Judicial and Prosecutorial Control of Lying by the Police

David M. Tanovich*

Until recently, the issue of police deception in testifying has received very little attention in Canada.[1] Reid Rusonik, a Toronto defence lawyer with considerable experience in exposing cases of police fabrication both in and out of court, explains the perjury phenomenon as follows:

> As a young criminal defence lawyer, I was taught that I must approach every case with the assumption that all police officers lie all of the time. I was taught that to analyze their anticipated evidence from any other starting point would be gross negligence. As a white, middle-class man from small-town Ontario, I was shocked and incredulous about the idea of using this assumption even merely as an intellectual exercise. Over the years, however, employing this analytical discipline in more than 1,000 cases has invariably produced evidence of its soundness in instances where there was room for a police officer to fabricate.
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> Many times the lies were merely exaggerations. Often it was a question of omitting truths as opposed to distorting them. Far too often, however, analysis of this type has exposed instances of blatant fabrication on critical points of evidence. In these last instances, I am not referring to fabrications borne out of the existence of contradictory evidence from another human being whose credibility was also in issue. I am referring to lies in the face of completely independent

*Faculty of Law, University of Windsor

[1]This is in contrast to our southern neighbours, where the issue has been recognized as a systemic issue for some time and has been coined "testilying." See, for example, the discussion in Melanie Wilson, "An Exclusionary Rule for Police Lies" (2010) 47 *Am Crim L Rev* 1; Melanie Wilson, "Improbable Cause: A Case for Judging Police by a More Majestic Standard" (2010) 15 *Berkeley J Crim L* 259; Larry Cunningham, "Taking on Testilying: The Prosecutor's Response to In-Court Police Deception" (1999) 18 *Crim Just Ethics* 26 at 26–27; David M. Dorfman, "Proving the Lie: Litigating Police Credibility" (1999) 26 *Am J Crim L* 455; Christopher Slobogin, "Testilying: Police Perjury and What To Do About It" (1996) 67 *U Col L Rev* 1037; and Irving Younger, "The Perjury Routine", *The Nation* (8 May 1967).

> evidence: audio and videotapes, computer records, the law of physics, and notes made by the officers themselves. . . .
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> Why do so many police officers lie? There are several obvious answers. Most obvious is the fact they are human beings. They do it because they believe they are doing the right thing, that the end justifies the means. They do it because they didn't understand how to do the job correctly and honestly in the first place. They do it because, like any group made up of human beings, some are lazy and look for shortcuts, some are too proud to admit they are wrong and some are simply dishonest.[2]

The issue appears to have skyrocketed to the top of the concerns of the criminal justice system in Ontario. This is as a result of a significant number of recent cases, almost all involving Black or racialized accused, where judges have courageously concluded that the evidence of the police was either an outright lie, deliberately misleading or was tailored[3]:

> *R. v. Thompson*[4]
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> "Sergeant Ceballo was not a credible witness. . . . [T]he witness was clearly struggling, not to recall precisely what had occurred or why he acted as he had, but rather on account of what I find to have been an effort, when pressed in questioning, to plug constitutional gaps with whatever occurred to him at the moment. *This type of mental scramble had the effect of misleading the court*. . . [T]he sergeant's evidence was *transparently and deliberately misleading* . . ."[5]

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[2]Reid Rusonik, "Canadians have a right to expect police to tell the truth — all the time" *Toronto Star* (3 May 2012).

[3]In other provinces, see, for example, *R. v. Huang*, 2010 BCPC 336 (B.C. Prov. Ct.) at para. 35 (Bayliff J.) where it was found that "[a]n inevitable consequence of my finding that the real motivation for this stop was that the officer had observed Huang's race, is the finding that Cst. Berze was being untruthful with the court."

[4]2013 ONSC 1527 (Ont. S.C.J.) (Hill J.) (loaded handgun excluded under s. 24(2)) (African-Canadian accused) [*Thompson*].

[5]*Ibid.* at paras. 173, 175, 203 (emphasis added). Ceballo, who is also African-Canadian, has been involved in a number of cases alleging racial profiling. See *Peart v. Peel (Regional Municipality) Police Services Board* (2006), 43 C.R. (6th) 175 (Ont. C.A.); and *R. v. Singh* (2003), 15 C.R. (6th) 288 (Ont. S.C.J.).

R. v. Obasi[6]

"It seemed as if [Sergeant Ceballo] *tailored his evidence* to fit the facts . . ."[7]

R. v. Mattison[8]

"I find on a balance of probabilities that *Officers Shin and Tremblay were untruthful* about seeing Mr. Mattison using a cellphone when they drove by him and that Officer Tremblay was *untruthful* about seeing a cellphone in the vehicle when he conducted a search . . ."[9]

R. v. Salmon[10]

"The trial judge found that the police had *fabricated evidence* to make it appear that two pieces of false identification in the name of the complainant had been found in the respondent's wallet at the time of his arrest, and that *at least one police officer then lied about it in testimony*."[11]

R. v. Dinh[12]

"*They essentially colluded and then committed perjury, en masse*."[13]

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[6]2012 ONSC 6824 (Ont. S.C.J.) (Bielby J.) (heroin excluded under s. 24(2)) (African-Canadian accused).

[7]*Ibid.* at para. 94 (emphasis added). See, also, *R. v. Martin*, 2012 ONSC 2298 (Ont. S.C.J.) (Corbett J.) (loaded handgun excluded under s. 24(2)) (African-Canadian accused) where it was observed at para. 40: "It is clear that Sergeant Ceballo's goal was to find a legal basis to search the car . . . This is not a form of policing that should be modeled to junior officers. This context raises broad institutional concerns."

[8]2012 ONSC 1795 (Ont. S.C.J.) (Backhouse J.) (loaded firearm and ammunition excluded under s. 24(2)) (African-Canadian accused).

[9]*Ibid.* at para 36. (emphasis added). See, further, at para. 37.

[10]2013 ONCA 203 (Ont. C.A.) (emphasis added) (human trafficking and related offences stayed as an abuse of process).

[11]*Ibid.* at para 1.

[12]2011 ONSC 5644 (Ont. S.C.J.) (Baltman J.) [*Dinh*] (2 kilograms of cocaine excluded under s. 24(2)).

[13]*Ibid.* at para. 111 (emphasis added).

R. v. Selvanayagampillai[14]

"P.C. [Scott Aikman] knew or ought to have known that he did not have the requisite grounds to detain the accused and search the van and *either fabricated or concealed evidence* in order to justify the search after the fact."[15]

R. v. McPhail[16]

"What can only be viewed as the *attempted cover up* of the strip search makes this conduct especially egregious. In my view, the conduct of the police both in conducting the strip search and in *attempting to hide it at trial* mitigates in favour of excluding the evidence obtained after the breach."[17]

R. v. Harrison[18]

"I note that the trial judge found the *officer's in-court testimony to be misleading*. While not part of the *Charter* breach itself, this is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour."[19]

Other recent Ontario cases involving findings of untruthful, tailored or misleading testimony or fabrication in securing a search warrant include

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[14]2011 ONCJ 873 (Ont. S.C.J.) (Bloomenfeld J.) (fraudulent credit and debit cards excluded under s. 24(2) in case involving "321 charges reflecting data theft and fraudulent use of credit, debit and gift card offences on an international scale and involving significant amounts of money and multiple victims and financial institutions" (at para. 75).

[15]*Ibid.* at para. 69. The reported judgment mistakenly spells Aikman as Aichman. Confirmation that it is Aikman can be found in an earlier decision (*R. v. Selvanayagampillai*, 2010 ONCJ 278 (Ont. S.C.J.). Constable Aikman was involved in the first case to raise racial profiling in the Ontario Court of Appeal. See *R. v. Richards* (1999), 26 C.R. (5th) 286 (Ont. C.A.).

[16]2011 ONCJ 315 (Maresca J.) (impaired driving charges stayed as an abuse of process).

[17]*Ibid.* at paras. 35–36 (emphasis added).

[18][2009] 2 S.C.R. 494 (S.C.C.) (35 kilograms of cocaine excluded under s. 24(2) (White accused)).

[19]*Ibid.* at para. 26 (emphasis added). See, further, *R. c. Côté*, 2011 SCC 46 (S.C.C.) at paras. 31–32, 51–52, 88.

R. v. Nartey[20]; *R. v. Wisdom*[21]; *R. v. Leong*[22]; *R. v. Spagnoli*[23]; and *Parsons v. Woodfine*.[24]

In order to begin to address the problem, I propose three recommendations.

1. The Ontario Court of Appeal Should Overturn *R. v. Ghorvei*

In *R. v. Ghorvei*,[25] the Ontario Court of Appeal held that a witness cannot be cross-examined on prior judicial findings of dishonesty or lying under oath, unless they resulted in a conviction for perjury or the giving of contradictory evidence. Justice Charron (as she then was) offered a number of justifications for this general rule:

- the evidence is not discreditable conduct;
- the findings are not made in proceedings like a perjury trial where the issue is the truth or falsity of the testimony;
- the witness is not given a chance to respond to the accusation that he lied under oath;
- the trial judge is not applying a proof beyond a reasonable doubt standard; and

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[20]2013 ONCA 215 (Ont. C.A.) at para. 13 (crack cocaine evidence excluded under s. 24(2)).

[21]2012 ONCJ 54 (Ont. C.J.) at para. 55 (Lipson J.) (loaded handgun and cocaine excluded pursuant to s. 24(2)). For a more recent case raising concerns about the same officer, see Peter Small, "Judge acquits drug suspect over police inconsistencies" *Toronto Star* (21 May 2013).

[22]2011 ONSC 3215 (Ont. S.C.J.) at para. 231 (Garton J.) (evidence relating to ecstasy drug lab excluded under s. 24(2)).

[23](2011), 284 C.C.C. (3d) 24 (Ont. S.C.J.) at paras. 17–18 (Hambly J.) (marijuana grow operation charges stayed to deter police lying).

[24](sub nom. *Parsons v. Niagara (Regional Municipality) Police Services Board)* 2009 CarswellOnt 3757 (Ont. S.C.J.) at paras. 114–117 (Harris J.).

[25](1999), 29 C.R. (5th) 102 (Ont. C.A.) [*Ghorvei*]. *Ghorvei* has been applied outside of Ontario. See *R. v. Boyne*, 2012 SKCA 124 (Sask. C.A.) at paras. 48–51; and *R. v. Karaibrahimovic*, 2002 ABCA 102 (Alta. C.A.) at paras. 7–8.

- the finding is nothing more than an opinion of a trial judge and the trier of fact has no opportunity to assess the value of the opinion.[26]

It is respectfully submitted that none of these concerns are compelling when the witness is a police officer (as was the case in *Ghorvei*).[27] Lying by police officers is very much discreditable conduct, especially in light of the systemic nature of the problem.[28] Moreover, police officers are, unlike most witnesses, professional witnesses. They are experienced in testifying and they are permitted to use their notes.[29] Lying also breaches

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[26]*Ibid.* at paras. 29–35.

[27]For a thoughtful critical comment on *Ghorvei*, see Frank Addario and Marcus Pratt, "The Ontario Court of Appeal Polishes Up Some Bad Apples" (1999) 29 C.R. (5th) 111. Addario and Pratt make many of the same points I do here but also include an important discussion of how *Ghorvei* is inconsistent with the English position as set out in *R. v. Edwards*, [1991] 2 All E.R. 266 (Eng. C.A.) at 275 [*Edwards*]; and *R. v. Guney (Erkin Ramadan) (Disclosure)*, [1998] 2 Cr. App. R. 242 (Eng. C.A. [Criminal Division]). In *R. v. Edwards*, [1996] 2 Cr App R 345R v Edwards at 350, for example, Beldam LF, for the Court, held:

> Once the suspicion of perjury starts to infect and permeate cases in which the witnesses have been involved and which are closely similar, the evidence on which the convictions are based becomes as questionable as it was in the cases in which the appeals have been allowed. It is impossible to be confident that had the jury convicting the appellant known the facts and circumstances in the other cases in which the police officer had been involved, they would have been bound to convict the appellant. In our view, that is the appropriate test.

For more recent application of the *Edwards* principle, see *R. v. Twitchell (Keith)*, [2000] Cr. App. R. 373 (Eng. C.A.); and *R. v. Dunne (Michael)*, [2001] EWCA Crim 169 (Eng. C.A.).

[28]See the discussion of using the rules of evidence to address the problem of police perjury in Dorfman, "Proving the Lie", *supra* note 1.

[29]In *Thompson*, *supra* note 4 at para. 212, Justice Hill makes the following important observations about police notes:

> By way of postscript, something must be said about the police note-taking as described in this trial. As a general rule:
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> > (1) because police officers don't wear head-cams and have to discharge their duties in often risky and fast-moving circum-

their duty as public servants and as officers of the administration of justice.

Most police perjury appears to occur in *Charter* applications where what is being litigated are low-visibility encounters with officers exercising highly discretionary powers (e.g. to detain or search). In this context, the officer is in effect on trial for his or her conduct and its compliance with the law and procedure and the truth of his or her evidence is very much a live issue. On *Charter voir dires*, police officers are provided an opportunity to explain or clarify, since the cross-examination will usually be lengthy and thorough. The prosecutor will often make submissions on the credibility of their testimony and on whether, in fact, they are lying. And, the trial judge is applying a burden of proof — the balance of probabilities standard — which the defence must discharge in order to make out a *Charter* violation. While not the reasonable doubt standard, it is the standard that is applied at police disciplinary hearings, and an officer can be cross-examined on a finding of guilt at a disciplinary hearing.[30]

> stances, it is to be recognized that there is a limit to the degree of detail that can be recorded in a notebook at the scene of an incident or indeed subsequently
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> (2) reasonable efforts should be made, however, to contemporaneously record significant details, including those relevant to constitutional rights of a suspect — note-taking should not be routinely deferred to later in a shift at a police facility
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> (3) where multiple officers participate in investigation of an incident, their notes should be made independently and not as a collective and not after a (de)briefing where the incident is discussed as a group
>
> (4) an officer should record when notes were made, where and in whose company if not alone. . . .

[30]See *R. v. McNeil*, 2009 SCC 3 (S.C.C.). In discussing the Crown's obligation to disclose disciplinary records of the police, Justice Charron, for the Court, held (at para. 54):

> Where the misconduct of a police witness is not directly related to the investigation against the accused, it may nonetheless be relevant to the accused's case, in which case it should also be disclosed. For example, no one would question that the criminal record for perjury of a civilian material witness would be of relevance to the accused

And finally, with respect to the suggestion that prior findings are only "opinions" that cannot be tested, there are two possible responses. First, we permit lawyers to call witnesses to impeach the credibility of other witnesses. This is done on reputation, which is often grounded in nothing more than hearsay and rumours. No ability to test the foundation of the opinion is permitted by our jurisprudence.[31] Second, it would always be open to a trial judge to refuse to permit the cross-examination using their exclusionary discretion where there is an insufficient foundation in the reasons for judgment for a finding of lying or tailoring under oath.[32] In another case, a trial judge might conclude that the prior finding took place in a case with a different factual matrix and, therefore, that the prejudicial effect of cross-examination would substantially outweigh its probative value.

2. Factoring Prior Cases of Deception by the Officer/Division into the 24(2) Analysis

In *Thompson*, Justice Hill opened the door for judicial consideration of a history of lying in court by a police officer, squad or force in assessing the seriousness of the breach under section 24(2):

> . . . while it is not strictly necessary to decide the point in this case, I am of the view that a trial court would not be foreclosed, in considering as a factor relating to the seriousness of a *Charter* breach, relevant history of a particular police officer, squad or force as unambiguously characterized by judicial officers in other cases.[33]

Based on *Thompson* and the other cases arising out of Peel Region, it is clear that very little is being done to address the judicial concerns ex-

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> and should form part of the first party disclosure package. In the same way, findings of police misconduct by a police officer involved in the case against the accused that may have a bearing on the case against an accused should be disclosed.

[31]See, for example, *R. v. Clarke* (1998), 18 C.R. (5th) 219 (Ont. C.A.).

[32]This may have been the case in *Ghorvei*, *supra* note 25 at para. 33, where Justice Charron held that ". . . the trial judge's finding that the officer's testimony was 'false' does not appear to be reasonable on the basis of the record before him." See, further, *R. v. Malabre*, 1997 CarswellOnt 6490 (Ont. C.A.); and *R. v. Barnes* (1999), 138 C.C.C. (3d) 500 (Ont. C.A.) at para. 17.

[33]*Thompson*, *supra* note 4 at para. 204.

pressed. Allowing a court to take into account a pattern of lying or institutional failure to take corrective action, in deciding whether to exclude the evidence, or as a basis for having a reasonable doubt (assuming *Ghorvei* is no longer followed), would encourage systemic change because it would put an onus on the police to address the problem or face the prospect of serious cases being thrown out of court.

3. Increase Prosecutorial Oversight

The issue of police lying has also been part of the public discourse as a result of a 2012 Toronto Star survey reporting over 100 cases across Canada involving false testimony and other deception by police officers.[34] One of the consequences of the Toronto Star series, and growing public and judicial concern on the issue, has been for the Attorney General of Ontario to implement a policy requiring prosecutors to report up-the-ladder cases where a police officer's evidence has been questioned by a trial judge. According to a summary of the policy in the Toronto Star,

> The policy deals not only with deliberate dishonesty on the witness stand but in any situation where a police officer is under oath, such as in an affidavit to get a wiretap or a search warrant.
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> Under the new system, if a judge makes findings or comments that an officer was deliberately untruthful, or the Crown attorney has reasonable evidence that the officer was lying, the trial prosecutor must report it to his local manager.
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> From there, the supervising Crown will review the case file and court transcripts to see if there are grounds to believe the officer deliberately lied. If there are grounds, the case gets forwarded to a regional director, who makes the decision whether to send the case to police for investigation. . . .
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> Police would decide whether the officer will be charged with a criminal offence. The police force may also internally discipline the officer. The ministry will track the number of cases it forwards to police to investigate . . .[35]

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[34]David Bruser and Jesse McLean, "Police who lie: How officers thwart justice with false testimony" *Toronto Star* (26 April 2012).

[35]David Bruser, "Crown must now report police who lie" *Toronto Star* (26 October 2012).

Given the systemic nature of the problem and the lack of concern by most police services who have to-date failed to take adequate steps to address the problem,[36] it is time to rethink allowing the police to investigate themselves when it comes to perjury. Given the seriousness of the allegations and the concerns about the lack of transparency and objectivity, it may be necessary for the Legislature to increase the mandate of the Special Investigations Unit in Ontario to investigate these charges by amending the *Police Services Act*.[37]

The case of *Dinh* raises serious questions over the integrity of police investigating their own officers for perjury and about Crown alignment with the police. In *Dinh*, the trial judge could not have been more explicit in her findings of perjury:

> . . . this is a flagrant case of bad faith; not only did the officers collude on an illegal search, but those who testified on the *voir dire* (Roy, Dann, Hobson and Kirkpatrick) *all gave false evidence designed to mislead the court*. . . . They essentially colluded and then committed perjury, *en masse*.[38]

> . . . at the *voir dire*, *the police lied under oath* in order to cover up the illegal search, and persisted in that lie when confronted with the most damning of evidence. All these misdeeds were calculated, deliberate and utterly avoidable. In sum, from their initial arrest of Mr. Dinh until their ultimate testimony in court, the police showed contempt not just for the basic rights of every accused but for the sanctity of a courtroom. Misbehaviour of this nature, particularly when committed by police officers, strikes at the heart of the administration of justice. It undermines society's confidence both in the police — who above all should uphold the law — and in the courts, where more than anywhere truth should prevail.[39]

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[36]See Jesse McLean and David Bruser, "Police who lie: False testimony often goes unpunished" *Toronto Star* (26 April 2012). See, more generally, the discussion in Gabriel J. Chin and Scott C. Wells, "The 'Blue Wall of Silence' As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury" (1998) 59 *U Pitt L Rev* 233.

[37]RSO 1990, Chapter P 15. Section 113(5) currently limits the jurisdiction of the SIU to cases involving death or serious injury (including sexual assault).

[38]*Dinh*, *supra* note 12 at paras. 109, 111.

[39]*R. v. Dinh*, 2012 ONSC 1016 (Ont. S.C.J.) at para. 28 (sentencing decision).

Notwithstanding these factual findings, no charges were laid following an internal affairs investigation and consultation with the Ministry of the Attorney General.[40] The fact that the Ministry presumably signed off on not laying a charge would appear, given the strong findings by the trial judge, to be another example of the alignment of the police and Crown in this province.[41]

Returning back to prosecutorial oversight, what are the ethical obligations of the prosecutor in Peel Region, for example, the next time that Sgt. Ceballo testifies on a *Charter* application, given his rebuke in *Thompson* and two other recent cases? The ethical issue of suborning perjury has largely focussed in Canada on defence counsel.[42] In that context, a high standard — knowledge of the falsity of the evidence — is required to trigger counsel's ethical obligations.[43] That knowledge in most of the rules of professional conduct in Canada must come from an admission by the client.[44]

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[40]See Louie Rosella, "Peel officers who 'lied under oath' won't face criminal charges" *Toronto Star* (19 October 2012).

[41]For a discussion of this issue, see David M. Tanovich, "*Bonds*: Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Power" (2011) 79 C.R. (6th) 132 at 146–149; and David M. Tanovich, "The Crown should align with justice not the police" *Ottawa Citizen* (11 December 2010). See, further, Jeremy Tatum, "Re-evaluating Independence: the Emerging Problem of Crown-Police Alignment" (2012) 30(2) *Windsor YB Access Just* (forthcoming).

[42]See, for example, Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at Chapter 7 — Client Perjury (*Ethics and Canadian Criminal Law*); and Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham: LexisNexis, 2011) at Chapter 6 — The Perjury Trilemma. See, however, *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (Ont. C.A.) at 213 where the Court of Appeal was clear that a prosecutor has an ethical duty to disclose perjury committed by one of its witnesses. See, further, the discussion in *Ethics and Canadian Criminal Law*, at 680–683.

[43]See the discussion in *R. v. Moore*, 2002 SKCA 30 (Sask. C.A.) at paras. 53–54.

[44]Proulx and Layton in *Ethics and Canadian Criminal Law*, *supra* note 42 at 370, advocate for an "irresistible conclusion of falsity from available information" standard that would trigger knowledge even where the client does not admit guilt or that they intend to lie. See, also, Woolley, *supra* note 42 at 166–167.

Should the high standard of "knowledge" that applies to defence counsel govern the prosecutor who owes additional obligations to the system as a minister of justice? Or should it be whether the prosecutor believes, based on all of the evidence, including the officer's history of testifying and prior judicial findings, that it is likely he or she will commit perjury? This is an issue that the Law Society of Upper Canada needs to urgently consider.[45] In "Taking on Testilying: The Prosecutor's Response to In-Court Police Deception," Larry Cunningham advocates the following approach to the issue:

> I argue that in light of the prosecutor's heightened duty to seek justice, the good cause standard of the crime of subornation should be adopted by the ABA. A prosecutor has the duty, in my opinion, to determine the veracity and truthfulness of all of his witnesses, police officer or not. Specifically, I believe that the ABA should adopt a new subsection to Model Rule 3.8, Special Responsibilities of a Prosecutor, as follows:
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> > The prosecutor in a criminal case shall: . . .
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> > > (h) prior to an adjudicative proceeding in which the prosecutor will examine a witness under oath, investigate the truthfulness of the witness's intended testimony. If, upon discovering that the witness intends to lie, the prosecutor's duties shall be governed by Model Rule 3.3 and the requirements of justice. As to the testimony of a police officer, the prosecutor shall consider the frequency and nature of institutionalized perjury, if any, by the police officer in the past or in the officer's police department in determining whether the officer is likely to commit perjury.
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> . . .
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> If a prosecutor determines before a trial or hearing that his or her police witness intends to commit perjury, the prosecutor has several courses of action. He should first try to dissuade the officer from lying. If the officer still persists in testifying falsely, or if he or she refuses to acknowledge that his or her testimony will be false (but the

[45]In *Krieger v. Law Society (Alberta)*, 2002 SCC 65 (S.C.C.), the Supreme Court recognized that the Law Society has a role to play in regulating and disciplining prosecutors for breaches of the Rules of Professional Conduct.

> prosecutor believes otherwise), the prosecutor should either not call the officer at all . . . or limit the questioning to areas in which the officer will not lie. If the necessary testimony can be obtained only by asking the police officer a question to which the prosecutor knows the officer will lie, the prosecutor should so warn the officer. If the officer does in fact lie, the prosecutor should notify the court and opposing counsel accordingly.[46]

There is much to be said for Cunningham's approach, as the prosecutor does not owe a duty of loyalty to police witnesses. Moreover, a police witness is rarely going to admit that they intend to lie to cover up their non-compliance with *Charter* standards or to tailor their evidence to ensure that the evidence will not be excluded under section 24(2) so as to satisfy the high knowledge of falsity test.

There is no question that the issue of police lying and deception is a complicated and difficult one for our justice system to acknowledge and address. Trial judges have shown the courage to expose the problem, and it is time for our appellate courts and professional bodies to ensure that there is sufficient judicial and regulatory oversight.

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[46]Cunningham, *supra* note 1, at 34.