronto Star Newspapers Ltd v Canada* (2005) 204 CCC (3d) 397 (ONCJ) at [21] (*Toronto Star*), a case not referred to by Mr Frater, although it remains authoritative, being recently applied in *Law Society of Upper Canada v Cengarle* 2017 ONLSTH 129 (CanLII) at [49]. But the omission is insignificant as *Toronto Star* relies on *R v O'Connor* [1995] 4 SCR 411(1995), (1995) 103 CCC (3d) 1, which is another of Mr Frater's most cited decisions, and (at 94) he refers to *World Bank Group v Wallace* [2016] 1 SCR 207 at [134] in which the point is covered, citing *R v Stinchcombe* [1991] 3 SCR 326 and *McNeil*. Incidentally, he also mentions (at p 74 footnote 10) *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 at [68]–[80] per Kirby J for a review of the leading statements regarding disclosure in other countries.

in publicly available guidelines.[20] Each gives full treatment of its subject to an extent relevant to the role of the prosecutor. For example, the chapter on abuse of process discusses the emergence of the doctrine, its application generally, the test for abuse of process,[21] abuse of the charging discretion, prejudicial changes in the Crown's position, and other categories of Crown misconduct (statements outside court, ignoring misconduct – past or future – by foreign authorities relevant to extradition cases, jury-related misconduct, proceeding against a person who is physically or mentally ill, reliance on perjured evidence, failure to protect the accused's rights, and condoning police misconduct).

The 370 pages of text have an average of five new - that is, excluding repeats - case citations per page, but this is not to say that extended discussion and amplification are absent. Only one New Zealand case is cited, in relation to abuse of process, and then only to give an instance of the application of a well-established point.

Where an issue has been settled by a New Zealand case there would be no need to look for overseas law. For example, on the subject of prosecutorial independence and the reviewability of decisions to, or not to, prosecute *Osborne v Worksafe New Zealand* [2017] NZCA 11 (*Osborne*) provides an answer. This was decided without reference to Canadian law,[22] but cases from the House of Lords, the Privy Council, England and Wales (High Court, Court of Appeal and Queens Bench Division), and Fiji were cited. Of those foreign decisions, about 75 per cent are mentioned by Mr Frater. *Osborne* confirms the justiciability of those prosecutorial decisions, the threshold that must be met before review can be undertaken, and the use that may be made of the Prosecution Guidelines (they are not to be construed as a code, as they are aspirational and have a high discretionary content). No reference was necessary in *Osborne* to the consistent Canadian decisions: *Kvello v Miazga (sub nom Miazga v Kvello Estate)* [2009] 3 SCR 339 and *Krieger v Law Society (Alberta)* [2002] 3 SCR 372.

Some readers will feel a trifle disappointed that the discussion of counsel's duty of civility is not more detailed because they enjoy reading about instances of rudeness, at least when they themselves are not involved. However, cases are cited and it is over to the curious to look them up. The discussion of inflammatory addresses to juries could give such readers more satisfaction, but additional illustrations could have been given of the claim that "[t]he case law is a veritable celebration of the tools of

[20] Useful material in New Zealand is still to be found in "Criminal Prosecutions" (NZLC R66 (October 2000)), much of which is background for the "Solicitor-General's Prosecution Guidelines" (1 July 2013), Crown Law, <www.crownlaw.govt.nz>.

[21] Serious conduct deliberately designed to undermine the integrity of the judicial process: *Henry v British Columbia (Attorney General)* [2015] 2 SCR 214, not cited in *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 but a similar test was used (the integrity rationale) at [60].

[22] However, in the High Court reference was made to *R v Anderson* 2014 SCC 41, [2014] 2 SCR 167, a case relied on by the defendant for the proposition that abuse of process must be established before the court will review prosecutorial decisions: *Osborne v Worksafe New Zealand* [2015] NZHC 2991 at [34]. Note also the recent comment in *Taylor v R* [2017] NZCA 53 at [11], an appeal against conviction for attempted murder where there was a significant difference in charges faced by two offenders, the Court observed, "counsel for Mr Taylor recognised that this was a matter of prosecutorial discretion and not properly a ground of appeal against conviction. The concession was wisely made." Leave to appeal was refused: *Taylor v R* [2017] NZSC 105.

rhetorical excess", if only to show that Mr Frater is not himself indulging in the same excess. A reader of normal sensibility – even a lawyer – could appreciate some occasional relief from the technical, and very proper, legal prose.

Just one niggle, and this is probably not the author's fault: the footnotes cross-refer to each other, and any subsequent mention of a case sends the reader back to the first footnote where the full citation is given. A lot of flicking back and forth may be necessary. This is one of those dreadful decisions on style[23] that is becoming common in judgments, and even in this journal. It conforms to the Law Style Guide, as "general style", but arguably there are times when convenience for users should be the dominant consideration. The alternative, "commercial style", in which full citation is repeated each time a case is cited, is preferable for a book, and is of obvious advantage where only a few pages have to be photocopied.

Mr Frater QC has written a scholarly and technical, but also an accessible and practical, analysis of his subject. He achieves a balance between citation and description which gives an overview as well as pointing to areas that could, depending on the researcher's needs, be productively explored by further investigation. While it is always necessary to check the local relevance of cases from other jurisdictions, this book is a valuable resource for anyone who needs to find examples of prosecutorial misconduct and to identify possible remedies.

[23] Some people share a dislike of unnecessary gender pronouns, such as "he or she" (used 18 times in this book, eight by the author and 10 in quoted passages). Only eight usages in 370 pages could hardly be called objectionable. But there are 45 instances of "his or her", 22 the author's and 23 in quoted passages. There may still be no strenuous objection, but a better style would acknowledge gender equality by dispensing with unnecessary pronouns, including the solitary "he" "him" and "his" where reference is to a person who could be of any gender (the Law Style Guide agrees on this point at [1.1.1(a)]). One example of this: in the context of improper cross-examination (p 218): Mr Frater says, "Section 14 of the Charter [which is equivalent to s 24(g) of the New Zealand Bill of Rights Act 1990] gives an accused the right to use a translator. It follows, naturally, that an attempt to cross-examine on the fact that he or she is relying on a translator will be improper." To avoid the gender pronouns, and also the unintended possibility that the translator might also be relying on a translator, the concluding words could be rewritten as: "... an attempt to cross-examine on use of a translator will be improper." In any event, Mr Frater's statement needs to be treated cautiously. A challenge to the use of an interpreter (as that person is more properly called), if relevant to an issue in the proceedings, could be made pre-trial or by voir dire, on the issue of the applicability of the right, that is, whether there was an inability to understand or speak the language. But after a ruling that an interpreter could be used, further challenge would indeed be improper unless new information, calling into question the correctness of the ruling, became available. See *Daradkeh v R* [2016] NZCA 172; *Singh v R* [2014] NZCA 293.