Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

controlling criminal prosecutions: the attorney general and the crown prosecutor

Working Paper 62

Canada

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CONTROLLING CRIMINAL PROSECUTIONS: THE ATTORNEY GENERAL AND THE CROWN PROSECUTOR

Law Reform Commission
of Canada

Working Paper 62

CONTROLLING CRIMINAL PROSECUTIONS: THE ATTORNEY GENERAL AND THE CROWN PROSECUTOR

1990

Canadian Cataloguing in Publication Data

Main entry under title:

Controlling criminal prosecutions : the Attorney General and the Crown Prosecutor

(Working paper ; 62)
Text in English and French.
Title on added t.p., inverted: Poursuites pénales.
Includes bibliographical references.

ISBN 0-662-57533-4

1. Attorneys general — Canada. 2. Public prosecutors — Canada. 3. Prosecution — Canada. 4. Law reform — Canada. I. Law Reform Commission of Canada II. Title: Poursuites pénales. III. Title: The Attorney General and the Crown Prosecutor. IV. Series: Working paper (Law Reform Commission of Canada); 62.

KE8813.C66 1990 342.71'066 C90-090362-7E

Available by mail free of charge from:

Law Reform Commission of Canada
130 Albert Street, 7th Floor
Ottawa, Canada
K1A 0L6

or
Suite 310
Place du Canada
Montréal, Québec
H3B 2N2

Catalogue No. J32-1/62-1990
ISBN 0-662-57533-4

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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CHAPTER ONE

The Role of the Attorney General

I. Introduction

The federal and provincial Attorneys General personify the public prosecution system in Canada. These officials are accountable to the public, through Parliament and the provincial legislatures, for the exercise of powers conferred by statute and common law. They lie at the centre of the justice system. The prosecution by the Crown of offences under the *Criminal Code*[1] or other federal and provincial legislation is carried out by agents of the Attorneys General. Superintendence over such public prosecutions, as well as the ability to control private prosecutions, rest with the Attorneys General. Further, Attorneys General have historically, though currently to a diminished extent, been responsible for the police and correctional facilities.

Equally central to the federal justice system is the Minister of Justice. As a member of Cabinet, the minister has political responsibilities. Federally, the Minister of Justice bears primary responsibility for formulating the legal policy of the government of the day, is responsible for the court system and the administration of justice generally, and is legal adviser to the Cabinet.

In light of the important functions of each of these offices separately, it is particularly noteworthy that in Canada they are combined into one. Federally, a Minister of Justice is created by statute, and the office-holder is *ex officio* the Attorney General of Canada. In addition, each province has a single office-holder who performs the functions associated with both posts. In some provinces the office-holder is known as the Attorney General, and in others as the Minister of Justice. For convenience, we will use the term "Attorney General" to refer to the holder of this combined office, unless the context requires otherwise.

The importance of having a responsible person of integrity in the role of Attorney General is apparent. In particular, the running of the prosecution service is a task with a great potential for conflict of interest. Situations have arisen on many recent occasions — the

1. R.S.C. 1985, c. C-46.

Donald Marshall inquiry,[2] the Manitoba "Ticketgate" inquiry,[3] the resignation of British Columbia's Attorney General[4] and the Patricia Starr inquiry[5] — in which the need to have someone act independently and free of political pressure or other conflicts has been made apparent.

This paper will examine the role, responsibilities, and powers of the merged office of Attorney General and Minister of Justice at the federal level. Our recommendations will concern two major areas: the administrative structure of the combined office of the Department of Justice and the office of the Attorney General, and the particular powers of the Crown prosecutor, acting under the Attorney General, to initiate, conduct, and terminate proceedings. The recommendations we will make for restructuring are directed specifically at the federal Department of Justice; however, we believe that the proposals would be equally appropriate to both the federal and provincial levels of government. The recommendations concerning the powers of the Attorney General and Crown prosecutors with relation to criminal prosecutions will directly affect the provinces.

II. Historical Sketch

Both provincial and federal legislation creating the office of Attorney General began by conferring upon the office-holder the powers and duties which have traditionally belonged to the Attorney General of England and Wales. As a result, the starting point for

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2. The inquiry was established in Nova Scotia to investigate the wrongful murder conviction of Donald Marshall. See the Royal Commission on the Donald Marshall, Jr., Prosecution, [*Report*] 7 vols. (Halifax: The Royal Commission, 1989). In the course of hearings, testimony raised the question of the proper relationship between the police and the Attorney General's office with regard to responsibility for deciding to lay criminal charges, possibly affecting the decision not to lay charges against a member of the provincial Cabinet.

3. A police investigation led to charges of ticket-fixing against a number of lawyers, and several judges, in Manitoba. The office of the Attorney General prosecuted the charges, but was also involved, through its administration of justice responsibility, in negotiations with judges concerning salary, retirement, etc. See *The Dewar Review: A Report Prepared by The Honourable A.S. Dewar at the request of the Attorney-General of Manitoba*, October 1988 [unpublished] [hereinafter *Dewar Review*]. One official in particular was found to have been in a clear conflict of interest in both engaging in plea-bargaining discussions with counsel for one of the judges, and participating in the process determining that judge's pension entitlement. See the discussion of this issue below at 35 in "Dividing the Offices of Minister of Justice and Attorney General".

4. Early in 1988, Brian Smith, the Attorney General of British Columbia, resigned his post. His stated reason for doing so was attempted interference from the Cabinet in what should be an independent prosecutorial responsibility for determining whether charges should be laid.

5. A judicial inquiry was established in Ontario to investigate a number of allegedly improper political contributions. The Attorney General of Ontario, Ian Scott, noted that it might be necessary for him or the Crown law office to advise investigating police officers whether charges should be laid. As a result, Scott felt that he ought not simultaneously to be acting as legal adviser to the government, and outside counsel was hired.

understanding the present offices is the history of the Attorney General of England and Wales.[6]

In earliest times the "King's Attorney", or Attorney General, was merely the barrister entrusted with supervision of the King's legal interests throughout the country. The "King's Solicitor", the precursor to the Solicitor General, was the Attorney General's senior deputy.[7] During the sixteenth century most prosecutions were in the hands of private individuals, but the Crown, through its personal representative, on occasion instituted and conducted proceedings. Since most prosecutions were nominally in the name of the Sovereign, the Crown had the right, through its representative, to terminate the proceedings prior to completion.[8] These powers of intervention thus came to be exercised by the Attorney General or by the Solicitor General. The latter acted, for many purposes, as the deputy to the Attorney General, and undertook much of the counsel work.

The two most important powers of the Attorney General in England and Wales were the right to initiate and terminate prosecutions. The Attorney General could initiate prosecutions by laying an information before a justice and seeking the issuance of process, or by the use of an *ex officio* information,[9] which could only be used for misdemeanours[10] and which removed the case into the Star Chamber, a court with wide discretionary powers in criminal matters. After the Star Chamber was abolished, the Attorney General was able to place the information directly into the Court of King's Bench, and also had a right to move

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6. Philip Stenning has conducted a detailed study of the historical roots of the public prosecution system under the auspices of the Law Reform Commission of Canada [hereinafter LRC]: *Appearing for the Crown* (Cowansville, Quebec: Brown, 1986). Only certain aspects of his research are recounted here.

7. *Ibid.* at 15-16.

8. *Ibid.* at 17.

9. D. Walker, ed., *The Oxford Companion to Law* (Oxford: Clarendon, 1980) defines *ex officio* information as follows at 444:

> A criminal information filed by the Attorney-General on behalf of the Crown in respect of crimes affecting the government or peace and good order of the country. It was utilized in cases of seditious writings or speeches, seditious riots, libels on foreign ambassadors, and the obstruction of public officers in the course of their duties. It was abolished in 1967.

10. Walker, *ibid.*, defines misdemeanour as follows at 843:

> At common law in England, a crime which was neither a treason nor a felony (qq.v.) but a lesser offence. Some crimes which were technically misdemeanours were serious, e.g. conspiracy, riot, assault, but many were trivial offences. In 1967, all distinctions between felony and misdemeanour were abolished, the rules applicable to misdemeanour being made applicable to both categories. The distinction has been replaced by that between arrestable and non-arrestable offences, the former being those for which the sentence is fixed by law or for which a person may be sentenced to five years' imprisonment.

indictments directly to that court. The Attorney General also had the power to terminate any private prosecution (except an "appeal of felony"[11]).

The Attorney General of England and Wales was, and continues to be, the head of the bar, and retains the right to be heard before all other counsel when appearing personally before any court. Any prosecution for a felony could be stopped by the Attorney General's personal use of a *nolle prosequi*.[12] The Attorney General could take over and conduct private prosecutions with the consent of the private prosecutor, though whether the ability existed to do so without that consent is unclear.[13]

In the English colonies that were established in the Maritimes and Upper Canada, this British system was largely adopted, but with some modifications. In each of these colonies and in Lower Canada, the English office of Attorney General was established. Particularly of note, however, is the greater involvement of these Attorneys General in prosecutions that, in England, would generally have been pursued privately.[14] In Upper Canada for example, the first Act creating a system of Crown Attorneys came more than 20 years before the

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11. Walker defines appeal of felony as follows (*ibid.* at 69):

> In case of death by murder or manslaughter the feudal lord of the deceased, the widow, or the heir male might bring an appeal, in substance an accusation or challenge or claim for loss to himself rather than for harm to the public. An appeal might be brought even after the appellee had been tried on indictment and acquitted. The defendant had the right to trial by battle. The parties had to fight personally, save that a woman, a priest, an infant, a person over 60, or lame or blind might hire a champion. The battle took place before the judges of the King's Bench or Common pleas, and the parties were each armed with a staff an ell long and a leather shield, and battered each other from sunrise to star-rise or until one cried "Craven". The defendant could clear himself by the ordeal or, after this was abolished, by jury trial *per patriam*. If beaten in combat or found guilty, the defendant suffered the same judgment as if convicted on indictment, and the Crown had no power to pardon because the appeal was a private suit. It became obsolete but was not abolished and in 1817 Ashford brought a writ of appeal in the King's Bench against Thornton for the alleged rape and murder of Mary Ashford. Thornton had already been tried and acquitted of the charge at assizes; he demanded trial by battle against Ashford who declined to accept the challenge and Thornton was discharged: see *Ashford* v. *Thornton* (1818), 1 B. & Ald. 405; in the following year appeals of felony and trial by battle were abolished by statute.

12. The term *nolle prosequi* is defined in *ibid.* at 883 as follows:

> In civil proceedings, an undertaking by the plaintiff not to proceed with his action at all or as to part of it, or as to certain defendants. The Attorney-General of England has power in any criminal proceedings on indictment at any time to enter a *nolle prosequi* and thereby to stay proceedings. The origin of the power is uncertain but the basis appears to be that the Crown, in whose name criminal proceedings are taken, may discontinue them. The first instance was in 1555. The court will not thereafter allow any further proceedings to be taken in the case, nor inquire into the reasons or justification for the Attorney-General's decision. It is not equivalent to an acquittal and does not bar a fresh indictment for the same offence.
>
> In the U.S., the discretion is vested in the prosecutor such as the district attorney and may be used if the accused agrees to make restitution or to plead guilty to a lesser charge.

13. Stenning, *supra*, note 6 at 30-31.

14. *Ibid.* at 40.

comparable English statute: it was modelled not on the system in use in England, but on that in Scotland.[15]

Two Committees of the Executive Council of the Province of Canada dealt with problems in the administration of justice in Canada East and Canada West.[16] The 1846 report of the committee discussed how, given the union of Upper and Lower Canada, to incorporate two Attorneys General and two Solicitors General into the government. It was recommended that all four law officers should continue to hold seats in Parliament, but that only the Attorneys General should remain in the Executive Council. The Attorney General's primary responsibility was to conduct personally the Crown's business before the courts and to advise Cabinet colleagues on legal matters. The Solicitors General were to continue to assist the Attorneys General in their duties, as requested, particularly in appearances before the courts. When none of the law officers was available to appear, the Attorney General or the Solicitor General could instruct counsel, usually Queen's counsel, to appear as their representative.[17]

With Confederation came several provisions of the *Constitution Act, 1867*[18] that are particularly relevant to a discussion of the role of the Attorney General:

1. Subsection 91(27) giving the federal Parliament exclusive jurisdiction over "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters";

2. Subsection 92(14) giving the provincial legislatures exclusive jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts";

3. Section 63 providing that the Executive Council of Ontario and Quebec shall be composed of such persons as the Lieutenant Governor thinks fit, but in the first instance, must include *inter alia* the Attorney General and in Quebec must include the Solicitor General;

4. Section 134 providing for the appointment, under the Great Seal of the province, of *inter alia* the Attorney General and in Quebec the Solicitor General as well; and

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15. See a discussion of the establishment of this system through *The Upper Canada County Attorneys' Act*, S.C. 1857, c. 59, in M. Bloos, "The Public Prosecutions Model From Upper Canada" (1989) 32 C.L.Q. 69.

16. Province of Canada, Committee of the Executive Council respecting the Salaries and Emoluments of the Law Officers of the Crown in this Province and the Fees to Queen's Counsel for Services rendered by them for the Crown payable out of the Public funds, 1844 (RG 1, E 1, Canada State Book C, pp. 563-569) and Province of Canada, Special Committee of the Executive Council in relation to the remuneration and duties of the Crown Law Officers, 1846 (RG 1, E 1, Canada State Book F, pp. 85-100) quoted in Stenning, *supra*, note 6 at 64-68.

17. Stenning, *supra*, note 6 at 64-68.

18. (U.K.), 30 & 31 Vict., c.3.

5. Section 135 providing that the Attorney General and Solicitor General continue to have all "Rights, Powers, Duties, Functions, Responsibilities or Authorities" as were vested in or imposed on them prior to Confederation until otherwise provided by the legislature.

The effect of this division of powers was to give conduct of the majority of criminal prosecutions to the provincial Attorneys General and their agents.

After Confederation, the federal and provincial governments each created the offices of Attorney General or Minister of Justice, although the titles are not uniform among provincial governments. To an extent these offices were based on the British model. In other significant aspects, they departed from that model. Certain aspects of the British arrangements will be considered both here and later, but a full explanation of the various offices in England and Scotland and their respective duties is set out in Appendix A.

The first post-Confederation federal legislation concerning the Attorney General was *An Act Respecting the Department of Justice*.[19] This Act creates the Department of Justice, and provides for the appointment of a Minister of Justice. In the original 1868 version of the Act, the minister's duties are to act as official legal adviser to the Governor General and Cabinet, to see to it that the administration of public affairs is in accordance with the law, to have superintendence of all matters connected with the administration of justice in Canada within federal control, and to advise upon the legislative acts of the provincial legislatures.[20]

The Act also provides that the Minister of Justice is *ex officio* the Attorney General of Canada. The Attorney General was by the 1868 Act entrusted with the powers and duties "which belong to the office of the Attorney General of England by law or usage".[21] The Attorney General had the powers that pre-Confederation provincial laws had given to provincial Attorneys General, where such laws were now in the federal sphere. The Attorney General was also the legal adviser to government departments, was responsible for approving instruments issued under the Great Seal of Canada, had the superintendence of prisons and penitentiaries, and was to regulate and conduct all litigation on behalf of the Crown in right of Canada.[22] In addition, when the North-West Mounted Police were created in 1873, supervision of the force was assigned to the Department of Justice.[23]

The office of federal Solicitor General was created in 1887, by *An Act to make provision for the appointment of a Solicitor General*.[24] This Act provided for the appointment of a

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19. S.C. 1868, c. 39.

20. *Ibid.*, s. 2.

21. *Ibid.*, s. 3.

22. *Ibid.*

23. *Administration of Justice, North West Territories Act*, S.C. 1873, c. 35. See the discussion of the establishment of this force in P. Stenning, *Legal Status of the Police*, Study Paper prepared for the LRC (Ottawa: Supply and Services Canada, 1981) at 45.

24. S.C. 1887, c. 14.

Solicitor General, whose duties were to "assist the Minister of Justice in the counsel work of the Department of Justice".[25] In effect, the Solicitor General was given the role traditionally assigned in England to the office, that of assistant to the Attorney General.

In each province the practice of assigning the duties of the Minister of Justice and Attorney General to one person was followed. The division of functions between those two offices was not uniform, however. A chart showing the various ways in which responsibilities have been divided is attached to this paper as Appendix B.

In providing that the same person was necessarily to fill the roles of Attorney General and Minister of Justice, both federal and provincial legislation departed from the English model that was the source of the offices. The Attorney General in England, for example, is not a member of Cabinet, and has responsibilities which are considerably more limited than in Canada. Responsibility for police and prisons in England rests with the Home Secretary, who also has some responsibility for the administration of courts. This responsibility is shared with the Lord Chancellor, who in addition recommends judicial appointments, supervises judges and courts, and serves as a legal adviser to the Cabinet. Both the Home Secretary and the Lord Chancellor are members of Cabinet, with the attendant political responsibilities.

Thus in the original legislation creating a federal Attorney General, Canada combined within one post responsibility for prosecuting, acting as legal adviser to the government, administering courts, supervising the police, and superintending prisons and penitentiaries. In addition, all of these duties were given to a member of Cabinet, with the political responsibilities that such a position entails. These are tasks that were, in the tradition from which they came, separated, and which today in England are divided among five different offices.

Since the original legislation there have been some amendments, but on the whole the structure is unchanged. Responsibility for the RCMP, prisons and penitentiaries, and parole and remissions was given to the Solicitor General in 1966.[26] This is a departure from the traditional English model of the Solicitor General's office, and is an anomaly that now exists federally and in six provinces.[27] With this exception, however, the functions assigned to the Minister of Justice and Attorney General remain today as they were in 1868.

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25. *Ibid.*, s. 1.

26. *Government Organization Act, 1966*, S.C. 1966-67, c. 25, s. 4. Responsibility for prisons and penitentiaries had been transferred from the Attorney General to the Minister of Justice in the *Department of Justice Act*, R.S.C. 1906, c. 21.

27. In Nova Scotia, New Brunswick, Ontario, Alberta, and British Columbia, the Solicitor General is responsible for the Police, and in Quebec, the police are under the Minister for Public Security. The *Alberta Police Act*, S.A. 1988, c. P-12.01, s. 2, charges the Solicitor General with the administration of the Act, but still places all police services and peace officers under the direction of the Attorney General.

III. The Present Role of the Attorney General

A full understanding of the Attorney General in today's context requires consideration of each of the various roles the position entails. The Attorney General must act as a member of Cabinet, accountable to Parliament and the public. The Attorney General must superintend the prosecution service, directing the course of criminal prosecutions conducted by the state, and supervising private prosecutions. As head of the prosecution service, the Attorney General is accountable to the courts. The Attorney General federally has had, and in some provinces continues to have, responsibility for the police.

A. The Attorney General and Parliament

In England the Attorney General is not a member of Cabinet, and is independent from its dictates with respect to the exercise of prosecutorial authority. It has been clear since the early part of this century that the English Attorney General may seek the advice of Cabinet but is not required to do so. The most well-known explanation of this relationship is that of Lord Shawcross, while Attorney General of England in 1951:

> I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that I have indicated affect government in the abstract arise it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.[28]

It is noteworthy, however, that this independence is a matter only of convention. As one commentator has noted, it is difficult to find "any clear *legal* ground for asserting a right in the Attorney-General to act independently".[29]

The extent to which the Attorney General of Canada is independent is less clear. Unlike in England, the Attorney General of Canada is a member of Cabinet, and is by statute also the Minister of Justice, responsible for "superintendence of all matters connected with the

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28. Lord Shawcross' statement is to be found in J.LI.J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 223 [hereinafter *Law Officers*].

29. G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon, 1984) at 112.

administration of justice in Canada''.[30] In addition, the Canadian Attorney General has always had duties and responsibilities held by the Home Secretary and Lord Chancellor in England, both of whom are members of Cabinet.

Stenning has pointed out that in colonial times, when the Attorney General was a professional lawyer retained by the government, ''No law officer of these days could seriously have thought that he enjoyed, or was entitled to, anything resembling 'political independence' from the dictates of the Governor of the day.''[31] In 1840, after the union of the two Canadas, the Attorneys General (and Solicitors General) of Canada East and Canada West were required to hold seats in Parliament, and to ''take part in political affairs''.[32] Stenning notes that ''the two heads of the Janus-like government of the Province at this time, Baldwin and Lafontaine, were respectively the Attorneys General of Canada West and Canada East.''[33] This combining of functions continued with Confederation, as Sir John A. Macdonald held the post of Attorney General between 1867 and 1873.[34]

Further, Edwards points out (albeit ''sadly'') that prior to 1978:

> [T]he evidence of previous administrations, irrespective of party affiliation, suggests that earlier Prime Ministers and Attorneys General subscribed to a totally different philosophy in which decisions in highly political cases were made by the Cabinet and carried out by the Attorney General.[35]

Edwards then discusses cases in the St. Laurent, Diefenbaker and Pearson governments, suggesting that at those times:

> [M]ost Ministers of the Crown would have viewed their involvement in the disposition of such prosecutorial questions in Cabinet as a natural application of the principle of collective responsibility for unpalatable political decisions.[36]

In recent years, however, the ''Shawcross principle'' has been cited as applicable to Canada. Beginning in 1978 with Mr. Basford, at least four Attorneys General in Canada have embraced the statement of principle made by Lord Shawcross that the Attorney General

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30. *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4(b).

31. *Supra*, note 6 at 288.

32. *Ibid.*

33. *Ibid.* at 288-289.

34. J.LLJ. Edwards, *The Attorney General, Politics, and the Public Interest* (London: Sweet & Maxwell, 1984) at 358 [hereinafter *Attorney General*]. Edwards also points out that William Aberhart acted as Attorney General of Alberta while Premier, and that ''Many instances are on record, well into the present century, where the Premier of a Provincial Government has simultaneously fulfilled the duties of Attorney General.'' Notable among these was Maurice Duplessis, Premier of Quebec, who also acted as Attorney General.

35. *Ibid.* at 361.

36. *Ibid.* at 362.

is not subject to control by the Cabinet in making prosecutorial decisions.[37] Mr. Basford stated:

> The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others.
>
> In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself.[38]

The McDonald Commission reached a similar conclusion about the need for the Attorney General to put aside personal or party political concerns when determining whether to initiate a prosecution.[39]

Several other writers have considered the role of the Attorney General, in particular with respect to *Charter of Rights* cases.[40] The Attorney General of Ontario stated that, if he was satisfied that a statutory provision creating an offence was unconstitutional, or that a prosecution would violate the accused's rights, it would be his duty to intervene to stay the proceedings.[41] Taking this obligation a step further, Mr. Scott contemplated that if he was convinced that a fellow minister's proposed course of action was unconstitutional, and he was unable otherwise to prevent it, the Attorney General might have to take legal proceedings against that minister. He concluded:

> The public and the legal profession should be vigilant to see that the Attorney General vigorously pursues this obligation in a matter that respects the fundamental principles of independence and objectivity that have historically guided the exercise of the Attorney General's responsibilities.[42]

Nevertheless, the federal Attorney General is appointed by the Prime Minister and so could be dismissed from office for insisting on a course of conduct that is against the advice of the Cabinet. In such circumstances the Attorney General might feel compelled to resign

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37. R. McMurtry, "The Office of the Attorney General" in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at 2-3 and 5-6 (former Attorney General of Ontario) and I. Scott, "The Role of the Attorney General and the Charter of Rights" (1986-87) 29 C.L.Q. 187 at 189-192 (present Attorney General of Ontario). The remarks of Mr. R. Basford and Mr. M. Macguigan (both former federal Ministers of Justice) are quoted in Edwards, *Attorney General, supra*, note 34 at 359-364.

38. Canada, *House of Commons Debates* at 3881 (17 March 1978).

39. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Third Report: Certain R.C.M.P. Activities and the Question of Governmental Knowledge* (Ottawa: Supply and Services Canada, 1981) (Chairman: Justice D.C. MacDonald) at 509.

40. See, *e.g.*, Scott, *supra*, note 37; D.C. Morgan, "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the Charter" (1986-87) 29 C.L.Q. 15; J.I.J. Edwards, "The Attorney General and the Charter of Rights" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 45-68.

41. Scott, *supra*, note 37 at 199.

42. *Ibid.*

before being dismissed.[43] Either event could be expected to have a serious political impact affecting even the government's survival.

It is also clear, having been stated both by Attorneys General and the judiciary, that the Attorney General is accountable to Parliament or the appropriate legislature. One leading case that expressly refers to this accountability is *Smythe* v. *The Queen*.[44] In that case, Chief Justice Fauteux stated that the court could not review the exercise of the Attorney General's discretion regarding the election to proceed by way of summary conviction, but that the Attorney General could be questioned in the legislature about the decision, and sanctioned by that body, if appropriate.

This amounts to saying that the accountability of the Attorney General to Parliament lies in the fact that ministers of the Crown can be called upon to answer questions in the House and can be censured by the House. But this theoretical accountability must be considered in the context of the reality that party solidarity would likely lead to the support of any Attorney General, whether independent in decision-making or not. As Lord Shawcross noted:

> Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there, which is the party to which the Attorney General of the day must belong. One has only to remember the so-called Shrewsbury "martyrs" and the Clay Cross affair to realize that that party will obviously not criticize the Attorney General of the day for not taking action which, if taken, might cause embarrassment to their political supporters.[45]

Further, it is the view of Edwards[46] that this accountability arises only after the fact: when the decision not to prosecute has been made, or when the prosecution is complete. The Attorney General cannot, it seems, be required to defend a decision while the case is still before the courts. As a result, Stenning points out:

> [T]he very nature of the Attorney General's prosecutorial discretion, and the desire to ensure that the administration of criminal justice is kept as far as possible removed from strong political pressures, have tended to ensure that parliamentary control over his discretion in this area can only be less than adequate. In the first place, in the pressure of business with which Legislatures are involved, they inevitably can and do become far removed from the stream of run-of-the-mill criminal prosecutions which are processed through the inferior

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43. Although such events are not common, the former Attorney General of British Columbia, Brian Smith, resigned his post in 1988: see note 4. Similarly, in 1977, Robert Ellicott resigned his post as Attorney General of the Commonwealth of Australia. Edwards, in *Attorney General, supra*, note 34, notes at 384 that in his letter of resignation to the Prime Minister, Ellicott charged that "decisions and actions which you and the Cabinet have recently made and taken have impeded and in my opinion have constituted an attempt to direct or control the exercise by me as Attorney General of my discretion". In his resignation speech, Mr. Ellicott quoted Lord Shawcross' statement of principle.

44. [1971] S.C.R. 680.

45. This quotation from Lord Shawcross was itself quoted in the paper given by the former Attorney General of Ontario, R. McMurtry, *supra*, note 37 at 5.

46. *Law Officers*, *supra*, note 28 at 224-225.

> courts every day. The volume and low visibility of these cases (which form the vast bulk of all criminal cases heard by the courts) make it fairly easy for abuses to go undetected by the politicians, and ensure that parliamentary control over such abuses is unlikely to be very consistently effective. . . . Secondly, such valuable parliamentary rules as the *sub judice* rule ensure to some extent that even when abuses do come to the attention of politicians, such control as they are able to exercise through the parliamentary process, being necessarily *ex post facto*, will often have very limited effectiveness in terms of securing justice for the accused. . . . The *sub judice* rule ensures that, once a prosecution has been launched, it is not until after the accused has been acquitted or convicted that the politicians can do anything about it. . . .[47]

Thus there are limits on both the accountability that can be demanded, and the control that can be exerted by a legislature.

It must also be noted that the "Shawcross principle" itself — that the Attorney General is to be free from political influences — has been questioned. Edwards has suggested that some qualification must be made to the principle, to take account of a distinction between types of political considerations. What the Attorney General must ignore are partisan political considerations: that is, considerations "designed to protect or advance the retention of constitutional power by the incumbent government and its political supporters."[48] On the other hand the Attorney General should have regard to "non-partisan" political considerations such as "maintenance of harmonious international relations between states, the reduction of strife between ethnic groups, the maintenance of industrial peace and generally the interests of the public at large."[49]

However, this distinction has not been universally accepted. It has been pointed out in reply that

> [E]ven those decisions which have the greatest appearance of consensus (e.g. laws passed by a representative democratic parliament) cannot necessarily be automatically characterized as "non-partisan", since they are almost invariably the product of a partisan political system in which one partisan faction (or a coalition of partisan factions) predominates and is able to implement its own policies. The distinction between partisan and non-partisan decisions according to this view, is not one of kind but of degree, and relies heavily for its validity on the ability of the dominant political faction to convince the populace that the decisions it proposes to implement "involve the wider public interest that benefits the population at large".[50]

Further, although it may be clear that the public interest is involved in a decision, that does not make clear what the decision should be. The nature of the political process is such that different political parties will in good faith disagree. It has been noted that the

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47. *Supra*, note 6 at 303-304.

48. J.L.J. Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services Canada, 1980) at 69-70.

49. *Ibid.*

50. Stenning, *supra*, note 6 at 291-292.

maintenance of harmonious international relations, reduction of strife between ethnic groups, and maintenance of industrial peace

> [A]re precisely the areas in which conservative and socialist politicians trust each other least. It might be, for example, that a politician holding the office of Attorney-General could believe that industrial peace would be endangered if legal proceedings were taken against strikers acting unlawfully in the alleged pursuance of a trade dispute. He might be right in this factual supposition, but those of a different political persuasion might not be willing to accept a decision based on this view as non-partisan.[51]

Given this, it is not sufficient simply to say that the Attorney General may give consideration to the wider public interest. It is not difficult to imagine circumstances in which the Attorney General claims to act based on the public interest, but is accused by opposition parties of acting out of partisan political motives. This is not to say that non-partisan political considerations do not exist; it is simply that the distinction between partisan and non-partisan motives may not always be clear in practice. In such circumstances the final arbiter must be public opinion. If the majority of the population is persuaded that the motives are non-partisan and acceptable, then the government will continue to have public support; if the public are not so persuaded, the government, or at least the Attorney General, will lose that support. Ultimately public opinion provides the only measure of whether a political motive is non-partisan.

Though there may be disagreement on how clear this distinction is in practice, it does not seem to be questioned by anyone that, in principle, partisan political considerations have no place in the normal operation of the prosecution service. The tradition in England, and in Canada, that the Attorney General is only in unusual circumstances involved in individual prosecutions is one method of achieving this aim. The tradition that exists in England, and which has recently been affirmed in Canada, against Cabinet direction of any decision by the Attorney General concerning individual prosecutions is a second method. But an important point flows from this. It must be recognized that the independence of the Attorney General is not an end in itself; rather, it is a means of assuring that improper motives do not enter into the decision whether to prosecute.[52]

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51. Marshall, *supra*, note 29 at 115.

52. Edwards, in *Attorney General (supra,* note 34), notes at 362-363 that:

> In making these decisions it should not be assumed that the Cabinet would necessarily be governed by politically partisan motives. At the same time, it would be unrealistic not to envisage situations in which, in the absence of any clearly understood constitutional prohibition against the referral by the Attorney General of prosecution matters for decision by the Cabinet or any group of ministers or by the Prime Minister, partisan influences would rise to the surface and prevail in whatever decision ultimately emerged.
>
> In reply, it might be suggested that an equally useful protection would be the understanding by Cabinet that partisan motives should not affect their decisions on prosecutorial matters, when political considerations do arise. This is arguably a better safeguard, since it is a direct rather than indirect statement of the relevant principle.

In light of this, and also in recognition that there are times when wider considerations of public interest should indeed affect individual prosecutions, there are those who disagree with the principle of the independence of the Attorney General, if this is taken to mean that the decision to prosecute in individual cases will always, in the end, be a decision made exclusively by the Attorney General.[53] Prosecutorial decisions are not alone in having potentially far-reaching consequences; decisions on matters of defence, foreign relations, the environment, or public health and safety can have equally broad consequences. This is not taken to be a justification for excluding Cabinet from any say in those decisions.[54]

In the same context, it can be questioned what the purpose of mere consultation by the Attorney General with the Cabinet might be. There would be little sense in the Attorney General, the legal adviser to the government, seeking legal advice from the Cabinet. But if the advice sought is not legal, then that suggests that the decision is not merely a legal one. In this case, one might hold that there is no reason in principle for the decision to be restricted to the law officer.[55]

Nonetheless it must be recognized that the principle of the independence of the Attorney General has become increasingly entrenched as a constitutional convention. This recognition raises several issues that must be borne in mind in considering any reform of the Attorney General's office. First, political considerations should not in normal circumstances affect prosecutorial decisions. However, when individual cases do raise political considerations, partisan motives must not be brought to bear. In such circumstances the Attorney General may seek the advice of Cabinet, but is not bound by that advice. Lastly, the final judges of whether a motive is partisan or not are the public. Any adequate system must see to it that these principles are protected.

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53. Lord Asquith, writing in 1924, discussed the decision to be made in 1914 in England whether to prosecute leaders of the Ulster movement for high treason. He queried:

> Is it really suggested that the Law Officers of the day should have assumed the undivided responsibility for instituting or withholding proceedings and that the Cabinet could have claimed no voice in a decision on which the whole political future of Ireland might have turned? (quoted in Edwards, *Law Officers*, *supra*, note 28 at 214, n. 48).

54. P. Stenning, *Submission to the Royal Commission Investigating the Prosecution of Donald Marshall, Jr.* [unpublished].

55. Edwards, in *Attorney General* (*supra*, note 34 at 363), discusses Cabinet consideration by the St. Laurent government of the case of James Endicott, a Canadian clergyman who had made statements suggesting that bacteriological weapons had been used by United Nations Forces during the Korean war. The Cabinet minutes show discussion of the fact that the easiest charge to prove would be treason, but that the only penalty at the time on conviction was death. The Cabinet noted that there would be a great deal of unfavourable international attention. One could well argue that these are non-partisan political considerations, and that there is in fact nothing objectionable about this type of Cabinet involvement.

Marshall (*supra*, note 29 at 113-114) argues that there is a distinction between an Attorney General seeking advice on the political advisability of a prosecution, and seeking advice about facts within the knowledge of another minister. He gives the example of a decision by an Attorney General in the Heath government in Britain seeking advice from the Secretary of State for Foreign Affairs on whether lives of hostages held by Palestinian guerrillas would be in greater danger if a particular airline hijacker were prosecuted.

B. The Attorney General and Crown Prosecutors

Individual prosecutions are actually conducted for the most part by public prosecutors, or "Crown Attorneys", acting as agents for the Attorney General. The historical development of the office of public prosecutor, and its present relationship to the Attorney General, must therefore be understood.

In the pre-Confederation Province of Canada, the Attorney General had little time to devote to court appearances as a result of the increasingly political nature of responsibilities in the Executive Council and Parliament.[56] This was also the case with the deputy, the Solicitor General. As well, the increase in population made it more difficult for these two law officers personally to appear in court on all of the Sovereign's business. When neither was available, Queen's counsel or "Crown counsel" were appointed on an *ad hoc* basis to represent them for the duration of a session of the court. However, these counsel did not enjoy the prerogatives of the law officers. In Upper Canada, and later in Ontario, it became expedient to appoint County Attorneys, who were later known as Crown Attorneys. These attorneys supervised the prosecution work, at first, on a part-time fee for service basis.

Following Confederation similar duties were conferred on officials designated as prosecuting officers or Crown attorneys in other provinces. The theoretical degree of independence varied among the provinces: in some provinces the local prosecutor was legally under the complete control of the provincial Attorney General, while in other cases the Crown attorneys enjoyed the rights and privileges of the Attorney General and Solicitor General when carrying out their prosecution functions. In other provinces, and in the federal system where there was no statutory recognition of Crown attorneys or public prosecutors, counsel are still employed on a full-time or part-time basis and exercise prosecutorial authority as counsel, agents, or delegates of the Attorney General.[57]

There have only been relatively minor changes in the duties of Crown attorneys during the last 130 years.[58] Their primary responsibilities are to conduct prosecutions for indictable offences, to conduct prosecutions for summary conviction offences (where the public interest so requires), to supervise private prosecutions and take over the case where justice towards the accused requires, to deal with questions of the sufficiency of sureties, and to provide legal advice to justices of the peace.[59] At the present time Crown attorneys must also examine documents sent by coroners, justices of the peace, and provincial judges to determine if further evidence needs to be gathered, or witnesses summoned to avoid a charge being dismissed for insufficiency of proof.[60]

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56. Stenning, *supra*, note 6 at 109-110.

57. *Ibid.* at 121-130.

58. See *The Upper Canada County Attorneys' Act*, *supra*, note 15 and *Crown Attorneys Act*, R.S.O. 1980, c. 107.

59. *Crown Attorneys Act*, *supra*, note 58, s. 12. Subsection 12(j) of this Act, giving the Crown Attorney the power to determine the sufficiency of sureties, was recently challenged under the *Charter*, but was upheld. However, the court held that this power was subject to Part XVI of the *Criminal Code*, allowing an applicant to have the question determined by the court. See *R.* v. *Dewsbury* (1989), 39 C.R.R. 301 (Ont. H.C.).

60. *Crown Attorneys Act*, *supra*, note 58, s. 12(a).

It is our view that Crown attorneys are accountable to, and under the control of, the Attorney General. Some writers have disputed this position, particularly in Ontario,[61] but the majority of historical and contemporary evidence supports the existence of this accountability.[62] However, of necessity the local Crown attorney has a "broad and generous area of unfettered discretion in criminal prosecutions."[63] Thus while Crown prosecutors are theoretically accountable to, and under the control of, the Attorney General, it is only in the most exceptional cases that the Attorney General would become directly involved in, or even knowledgeable about, a particular case. The Attorney General bears responsibility for the issuing of "wide and general guidelines as to policy",[64] but the day-to-day administration of justice must be in the hands of the local Crown attorneys or agents.

The legal effect of these policy guidelines has received some recent attention. In *R.* v. *Catagas*[65] the Manitoba Court of Appeal considered an allegation of abuse of process because the accused, a native Indian, was prosecuted for breach of the *Migratory Birds Convention Act*;[66] this prosecution, the accused alleged, was contrary to a policy of the provincial and federal governments (though the policy does not appear to have come from the Attorney General). The court held that the abuse-of-process argument failed since the policy itself was illegal, contrary to well-established constitutional principles that "[t]he Crown may not suspend laws or the execution of laws without the consent of Parliament; nor may it dispense with laws, or the execution of laws; and dispensations by *non obstante* [notwithstanding] of or to any statute or part thereof are void and of no effect, except in such cases as are allowed by statute."[67] The court, however, went out of its way to point out that the holding in this case did not affect the legitimate exercise of prosecutorial discretion:

> Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket. An Attorney-General, faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence, may decide to prosecute on the latter and not on the former. . . . But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race. . . .

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61. K. Chasse, "The Role of the Prosecutor" in S. Oxner, ed., *Criminal Justice: Papers Prepared for Presentation at the Canadian Institute for the Administration of Justice Conference on Criminal Justice held at Halifax, October 28, 29 and 30, 1981* (Toronto: Carswell, 1982).

62. See, *e.g.*, the comments of former Ontario Attorney General John Clement, quoted in Chasse, *ibid.* at 83, and also the remarks of a former Crown Attorney, the Honourable Judge Graburn, "The Relationship of the Crown Attorney to the Attorney General" (1976) 35 C.R.N.S. 259 at 270-271.

63. Former Ontario Attorney General John Clement, cited in Chasse, *supra*, note 61.

64. *Ibid.* at 84.

65. (1977) 38 C.C.C. (2d) 296 (Man. C.A.).

66. R.S.C. 1970, c. M-12.

67. *Halsbury's Laws*; 3rd ed., vol. 7 (London: Butterworths, 1954) para. 486 at 230, cited in *R.* v. *Catagas*, *supra*, note 65 at 297.

> The Crown may not by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.[68]

Therefore the Attorney General cannot unlawfully fetter the discretion that is inherent in that office, nor that of the counsel who derive their power from, and are accountable to, it. To determine the legality of guidelines one would have to determine whether they would be a lawful exercise of discretion if exercised by the Attorney General personally. It would seem that, so long as there remains room to examine the individual case on its own merits, the guidelines would not be improper.[69]

The Attorney General is accountable to the legislature for the actions of the agents employed as prosecutors, and so must have the right to intervene in any particular case and direct the manner of the prosecution. Such direct interventions, however, leave the Attorney General vulnerable to allegations of partisan political influence. While there is nothing improper in the Attorney General personally exercising power, perhaps in the face of advice from the local prosecutor, in practice one would expect this to occur only when the matter was of such importance that a decision at the highest level was required. Interventions in more mundane prosecutions would raise the question as to why it was felt necessary to intervene. Therefore there is a useful function fulfilled in issuing broad policy guidelines to Crown counsel: the guidelines keep prosecutors accountable to the Attorney General, without seeming to involve improper considerations.

To conclude, while theoretically the public prosecutors are accountable to, and under the control of, the Attorney General, as a practical matter responsibility for individual prosecutions is in most cases exercised at the local level.

C. The Attorney General and Private Prosecutors

Another important aspect of the role of the Attorney General, similar in some ways to the relationship to Crown prosecutors, is the relationship between the Attorney General and private prosecutors.[70] On the one hand, by its very nature, criminal law concerns acts that are serious enough to be regarded not merely as wrongs to an individual, but to the state. For this reason, most criminal proceedings involve the resources of the state, being investigated by the police and prosecuted by a Crown prosecutor. On the other hand, most

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68. *R.* v. *Catagas*, *supra*, note 65 at 301.

69. An example of guidelines that have affected a very large number of prosecutorial decisions are those of the federal Department of Justice which set out when the charge of importing will be laid in an "border possession" case (which carries with it a statutory minimum of seven years), and when the charge of possession for the purpose of trafficking (which carries no minimum sentence) will be laid. Although the mandatory minimum seven years has recently been struck down by the Supreme Court of Canada (*R.* v. *Smith*, [1987] 1 S.C.R. 1045), these guidelines operated for several years, and affected the exercise of a prosecutorial discretion which had enormous impact on accused.

70. The Commission has considered this issue at length in a previous working paper: see LRC, *Private Prosecutions*, Working Paper 52 (Ottawa: The Commission, 1986).

of the formal mechanisms for prosecutions are equally available to any private individual. For example, under section 504 of the *Code*, the power to lay an information before a justice rests with anyone, and "prosecutor" is defined in section 2, where the Attorney General does not intervene, to mean "the person who institutes proceedings to which this Act applies". Thus, in principle, it is open to any private citizen to commence and continue a criminal prosecution.

There are two important aspects of the relationship between the Attorney General and private prosecutors. The first is the supervisory role played by the Attorney General. The second concerns the different powers, in particular related to guarding the public interest, that may be exercised by each.

Even when a prosecution has been commenced privately, the Attorney General retains the right to intervene in the proceedings. Such intervention can have two purposes. It is open to the Attorney General to intervene in a private prosecution in order to conduct the prosecution.[71] Equally, the Attorney General can intervene simply in order to stay proceedings.

The Attorney General might intervene to continue proceedings that a private prosecutor intends to abandon, where the Attorney General considers the proceedings to be in the public interest.[72] Equally, the Attorney General can intervene simply on the ground that the charge is an appropriate one, and ought to be conducted by the state.[73]

However, intervention to stay proceedings is more common. Historically this power reflects the Attorney General's ability to enter a *nolle prosequi*, the basis of which is that "it was natural for the Crown, in whose name criminal proceedings were instituted, to reserve the right to terminate the same proceedings at will."[74] The significance of this power should not go unrecognized: it allows the Attorney General to deprive a private prosecutor of the right to conduct a prosecution.

In the use of this power, the Attorney General is not ordinarily subject to review by the courts.[75] Rather, the Attorney General is accountable for its use to Parliament. The policy behind the *nolle prosequi* power, equally applicable to the power to intervene and stay proceedings, has been stated to be:

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71. *Re Dowson and R.* (1980), 57 C.C.C. (2d) 140 (Ont. H.C.); *R. v. Hauser*, [1979] 1 S.C.R. 984 at 1011-1012, *per* Dickson J., dissenting on other grounds; *Re Osiowy and R.* (1989), 50 C.C.C. (3d) 189 at 191 (Sask. C.A.).

72. See, *e.g.*, *Re Bradley and R.* (1975), 9 O.R. (2d) 161 (C.A.), where the Attorney General intervened to continue with a privately laid charge of intimidation under s. 423 (then s. 381) of the *Code*, arising out of a labour dispute.

73. Our consultants in British Columbia indicate that private prosecutions commenced in that province are uniformly examined by the Attorney General's office. If they do not feel that a case is made out for prosecution, the Attorney General intervenes to stay the proceedings. If they feel that prosecution is appropriate, then the Attorney General's department takes over the proceeding.

74. Edwards, *Law Officers*, *supra*, note 28 at 227.

75. The one limited exception to this rule is discussed below in "The Attorney General and the Courts" at 22.

> In this country, where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be some tribunal having authority to say whether it is proper to proceed farther in a prosecution. That power is vested by the constitution in the Attorney General, and not in this Court.[76]

Ultimately, then, the Attorney General has supervisory authority over all prosecutions. Even in the case of privately commenced and conducted prosecutions, it will be true that no criminal proceeding occurs without at least the Attorney General's sufferance. In this sense, then, the Attorney General is ultimately accountable to Parliament not only for using the power to intervene and stay charges, but also for a decision not to intervene.

Also significant, and reflecting the Attorney General's supervisory role, is the difference in powers between private prosecutors and the Crown. The powers of each to lay a charge and to proceed with a prosecution are generally the same.[77] However, some differences do arise due to the Attorney General's wider responsibility for the administration of justice as a whole. In particular, some prosecutions require the consent of the Attorney General before a charge, private or otherwise, can be laid. In addition, the Attorney General is the guardian of the public interest, and as a result has powers and responsibilities beyond those of the private prosecutor.

We will discuss the consent requirement in more detail later in this paper.[78] For the moment, it suffices to point out that although the majority of *Criminal Code* provisions do not require consent, a small number do.[79] In the case of these offences, the Attorney General's

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76. *R.* v. *Allen* (1862), 1 B.& S. 850 at 855, 121 E.R. 929. We suggest that this statement is equally applicable to Canada.

77. There are some differences with the carriage of a prosecution in the case of indictable offences, most notably regarding the right to prefer an indictment and to appeal the trial decision. These differences are discussed at greater length in *Private Prosecutions*, *supra*, note 70.

78. See "Consent to Prosecutions" below at 67.

79. Some of the offences that require the consent of the Attorney General prior to launching a prosecution are as follows:

    s. 7(7)(aircraft offences) Attorney General of Canada
    s. 119(2)(bribery of judicial officers) Attorney General of Canada
    s. 136(3)(giving contradictory evidence) Attorney General
    s. 164(7)(obscene publications, following *in rem* proceedings) Attorney General
    s. 166(3)(unlawful publication, judicial publications) Attorney General
    s. 172(4)(corrupting children) Attorney General
    s. 174(3)(public nudity) Attorney General
    s. 251(3)(unseaworthy vessel) Attorney General of Canada
    s. 318(3)(advocating genocide) Attorney General
    s. 319(6)(inciting hatred) Attorney General
    s. 347(7)(loansharking) Attorney General
    s. 385(2)(fraudulent concealment of title documents) Attorney General
    s. 422(3)(criminal breach of contract) Attorney General
    s. 740(2)(breach of probation out of province where offence committed) Attorney General
    s. 803(3)(failure to appear under s. 145 where trial proceeded *ex parte*) Attorney General

    Note that some sections specify that it is the Attorney General of Canada who must consent prior to a prosecution, for example s. 251(3), taking an unseaworthy ship to sea.

supervisory ability extends not merely to discontinuing prosecutions, but to preventing them from being brought in the first place. Unlike the ability to discontinue proceedings, this supervision takes place without the need for any public act. Thus, although the Attorney General is still accountable for this aspect of the supervisory role, that accountability is limited by the fact that the public may have no knowledge of the action, or lack of action, on the part of the Attorney General.

In the role of guardian of the public interest, the Attorney General may undertake actions other than criminal prosecutions. In particular, and for example, the Attorney General may be called upon to bring civil proceedings, by means of a relator action, to enjoin a public nuisance, or to prevent the repeated commission of an offence.[80] The Attorney General always has the right to bring such action. The abilities of a private citizen to do so are very limited, as is the ability of a court to review a decision of the Attorney General in this regard. It is in this role, in many ways, that the independent and supervisory role of the Attorney General is most clearly seen.

The ability of the Attorney General to exercise discretion has been recognized in both Britain and Canada. In discussing the issue, Lord Halsbury noted that:

> My Lords, one question has been raised,. . . which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction, it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not. . . . In a case where as a part of his public duty he has a right to intervene, that which the Courts can decide is whether there is the excess of power which he, the Attorney-General, alleges. Those are the functions of the Court; but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.[81]

It is also possible for a relator action to be taken by a private prosecutor. However, the power of a private prosecutor to bring such an action is strictly circumscribed.

If the action is one concerning which the private prosecutor has no special interest — that is, the action can only be justified on the basis of the public interest generally — then the consent of the Attorney General is required. The ordinary interest of any private citizen

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80. See Edwards, *Law Officers*, *supra*, note 28 at 286ff.

81. *London County Council* v. *Attorney General*, [1902] A.C. 165 at 168-169. This case has been cited in Canada for the principle of the independence of the Attorney General in making these decisions: see *e.g.*, *Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607

is not sufficient to clothe that person with the same authority and standing as the Attorney General. This point was the subject of disagreement in Britain between the Court of Appeal and the House of Lords in *Gouriet* v. *Union of Post Office Workers*, with the House of Lords, of course, having the final say.[82]

In that case, a private citizen was refused the consent of the Attorney General to bring a relator action, and so sought to bring the action on his own. The Court of Appeal held that he had the right to do so, but the House of Lords overturned this decision. Lord Wilberforce noted that:

> The Attorney-General's right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney-General can and the individual (absent special interest) cannot seek to enforce, and private rights is fundamental in our law. To break it, as the plaintiff's counsel frankly invited us to do, is not a development of the law, but a destruction of one of its pillars. . . . More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make.[83]

Thus, generally speaking, there is what has been described as "discretionary control of the Attorney General over public interest standing."[84] However, the Supreme Court has recognized a limited exception to this rule, according to which a private litigant may be granted standing to challenge the validity of legislation.

Of course, in one sense, it is generally open to a private litigant to challenge criminal legislation by means of a test case. By violating a law, a litigant can arrange to mount a court challenge to legislation, using that challenge as a defence in a prosecution. This right is very limited, particularly as the litigant, if unsuccessful, will be convicted of a criminal offence. More interesting from the perspective of the relationship between the Attorney General and private prosecutors is the ability of a private litigant directly to challenge a law.

The Supreme Court has recognized that there is a role for private citizens to play in this regard. Normally, to challenge legislation, a litigant must show a special interest beyond that of most people to be granted standing.[85] However, due to the decisions in *Thorson* v.

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82. [1978] A.C. 435 (H.L.); rev'g [1977] 1 Q.B. 729 (C.A.).

83. *Gouriet*, *supra*, note 82 at 482 (H.L.).

84. *Finlay* v. *Canada (Minister of Finance)*, *supra*, note 81 at 618.

85. See *ibid.* at 619, where LeDain J. quotes *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109 to the effect that:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with. . .and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

Attorney General of Canada,[86] *Nova Scotia Board of Censors* v. *McNeil*,[87] and *Minister of Justice of Canada* v. *Borowski*[88] a slightly wider scope exists.

The facts in each of these cases differ, of course, but all hold that in some circumstances a private litigant should be granted standing to seek a declaration that particular legislation is invalid. In *Borowski*, for example, the court was faced with a challenge to the sections of the *Criminal Code* that allowed abortions on the approval of a hospital therapeutic abortion committee. The court considered the earlier decisions in *Thorson* and *McNeil*, as well as the possibility of the legislation in question being challenged by any other means. The court pointed out that the legislation was exculpatory, and therefore that no one directly affected by it would have any interest in challenging it. The court granted standing, laying down the rule that

> [T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.[89]

Thus a private prosecutor can share to a very small extent in the public-interest jurisdiction of the Attorney General. However, the extent of this power in the private litigant should not be exaggerated. By implication, *Borowski* suggests that if the route of challenging legislation by means of being charged under it is open, though that route is less satisfactory from an individual's point of view, nonetheless a declaration cannot be sought.

In the final analysis, then, it remains to the Attorney General to be the primary guardian of the public interest, as well as supervising criminal prosecutions. The role of private prosecutors is very much subordinate to that of the Attorney General. By contrast, in supervising private prosecutions, and in determining what actions ought to be brought in the name of the state, the Attorney General is largely immune from review.

D. The Attorney General and the Courts

The Attorney General does not often appear personally in court, and so judicial scrutiny is more often directed at the Attorney General's agents, the Crown prosecutors. However, in certain circumstances decisions of the Attorney General personally are considered by the court.

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86. [1975] 1 S.C.R. 138.

87. [1976] 2 S.C.R. 265.

88. [1981] 2 S.C.R. 575.

89. *Ibid.* at 598.

Decisions of the executive are reviewable by the courts.[90] In the context of this paper, the interesting question is the extent to which decisions of the Attorney General in relation to individual criminal cases — for example, to stay charges — are reviewable.

In *Campbell* v. *Attorney-General of Ontario*,[91] the Ontario Court of Appeal held that the courts would not interfere with an Attorney General's decision to stay proceedings absent "flagrant impropriety". The court upheld the decision of the trial judge, who had examined the reasons offered by the Attorney General's agent, and found them not to constitute flagrant impropriety.

In a similar case in Quebec, the judge at trial held that the Attorney General's decision could be overturned by the court if the Attorney General's reasons for staying the prosecution were not sufficient to "justify" the action.[92] The Quebec Court of Appeal overturned this decision, adopting reasons similar to those in *Campbell* v. *Attorney-General of Ontario*.[93] However, they also rejected the contention that the court could not review an exercise of the Attorney General's discretion at all, holding that a stay could be set aside if the Attorney General were shown to have acted with bias or had abused the law.[94]

Other decisions of an Attorney General may come under review. A duty of fairness in the exercise of statutory and discretionary power has recently been affirmed in Canadian law.[95] This duty allows for some judicial supervision of executive decisions; for example, it has been held to apply to the Minister of Justice when exercising a discretion under an extradition treaty to insist on assurances from the demanding state that no death sentence will be carried out,[96] or when considering an application for mercy under section 690 of the *Criminal Code*.[97]

This is not to say that every administrative decision is reviewable. It is doubtful, for example, that a decision to lay a charge would be, or should be, reviewable by the courts.

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90. *Operation Dismantle Inc.* v. *R.*, [1985] 1 S.C.R. 441.

91. (1987) 35 C.C.C. (3d) 480 (Ont. C.A.); aff'g (1987) 31 C.C.C. (3d) 289 (Ont. H.C.). The case concerned a stay entered by the Attorney General of a privately commenced prosecution against the Morgentaler abortion clinic. The Attorney General stayed the prosecution, since the issue was still pending before the Supreme Court of Canada.

92. *Chartrand.* v. *(Quebec) Minister of Justice* (1986), 55 C.R. (3d) 97 (Que. S.C.).

93. *Attorney General of Quebec* v. *Chartrand; Machabee* v. *Chartrand* (1987), 59 C.R. (3d) 388 (Que C.A.). See also *Re Osiowy and R.*, *supra*, note 71, which requires proof of "flagrant impropriety" as the standard for interference with a decision by the Attorney General to stay charges.

94. *Attorney General of Quebec* v. *Chartrand*; *Machabee* v. *Chartrand*,; *supra*, note 93 at 390 and 393.

95. *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

96. *Kindler* v. *Canada (Minister of Justice)*, [1987] 2 F.C. 145 (T.D.). Rouleau J. accepted that the minister had a duty to act fairly when exercising his discretion under Article 6 of the Extradition Treaty between Canada and the United States of America.

97. *Wilson* v. *Minister of Justice*, [1985] 1 F.C. 586 (A.D.).

That decision undeniably affects an accused, but only by setting into motion a system which is itself equipped with protections for the rights of the accused.[98]

The decision to proceed with a charge may come before a court, however, not in the form of a judicial review of that decision, but in the context of an action for malicious prosecution against the Attorney General or a Crown prosecutor. Whether such an action is possible has recently been considered by the Supreme Court of Canada in the *Nelles* decision; until that decision, the Attorney General and Crown prosecutors enjoyed absolute immunity from prosecution in some provinces. The Supreme Court has now made it clear that the Attorney General does not enjoy such an immunity.[99]

The policy arguments in favour of immunity, which had been adopted by the Ontario Court of Appeal, were considered by Mr. Justice Lamer in his decision. He noted that the immunity was intended to encourage confidence in the impartiality of prosecutors and the Attorney General, and that the threat of personal liability could have a "chilling effect" on the prosecutor's exercise of discretion. Allowing civil suits, it had been argued, would create a flood of litigation distracting prosecutors from their regular duties.

The Supreme Court rejected these considerations. First, Mr. Justice Lamer suggested that public confidence in the justice system actually suffered from prosecutors enjoying freedom from civil liability, even in the face of abuse of power through a malicious prosecution. Further, he noted that an action for malicious prosecution was not simply a matter of second-guessing the judgment of a prosecutor; rather, "a plaintiff bringing a claim for malicious prosecution has no easy task",[100] and what needed to be proved was "deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function."[101] Given this, he suggested that the "chilling effect" was not likely to appear:

> [A]mple mechanisms exist within the system to ensure that frivolous claims are not brought. In fact, the difficulty in proving a claim for malicious prosecution itself acts as a deterrent.[102]

He noted that in Quebec, where the Attorney General and prosecutors have been liable to civil prosecution since 1966, there has been no flood of claims.

Further, Mr. Justice Lamer noted that preventing civil actions against the Attorney General and prosecutors might also act to prevent *Charter* remedies under subsection 24(1). An individual who has been maliciously prosecuted has suffered a deprivation of liberty and

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98. This example is similar to the comparison made by Wilson J. in *Operation Dismantle Inc.* v. *R.*, *supra*, note 90, *e.g.*, where she contrasts the clearly unacceptable practice of "press gangs" with conscription for military service carried out in accordance with appropriate enabling legislation.

99. *Nelles* v. *Ontario*, [1989] 2 S.C.R. 170.

100. *Ibid.* at 194.

101. *Ibid.* at 196-197.

102. *Ibid.* at 197.

security of the person not in accordance with the principles of fundamental justice. Subsection 24(1) of the *Charter* should guarantee that person access to a court of competent jurisdiction to seek a remedy; immunity from civil liability would prevent that access. He noted this argument to be "a compelling underlying reason for finding that the common law itself does not mandate absolute immunity."[103]

At a minimum, it would seem that the Attorney General's powers must be used in way that is consistent with the *Charter*. However, it has been held that a stay of proceedings does not infringe the complainant's *Charter* rights,[104] and that an accused has no constitutional right to a preliminary inquiry.[105] The extent to which the Attorney General is subject to review short of "flagrant impropriety", therefore, is as yet unclear.

More frequently than they review decisions of the Attorney General, courts review and to a certain extent supervise the actions of the Attorney General's agent, the Crown prosecutor. The Crown prosecutor occupies a unique position in the Anglo-Canadian tradition which has sometimes been described as a quasi-judicial office.[106] Perhaps the best known expression of this concept comes from Mr. Justice Rand:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[107]

Although trial and appellate courts exercise considerable powers to guard against prosecutorial misconduct in the court, as in the presentation of the Crown's case, cross-examination of witnesses, particularly the accused,[108] disclosure to defence,[109] and in closing address,[110] the courts have recognized only a limited role in supervising the exercise

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103. *Ibid.* at 196. Although Mr. Justice Lamer was writing for the majority, only two others of the six justices rendering the decision concurred with him on this point.

104. *Campbell* v. *Attorney General of Ontario*, *supra*, note 91.

105. See *Re R. and Arviv* (1985), 19 C.C.C. (3d) 395 (Ont. C.A.), and discussion of this point below at 89, in "Preferred Indictments".

106. See *e.g.*, *Re Forrester and R.* (1976), 33 C.C.C. (2d) 221 (Alta. S.C.T.D.) at 227.

107. *Boucher* v. *R.*, [1955] S.C.R. 16 at 23-24.

108. *R.* v. *Logiacco* (1984), 11 C.C.C.(3d) 374 at 383 (Ont. C.A.), per Cory J.A.:

> For a Crown prosecutor to deliberately persist in seeking answers to such irrelevant questions will very often lead to such a manifest appearance of unfairness that a new trial will be the inevitable result.

109. *R.* v. *Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.).

110. *R.* v. *Theakston* (1980), 53 C.C.C. (2d) 554 (Ont. C.A.).

of prosecutorial authority outside the courtroom. This can be easily understood in view of the perceived need for independence of both the judiciary and the prosecutor.

The Commission's Working Paper on *Control of the Process*[111] discussed the distinction between the roles of the Crown and the judiciary. We suggested there that the division of power between the two should rest on a distinction between political and non-political aspects of the administration of justice. In that context, we considered an aspect "political" if

> [I]t involves a decision whether or not to enforce a particular law; it involves the question of allocation of resources in terms of money, facilities and personnel; it is an issue amenable to solution according to public opinion of a particular time and place; it is one that subjects the decision-maker to these pressures of public opinion and to the possibility of a sanction, such as accountability to the legislature or the electorate, or dismissal from office.[112]

As a general rule, it can be stated that the courts will not intervene in the exercise of prosecutorial authority either in or out of the court unless there has been an abuse of that authority. This may be manifested as an abuse of power, breach of duty, unfairness or injustice to the accused, possible miscarriage of justice, or conduct that brings the administration of justice into disrepute. Thus in rare circumstances a trial judge will require a prosecutor to make additional disclosure to the accused or direct that certain witnesses be called.[113] A trial court may intervene to prevent admission of prejudicial evidence, or abusive cross-examination of an accused. Appellate courts have quashed convictions where the trial is tainted by improper prosecutorial tactics such as appeal to prejudice through an improper jury address.[114]

The ability to try the accused repeatedly is confined by legal doctrines of double jeopardy.[115] The most difficult area to quantify, however, is embraced by the doctrine of abuse of process. In this area there are no hard rules nor easily recognized principles. As well, several elements of the prosecutorial and judicial function make judicial control over prosecutions difficult to reconcile. In the first place the independence of the Attorney General militates against accountability to any other branch of government. Secondly, the traditional function of the judiciary is to determine the guilt or innocence of the accused based on the evidence presented. The judiciary seem ill-equipped to determine what cases ought to be brought before the courts and it might be thought improper for them to be involved in this aspect of the prosecutorial function. As Viscount Dilhorne said in *Director of Public Prosecutions* v. *Humphrys*:

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111. LRC, *Criminal Procedure: Control of the Process*, Working Paper 15 (Ottawa: Information Canada, 1975).

112. *Ibid.* at 33.

113. See *e.g.*, *R.* v. *Gudbrandson* (1986), 53 C.R. (3d) 20 (B.C. Co. Ct), overturned on another point, (1987) 61 C.R. (3d) 80 (B.C.C.A.).

114. *Pisani* v. *R.*, [1971] S.C.R. 738.

115. *R.* v. *B.* (1986), 29 C.C.C. (3d) 365 (Ont. C.A.). The Commission's forthcoming Working Paper *Double Jeopardy, Pleas and Verdicts* discusses the doctrine of double jeopardy more fully.

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.[116]

This statement might be criticized as somewhat simplistic; the fact that a court feels it necessary to intervene to prevent an abuse of its process in one case does not mean that the judicial and prosecutorial functions will become hopelessly blurred in all cases. Nevertheless the cautionary note registered by Viscount Dilhorne does emphasize that the court's role in supervision of the prosecutorial function, through the abuse-of-process doctrine, can only legitimately flow out of the court's need to preserve the integrity of its process. The courts cannot be expected to undertake a more general supervision of the prosecutorial function under the rubric of abuse of process. Clearly the judiciary cannot be expected to exercise a discretion based only on a vague notion of unfairness, but likewise cannot abdicate their "responsibility for seeing that the process of law is not abused."[117]

After considerable uncertainty in the Supreme Court of Canada and in the lower courts, the Supreme Court has recognized a jurisdiction in trial courts to stay proceedings for abuse of the court's process. In *R.* v. *Jewitt*, Chief Justice Dickson stated, for the Court:

> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly* v. *Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.) at p. 1354:
>
> > "Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."
>
> I would adopt the conclusion of the Ontario Court of Appeal in *R.* v. *Young*, *supra*, and affirm that [at p. 31]:
>
> > "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings."
>
> I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases."[118]

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116. [1976] 2 All E.R. 497 at 511 (H.L.).

117. *Connelly* v. *Director of Public Prosecutions*, [1964] 2 All E.R. 401 at 442 (H.L.) *per* Lord Devlin.

118. [1985] 2 S.C.R. 128 at 136-137.

It would serve no particular purpose to catalogue the various instances where courts prior to *Jewitt* found an abuse of process so serious as to require a stay of proceedings despite the merits of the particular case.[119] There are several hundred reported cases in the past twenty years which have considered particular fact situations including the withdrawal and relaying of charges, entrapment, and reneging on an agreement to withdraw charges in exchange for co-operation with the authorities. As former Chief Justice Laskin stated in *Rourke* v. *The Queen* after reviewing the exercise of the power to stay proceedings in the lower courts:

> I have paraded this long list of cases to show how varied are the fact situations in which Judges of different levels and of different Provinces have used abuse of process as a way of controlling prosecution behaviour which operates prejudicially to accused persons. I pass no judgment on the correctness of any of the decisions, but they do indicate by their very diversity the utility of a general principle of abuse of process which judges should be able to invoke in appropriate circumstances to mark their control of the process of their Courts and to require fair behaviour of the Crown towards accused persons.[120]

What these cases do illustrate, however, is that in some instances the prosecutor does not operate fairly, does proceed in circumstances where it is fundamentally unjust to do so, and that courts are capable of addressing these problems.

In summary, then, the actions of the Attorney General are reviewable by the courts, but only in extreme or unusual circumstances. "Flagrant impropriety" on the part of the Attorney General can attract a judicial remedy. The doctrine of abuse of process may apply to provide judicial review of decisions either of the Attorney General personally, or of Crown prosecutors.

E. The Attorney General and the Police

At the time of Confederation and for a considerable period thereafter, the federal Attorney General had responsibility for the national police. Today at the federal level[121] and in some provinces,[122] responsibility for the police is given to a minister other than the Attorney General, usually, as at the federal level, the Solicitor General.

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119. There are many excellent articles on abuse of process. In addition to the discussion in Stenning, *supra*, note 6 at 329ff., see *e.g.*, J. Olah, "The Doctrine of Abuse of Process: Alive and Well in Canada" (1978) 1 C.R. (3d) 341; Morgan, *supra*, note 40; P. Béliveau, J. Bellemare, J.-P. Lussier, *Traité de procédure pénale*, vol. 1 (Montréal: Yvon Blais, 1981) at 49-51; C. Lacerte-Lamontagne, "L'abus de procédure en droit pénal" (1982) 42 R. du B. 69; J.-C. Hébert, "La Charte canadienne et le contrôle de la discrétion ministérielle du Procureur général en droit criminel" (1986) 46 R. du B. 343.

120. [1978] 1 S.C.R. 1021 at 1034.

121. At the federal level, the RCMP are responsible to the Solicitor General. For further discussion of this relationship, see also: Stenning, *supra*, note 23 at 65-97 and A. Grant, *The Police: A Policy Paper*, Study Paper prepared for the LRC (Ottawa: Supply and Services Canada, 1980) at 16-20.

122. The provinces of Nova Scotia, New Brunswick, Quebec, Ontario, Alberta, and British Columbia each have a separate ministry responsible for the supervision of the police. In Quebec, the minister is known as the Minister of Public Security. In each of the other provinces, the minister is called the Solicitor General.

The relationship between the police and the Attorney General or other supervising law officer in Canada is complex. Under our federal structure, both federal and provincial governments have jurisdiction over policing, different ministers are responsible for police in different jurisdictions, and in addition, a number of contractual relationships concerning policing exist between the federal government and several provinces. All of this results in some lack of clarity concerning a relationship that is not well understood or defined in any event.

In England, however, the classic statement of the relationship was made by Lord Denning in *R.* v. *Commissioner of Police of the Metropolis, Ex parte Blackburn*, where he stated:

> I hold it to be the duty of every Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.[123]

In Canada, cases discussing the independence of the police date back 100 years.[124] These cases primarily concerned vicarious liability of various levels of government for the acts of the police, finding that such liability did not exist. It has been suggested that these cases show that:

> The basis for this non-liability is the status of a constable as a "peace officer" when performing his public duties with respect to the enforcement of the law and the preservation of the peace. When performing such duties, the constable acts not as the servant or agent of the municipality, board or government that appoints him, but as a public officer whose duties are owed to the public at large.[125]

In a recent Ontario case, Crown counsel in remarks to the court discussed the relationship between the Attorney General and the police, attributing the position the Crown was taking to the Attorney General of Ontario. Counsel stated that:

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123. [1968] 2 Q.B. 118 at 136 (C.A.). While holding that the police were free of direction from the executive, and had a largely unfettered discretion, Lord Denning did hold that the courts could interfere with some police policy decisions.

124. *Wishart* v. *City of Brandon* (1887), 4 Man. R. 453 (C.A.); *Rousseau* v. *La Corporation de Lévis* (1888), 14 Q.L.R. 376 (S.C.). See Stenning, *supra*, note 23 at 101-109 regarding these and other early cases.

125. Stenning, *supra*, note 23 at 109. Stenning also notes that notes that the subsequent case of *Chartier* v. *Attorney General of Quebec*, [1979] 2 S.C.R. 474 reaches a contrary conclusion on liability, but points out that liability on this ground was not contested in the case.

> Constitutional authority in this country, and the United Kingdom, makes it plain that the decision to investigate alleged offences and to lay charges is the *constitutional responsibility* of the police. The Crown Law Office must determine how and when to proceed with the charges once they are laid.[126]

A similar position has been stated by former Prime Minister Trudeau. In 1977, in discussing the relationship between the Solicitor General and the RCMP, the Prime Minister stated that the government was guided by the principle

> [T]hat the particular minister of the day should not have a right to know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it.[127]

These authorities suggest that police in Canada enjoy a position similar to that described by Lord Denning in *Blackburn*. However, there are some indications otherwise.

The police in Canada today are governed by statute. At the federal level and in each province, legislation establishes the powers and duties of police officers.[128] Typically this legislation makes the police subject to direction from the minister responsible or some other body; for example, section 5 of the *Royal Canadian Mounted Police Act*[129] notes that the Commissioner of the police shall have the control and management of the force "under the direction of the Minister". Since the powers and status of the police are defined by statute in Canada, this might be taken to indicate that the minister responsible can instruct the police to observe or investigate particular matters.

Further, the *Blackburn* decision has been discussed in Canadian cases, most notably in *Bisaillon* v. *Keable*.[130] In that case, the Quebec Court of Appeal distinguished *Blackburn* on the facts from the situation in Quebec. Mr. Justice Turgeon noted that the police in England enjoy great autonomy; in Quebec, they were under the supervision of the Minister of Justice

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126. The remarks of Crown counsel are set out in *Campbell* v. *Attorney General of Ontario, supra*, note 91 at 292; emphasis added. The case involved the decision to stay proceedings on abortion charges against Dr. Henry Morgentaler while the Supreme Court of Canada appeal in a previous prosecution concerning the same issue was still pending. It is not clear, as will be discussed shortly, that it is correct to describe the responsibility of the police as a constitutional one.

127. Quoted in Edwards, *Ministerial Responsibility, supra*, note 48 at 94. Edwards is critical of this position, holding at 96 that "it treats knowledge and information as to police methods, police practices, even police targets, as necessarily synonymous with improper interference with the day to day operations of a force." However, Edwards does agree with the principle of non-interference in police decision-making.

128. *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10; *The Constabulary Act* (now *The Royal Newfoundland Constabulary Act*), R.S.N. 1970, c. 58; *Police Act*, R.S.N.S. 1989, c. 348; *Police Act*, S.N.B. 1977, c. P-9.2; *Police Act*, R.S.P.E.I. 1988, c. P-11; *Police Act*, R.S.Q. 1977, c. P-13; *Police Act*, R.S.O. 1980, c. 381; *The Provincial Police Act*, R.S.M. 1987, c. P150; *Police Act*, R.S.S. 1978, c. P-15; *Police Act*, S.A. 1988, c. P-12.01; *Police Act*, R.S.B.C. 1979, c. 331.

129. *Supra*, note 128.

130. (1980), 17 C.R. (3d) 193 (Que. C.A.).

(they are now under the Minister of Public Security), who has responsibility for all aspects of the administration of justice in the province. Turgeon J. also suggested that stricter prosecutorial control in Quebec meant that the decision whether to lay charges in that province lay with the prosecutor's office rather than with the police. As a result, he held that *Blackburn* was not applicable in Quebec.

Stenning has been critical of the reasoning in this decision,[131] which appears not to have been followed in other provinces. The *Bisaillon* decision has been overturned by the Supreme Court of Canada, but on other grounds; the Supreme Court declined to address these particular issues, holding that they were not essential to the decision.[132]

Blackburn was also considered in *Wool* v. *The Queen*,[133] though that case considered a different aspect of *Blackburn*. In *Wool*, a staff sergeant in the RCMP sought to enjoin his Commanding Officer from preventing him from continuing an investigation against a former Minister of Justice of the Yukon. In refusing to grant the injunction, the court held that the Commanding Officer's duty to investigate was owed to "the Crown, or the public at large".[134] At the same time, the court noted that, due to section 18 of the *Royal Canadian Mounted Police Act*, "whereas the plaintiff has a right to lay an information, that right is not absolute, but subject to the orders of the Commissioner."[135]

On the one hand, then, *Wool* agrees with *Blackburn* that the duty of a police officer to investigate is owed to the public at large, not to the executive. However, the case also affirms that the rights of an officer in this regard can be limited by statute. Presumably, therefore, the rights of a police officer could be made directly subject to control of the executive (as, at least in the case of the RCMP, they arguably now indirectly are[136]) by a simple statutory amendment.

A further factor complicating control over the police is created by the division of powers in the Constitution. Both the federal and provincial governments have enacted legislation concerning police forces within their jurisdiction; nonetheless, in seven of the ten provinces policing is in fact provided on a contract basis by the RCMP.[137] As a result, in those provinces the same police force is potentially subject to direction from more than one level of government. Litigation has made it clear that generally speaking, the RCMP remain subject

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131. Stenning, *supra*, note 23 at 124-126.

132. *Attorney General of the Province of Quebec* v. *Attorney General of Canada*, [1979] 1 S.C.R. 218.

133. (1985-86) 28 C.L.Q. 162 (F.C.T.D.).

134. *Ibid.* at 166.

135. *Ibid.*

136. Section 18 of the *Royal Canadian Mounted Police Act*, supra, note 128, makes each officer, in the performance of duties, "subject to the orders of the Commissioner", while s. 5 of the Act puts the Commissioner "under the direction of the Minister".

137. Ontario, Quebec, and Newfoundland have established separate police forces, though the RCMP also provide police services in Newfoundland.

exclusively to the federal government, but the extent to which provincial governments might have power to direct the RCMP has not been entirely settled.[138]

Police officers are placed within a bureaucratic structure, taking direction from superior officers who, importantly, are responsible for their supervision and discipline.[139] Their superiors in turn are located within the hierarchy of governmental authority, and are ultimately accountable to a responsible minister. The challenge within such a system is the maintenance of the proper degree of independence consistent with the appropriate measure of accountability.

138. See, *e.g.*, *Attorney General of the Province of Quebec* v. *Attorney General of Canada*, *supra*, note 132, which decided that a provincial Board of Inquiry did not have the jurisdiction to examine the administration and management of the RCMP. In that case, the inquiry was established by the province of Quebec, which is one of the provinces not served by the RCMP. In *Attorney General of Alberta* v. *Putnam*, [1981] 2 S.C.R. 267, the Supreme Court considered whether the province of Alberta, which is served by the RCMP, had the jurisdiction under its own *Police Act* to investigate and discipline RCMP officers. The court held that Alberta did not have this power; however, Stenning in *Legal Status of the Police*, *supra*, note 23 at 76 has suggested that the court's reasoning leaves open the possibility that a province might have the power to investigate but not discipline members of the RCMP.

139. *Wool* v. *R.*, *supra*, note 133.

CHAPTER TWO

The Need for Reform in the Present Law

I. Introduction

Our review of criminal procedure has stressed the need for a principled approach to law reform. The principles to be applied are discussed in depth in *Our Criminal Procedure*.[140] The application of those general principles to the control of prosecutions is a complex task. The Attorney General and, to a lesser extent, the Attorney General's counsel and agents, are entrusted with very broad powers, which are subject to very limited controls. Yet, as one judge has stated, we "cannot conceive of a system of enforcing the law where some one in authority is not called upon to decide whether or not a person should be prosecuted for an alleged offence."[141] However, the need for broad powers does not preclude restraint, or that those who exercise the powers be accountable, that the parameters of the powers be clear, and that they be fairly exercised. No one of these principles should be given invariable precedence over the others, and they cannot be enforced so rigorously that the system becomes hopelessly inefficient. The system must also be open to public view and criticism.

We accept the general proposition that the majority of daily decisions involving the use of prosecutorial discretion need not be subject to judicial review, and that, to a considerable extent, the preservation of the high standards demanded of the Attorney General will continue to depend on the personal integrity of the office holder. Nonetheless greater clarity in the nature of the powers of the Attorney General would be achieved if the Crown's common-law powers were codified. The balancing of these principles with the need to provide broad discretionary powers to the Attorney General is the focus of many of our recommendations.

Although the powers of the Attorney General are an important starting point in a consideration of the office, the nature of the office itself, and the mix of responsibilities within it, are also of significance. This area of study has become more important with the advent of the *Charter*. As head of the prosecution staff for the federal government, the

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140. LRC, *Our Criminal Procedure*, Working Paper 32 (Ottawa: The Commission, 1988).

141. *R.* v. *Court of Sessions of the Peace, Ex Parte Lafleur*, [1967] 3 C.C.C. 244 at 248 (Que. C.A.), quoted with approval in *Smythe* v. *R.*, [1971] S.C.R. 680 at 686.

Attorney General has in several important cases advocated, through counsel, a narrow interpretation of the rights of the individual under the *Charter*, in an apparent attempt to minimize its impact on law-enforcement techniques and prosecutions.[142] On the other hand, the Supreme Court has stated that the *Charter* should receive a "broad and liberal" interpretation,[143] an approach the Attorney General should adopt when advising on legislation in the role of Minister of Justice.

These same tensions surface when the Attorney General considers the reform of criminal law. Restraint in the intrusion into the lives of individuals must be balanced with the requests of police and prosecutors for "tougher, more effective laws", which ultimately means giving those officials broader powers. We will therefore first consider whether these potentially conflicting roles can best be served by a single ministry, or whether a different division of responsibilities is desirable.

II. The Structure of the Department of Justice and the Department of the Solicitor General

A. The Department of Justice

We have noted that in Canada, the offices of Attorney General and Minister of Justice are combined by statute in one person. This fact is reflected in the structure of the department, and the administrative arrangements that are made for control of the criminal prosecution service.

Below the ministerial level, the Department of Justice is headed by the Deputy Minister of Justice, who is by statute also the Deputy Attorney General. The next most senior officials are three Associate Deputy Ministers, responsible for civil law, for litigation, and for public law.[144]

Criminal prosecutions are conducted by the Criminal Law Branch. That branch is headed by an assistant deputy attorney general who reports to the Associate Deputy Attorney General, Litigation. The Litigation Sector also includes branches dealing with civil and tax matters (each headed by an assistant deputy attorney general), and the Chief General

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142. See, *e.g.*, *R.* v. *Hamill*, [1987] 1 S.C.R. 301, where the Attorney General argued in favour of writs of assistance, or *R.* v. *Smith*, *supra*, note 69, where the Attorney General argued in favour of a minimum seven-year jail term for importation of narcotics.

143. See *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 154-155; and *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357 at 365ff.

144. *Department of Justice Act*, *supra*, note 30, s. 3(2). The information in this section is drawn from: Department of Justice, *Annual Report 1988-1989* (Ottawa: Supply and Services Canada, 1990). A flowchart is attached to this paper as Appendix C, showing the organizational structure of the Department of Justice.

Counsel, who conducts complex litigation which requires counsel of particular seniority and expertise.

Government bills and amendments are prepared by the Legislative Programming Branch, which is under the supervision of the Associate Deputy Minister, Civil Law. However, "Criminal Law Branch counsel are consulted on amendments to the *Criminal Code*, on legislative proposals pertaining to criminal law, and on the development of criminal law policy and programs".[145]

It will be seen from this arrangement that the prosecution service does not enjoy any particular structural independence. Rather, it is an integrated part of the department, with each more senior supervisory office being part of the general bureaucracy. In addition, the policy making functions of the Minister of Justice are conducted through the same ministry as the prosecution service, and indeed amendments concerning criminal law are made after consultation with the prosecution service.

It is our suggestion that each of these situations — the lack of independence of the prosecution service, and the combining of the functions of the Minister of Justice and the Attorney General — creates potential difficulties for the proper administration of justice. We shall consider each situation in turn.

1. Dividing the Offices of Minister of Justice and Attorney General

(*a*) Overview

One major source of concern within the present structure of the Department of Justice is the potential for improper political interference with the prosecution service. This problem will be addressed below. However, other sources of potential difficulty, entirely removed from this issue, also exist.

Generally speaking, these problems arise from the conflicts between the different roles that the combined Minister of Justice and Attorney General is required to fill. In essence, the problem is this: the job of Minister of Justice is primarily a neutral one. The Minister of Justice is legal adviser to the Cabinet, including certifying legislation to be in accordance with the *Charter*,[146] has the primary responsibility for formulating the legal policy of the government, and is responsible for the court system and the administration of justice. These are all tasks that require a completely even-handed approach. However, the same minister, as the Attorney General, is in charge of the prosecution service. This task cannot, despite the Crown prosecutor's duty to act fairly, really be described as a neutral one; rather, the Crown prosecutor is effectively a partisan participant in the administration of justice. When the same department is in charge of both of these functions, therefore, there is inevitably a

145. Department of Justice, *supra*, note 144 at 19.

146. *Department of Justice Act*, *supra*, note 30, as amended by S.C. 1985, c. 26, s. 106.

danger, or at the very least a possible perception, that tasks which should be carried out in an even-handed manner will be influenced by and therefore favour the prosecution.

Consider, for example, the task of certifying legislation to be in accordance with the *Charter*. As noted earlier, the Supreme Court of Canada has made clear that the *Charter* is to receive a "broad and liberal interpretation",[147] and so it is appropriate for the Minister of Justice to take such an approach in considering the validity of legislation. In this role, therefore, the Minister of Justice should be adopting an attitude that preserves and protects individual rights, and should not certify legislation that threatens them.

The Attorney General, on the other hand, is responsible for prosecutions, and in that role would understandably and properly desire tough legislation that assisted law-enforcement purposes. Such legislation could readily pose a threat to the individual rights guaranteed under the *Charter*, and so should be particularly closely scrutinized for validity before being certified. However, when this scrutiny is conducted by the very person most interested in having the legislation passed, there is room for concern that the scrutiny may not be as independent as is desirable.[148]

By the same token, the stance taken in litigation by counsel representing the Attorney General is likely to be in conflict with the "broad and liberal" approach required of the Minister of Justice. Since the *Charter* is only applicable when some degree of government involvement exists,[149] counsel for the Attorney General will normally be involved in *Charter* challenges, and normally will be arguing against the challenge. Thus, for example, in *Hunter* v. *Southam Inc.*,[150] counsel for the Attorney General had argued to uphold the search and seizure provisions of the *Combines Investigations Act*.[151] Subsequently counsel for the Attorney General have argued in favour of the validity of writs of assistance,[152] and of a minimum seven-year jail term for the importation of narcotics,[153] provisions which the

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147. See *Hunter* v. *Southam Inc.*, *supra*, note 143, and *Law Society of Upper Canada* v. *Skapinker*, *supra*, note 143.

148. Consider, *e.g.*, s. 487.2 of the *Criminal Code*. This subsection, which restricts the type of publicity that can be given to search warrants, was certified by the Minister of Justice. The legislation has since been struck down by lower courts in two jurisdictions as violating the *Charter*: see *Canadian Newspapers Co.* v. *Attorney-General of Canada*, (1986), 28 C.C.C. (3d) 379 (Man. Q.B.) and *Canadian Newspapers Co.* v. *Attorney-General of Canada* (1986), 29 C.C.C. (3d) 109 (Ont. H.C.). The Minister chose not to appeal these lower court decisions, but instead opted to treat the legislation as inoperative. This suggests that, after the fact, the Department of Justice considered the legislation anew, agreeing that it violated the *Charter*. It is not clear why the Department did not reach this conclusion before originally certifying the legislation.

149. Section 32 of the *Charter* states that it is applicable "to the Parliament and government of Canada" and "to the legislature and government of each province". The exact limits of the applicability and degree of government involvement necessary to call the *Charter* into play have not been fully determined: see, *e.g.*, *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

150. *Supra*, note 143.

151. R.S.C. 1985, c. C-34.

152. *R.* v. *Hamill*, *supra*, note 142.

153. *R.* v. *Smith*, *supra*, note 69.

Supreme Court of Canada found to violate the *Charter*. In practice, the motivation of preserving what are seen to be effective law-enforcement techniques frequently requires counsel for the Attorney General to adopt a different attitude from that of the Minister of Justice, and to argue for a narrow and limited interpretation of the rights guaranteed in the *Charter*.

A different manifestation of this conflict is seen in having the same office responsible for both the prosecution service and legal aid. A significant portion of legal-aid work consists of defending those charged with crimes.[154] Thus, to a large extent, the same law officer is ultimately responsible for both prosecution and defence. In deciding on the allocation of funds or other support services between these two services, then, the Attorney General faces a clear potential for conflict.

Further, the same minister who directs the prosecution arm of the government not only appoints the judges before whom Crown counsel appear, but also negotiates with those judges about questions such as their level of remuneration and pension benefits. At the very least, one must question whether justice appears to be done when the person who selects and pays judges is the chief prosecutor.

Potential for conflict also exists when agents of the Attorney General are required to investigate or prosecute others within the Department of Justice, or associated with it. For example, in the recent ticket-fixing scandal in the province of Manitoba, the police and the Crown office, both under the jurisdiction of the provincial Attorney General, investigated and prosecuted a number of persons, including two Provincial Court judges and one magistrate — all three of whom were part of a court system also administered through the Attorney General's department. As former Manitoba Chief Justice Dewar remarked in his review of the handling of the scandal:

> The Criminal Justice Division of the Department of the Attorney-General (the Crown Office) was not the appropriate instrument for exercising Crown prosecutorial independence when the integrity of a court system, organized and administered by that Department, is in question. In the circumstances, given the present organization of the Department, Crown office officials and prosecutors cannot be viewed as independent. This ticket-fixing affair demonstrates a point at which internal conflict arises and independence of the prosecutorial role breaks down.[155]

Quite apart from the question of investigating those employed by the same department, the Dewar Report shows instances of other potential conflicts that we have noted arising from having the prosecution service tied too closely to the rest of the Attorney General's department. For example, correspondence quoted in the report shows a concern on the part of the Director of Criminal Prosecutions over a possible conflict in his roles. On the one hand, he was negotiating a plea bargain with counsel for one of the Provincial Court judges.

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154. The report of the National Task Force on the Administration of Justice, *Legal Aid Services in Canada 1977-78* [s. l.]: The Task Force, 1979) at 7-8 noted that in 1977-78, 42% of legal-aid cases were criminal matters, and that the federal government paid 48% of the cost of criminal-related expenditures.

155. *Dewar Review*, *supra*, note 3 at 64.

On the other hand, through his involvement in the Department of Justice, he was involved in discussions that determined whether that same judge would be eligible for particular pension benefits. As Mr. Justice Dewar notes:

> Pure expediency influenced the Crown to participate in the plea bargains, and to employ as bargaining leverage an ability to arrange an enhanced pension benefit in one case and continued employment in the other, both being arrangements made by or through the intervention of senior officials in the Department of the Attorney-General, contacted by solicitors for the accused. Crown counsel in both cases recognized an ethical dilemma, but carried on, their independence compromised.[156]

Of course, no matter what arrangements are made, there remains the possibility of conflict when the prosecution service is required to investigate itself. In any case where a direct internal conflict of this sort arises, it would remain open to the Attorney General or the Director to appoint outside counsel to handle specific cases, but it is preferable to avoid this type of *ad hoc* arrangement when possible. The greater the extent to which the prosecution service is isolated from the other aspects of the administration of justice, and indeed of the Attorney General's department, the less likely this potential conflict becomes.

The conflict can also be looked at from the other perspective: one could suggest that the Attorney General's duty to represent government departments, not just in criminal but in civil matters, can be compromised by the duty, as Minister of Justice, to consider issues impartially. A department that wished to argue for a broad construction of its statutory powers to conduct searches and effect seizures, for example, might not feel adequately represented by counsel who also has a duty to advocate the least governmental interference with personal liberty that is consistent with the protection of society.[157]

Indeed, a situation similar to this arose in *Re Blainey and Ontario Hockey Association*.[158] The plaintiff, a twelve-year-old girl, was suing the Ontario Hockey Association, after the Ontario Human Rights Commission had held that its governing legislation allowed the particular form of discrimination of which she complained, thus preventing it from entertaining her complaint. The Human Rights Commission was also named in the action. In the Court of Appeal, Mr. Justice Finlayson in dissent noted the difficulty faced by counsel for the Commission: she was apparently representing only the Commission, not the Attorney General, though Finlayson J. noted that the Attorney General would have been the appropriate person to have instructed counsel. In addition, although the Commission had relied upon its governing legislation to refuse the plaintiff's complaint, counsel for the Commission agreed that the Attorney General had publicly stated that the governing legislation in question ought to be changed, and indeed argued in the case that the legislation was unconstitutional. Counsel representing the government was therefore placed in the

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156. *Ibid.* at 65.

157. In this regard, note the comments of Ian Scott, to the effect that an Attorney General might feel compelled to take a fellow minister to court to prevent an unconstitutional course of action, discussed above at 10.

158. (1986) 54 O.R. (2d) 513 (C.A.).

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position of defending the actions of the commission, based on limitations in the law, but at the same time for policy reasons being opposed to those limitations.[159]

There have been recognized instances in which a conflict has been noted between the policy and litigation functions of the Department of Justice. For example, the Canadian Human Rights Commission is under the auspices of the Minister of Justice, reporting to Parliament through that law officer. On more than one occasion, it has been observed that this arrangement creates a potential conflict:

> The Minister of Justice is also the Attorney General of Canada and, as such acts for government agencies and departments in any litigation concerning them, including litigation in which they take an adversarial position vis-à-vis the Canadian Human Rights Commission.[160]

Despite several internal requests and external recommendations, this arrangement has not been changed.[161]

Similarly, arrangements concerning the Court Challenges Program, established to fund private challenges to legislation under the *Charter*, has been criticized:

> The Court Challenges Program was an important initiative. It helped litigants obtain a number of important judicial decisions in the area of language rights. However, it had a major weakness. The Department of Justice participated in determining who received financial assistance in litigation, yet its own lawyers could be acting for a government

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159. In "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989), 39 U.T.L.J. 109, Ian Scott discusses his involvement in this case as Attorney General. He notes that his department agreed that the section was unconstitutional, and had prepared but not yet had passed by the legislature an amendment.

    Scott also notes that the position his department was able to take in that case was made easier by two factors. First, the case was a civil one, dealing with a provincial statute. He notes at 123-124 that a more difficult question arises when a provincial Attorney General forms the opinion that a federal law, such as a section of the *Criminal Code*, is unconstitutional. He notes that he has "not yet formed a clear view based on principle about this issue", but suggests that "it is appropriate for a provincial attorney to pay a significant degree of deference" to the determination of the federal Attorney General.

    Second, he notes that in *Blainey* the Cabinet agreed with his advice that the section was unconstitutional. In other cases, he suggests at 126, based on considerations other than those appropriate to the Attorney General, "[t]here is every chance that an attorney general may face the fact that the Cabinet will not accept advice to concede the unconstitutionality of a civil enactment".

160. Canadian Human Rights Commission, *Annual Report 1979* (Ottawa: Supply and Services Canada, 1980) at 15.

161. See, *e.g.*, the annual reports of the Human Rights Commission for 1979, 1980 and 1981. The commission withdrew the request without explanation in its 1983 report. However, two subsequent independent reviews have also recommended that the arrangement be changed; see House of Commons, Special Committee on Participation of Visible Minorities in Canadian Society, *Equality Now! Report of the Special Committee on Visible Minorities in Canadian Society* (Ottawa: Queen's Printer, 1984) and House of Commons, Standing Committee on Justice and Legal Affairs, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer, 1985).

department involved in that litigation. This put the Department in a position of potential conflict.[162]

Responsibility for the Court Challenges Program has since been handed over to the Canadian Council for Social Development.

(*b*) Recommendations

The Commission has decided not to make, at this time, any recommendations regarding dividing the functions of Attorney General from those of the Minister of Justice, and creating two separate ministries. It is our opinion that a strong case exists for doing so, but that other issues, particularly in the non-criminal field, need to be considered before any final arrangement can be proposed.

One major reason for splitting the department is the potential prosecutorial bias created by having new legislation prepared and certified by the department which conducts prosecutions. Therefore, if the department were to be split, we suggest that all litigation, both civil and criminal, should be handled by the Attorney General. In addition, we feel it would likely be appropriate for the Attorney General to take on the role of legal adviser to Cabinet and government departments, at least in the context of advising the government of what its obligations are under the existing law. This advisory role would be, we feel, similar to that between any client and counsel.

In drafting new legislation, advising on the appropriate policy for new laws, and certifying the consitutional validity of that legislation, however, in our view the Minister of Justice would be the appropriate person to act. Similarly the Minister of Justice would keep responsibility for court administration and the administration of justice generally, since these are tasks best undertaken by a party not required to appear in those courts. Law reform is also appropriately grouped with these functions. Responsibility for legal aid does not fit neatly with either ministry, but less potential conflict exists when it is placed with the Minister of Justice.

We do not make any final recommendations in this regard for several reasons. First, we acknowledge that making such a major structural change in the office of the Attorney General will have an effect on the role the office-holder can and will play in Cabinet. Some of our consultants have suggested that if there are three law officers in Cabinet (Minister of Justice, Attorney General, and Solicitor General), the influence of each, particularly the former two, will be diminished. There is potential for this to have a detrimental effect on the administration of justice.

In addition, it must be noted that the Attorney General/Minister of Justice also has responsibilities in the non-criminal sphere. All legislation, whether criminal or not, is prepared through the Minister of Justice. All litigation, both civil and criminal, is conducted through the Attorney General. Although splitting the two departments is desirable based on

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162. *Equality for All*, *supra*, note 161 at 133.

criminal law considerations, there will be a major impact on the other public-law aspects of the department. Without studying those issues, it would be unwise to propose major structural change. We anticipate that the Commission will return to this issue and make recommendations in this regard in a later Working Paper.

Finally, we feel that we are able to address the problems inherent in the combined office, at least partly, without proposing a division. We have earlier discussed the need for the Crown prosecution service to be insulated from potential political pressure.[163] For that reason, in the next section we will propose the establishment of an independent office of Director of Public Prosecutions to handle criminal prosecutions. By its very nature, this office will have to be administratively separated from the rest of the Department of Justice. The main purpose of this separation, of course, is to protect the prosecution service from political pressure. Equally, however, establishing this office will serve to create a greater division between the prosecutorial and policy-making segments of the ministry. We expect that this separation will have a salutary effect on the potential conflicts we have noted.

2. An Independent Prosecution Service

(*a*) Overview

The holder of the combined office of Minister of Justice and Attorney General is a member of Cabinet. We have discussed earlier the principle that political considerations should not normally play a role in prosecutorial decisions; this principle could lead some to suggest that the Attorney General should not be a member of Cabinet at all. As the recent suggestions of interference made by the former Attorney General of British Columbia on his resignation show, there is a potential for improper interference with prosecutorial discretion when the head of the prosecution service is actively involved in the political process. It is necessary to strike a delicate balance in which the need for political independence on the part of Crown counsel is recognized, and yet accountability is not sacrificed.

It would be instructive in this regard to consider the institutional arrangements in other jurisdictions concerning the prosecution of offences. These jurisdictions have also wrestled with the problems of independence and accountability, reaching a variety of solutions. What might be considered the traditional model is that of England and Wales. The systems established in the Republic of Ireland and the State of Victoria in Australia show the extreme end of structural independence for the prosecution service, while those of New Zealand and the Commonwealth of Australia have relatively few, if any, institutional guarantees of independence.[164]

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163. See "The Attorney General and Parliament" above at 8.

164. A summary of this information in form of a chart follows this paper as Appendix D.

In addition, we shall also consider structural arrangements which have been made in Canada for offices that have a similar need for independence from government interference: the Auditor General, and the Human Rights Commission.

(i) *Institutional Arrangements in Other Countries*[165]

(A) *England and Wales*

The institutional arrangements of all the various office-holders in Great Britain concerned with criminal matters are considered in Appendix A. Here, only the responsibilities of the Attorney General and Director of Public Prosecutions need be considered.

Formal responsibility for criminal prosecutions is given to the Attorney General, who has the power to take over private prosecutions, and to terminate them through the *nolle prosequi* power. The Attorney General is not a member of Cabinet, and by tradition may consult with, but must not be directed by, Cabinet in making decisions about prosecutions.

Serious criminal offences are generally prosecuted through the office of the Director of Public Prosecutions. The office was originally created under the *Prosecution of Offences Act, 1879*.[166] However, until 1985 the Director was responsible for only a small percentage of the total number of criminal prosecutions in England, with the great majority being handled by counsel briefed by local chief constables.[167] This situation changed with the passage of the *Prosecution of Offences Act, 1985*.[168] The Office of Director of Public Prosecutions is created by the statute, which calls for the Director to be appointed by the Attorney General, and paid a salary determined by the Attorney General with the approval of the Treasury,[169] and pension benefits arranged individually with the Treasury (unless the Director is appointed from within the Civil Service).[170] The Director of Public Prosecutions is head of the Crown Prosecution Service, which is responsible for all non-private prosecutions throughout England and Wales (though the laying of informations remains in private hands, and private prosecutions are still allowed). The Director is appointed not for a specific term, but until retirement: however, the Director is subject to the normal terms and conditions governing civil servants, and so could be removed from office for inefficiency

165. The information in this discussion is primarily drawn from the work of J.LlJ. Edwards, and in particular his writing for the Royal Commission on the Donald Marshall, Jr., Prosecution, *Walking the Tightrope of Justice*, vol. 5 (Halifax: The Royal Commission, 1989).

166. (U.K.), 42-43 Vict., c. 22.

167. A. Sanders, "The New Prosecution Arrangements — (2) An Independent Crown Prosecution Service?" [1986] Crim. L.R. 16 at 16.

168. (U.K.), 1985, c. 23.

169. *Ibid.*

170. Private communication with the Law Reform Commission by Roger K. Daw, Policy and Information Division, Director of Public Prosecutions (U.K.), 15 December 1989.

or for falling foul of the law or normal rules of conduct.[171] Nonetheless, the Director has a certain measure of independence with regard to staffing the Crown Prosecution Service: the Director makes the appointments, with the approval of the Treasury as to numbers.[172]

In fulfilling these duties the Director is not independent. Subsection 3(1) of the 1985 Act notes, as did earlier versions, that

> The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.

The nature of this superintendence has been explained by Sir Michael Havers, former Attorney General of Great Britain, as meaning that:

> My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship with him is such that I require to be told in advance of the major, difficult, and, from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction.[173]

It would therefore be open to the Attorney General to instruct the Director to take over proceedings that have been privately commenced, but then offer no evidence. Equally, the Attorney General could instruct the Director to institute particular proceedings.

Under section 9 of the Act, the Director is required to present an annual report to the Attorney General, who must in turn present that report to Parliament and cause it to be published. Among other things, that report must contain any changes to the Code for Crown Prosecutors, which gives general guidelines concerning whether to initiate charges, whether to discontinue charges, and so forth.

The independence of Crown counsel from political influence is protected for the most part, but nevertheless significantly, by tradition. The actual prosecutors are protected by virtue of the relative independence of their immediate superior, the Director. It is understood by the parties involved that the Attorney General will not normally interfere with the Director's management of the office, or the handling of particular cases. If this should occur, it is understood that the Attorney General will not act from partisan political motives, and

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171. *Ibid.*

172. *Prosecution of Offences Act, 1985*, *supra*, note 168, s. 1(2).

173. Edwards, *Attorney General, supra,*, note 34 at 48-49.

that the Cabinet will not attempt to dictate the appropriate course of action to the Attorney General.[174]

(B) *The Republic of Ireland*

The office of Attorney General is established in the constitution of the Republic of Ireland. The Attorney General is the adviser to the government on matters of law and is responsible for the prosecution of crimes and offences other than summary conviction matters. Although a political appointment, the Attorney General does not sit as a member of Cabinet, and is not required to hold a seat in the Irish House (Dáil). The Attorney General's independence is further stressed by the rule of the Dáil that, even if a member, the Attorney General cannot be called upon in the House to justify the handling of particular prosecutions: rather, such questions are handled by the Prime Minister (Taoiseach) or Parliamentary Secretary.[175]

Since the *Prosecution of Offences Act, 1974*,[176] the office of Director of Public Prosecutions has also existed. The Director is a civil servant, appointed by the government.[177] However, the appointment is made based on recommendations from a committee of five people, including, for example, the Chief Justice, and the Chairman of the General Council of the Bar of Ireland.[178] The terms and conditions of employment, including superannuation benefits, are determined by the Taoiseach on consultation with the Minister for the Public Service.[179] Although the Director has charge of the prosecution service, the statute reserves to the Taoiseach the power to appoint the officers and servants of the Director.[180]

Subsection 3(1) of the Act states that the Director "shall perform all the functions capable of being performed in relation to criminal matters. . .by the Attorney General". Subsection 2(5) notes that "The Director shall be independent in the performance of his functions." There is a requirement under subsection 2(6) of the Act for the Attorney General and Director of Public Prosecutions to consult from time to time concerning the functions of the Director, but this does not give the Attorney General any right to give directions to

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174. Stenning points out in *Appearing for the Crown, supra*, note 6 at 293ff. that the Attorney General's accountability to Cabinet is problematical at best, in that there may be no actual obligation for the Attorney *General to report to Cabinet. Equally, the accountability of the Attorney General to the legislature is limited* to being questioned in the House, generally after the fact, concerning particular decisions. Stenning notes at 305 that there has been no instance of an English Attorney General resigning or being dismissed due to parliamentary criticism, and suggests that any vote on such an issue would follow party lines, effectively protecting the Attorney General.

175. Edwards, *Attorney General, supra*, note 34 at 267 n. 47.

176. (Eire), No. 22.

177. *Ibid.*, ss. 2(2) and 2(4).

178. *Ibid.*, s. 2(7).

179. *Ibid.*, s. 2(8).

180. *Ibid.*, s. 2(11).

the Director.[181] Indeed, the independence of the Director is stressed by subsection 6(1) of the Act, which prohibits communication with the Director's staff or the Director for the purpose of influencing pending criminal proceedings.

There are a few restrictions on the Director. Responsibility for authorizing prosecutions under certain Acts (the *Geneva Conventions Act 1962*, the *Official Secrets Act 1963*, and the *Genocide Act 1973*) remains with the Attorney General, as does defending against challenges to the constitutional validity of laws. However, these limitations do not amount to control over the Director; they merely reserve some tasks to the Attorney General. The Director remains independent in performing all those tasks attached to the office.

However, subsection 5(1) of the Act allows the government to transfer individual cases to the Attorney General if it is necessary in the interests of national security. This seems unlikely to be a power that will interfere with the Director's day-to-day handling of the department; nonetheless it is a residual form of control in the hands of the government. At least in cases that concern national security, the Director will be aware that control of a case can be taken away if the government disagrees with the proposed course of action.

There are further safeguards for the independence of the Director, found in the procedures for filling the office or removing the incumbent. The Director is appointed by the Taoiseach, but on the recommendation of a committee consisting of the Chief Justice, the Chairman of the General Council of the Bar of Ireland, the President of the Incorporated Law Society, the Secretary to the Government, and the Senior Legal Assistant in the Office of the Attorney General. The Director can be removed by the Dáil, but it must have before it a report of a committee consisting of the Chief Justice, a Judge of the High Court, and the Attorney General. No specific grounds for removal are set out; the statute only notes that the committee can investigate "the condition of health, either physical or mental, of the Director" or "inquire into the conduct (whether in the execution of his office or otherwise) of the Director, either generally or on a particular occasion".[182]

In the Irish system, then, there is little control by the government or Attorney General over the prosecution service, and there are considerable institutional protections for the independence of that service. Only in limited circumstances can cases be taken from the Director, and in those circumstances they are transferred to the Attorney General. Since the Attorney General is equally considered to be independent of Cabinet, even this would seem to give the government as a whole little say.

Indeed, it has been questioned whether the degree of independence is not so great as to eliminate any real accountability for the prosecution service:

> With complete independence being conferred upon the Director of Public Prosecutions in Ireland and the elimination of any power or control over the Director's actions by the

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181. In *Attorney General, supra*, note 34 at 265. Edwards cites an explanatory memorandum issued by the Irish government to this effect.

182. *Prosecution of Offences Act, 1974, supra*, note 176, s. 2(9).

> Attorney General, who, it may well be asked, is accountable to the Irish Parliament for the decisions taken by the Director of Public Prosecutions? If the experience of other Commonwealth countries, which have adopted into their constitutions a similar model of an unaccountable public prosecutor, is any pointer to what lies in store for the Republic of Ireland it is only a matter of time before the fundamental questions of control and accountability force themselves before its elected Parliament for intense debate.[183]

In opposition to this view, however, it has been suggested by an Irish commentator that the system reflects a conscious adoption of the principle of an unaccountable public prosecutor, and that there has been "general satisfaction with the operation of the constitutional principle which this country has adopted."[184]

(C) *State of Victoria, Australia*

The Attorney General's office is created in the constitution of the state of Victoria, which requires that the Attorney General be a member of Cabinet.

As in England, however, the prosecution service is not under the direct control of the Attorney General. Rather, it is administered through the office of the Director of Public Prosecutions, which was created by the *Director of Public Prosecutions Act 1982*.[185]

The Director is appointed by the Governor in Council.[186] The Director's office prepares, institutes, and conducts all criminal proceedings on behalf of the Crown in the High Court, Supreme Court, and County Court, conducts preliminary inquiries, and has the authority to take over proceedings in any summary offence.[187] The Director has the same power as the Attorney General to enter a *nolle prosequi* in criminal proceedings, though the Attorney General also retains that power.[188] The Director is "responsible to the Attorney-General for the due performance of his functions under this Act", but this responsibility does not "affect or derogate from the authority of the Director in respect of the preparation institution and conduct of proceedings under this Act".[189]

By this scheme, Victoria has created a Director of Public Prosecutions with virtually complete structural independence. The purpose of this arrangement is to insulate the Director from any control by the Attorney General, and thereby guarantee that the Director's decisions are made without reference to political considerations that might be feared to motivate the Attorney General.

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183. Edwards, *Attorney General, supra*, note 34 at 267-268.

184. D. Costello, Book Review of *The Attorney General, Politics, and the Public Interest* by J.L.I.J. Edwards (1985) 20 The Irish Jurist 223 at 224.

185. (Victoria, Australia) no. 9848/1982.

186. *Ibid.*, s. 3(1).

187. *Ibid.*, s. 9(1).

188. *Ibid.*, s. 14.

189. *Ibid.*, s. 9.

This insulation from influence is supported by other arrangements concerning the Director of Public Prosecutions. The Director has responsibility for selecting staff and controlling the budget of the Office.[190] The office-holder is appointed until the age of 65, receives the salary and pension benefits of a puisne judge of the Supreme Court, and is not subject to the provisions of the *Public Service Act 1974*.[191] The Director may be suspended by the Governor in Council; if the Director is suspended, a full statement of the grounds must be presented by the Attorney General to Parliament within seven days (or, if the House is not sitting, within seven days of the start of the next session). If Parliament does not within seven days from that report pass a resolution for the removal of the Director, then the suspension is lifted. This is the only mechanism for the removal of an incumbent Director.[192]

The independence of individual prosecutions is further protected by restrictions on the Director's involvement at that level. The Director is entitled to furnish general guidelines to prosecutors, police, or other persons; however, "the Director is not entitled to furnish guidelines in relation to a particular case."[193] In addition, any guidelines which are issued must be published in the *Government Gazette*.[194]

The Victoria model is at the extreme end of independence in the prosecution of criminal offences. As with the Republic of Ireland, therefore, it is arguable that little room has been left for accountability. Further, even more than in the United Kingdom, it is open to the government, and indeed the Attorney General, to disavow responsibility for any unpopular or unwise decisions. The Attorney General has no power to influence particular prosecutions, for proper or improper motives. The Director is similarly limited. The government is not responsible for the actions of the Director, beyond having made the initial appointment, and so at no level above the individual prosecutor is there anyone who can effectively be held accountable.

(D) *Commonwealth of Australia*

The office of Attorney General was created in the *Commonwealth of Australia Constitution Act* (1900),[195] to head the Department of the Attorney General. The office-holder is required to be, or within three months to become, a Senator or Member of the House of Representatives. The Attorney General is not excluded from the Cabinet, but at the same time is not necessarily a member. The office is sometimes, but not always, combined with that of Minister of Justice.[196]

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190. Private Communication with the Law Reform Commission by John Coldrey, Q.C., Director of Public Prosecutions (Victoria), 14 March 1990.

191. *Director of Public Prosecutions Act 1982*, *supra*, note 185, ss. 4, 6.

192. *Ibid.*, s. 5. The statute does not set out any specific grounds for removal, and none have otherwise been established: private communication from John Coldrey, *supra*, note 190.

193. *Director of Public Prosecutions Act 1982*, *supra*, note 185, s. 10(1).

194. *Ibid.*, s. 10(2).

195. (U.K.), 63 & 64 Vict., c. 12.

196. Edwards, *Attorney General*, *supra*, note 34 at 367.

As in other jurisdictions, control of prosecutions has been placed in the hands of a Director of Public Prosecutions, an office created by the *Director of Public Prosecutions Act 1983*.[197] The Director is appointed by the Governor General, and is paid remuneration determined by the Remuneration Tribunal.[198] The staff of the Director's office are appointed under the *Public Service Act 1922*, with the Director having the powers of a permanent head under that Act.[199]

The Attorney General has retained the ability to be involved in the prosecution service, either through general guidelines, or in dealing with individual cases. Subsection 8(1) of the Act states that:

> In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney-General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.

Subsection 8(2) of the Act continues that:

> Without limiting the generality of sub-section (1), directions or guidelines under that sub-section may —
>
> (a) relate to the circumstances in which the Director should institute or carry on prosecutions for offences;
>
> (b) relate to the circumstances in which undertakings should be given under sub-section 9(6); and
>
> (c) be given or furnished in relation to particular cases.

However, although the Attorney General can require the Director to act in a particular manner in a particular case, steps are taken to prevent the abuse of this power. Subsection 8(1) required any directions to be in writing. Subsection 8(3) of the Act states that:

> Where the Attorney-General gives a direction or furnishes a guideline under sub-section (1), he shall —
>
> (a) as soon as practicable after the time that is the relevant time in relation to the instrument containing the direction or guideline, cause a copy of the instrument to be published in the *Gazette*; and
>
> (b) cause a copy of that instrument to be laid before each House of the Parliament within 15 sitting days of that House after that time.

197. (Australia), no. 113/1983.

198. *Ibid.*, ss. 18, 19.

199. *Ibid.*, s. 27.

The Act also contains provision for publication to be delayed where the interests of justice require.[200]

As in other jurisdictions, the Director is a statutorily protected appointee, enjoying greater security of tenure than would a civil servant. The Director is appointed by the Governor General for a specific term not to exceed seven years, but is eligible for reappointment.[201] There are grounds for removal before that time, some of which make removal possible, while others make it compulsory; the Governor General may terminate the appointment of a Director for "misbehaviour or physical or mental incapacity", and must terminate the Director's appointment in certain events, such as bankruptcy or engaging in outside employment.[202] Pension arrangements, however, are not specifically designed to give the Director greater independence than a civil servant enjoys. The Director, if appointed from within the civil service, would continue to be covered by the civil service superannuation plan: Directors appointed from outside may join the civil service superannuation plan, or make other pension arrangements.[203]

Clearly, this model takes a very different approach from those of Victoria or Ireland. The Director of Public Prosecutions has charge of the prosecution service, and directs its day-to-day operations. However, the Attorney General retains the ability to direct the Director of Public Prosecutions, not only in general terms, but concerning individual cases. Thus there is direct accountability by the Director to the Attorney General, by virtue of this control over the Director. This control has been praised as a necessary residual measure, if the office of Attorney General is not to become an empty shell, "incapable of discharging in full the obligations associated with the doctrine of ministerial responsibility."[204]

The Attorney General is also publicly accountable for actions taken with regard to the prosecution service. This accountability is provided by the requirements surrounding directives. Since such directives must be in writing, and must be both published and presented to the House, any direct involvement by the Attorney General will come to light. The Attorney General will therefore be held accountable both to the House and to the general public.

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200. *Ibid.*, ss. 8(4), 8(5). Since the office of Director was established, only one direction has been issued by the Attorney General, and it was at the Director's request. Until recently, only the Attorney General, and not the Director, had the ability to lay an *ex officio* information without a prior committal hearing, or despite a discharge at that hearing (similar to the power in s. 577 of the *Criminal Code*), and only the Attorney General could give an undertaking that an accomplice would not be prosecuted in exchange for that person's testimony. However, "with the most recent amendments to the *DPP Act* these powers have now been given to the Director, and as a matter of practical reality there is no longer any need for the Attorney General to involve himself in any aspect of the prosecution process": private communication with the Law Reform Commission by J.W. McCarthy, Senior Assistant Director, Commonwealth Director of Public Prosecutions, 15 December 1989.

201. *Director of Public Prosecutions Act 1983*, *supra*, note 197, s. 18.

202. *Ibid.*, s. 23.

203. Private communication with the Law Reform Commission by J.W. McCarthy, *supra*, note 200.

204. J.L.J. Edwards, "The Charter, Government and the Machinery of Justice" (1987) 36 U.N.B.L.J. 41 at 56.

(E) *New Zealand*

In New Zealand's early history, various institutional experiments were tried in organizing the Attorney General's office. In 1866, the office of Attorney General was changed from a political appointment to a non-political, permanent appointment. The legislation was amended by the *Attorney-General's Act, 1876*[205] to allow the possibility of the Attorney General's being a member of Parliament. In fact, the Attorney General has been a member of Parliament since that time. Traditionally, though not by statute as in Canada, the Attorney General has also acted as Minister of Justice, and so has been a member of Cabinet.[206]

The Attorney General is nominally responsible for the prosecution of criminal offences. What has actually occurred, however, is that this function has been taken over by the Solicitor General. This office was in 1875 made into a permanent non-political appointment; its powers were not determined by statute, but the Supreme Court of New Zealand ruled in 1875 that the Solicitor General had the duties traditionally held by the Solicitor General in England.[207] In addition, New Zealand's *Interpretation Act* has stated since 1924 that the Solicitor General has all the powers, duties, authority, and functions of the Attorney General.

More important than the institutional arrangements, however, is the way in which the roles of the Attorney General and Solicitor General have developed. It has come to be accepted that the Solicitor General is the chief legal adviser to the government, despite being junior to the Attorney General. The Solicitor General is in charge of the Crown Law Office, which is responsible for handling prosecutions in the Supreme Court and Court of Appeal as well as for providing legal opinions to the Government. The Attorney General is nominally, and indeed in fact, superior to the Solicitor General, but there has traditionally been deference by the Attorney General to the legal opinion of the Solicitor General.[208]

Despite the fact that there is no office of the Director of Public Prosecutions, something very similar has evolved. What in effect exists in New Zealand is an independent prosecution service, in which it is accepted that the Attorney General should play no role. The day-to-day operations of the service, as well as the provision of legal opinions and advice, are the responsibility and largely unhindered domain of the Solicitor General. Although the Attorney General is not prevented from giving directions to the Solicitor General, or required to make public any directions, in practice no such involvement by the Attorney General takes place.[209]

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205. (N.Z.), 40 Vict., c. 71.

206. Edwards, *Attorney General, supra*, note 34 at 390.

207. *Solicitor General ex relatione Cargill* v. *The Corporation of the City of Dunedin* (1875-1876), 1 N.Z. Jur. (N.S.) 1.

208. Edwards, in *Attorney General, supra*, note 34, notes at 393 that the only recorded instances of disagreement between the two office holders are in 1918-1919, when the Attorney General gave instructions to the Crown prosecutors that were contrary to the wishes of the Solicitor General.

209. *Ibid.* at 391-394.

In this case, of course, what protects the independence of the prosecution service is tradition alone. The Solicitor General's office does not exist by statute, and there is no structural independence. This means that the possible danger is not a lack of accountability, but an excess of control. As Edwards has noted:

> Other considerations that bear on the sensitive nature of this relationship, in which the junior partner, as it were, generally exercises *de facto* authority, must include the relative years of experience in office that each of the Law Officers can draw upon, the individual personalities and the strength of commitment that each is prepared to invest in their respective constitutional roles. As often as not the focus for any possible divergence of approach between the Attorney General and the Solicitor General will concern the degree of influence that political considerations should exert on the decision to institute or to terminate criminal proceedings. In interpreting where the balance of public interests should fall it should not occasion too much surprise if the Law Officers, with their different perspectives, should sometimes disagree.[210]

(*ii*) *Independent Canadian Offices*

If new administrative structures are to be established, it is preferable that they fit harmoniously into the Canadian context. It would also be useful to consider some Canadian officials who fill similarly independent roles to a director of public prosecutions. We shall therefore consider briefly some aspects of the arrangements concerning the Auditor General and the Chairman of the Human Rights Commission.

The office of Auditor General is created in the *Auditor General Act*.[211] The Auditor General is appointed by the Governor in Council for a term of ten years, or until age 65, and no re-appointment is possible[212]. The Auditor General can be removed by the Governor in Council, on address of the Senate and the House. No specific grounds for removal are set out, but the Auditor General holds office during "good behaviour".[213]

The Auditor General is paid the salary of a puisne judge of the Supreme Court. Pension benefits are established in accordance with the *Public Service Superannuation Act* or the *Diplomatic Service (Special) Superannuation Act*, at the Auditor General's option.[214]

The staff of the Auditor General's office are appointed under the *Public Service Employment Act*.[215] However, the Auditor General has the powers of appointment of a Public Service Commissioner, and the power of the Treasury Board regarding personnel

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210. *Ibid.* at 393-394.

211. R.S.C. 1985, c. A-17.

212. *Ibid.*, s. 3.

213. *Ibid.*

214. *Ibid.*, s. 4.

215. *Ibid.*, s. 15.

management and employer-employee relations, which provides the department with a measure of independence in staffing.[216]

The Human Rights Commission is established by the *Canadian Human Rights Act*,[217] which calls for from five to eight commissioners to be appointed, including the Chief Commissioner.[218] The Chief Commissioner is appointed by the Governor in Council for a term of up to seven years, with eligibility for reappointment.[219] The Chief Commissioner can be removed by the Governor in Council "on address of the Senate and the House of Commons". Once again, no specific grounds for removal are set out, beyond that the Chief Commissioner holds office during good behaviour.[220]

The salary of the commissioners is set by the Governor in Council,[221] and no provision concerning pensions is made in the statute.

The staff of the Human Rights Commission are appointed under the *Public Service Employment Act*,[222] with no special provisions to guarantee independence being made.

(iii) The Need for Change in Canada

In determining any new system to recommend for Canada, it would be well to recall the principles that were earlier suggested to be important. First, political considerations should normally have no place in individual prosecutorial decisions. Next, in those circumstances in which political considerations in the broad sense do arise, partisan motives, based on the political consequences to the Attorney General or the government of the day, must not prevail. One method of trying to achieve this is through the independence of the Attorney General from Cabinet, but what is most important is a clear understanding of, and adherence to, the principle of non-partisanship by the decision-maker.

Further, the distinction between partisan and non-partisan political considerations cannot always be drawn clearly. In such circumstances, public opinion must act as the arbiter, and the measure of accountability that one has acted not selfishly, but in the public interest.

It is also instructive to note the wide range of models that has been found to operate satisfactorily in other countries. Systems that incorporate an extreme degree of institutional independence, as well as those with virtually no structural independence, both seem to be capable of producing an apparently unbiased prosecution service. It can be argued that what

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216. *Ibid.*, ss. 15(3), 16.

217. R.S.C. 1985, c. H-6.

218. *Ibid.*, s. 26(1).

219. *Ibid.*, ss. 26(3), 26(5).

220. *Ibid.*, s. 26(4).

221. *Ibid.*, s. 30.

222. *Ibid.*, s. 32.

is crucial, therefore, are not the institutional arrangements, but rather adherence to the proper governing principles. As Edwards has stated:

> I am convinced that, no matter how entrenched constitutional safeguards may be, in the final analysis it is the strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of holders of the office of Attorney General, which is of supreme importance. Such qualities are by no means associated exclusively with either the political or non-political nature of the office of Attorney General.[223]

This should not be taken to mean, however, that it makes no difference what system is adopted. Rather it suggests that an important feature of any system is that failure to adhere to these proper principles should come readily to light. This will further enhance the accountability of any parties involved.

(*b*) Recommendations

1. To ensure the independence of the prosecution service from partisan political influences, and reduce potential conflicts of interest within the Office of the Attorney General, a new office should be created, entitled the Director of Public Prosecutions. The Director should be in charge of the Crown Prosecution Service, and should report directly to the Attorney General.

2. The Director of Public Prosecutions should not be a civil-service appointment. The Director should be appointed by the Governor in Council, and chosen from candidates recommended by an independent committee.

3. The Director should be appointed for a term of ten years, and should be eligible to be reappointed for one further term.

4. The Director should be removable before the expiry of a term. The grounds for possible removal should be misbehaviour, physical or mental incapacity, incompetence, conflict of interest, and refusal to follow formal written directives of the Attorney General.

5. The Director should only be removable by a vote of the House of Commons, on the motion of the Attorney General, following a hearing before a Parliamentary committee.

6. The Director should be paid the same salary and receive the same pension benefits as a judge of the Federal Court of Canada.

7. The Attorney General should have the power to issue general guidelines, and specific directives concerning individual cases, to the Director. Any such guidelines or

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223. *Attorney General, supra*, note 34 at 67.

directives must be in writing, and must be published in the *Gazette* and made public in Parliament. If it is necessary in the interests of justice, the Attorney General may postpone making public a directive in an individual case until the case concerned has been disposed of.

8. The Director should have the power to issue general guidelines, and specific directives concerning individual cases, to Crown prosecutors. Any general guidelines must be in writing, and must be published in an annual report by the Director to Parliament.

9. The Director should have all of the criminal-law-related powers of the Attorney General, including any powers given to the Attorney General personally. The Attorney General should also retain these powers.

10. The budget for the Office of the Director of Public Prosecutions should be included as a line item within the budget of the Attorney General. Control over the funds allocated to the office should rest with the Director, not with the Attorney General.

Commentary

We propose that there should be created in Canada an office of Director of Public Prosecutions, akin to the office of Director of Public Prosecutions in the other jurisdictions we have surveyed. We considered recommending the creation of a Director of Public Litigation, to have charge of all government litigation, both in the criminal and civil spheres. We have chosen, however, to limit our recommendations to the field of prosecutions; proposing new arrangements for the handling of the government's civil-litigation concerns lies outside the scope of this paper. Nonetheless, we do feel that consideration should be given to similar arrangements to include all litigation to be handled by the reconstituted Attorney General's office.

In general, we favour the model of the Commonwealth of Australia, although we see benefits to be gained from salary and tenure provisions similar to those in the Australian state of Victoria, and appointment and removal provisions similar to those in Ireland. In addition, we do not wish to depart too dramatically from arrangements for similar Canadian offices.

The doctrine of the independence of the Attorney General from Cabinet is based on the assumption that the Attorney General alone would find it easier to set aside partisan political motives than would Cabinet as a whole. We suggest that a tenured professional with no personal interest in the fortunes of the party in power will find it correspondingly easier to ignore such considerations.

Several advantages will flow from the creation of this office. Primarily, as noted, the existence of an office of Director of Public Prosecutions should increase the actual

independence, and the public perception of the independence, of Crown counsel. In addition, removing direct control over prosecutions from the Attorney General will help create a division of responsibilities which lessens the apparent conflict which now exists when a single minister, exercising the dual roles of Attorney General and Minister of Justice, acts as both the legal adviser to the government and the head of the government's litigation team.[224] Further, placing control in the hands of a person with security of tenure, who will not change as each government does, will provide greater continuity to the prosecution service.

The Director, who will be a lawyer, will have charge of the criminal prosecution service, and report directly to the Attorney General. The Director will not be a civil servant, but rather should be appointed by the Governor in Council. With regard to appointments, we propose adopting the approach of the Republic of Ireland, which is similar to the manner in which judicial appointments are made in Canada.[225]

We recommend that a special committee should be created to recommend to the Governor in Council appropriate candidates for the post of Director. The power of appointment will remain with the Governor in Council, but they will select from a short list of candidates recommended by the committee. We are not proposing at this time the precise candidates for the committee; however, we envision that it should be similar in make-up to the Irish model, which consists of the Chief Justice of the Supreme Court, the Chairman of the General Council of the Bar of Ireland, the President of the Incorporated Law Society, the Secretary to the Government, and the Senior Legal Assistant in the Office of the Attorney General.[226]

The term of office must be appropriate. We favour a fixed term, as in the Commonwealth of Australia, rather than leaving the term unspecified, or to be set with each new Director. However, if the term is too short, and reappointment is not allowed, then no advantages are gained through continuity of administration. Similarly, if reappointment is possible, too short a term may create the perception that a Director must please the government of the day, particularly shortly before the term expires, in order to retain the job. On the other hand, too long a term — appointment for life, like a judge, or as in the state of Victoria, for example — will tend to make the Director less accountable.

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224. See the earlier discussion of this issue at 35 in "Dividing the Offices of Minister of Justice and Attorney General".

225. Recent reforms introduced by the federal Minister of Justice require that candidates for judicial appointments first be assessed as "qualified" or "not qualified" by a committee in the province in which the appointment is to be effective. The committee consists of a nominee of the provincial or territorial law society, a nominee of the provincial or territorial branch of the Canadian Bar Association, a puisne judge of a federally appointed court, a nominee of the provincial Attorney General or territorial Minister of Justice, and a nominee of the federal Minister of Justice.

226. *Prosecution of Offences Act, 1974*, *supra*, note 176, s. 2(7)(a)(i).

We propose that the term of office be ten years, and that the Director be eligible for reappointment to a second term. We do not believe that the benefits from continuity of administration justify continuing any one person in the job beyond twenty years.

Because reappointment will be possible, it is necessary to take steps limiting any incentive for the Director to act, or be perceived as acting, to please the government toward the end of term. In part, this can be achieved through the salary and pension provisions that are made.

With regard to salary, we propose adopting an approach similar to the Australian state of Victoria, and to the present Canadian arrangements for the Auditor General. Rather than leaving the salary to be set by the government, or negotiated with each incumbent, the Director will be paid the same salary as a judge of the Federal Court. The advantages of this approach have been pointed out by a Director of Public Prosecutions in Victoria, where the Director is paid the salary of a Supreme Court judge:

> The creation of independence, both in fact and in appearance, has been achieved by according the Director of Public Prosecutions the status of a Supreme Court Judge. Apart from the inviolability of tenure a further advantage accruing from this situation is that any subsequent appointment of a Director as a Judge of the Supreme Court of Victoria involves a lateral transfer of duties and interests thus effectively nullifying any temptation to use the position of Director as a stepping stone in a career dependent for advancement upon future Government approval. A tangential benefit of investing the Office with judicial prestige is that the decisions of a Director are more readily accepted by the community.[227]

We would further adopt that approach by providing the Director with the same pension entitlement as a judge of the Federal Court. Providing this guarantee to the Director will make the incumbent less dependent on reappointment, and therefore more able to act independently.[228] The fact that such pension benefits are available is from the point of view of the government, and cost efficiency, a factor which favours keeping an incumbent in office.

These various guarantees of independence will be undermined, of course, if removal of a Director prior to the completion of a term is easily arranged. If removal is too easy, the Director may have, or at least be perceived to have, a motivation to please the government of the day, and therefore be insufficiently independent. Of course, not to allow for the

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227. J. Coldrey, in a paper presented at a conference on reform of the criminal law, held at the Inns of Court, London, July 1987, and quoted in Royal Commission on the Donald Marshall, Jr., Prosecution, *supra*, note 165 at 47.

228. Some adjustment of the pension provisions must obviously be made to take into account that the Director is only expected to serve a particular term, rather than being appointed until retirement. Further, in certain cases, different pension arrangements might be preferable from the point of the view of the Director. For example, a Director might have been working within the public service, and so might prefer to remain under the *Public Service Superannuation Act*. Since our purpose is to provide favourable pension benefits to the Director, we suggest that the Director should be able to opt for a plan different from what we have proposed.

premature removal of a Director would make the Director virtually unaccountable. This would violate our principle that those exercising power must do so within defined limits.

Consequently, we recommend that the Director should be removable; however, we do not favour allowing removal simply by the Governor in Council acting on its own. Instead, we propose that the Director be removable by a vote of the House of Commons, on the motion of the Attorney General. Requiring that the motion be made by the Attorney General means that the Director is not directly, personally, accountable to Parliament. Rather, the Director is accountable to the Attorney General. However, requiring a vote of the House for removal of the Director enhances the accountability of the government in making such a decision. Although realistically the government, with its majority in the House, will be able to have the motion passed, nonetheless the opportunity for public scrutiny and parliamentary debate on the issue will act to make the government more accountable for the decision.

In addition, we propose that the Director only be removable on certain specified grounds, and only after a hearing before a parliamentary committee, most appropriately the House of Commons Standing Committee on Justice and the Solicitor General.[229] We propose misbehaviour, physical or mental incapacity, incompetence, conflict of interest, and refusal to follow formal written directives of the Attorney General as grounds for removal. These grounds are largely adopted from those in the Commonwealth of Australia, though in our scheme, removal would not necessarily follow from any of them; in each case, it would only be a possibility.

We propose that the Attorney General should have the ability to give instructions to the Director, in the form of both general guidelines, and directives relating to particular cases. We will recommend in this paper, for example, that general guidelines should be established and published concerning the factors to consider in determining whether to recommend initiating charges, or when to permanently discontinue a prosecution. Further, we have recommended that the Attorney General should have the power to permanently discontinue any prosecution, and so could instruct the Director to do so. However, any such instructions must be in writing, and must be both published in the *Gazette*, and presented to the House of Commons.[230]

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229. Removal of a Director will therefore be similar to the present Canadian provisions for removal of a judge. The Governor in Council can remove a judge based on a report of the Canadian Judicial Council. Having done so, the Governor in Council must then report the action to Parliament within 15 days, though no vote of the House is required: *Judges Act*, R.S.C. 1985, c. J-1, ss. 63-68.

230. The Commission has noted in *Criminal Procedure: Control of the Process*, *supra*, note 111, at 51-52 that prosecutorial guidelines would be of interest to the public, as well as serving to make the Attorney General accountable for the administration of Criminal law. The Commission also proposed a tentative list of matters where the structuring of Crown discretion would be appropriate, including a policy concerning successive or multiple prosecutions, wording of charges, and withdrawal of charges. In *Control of the Process*, we proposed that this structuring should be done by statutory rules. We now feel, however, that guidelines issued by the Attorney General or the Director will be more appropriate.

The Attorney General's ability to exercise this form of control will make the Director accountable to the Attorney General. In addition, it will make the Attorney General accountable to the House, either for directives given, or the failure to give directives when they would have been appropriate.[231] Further, the obligation to publish and present to the House both directives and guidelines will guarantee that involvement by the Attorney General in individual prosecutions will come to public attention. This will provide a measure of accountability concerning whether partisan political considerations have motivated the involvement.

Although we feel that accountability by the Attorney General justifies making public any directives given in particular cases, we recognize that in some circumstances, the nature of the case may be such that it would be unwise or counter-productive for those directives to be made public immediately. In matters concerning national security, for example, or in cases where investigations are still continuing without the knowledge of a potential accused, it could be contrary to the interests of justice for any directives given to be made public immediately. Therefore we have allowed for a power on the part of the Attorney General to postpone making the directives public, where this is necessary in the interests of justice.

It is also appropriate for the Director to be able to give specific directives to individual Crown prosecutors. It is not anticipated that the Director would, or indeed could, exercise control over the day-to-day decision-making involved in the prosecution service. At the same time, if the Attorney General is to be able to exercise this type of control when deemed appropriate, then the Director needs the ability to become involved in individual cases.

In addition, it will be appropriate for the Director to have the same ability as the Attorney General to issue guidelines concerning various topics.

One difference exists with regard to the publication requirements imposed on the Director and the Attorney General: specific directives of the Director need not be published. We recommend this because, although the Director will not normally be closely involved in individual prosecutions, nonetheless such involvement is possible and not undesirable. We therefore do not require that all specific directives from the Director be in writing and published. Any directives which are passed on by the Director from the Attorney General, of course, will be published due to the requirements imposed on the Attorney General.

We also feel that the Director should have any extraordinary powers possessed by the Attorney General that are directly related to the prosecution of offences, including those powers designated as available only to the Attorney General personally. Under our proposals, the powers of the Attorney General will include, for example, the ability to require a trial by jury, to select the forum of trial, to discontinue proceedings and, within some limits, to prefer charges. In addition, although we recommend a change in this regard,[232] at present the Attorney General's consent is required prior to a prosecution for some charges. All of

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231. It must be acknowledged, however, that this proposal does nothing with regard to the *ex post facto* nature of the accountability.

232. See "Consent to Prosecutions" below at 67.

these powers, including the ability to give consent if it is retained, should be available to the Director as much as to the Attorney General. This provision is necessary if the Director is properly to administer the prosecution service without the regular involvement of the Attorney General. Those powers should also be retained by the Attorney General, who remains ultimately responsible for the prosecution service.

We suggest that the budget for the office of the Director of Public Prosecutions should still be a part of the budget for the Attorney General's department, as the Crown prosecution service currently is. The Attorney General remains ultimately responsible for prosecutions, and so can represent the service in Cabinet when allocations of funds are made. We propose that control over the funds when they have been allocated should be an internal matter within the office of the Director. In part, this is to emphasize the independence of that service. In addition, having control of the funds divided in this way will tend to minimize the budgetary conflicts that can arise from the different responsibilities in the Attorney General's department.[233]

In a similar vein, although we have not made a formal recommendation in this regard, we believe it would be desirable if the office of the Director of Public Prosecutions were physically separate from the Attorney General's department. The potential interaction between the policy-making and prosecution functions would thereby be reduced, and the appearance of independence would be enhanced. This arrangement would therefore result in benefits to both aspects.[234]

B. The Department of the Solicitor General

1. General

(a) Overview

The Solicitor General was originally in Canada, as in England, simply the deputy to the Attorney General.[235] As a result, the *Criminal Code* definition of "Attorney General" includes, for prosecutions conducted by a province, the Solicitor General. However, there has been a fundamental change in the nature of the Solicitor General's office, with the result that the title is no longer accurate, and the Solicitor General's inclusion in the *Criminal Code* becomes problematic.

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233. *E.g.*, when the same department is responsible both for the prosecution service and legal aid, and must allocate funds between the two. See the earlier discussion of this point in "Dividing the Offices of Minister of Justice and Attorney General" at 35.

234. These same benefits have been observed in the Commonwealth of Australia, where the Director of Public Prosecutions has observed: "Independence is of prime importance. So is the appearance of independence. Thus the Central Office of the D.P.P. has been established in premises close to but physically separate from the Attorney General's Department" (quoted in Royal Commission on the Donald Marshall, Jr., Prosecution, *supra*, note 165, at 62).

235. *An Act to make provision for the appointment of a solicitor general*, *supra*, note 24, s. 1. See the discussion in "Historical Sketch" at 2.

Federally, the Solicitor General has responsibility for the RCMP, and for prisons and penitentiaries. In addition, the Solicitor General has other responsibilities connected with the administration of criminal justice.

The federal Department of the Solicitor General consists of four agencies and a secretariat. The agencies are the Royal Canadian Mounted Police, the National Parole Board, Correctional Services, and the Canadian Security Intelligence Service (CSIS). Each agency reports independently to the Solicitor General. In addition, the RCMP External Review Committee, the RCMP Public Complaints Commission, and the Correctional Investigator report to the Solicitor General.

The secretariat's role is to develop and co-ordinate the policy of the minister. It is headed by the Deputy Solicitor General, and is divided into three branches: Police and Security, Planning and Management, and Corrections. There is also a Communications Group. In addition, the Inspector General of CSIS reports to the Deputy Solicitor General. The secretariat does not administer the other agencies reporting to the Solicitor General, but does provide them with some services.[236]

Six provinces have separated control of policing functions from the Attorney General. In Nova Scotia, New Brunswick, Ontario, Alberta, and British Columbia, the minister responsible for these matters is the Solicitor General; in Quebec it is the Minister of Public Security.

The major advantage to a division of this sort is the administrative separation of police and prosecution functions; the head of the prosecution service no longer also controls the police. However, this advantage is lost when the *Criminal Code* includes "Solicitor General" as part of the definition of "Attorney General". Such an inclusion merely serves to continue the potential conflict otherwise resolved by transferring policing and corrections away from the Attorney General.

(*b*) Recommendations

11. Ministerial responsibility for the police should not be the responsibility of the Attorney General. Policing should continue to be the responsibility of a separate Minister.

12. The Department of the Solicitor General should be renamed the Department of Police and Corrections.

13. Section 2 of the present *Criminal Code*, which defines the Attorney General as including the Solicitor General, should be amended to delete reference to the Solicitor General, and reference to the Minister of Police and Corrections should not be added.

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236. Department of the Solicitor General, *Annual Report 1987-88* (Ottawa: Supply and Services Canada, 1989).

14. The Attorney General and the public prosecutor should have the power to require the police to make further inquiries once a prosecution has been launched to assist in the proper presentation of the prosecution's case and discovery of evidence tending to establish the guilt or innocence of the accused.

Commentary

At present at the federal level, policing is entrusted to the Solicitor General. We feel that this supervision of the police by a department other than that of the Attorney General is desirable, to avoid the appearance of conflict and actual conflict which might otherwise arise.

In Canada today, the Solicitor General is not a solicitor, and is not the deputy to the Attorney General. The use of this historical title is at best unhelpful and at worst misleading. More accurately to reflect the nature of the minister and the Department, we suggest renaming both the position and the department.

In addition, no useful purpose is served by the inclusion of "Solicitor General" in the *Criminal Code* definition of "Attorney General". Some specific powers under the *Criminal Code* will involve the Solicitor General: in our proposed *Code of Criminal Procedure*, for example, certain steps in applying for wiretap authorizations will require the Solicitor General to act, as the minister having responsibility for the police. However, we suggest that the Solicitor General should not be able to exercise the powers generally given to the Attorney General under the *Code*. To leave this power in the *Code* would simply be to retain the potential conflict that removing control of the police from the Attorney General was designed to prevent. Consequently we believe that this definition should delete any reference to the Solicitor General, whether under the old name or a new one.

There is one limited area in which the administrative separation of policing and prosecution functions should give way to a certain extent. The prosecutor has a duty to the court to see to it that all relevant evidence is uncovered and presented to the trier of fact. In addition, the prosecutor has an ethical duty to the defence to make full disclosure, including the disclosure of evidence tending to exculpate the accused. However, the prosecutor is not in charge of the investigation of the offence. In order to be able to fulfill the duties associated with the office, therefore, the prosecution must be able to insist that it receives all relevant information, which may require directing the police to carry out further inquiries. It must be noted that this control is very limited, and will not allow, for example, the prosecutor to prevent the police from carrying out whatever other investigations they choose.

2. Prosecution by Police Officers

(*a*) Overview

One particular difficulty arises when control of the police does not rest with the Attorney General. In some remote parts of some provinces, police officers act as prosecutors,

particularly in connection with summary-conviction prosecutions. However, for a police officer to act as a prosecutor, the officer must have been appointed or authorized by the Attorney General under section 785 of the *Criminal Code*.[237] The appointment cannot be delegated to the senior officers of the force.

The constitutional validity of some police prosecutions has been upheld in Newfoundland,[238] and on the whole there have been few allegations of actual unfairness. At the same time, having prosecutions conducted by the police is undesirable. We have discussed the desirability of separating the police and prosecutorial functions, and shall consider the issue in more depth below in section III.C.1, "Crown Prosecutors and the Police".

(*b*) Recommendation

15. All public prosecutions should be conducted by a lawyer responsible to, and under the supervision of, the Attorney General.

Commentary

The public prosecutor is a lawyer, is subject to professional discipline for any breach of the ethical code of lawyers, and must act fairly.[239] Police prosecutors are not subject to these constraints, and are not independent of the investigative process.

The Philips Commission, which investigated criminal procedure in England and Wales, found no evidence that police investigators, who until recently controlled most exercises of prosecutorial discretion, were incapable of making a dispassionate decision regarding prosecution. Nevertheless for reasons which commend themselves to us, the commission advocated a clear division of responsibility between investigation and prosecution:

> We consider that there should be no further delay in establishing a prosecuting solicitor service to cover every police force. This should, in our view, be structured in such a way as both to recognise the importance of independent legal expertise in the decision to prosecute and to make the conduct of prosecution the responsibility of someone who is both legally qualified and is not identified with the investigative process (we are here concerned with fairness); to rationalise the present variety of organisational and administrative arrangements (in order to improve efficiency); to achieve better accountability locally for the prosecution service while making it subject to certain national controls (fairness and openness are both involved here); and to secure change with the minimum of upheaval and at the lowest cost possible.[240]

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237. *Re R. and Hart* (1986), 26 C.C.C. (3d) 438 (Nfld. C.A.).

238. *Ibid.*, and *R.* v. *White* (1988), 41 C.C.C. (3d) 236 (Nfld. C.A.).

239. See *Boucher* v. *R.*, *supra*, note 107.

240. Royal Commission on Criminal Procedure, *Report*, Cmnd 8092 (London: HMSO, 1981) at 144-145 (Philips Commission).

In the United States there is an even stronger commitment to all prosecutions being conducted by the public prosecutor, and private prosecutions are discouraged. It is argued in the commentary to the American Bar Association's *Standards for Criminal Justice* that:

> The participation of a responsible public officer in the decision to prosecute and in the prosecution of the charge gives greater assurance that the rights of the accused will be respected. Almost all prosecutions of a serious nature in this country now involve a professional prosecutor. The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions that are not consonant with our traditions of justice.[241]

In our view, a professional prosecutor should have carriage of all state-initiated criminal cases. In many jurisdictions, prosecutors, judges, and defence counsel are transported to remote areas. Such programs should be encouraged.

We recognize that local conditions may create difficulties in eliminating the police prosecutor and involve some costs, but we believe these problems are not insurmountable. It is now time, we believe, that all public prosecutions under the *Criminal Code* be conducted by lawyers responsible to the Attorney General.

III. The Powers of the Attorney General

A. Introduction

We now turn to a discussion of the specific powers of the Attorney General and Crown prosecutors. For the moment we will simply catalogue those powers. A more in-depth discussion of each power will follow this list.

By virtue of the definitions of "prosecutor" in sections 2 and 785 of the *Criminal Code*, any powers given to the prosecutor in the *Criminal Code* belong to the federal or provincial Attorney General, or the Attorney General's counsel, unless a decision has been made not to intervene in the prosecution.[242] The definition of "Attorney General" in section 2 of the *Criminal Code*, as it applies to *Criminal Code* prosecutions, includes the lawful deputy of the Attorney General, and the Solicitor General. With respect to any other federal prosecutions, or prosecutions in the Yukon or Northwest Territories, section 2 of the

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241. ABA, 2d ed. (Boston: Little, Brown and Company, 1980) at 3.12. However it should be noted that the American prosecutorial system is very different from that in Canada. The senior prosecutor in the American system is the district attorney, who is elected. The district attorney, or the deputies within the office, are often consulted by the police from the early stages of serious investigations, and take an active role in directing investigations. As well, as an elected official, the district attorney is accountable to the voters, not to a more senior elected official such as the Attorney General.

242. There is an interesting review of the Attorney General's and of the Crown prosecutor's functions and powers in *Le Rapport du Comité d'étude sur la rémunération des substituts du Procureur Général du Québec* (Québec: Ministère de la Justice, 1985) (Chairman: Alfred Rouleau).

Criminal Code states that "Attorney General" means "the Attorney General of Canada and includes his lawful deputy".

The effect of this is that most prosecutions are conducted by the provincial Attorneys General. Given this fact, it is to be expected that practice will vary from province to province, notwithstanding that the powers exercised come from the federal *Criminal Code* and a common-law heritage with roots in the prosecution system of Great Britain. It is not the purpose of this study to review these differences but they must be borne in mind. A practice that makes great sense in large centres may be both impracticable and unnecessary in many smaller towns.[243]

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243. A critical constitutional question is the limit of federal power under s. 91(27) of the *Constitution Act, 1867* (the criminal-law power) to control the exercise of powers by provincial Attorneys General. It seems relatively clear that Parliament can confer various rights and duties on the provincial Attorney General and public prosecutors, if they undertake the prosecution of federal offences, including offences under the *Criminal Code*: see *Attorney General of Canada* v. *Canadian National Transportation, Ltd.*; *Attorney General of Canada* v. *Canadian Pacific Transport Co.*, [1983] 2 S.C.R. 206. Such legislation is either a matter of criminal procedure or necessarily incidental to it.

A more troublesome question is whether Parliament can relieve the provincial Attorney General of responsibility for criminal prosecutions either by giving those functions to a federally appointed official (such as the federal Attorney General) or by giving that officer power to intervene in any criminal prosecutions. In 1969, amendments to the *Criminal Code* definition of "Attorney General" had the effect of dividing responsibility for prosecutions between the provincial and federal Attorneys General along the lines of *Criminal Code* and non-*Criminal Code* offences respectively. Although provincial prosecutors could prosecute non-*Criminal Code* offences, this appeared to be as a result of sufferance by the federal Attorney General if the proceedings were "instituted at the instance of the Government". There were several challenges to the constitutionality of this provision on the premise that prosecutorial authority, even of federal enactments, was a provincial matter and that it was not open to Parliament to give paramountcy to federal officials over those prosecutions: see *R.* v. *Hauser, supra*, note 71; *R.* v. *Pontbriand* (1978), 39 C.C.C. (2d) 145 (Que. S.C.); and *R.* v. *Hoffmann-La Roche Ltd.* (1980), 53 C.C.C. (2d) 1 (Ont. H.C.), aff'd (1981) 62 C.C.C. (2d) 118.

This issue is particularly difficult where the federal offence, although not in the *Criminal Code*, is a true criminal offence or depended for its constitutional validity on the criminal-law power. If Parliament can give paramountcy in those cases to its officials, there would be no constitutional impediment to doing so in *Criminal Code* matters. The fact that a crime is in the *Code*, as opposed to some other enactment, is sometimes a matter of mere convenience rather than the application of constitutional principles. Unfortunately a series of cases in the Supreme Court of Canada has not clearly settled this question. It seems safe to say, however, that the province does not have exclusive jurisdiction over prosecution of federal, including *Criminal Code*, offences: *Attorney General of Canada* v. *Canadian National Transport, Ltd.*; *Attorney General of Canada* v. *Canadian Pacific Transport Co.* It follows logically in view of the doctrine of paramountcy that Parliament could give federal officials primary responsibility for prosecutions.

However, we do not suggest that such action would be desirable on the part of the federal government. Although we do not recommend that federal involvement in prosecutions should be lessened in any way, we do accept the statement of principle by Dickson J., speaking in dissent in *R.* v. *Hauser*, as showing that an extension of federal involvement at the expense of the provinces is undesirable:

> It would seem to have been the view of the Fathers of Confederation that the countless decisions to be made in the course of administering criminal justice could best be made at the local level. Such decisions were made locally at the time of Confederation, and thereafter until 1969, by provincial Attorneys General and their agents in discharge of their significant constitutional responsibility. There is, I think, a certain unity and cohesion between the three aspects of law enforcement, namely, investigation, policing, and prosecution, which would be imperilled if the investigatory function were discharged at one level of government and the prosecutorial function at another level. (*supra*, note 71 at 1032).

Despite the major prosecutorial role played by the provinces, the federal Attorney General has a significant role to play, being responsible for prosecutions under the *Narcotic Control Act*,[244] the *Food and Drugs Act*,[245] and the *Income Tax Act*,[246] among other Acts.

Whichever level of government has responsibility, the corresponding Attorney General has the right to intervene in any prosecution, including a private one, and continue the prosecution.[247] A few crimes require the prosecutor to obtain the prior consent of the Attorney General before proceeding, but there does not appear to be any very clear principle which has guided Parliament in determining when this consent is needed.[248]

The principal means employed by the Attorney General to supervise private prosecutions is intervention to halt a proceeding. Any criminal proceeding can be stayed by the Attorney General, or counsel so instructed, "at any time after proceedings in relation to an accused or a defendant are commenced".[249] The entry of a stay gives the right to recommence proceedings within a period of one year, without a new charge being laid.

The Attorney General, or counsel on behalf of the Attorney General, has a common-law right to withdraw charges.[250] The present position appears to be that prior to plea this power may be exercised as of right,[251] and after plea with the consent of the trial judge.[252]

The Attorney General also has the power to bypass the usual procedure in indictable matters and directly indict the accused without the accused having the benefit of a preliminary inquiry.[253] As well even where the accused is discharged at the preliminary inquiry, the Attorney General can prefer an indictment or consent to a new information being laid.[254] Under section 568 the Attorney General can require that an accused be tried by a

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244. R.S.C. 1985, c. N-1.

245. R.S.C. 1985, c. F-27.

246. S.C. 1970-71-72, c. 63.

247. *Re Dowson and R.*, *supra*, note 71; *R.* v. *Hauser*, *supra*, note 71 at 1011-1012, *per* Dickson J. dissenting on other grounds.

248. See the partial list of offences requiring consent, *supra*, note 79.

249. *Criminal Code*, s. 579, as amended by S.C. 1985, c. 19, s. 117.

250. See S. Cohen, *Due Process of Law* (Toronto: Carswell, 1977) at 150-166 for a discussion of the distinction between a stay and a withdrawal, and also *R.* v. *Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.). However, consider the proviso in *R.* v. *Dick*, [1969] 1 C.C.C. 147 at 156 (Ont. H.C.) that this right to withdraw existed "in the absence of special circumstances".

251. For a discussion of cases about the Crown's right to withdraw charges see U. Gautier "The Power of the Crown to Reinstitute Proceedings after the Withdrawal or Dismissal of Charges" (1979-1980) 22 C.L.Q. 463, and J.-C. Hébert, "Le retrait d'une inculpation" (1984) 39 C.R. (3d) 180.

252. *Re Blasko and R.*, [1975] 29 C.C.C. (2d) 321 (Ont. H.C.).

253. *Criminal Code*, s. 577.

254. *Ibid.*

court composed of a judge and jury notwithstanding an election for trial by provincial court judge or judge without jury.[255]

When conducting a prosecution, the Attorney General, or the public prosecutor, has a broad range of additional powers. As explained in the Commission's Working Paper on *Classification of Offences*,[256] there are some sixty-five offences which may be prosecuted by way of summary conviction or by indictment. These offences are sometimes referred to as "hybrid offences". The Attorney General, or counsel on behalf of the Attorney General, has the discretion to determine the manner in which the offence is prosecuted.[257] The prosecutor's consent is required at certain stages of the proceedings, for example, to waive the hearing of evidence at the preliminary inquiry,[258] to adjourn the proceedings in provincial court for more than eight days,[259] and to elect and re-elect certain modes of trial.[260] The prosecutor can prefer an indictment that contains offences which were disclosed by the evidence at the preliminary inquiry, although there has been no order to stand trial on those charges.[261]

The Attorney General or counsel on behalf of the Attorney General is also entitled to select the forum of trial if the accused, having elected trial other than provincial court, need not be tried in the superior court of criminal jurisdiction.[262] The consent of the Attorney General or counsel is required to transfer charges from one jurisdiction to another.[263] Like the accused, the prosecutor can apply for a change of venue.[264]

The prosecutor is entitled to make submissions to the judge and the trier of fact; to exercise certain rights in the jury selection process, some of which are different from those

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255. This section was recently challenged under the *Charter*, but was upheld: *Re Hanneson and R.* (1987), 31 C.C.C. (3d) 560 (Ont. H.C.).

256. LRC, *Classification of Offences*, Working Paper 54 (Ottawa: The Commission, 1986) at 30.

257. *Smythe* v. *R.*, *supra*, note 141; *R.* v. *Century 21 Ramos Realty Inc.* (1987), 32 C.C.C. (3d) 353 (Ont. C.A.). The Commission has recommended that "hybrid" offences (which allow the Crown to choose whether to proceed summarily or by indictment) be abolished: see *Classification of Offences*, *supra*, note 256, Recommendation 10 at 33.

258. *Criminal Code*, s. 549.

259. *Ibid.*, s. 537.

260. *Ibid.*, s. 561.

261. *Ibid.*, s. 574.

262. *R.* v. *Beatteay* (1979), 50 C.C.C. (2d) 400 (Ont. H.C.).

263. *Criminal Code*, ss. 478 and 479.

264. *Ibid.*, s. 599.

of the accused;[265] to make submissions at the time of sentencing; and to take part in any meeting with the judge or any pre-trial discussions.[266]

As a function of the power to stay proceedings and withdraw charges, the Attorney General and the public prosecutors have wide powers as to selection of accused and charges. They can offer total or limited immunity from prosecution to witnesses for their cooperation.[267] They can offer their assistance in the courts to such persons by recommending lenient sentences.[268]

Since there are limited formal discovery mechanisms in the *Criminal Code*, except for the availability of the preliminary inquiry in the case of some indictable offences (i.e. where the trial is not to take place in provincial court), the prosecutor has wide powers to control discovery of the Crown's case by the accused.[269] As well the prosecutor has a discretion as to the mode of conducting the case, and is free, for example, within some limits, to choose to call only some witnesses.[270] Crown counsel is free to advance a particular theory, even the defence of insanity without the consent of the accused.[271]

B. Consent to Prosecutions

1. Overview

Certain crimes cannot be prosecuted without the prior personal consent of the appropriate Attorney General. The decision of the Attorney General to grant or withhold consent is not reviewable by the courts.[272] The offences for which this consent is required, including bribery of a judicial officer, public nudity, use of an unseaworthy vessel, and fraudulent concealment of title documents, have no obvious unifying factor.

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265. *Ibid.*, s. 634. The Commission has recommended in *The Jury*, Report 16 (Ottawa: Supply and Services Canada, 1982) that the right to make challenges to the jury be made equal between the Crown and the accused: see proposed legislation (sections 5 to 8).

266. *Criminal Code*, s 625.1.

267. *Palmer* v. *R.*, [1980] 1 S.C.R. 759.

268. *R.* v. *Kirby* (1981), 61 C.C.C. (2d) 544 (Ont. Co. Ct).

269. *R.* v. *Lalonde* (1971), 5 C.C.C. (2d) 168 (Ont. H.C.). This is not an unlimited power, however, and the courts will intervene either by exercise of their common-law jurisdiction or the duty to protect an accused's constitutional right to a fair trial. See, *e.g.*, *R.* v. *Savion and Mizrahi*, *supra*, note 109, and *Re R. and Arviv*, *supra*, note 105.

270. *Lemay* v. *The King*, [1952] 1 S.C.R. 232.

271. See *e.g. R.* v. *Swain* (1986), 53 O.R. (2d) 609 (C.A.). However the Supreme Court has granted leave in this case, apparently to consider the Crown's power to raise the insanity defence as well as other issues concerning s. 614 of the *Criminal Code*.

272. *Re Warren and R.* (1981), 61 C.C.C. (2d) 65 (Ont. H.C.).

The withholding of consent is a decision taken in private, and does not have to be accompanied by reasons. Although there have been a few exceptional cases where a persistent litigant has drawn the attention of the media or a provincial legislature, on most occasions the public will be unaware of a request for permission to prosecute, or of its denial.

As a result, for those offences requiring consent, the Attorney General can prevent prosecutions from occurring without the need to intervene and enter a stay. Further, because the decision is not made in a public forum, the Attorney General is less accountable.

Some of our consultants have suggested that there is a limited place for requiring the Attorney General's consent, in cases with an extraterritorial element, or involving relations between states. For example, they have suggested, offences involving war crimes or the *Official Secrets Act* might appropriately require the Attorney General's consent prior to prosecution.

2. Recommendations

16. The personal consent of the Attorney General should not be required prior to the prosecution of any crime.

17. The Attorney General and the public prosecutor should continue to have the power to take over any private prosecution.

Commentary

In *Private Prosecutions*[273] the Commission stated its position on the consent requirement:

> It is difficult to accept as necessary the *prior* consent of the Attorney General to the initiation of a prosecution, given that he has the power in all cases to intervene *after* charges have been laid in order to direct a stay of proceedings and that this power is exerciseable regardless of whether the proceedings are triable by summary conviction procedure or on indictment.[274]

We recommend that the Attorney General or a public prosecutor should continue to be able to take over any prosecution commenced by a private prosecutor. This is an important aspect of the Attorney General's responsibility for supervising criminal prosecutions. We have not felt it necessary, however, to require that the Attorney General personally authorize the taking over of private prosecutions. There is no such requirement at present, and we are not aware of any difficulties in this regard in the current situation.

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273. *Supra*, note 70.

274. *Ibid.* at 28. However, it should be noted that in that paper, as in this one, the Commission is differing from the position taken on this issue in *Criminal Procedure: Control of the Process*, *supra*, note 111. In that paper we favoured a requirement of the prior consent of the Attorney General in some cases, though we did not indicate for which offences this requirement would be appropriate.

In our later recommendations, we will suggest preserving the Attorney General's ability to discontinue any prosecution. Given that it will therefore be possible to take over any private prosecution, and having taken it over, discontinue it, we do not feel that there is any need for a requirement of prior consent.

The most persuasive justification that can be advanced for requiring the Attorney General's consent prior to the laying of an information is that even the initial laying can be a threat to fundamental rights and liberties, and could amount to an abuse of process. A related argument is that some offence-creating sections may allow prosecution of very trivial cases, or may come close to infringing a protected right or freedom.

We feel that if there is a problem with any particular section of the *Criminal Code*, the solution lies in amending that section, rather than requiring consent prior to prosecution. Similarly we do not feel that the potential threat created simply by laying a charge is sufficient justification for retaining a consent requirement.

The principles of openness and accountability should be paramount. They require that the prevention of a criminal prosecution must be done openly, in a public forum.

We have chosen not to require consent in cases involving extraterritoriality or foreign relations. We recognize that there may be special considerations in such cases affecting whether it is in the public interest to continue a prosecution. However, we would prefer to see these cases dealt with through the Attorney General's ability to discontinue proceedings.

C. Initiation of Charges

1. Crown Prosecutors and the Police

(*a*) Overview

In the particular context of the initiation of prosecutions, the relationship between Crown prosecutors and the police is worthy of note. Although the former are responsible for the conduct of trials once charges have been laid, they have no responsibilities with regard to the laying of those charges. Rather, this is a task that lies primarily with the police.

The power to lay an information is found in section 504 of the *Criminal Code*. Notably, the section states that "*Any one* who, on reasonable grounds, believes that a person has committed an indictable offence" may lay an information before a justice (emphasis added). That is, the police have no particular power to lay an information, but rather have in that regard only the same powers as any other person.

In most provinces, Crown prosecutors, though they must eventually take charge of state-initiated prosecutions, have no prior say over whether an information should be laid, or the form that it should take. The exceptions to this rule are New Brunswick, Quebec and

British Columbia. In each of these provinces, systems are in place requiring the approval of a Crown prosecutor before a charge can be laid.

The *Criminal Code* provisions for laying charges allow anyone who has reasonable grounds to believe that a person has committed an indictable offence to swear an information to that effect before a justice of the peace (s. 504). The justice must accept the information, but then has a discretion, following a hearing which may be *ex parte*, whether to issue process, and if so, whether to proceed by summons or warrant (s. 507). If the justice refuses to issue process then, unless another justice acts on it, the information will simply lie dormant.[275]

In the case of police-initiated charges, the entire procedure appears to be a mere formality. The informant often has no first-hand knowledge, and is swearing the information on the basis of a report prepared by other officers. Indeed, in a recent case the process by which the information was sworn was described as follows:

> The Court determined that for the past two and one-half years part of the informant's duties as a police officer were to swear informations, however, he could not recall receiving instructions, *i.e.* that he should read the whole information. On questioning by [the trial judge] as to whether he had "reasonable and probable grounds to believe and does believe that [the accused]" committed the offence charged, he responded: "... I can't answer that, because if I never read the body of the information I wouldn't know what's contained in it."[276]

The officer also indicated that he had acted in a similar fashion on many previous occasions. The court found this procedure unacceptable, and quashed the information.

The person responsible for determining whether to issue process based on the information is the justice of the peace. Justices of the peace are not usually lawyers, and it is therefore not reasonable to expect them to screen an information for substantive or technical defects. Further, when police officers regularly appear as informants before them, as is the case in the vast majority of prosecutions, there is a natural tendency for justices to accede to police requests.

As a consequence of the routine nature of the process for both police and justices, there is a tendency for the procedures in the *Criminal Code* to become mere formalities. As a result, the protections that these procedures were intended to provide to individual liberty are largely lost. In addition, the resources of the courts can be wasted by the initiation of prosecutions that have little chance of success.

The major advantage to the system in New Brunswick, Quebec and British Columbia, where a Crown prosecutor must approve any charge in advance, is the increased assurance that criminal charges will only be laid where such action is appropriate. Our consultants

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275. *R.* v. *Allen* (1974), 20 C.C.C. (2d) 447 (Ont. C.A.).

276. *Re Kamperman and R.* (1981), 63 C.C.C. (2d) 531 (N.S.S.C.T.D.) at 533.

from these provinces argue that the decision to lay a criminal charge is distinct from the investigation of crime. It is a decision that involves a judgment whether sufficient evidence exists to support a conviction. This decision, they argue, is one most appropriately made by the person trained in this area, the Crown prosecutor. Not every case in which there are reasonable and probable grounds to charge is one that can successfully be prosecuted. It is in the interest both of the individual and of the state to avoid the restrictions on liberty and waste of state resources involved in an unjustified prosecution. In the same vein, a further advantage to such a system is the ability to detect technical errors in the form of charges in advance. When this screening occurs before charges are laid, the time of all parties and the court need not be taken up with objections, amendments or re-laying of charges.

Against this, the major advantage of allowing the police an unrestricted right to lay charges is that it more affirmatively maintains the independence of the various aspects of the judicial system. The investigation of crime should be kept separate from the prosecution of crime, a position that is supported by the recent trend in Canada to remove control of the police from Attorneys General. The need for independence in the control of prosecutions is particularly clear in cases that involve allegations of criminal conduct by police officers. Without a division of authority between investigations and prosecutions, a strong potential for conflict of interest would exist.[277]

The proper role of the prosecutor, for example, shows the advisability of the independence of the two aspects. A prosecutor must not be concerned with winning or losing; rather, the Crown must present fairly all evidence to the court.[278] The Commission has noted of the prosecutor in *Criminal Procedure: Control of the Process* that:

> Though he functions within an adversary system, he is an adversary with a difference. His primary duty *is not to act as the instrument of the police* or to secure convictions by exploiting the opportunities afforded him by the rules of the process.[279]

This responsibility has been contrasted to that of the police, in the context of the police acting as prosecutors. In a dissenting judgment in *R.* v. *Edmunds*, Mr. Justice Gushue stated that:

> The role of the Crown prosecutor is not to obtain a conviction, but to assist the Court in eliciting the truth and he has a duty to protect the rights of the accused as well as those of society. The professional police officer — and this is not a criticism of police officers — is not trained in this way. His object is to secure a conviction.[280]

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277. See, *e.g.*, *Re Johnson and Inglis* (1980), 52 C.C.C. (2d) 385 (Ont. H.C.), where, although the court did not ultimately find a conflict, a private complainant sought the preferment of an indictment against several police officers who had shot her husband.

278. See *Boucher* v. *R.*, *supra*, note 107.

279. *Supra*, note 111 at 25; emphasis added.

280. (1978) 45 C.C.C. (2d) 104 at 116 (Nfld. C.A.). Gushue J. dissented from the decision of the majority that the practice of allowing police to prosecute indictable offences was allowable, suggesting in an *obiter* remark that whether legal or not, the practice is undesirable. On appeal, the Supreme Court of Canada overturned the decision, holding that police officers did not come within the definition of "prosecutor" in the *Code*, even in the case of indictable offences tried before a Magistrate; see *Edmunds* v. *R.*, [1981] 1 S.C.R. 233.

If the Crown is seen as too closely allied with the police, there may be a perception that the responsibility of the Crown is not being upheld.

A further argument for the independence of the two aspects is the role of the police. Their independence provides a valuable safeguard against concerns of improper pressure being brought to bear, particularly when the case involves allegations about employees of the Attorney General or members of the government. The Marshall inquiry in Nova Scotia, for example, has turned up instances of confusion over these roles possibly affecting the laying of charges.[281]

An example of what might be considered the system working as it should is found in charges laid in Ontario against Dr. Henry Morgentaler. Ian Scott, Attorney General of Ontario, noted that while a Supreme Court decision in an earlier prosecution was still pending:

> [T]he Toronto police again charged Dr Morgentaler and his associates with the same offence. There is no doubt that they had reasonable and probable grounds to believe that an offence against the Criminal Code was being committed. But, as has been emphasized, this is not the only decision to be made in deciding whether to proceed to trial. The High Court of Justice in Ontario has held that it would not proceed with any further trial of the accused while their appeal was pending before the Supreme Court of Canada. Given that the facts supporting the charge, and presumably the defence raised, would be virtually identical to the charge upon which the accused were tried and acquitted, it was, in my opinion, in the interests of justice that any further allegations of criminal activity be held in abeyance until the highest court authoritatively ruled on the legality of the impugned conduct. With these factors in mind, the charges laid were immediately stayed.
>
> This example clearly demonstrates the differences in the roles of the attorney general and the police. Before laying the charges, the police consulted the attorney general and his agents, and were advised that any charges that were laid would, in the circumstances, be stayed. Notwithstanding this advice, the police concluded that it was their duty and responsibility to lay the charges that they believed on reasonable and probable grounds were warranted. The attorney general, while acknowledging the role of the police that entitled them to take this action, did what he believed the administration of justice required. To some observers it may have appeared that the right hand did not know what the left was doing. In my view, that difficulty does not offset the importance of the principle of separation.[282]

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281. The *Commissioner's Report* (Royal Commission on the Donald Marshall, Jr., Prosecution, vol. 1, Halifax, the Royal Commission, 1989), notes at p. 232 that "under our system, the policing function - that of investigation and law enforcement - is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice." The report also notes at p. 234 that:

> In Nova Scotia, there clearly has been confusion over the question of the police's unfettered right to lay charges. In the Thornhill [a member of the provincial cabinet] investigation, for example, Deputy Attorney General Gordon Coles strongly believed that he, acting for the Attorney General, had the right to instruct the RCMP not to lay charges. Although the RCMP did not accept the validity of this position, they did acquiesce in the face of the Attorney General's wishes.

282. *Supra*, note 159 at 117-118.

The most desirable system for the laying of charges, therefore, will be one that preserves the independence of the various participants in the criminal justice system, while at the same time ensuring as much as possible that only appropriate charges are laid.

(*b*) Recommendations

18. Police officers should continue to have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment and subject to the Crown's right to terminate the prosecution.

19. Before laying a charge before a justice of the peace, the police officer shall obtain the advice of the public prosecutor concerning the facial and substantive validity of the charge document, and concerning the appropriateness of laying charges. Legislation setting out the duties of the public prosecutor should be amended, if required, to state this duty explicitly.

20. When seeking the advice of the public prosecutor, the police officer shall advise the prosecutor of all the evidence in support of the charge and all the circumstances of the offence, and the prosecutor shall where appropriate advise the police officer either that the evidence is not sufficient to support a conviction for the charge, or that a different charge or no charge would be more appropriate in all the circumstances.

21. Where it is impracticable to have the charge examined by the public prosecutor, or if the public prosecutor advises against proceeding with the charge, the peace officer nevertheless may lay the charge before a justice of the peace. In such cases, the peace officer must provide reasons to the justice of the peace explaining why it was impracticable to have the charge examined, or if applicable, must disclose that the public prosecutor has advised against the laying of the charge.

Commentary

The police are by legislation subject to the supervision of a law officer; however, we feel that this direction should only be exercised at the level of general policy directives. At the level of individual cases, the independence of the police should be respected. In this respect, the supervision of the police by the Solicitor General or other law officer should be similar to the present superintendence of the prosecution service by the Attorney General.

To preserve this independence, we believe that the police should have an unrestricted right to lay charge documents before a justice. We believe that this ability is an important safeguard of the independence of the police, and that the importance of the separation of functions outweighs any benefits to be gained from depriving the police of this ability.

Our proposal, therefore, only requires the police to seek advice on a charge document from a prosecutor before laying it in front of a justice. We do not consider this to be

inconsistent with the independence of the police, because they will retain the right to lay charges, whether the Crown prosecutor agrees that charges should be laid or not.[283]

Requiring the police to seek this advice will have the main benefits that flow from requiring advance Crown approval. It will provide an opportunity to avoid technical errors in the form of the charge. It will also allow the prosecutor to advise the police in advance whether the evidence will support any or all proposed charges, and to offer an opinion on whether laying charges is appropriate at all. None of this advice will be binding on the police, but where it is useful, we presume that it will be accepted.

Indeed, our expectation is that only in unusual circumstances will a police officer decide to lay a charge despite the contrary advice of a prosecutor. In the normal course of events, we expect police officers to recognize the superior expertise of prosecutors with regard to the sufficiency of evidence and other relevant factors. The police are liable to civil suits for malicious prosecution for their charging decisions, and the fact that a prosecutor advised against laying charges would be relevant evidence in any such suit. Consequently police officers will only choose to go against the advice given them when they have good reason to do so.

To advise the police officer adequately, it is clearly important that the prosecutor be aware of all the evidence and the relevant circumstances. This will allow the prosecutor not only to confirm that there are no technical errors on the face of the charge document, but also to advise whether it is likely that a conviction will result. Further, by being informed of the circumstances — the age of the accused, any mitigating factors, and so forth — the prosecutor will be able to advise whether it is more appropriate to deal with the matter in some way other than a criminal charge. Recommendation 20 therefore requires the officer to fully inform the prosecutor of all the evidence and circumstances.

Although, under Recommendation 21, a police officer is not prevented from laying a charge before a justice despite the contrary advice of a prosecutor, the officer is required to inform the justice of that contrary advice. Similarly, where the police officer has been unable to seek the prior advice of a prosecutor, the police officer must explain why doing so was impracticable. The decision whether to issue process in these cases, as in all others, will be with the justice. Our expectation, however, is that in these cases, the justice will be put on notice that the charge document should be examined more carefully than is often the case. Because of this particular attention, we expect that the issuing of process will not be routine and unconsidered, and that therefore the protections intended to be provided by the justice's discretion will be more likely to exist.

Some of our consultants have suggested that requiring prosecutors to inspect every charge before it is laid will cause administrative problems, requiring the hiring of additional prosecutors. However, the systems in New Brunswick, Quebec and British Columbia, with

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283. By not requiring the approval of the Crown prosecutor for a charge to be laid, we differ from the system in Quebec which was found in *Bisaillon* v. *Keable*, *supra*, note 130 and *Attorney General of the Province of Quebec* v. *Attorney General of Canada*, *supra*, note 132, to distinguish the *Blackburn* decision.

a similar prosecutorial duty, apparently function well.[284] The fact that the system has proved workable in both a small jurisdiction with limited resources and a large jurisdiction with a high volume of prosecutions suggests that any increased burden at an early stage produces subsequent benefits of at least equal value.

We have noted the inadequacy in the present system for swearing charge documents. These proposals, we suggest, will assist in the screening out of poorly drafted or ill-founded charges at an earlier stage than is the case at present. In addition, these proposals are consistent with our recommendations in *The Charge Document in Criminal Cases*.[285] The Commission suggested there that a greater involvement of Crown prosecutors in drafting charges was desirable. We also suggested that the use of a standard format, and the aid of word-processing techniques, would simplify drafting, and allow the use of technology to avoid technical errors.[286] These methods, we suggest, are likely to produce the early benefits apparently enjoyed in those provinces requiring prosecutorial consent.

We acknowledge, however, that our recommendations for pre-screening of charges by a public prosecutor might be less necessary if the scrutiny of charge documents by justices of the peace currently provided for was carried out more effectively. Some of the problems of the present system, we feel, are the result of inadequate legal training for justices of the peace. We believe, as a long-term goal, that occupational requirements and training of justices of the peace should be upgraded (perhaps even to the point that future appointees be lawyers), and that they should be remunerated accordingly. Given the increasing difficulty in vetting the contents of charge documents and search warrants (to name only two types of documents now authorized by justices of the peace) in light of new statutory and *Charter* requirements, these public officials need legal training. Previous studies and judicial decisions have noted the need to upgrade their competence and training[287] and independence.[288] Although we perceive these suggestions to be consistent with our other proposals, we have refrained from making any formal recommendations in this regard.

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284. Our consultants in British Columbia estimate that the number of convictions and guilty pleas increased by about 10 to 15% when they instituted this system, because the number of problem cases were reduced. Also, in G.F. Gregory, "Police Power and the Role of the Provincial Minister of Justice" (1979) 27:1 Ch. L.J. 13 at 16, the author notes that only 12% of charges are withdrawn in New Brunswick, compared to 40% to 50% in jurisdictions where prosecutors do not vet the charges. However, it must be noted that both of these jurisdictions go further than we propose, in that administratively they do not allow charges to be laid without the approval of a prosecutor.

285. LRC, *The Charge Document in Criminal Cases*, Working Paper 55 (Ottawa: The Commission, 1987).

286. *Ibid.* at 16.

287. See, *e.g.*, A.W. Mewett, *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario*, 1981 [unpublished] at 18-19, 43, 67-71; and LRC, *Police Powers: Search and Seizure in Criminal Law Enforcement*, Working Paper 30 (Ottawa: Supply and Services Canada, 1983) at 84. Although the Commission has not undertaken an empirical study of the procedures followed in the laying of informations, the *Police Powers* paper reports the results of a survey of practices in the issuance of search warrants. The study found only 39.4% of the warrants in the sample to have been validly issued.

288. See *Reference Re Justices of the Peace Act, Re Currie and Niagara Escarpment Commission* (1984), 16 C.C.C. (3d) 193 (Ont. C.A.).

In making our present recommendations, we are differing in part from proposals we made in *Criminal Procedure: Control of the Process*.[289] That paper suggested, as we do here, that it is rational for the Crown prosecutor to see the charge before the first court appearance. However, *Control of the Process* also proposed that the prosecutor's consent to the form of the charge should be necessary, and that the prosecutor should have the authority to change the charge.[290]

The Commission's primary concerns in making that earlier recommendation were to prevent mistakes in the form of the charge, to ensure that there was sufficient evidence to support the charge, and to confirm that other factors did not militate against prosecution. We feel that these are legitimate concerns; however, we feel that they are equally well protected by our present proposals. In addition, we suggest that our present proposals preserve a better division of responsibility, as well as providing greater accountability.

Some Commissioners preferred the system operating in New Brunswick, Quebec and British Columbia, the provinces requiring prior consent of the prosecutor, and the proposals made in *Control of the Process*. In their view, the decision to lay a charge is not a function of an investigation, but rather is the first step in a prosecution. Thus, they feel, it is more appropriate for the person who would have carriage of the prosecution to make the decision whether to lay a charge. In that respect they feel that leaving the charging decision with the police, even in what is effectively only a residual way, actually blurs the distinction between the two roles, rather than keeping them distinct. A real commitment to separating functions, they suggest, would require that charges can only be laid by or with the approval of a prosecutor.

In their view it is advisable, with regard to public prosecutions, to have a clear functional division of powers. Where there is a potential conflict, because those investigated are members of the Attorney General's department, or because the Attorney General may be reluctant to prosecute for political reasons, a private prosecution may be launched by the victim, any citizen, or a police officer acting in the capacity of a private citizen. They suggest that the possibility of a private prosecution acts as a check upon the powers of the Attorney General and public prosecutors and provides, along with the openness of the criminal justice system, sufficient guarantee that the existence of the potential conflict will be brought out and dealt with in the open.

2. Guidelines for the Initiation of Prosecutions

(a) Overview

An equitable justice system requires a reasonable degree of consistency in the circumstances in which prosecutions take place. Whether the prosecutor determines which prosecutions may be commenced, or simply has the later ability to discontinue proceedings,

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289. *Supra*, note 111.

290. *Ibid.* at 40-44.

clear guidelines assist in achieving consistency and fairness. As noted earlier,[291] the Attorney General has the responsibility for issuing such guidelines.

In Canada at present, the criteria used by the Crown to determine which prosecutions should take place are not generally available to the public.[292] Without such publication, it is difficult to know whether the guidelines are followed consistently, or indeed whether they contain appropriate criteria. Such guidelines have been prepared and published in a number of countries, including England,[293] Australia[294] and the United States.[295]

The Philips Commission observed that:

> No one has suggested to us that any prosecution system can entirely avoid the prosecution of people who have not in fact committed the offence charged. The investigator and prosecutor can be misled by witnesses or even the accused person himself. Nor. . .can a prosecution system bring all those who are in fact guilty before the courts. The proper objective of a fair prosecution system is not therefore simply to prosecute the guilty and avoid prosecuting the innocent. It is rather to ensure that prosecutions are initiated only in those cases in which there is adequate evidence and where prosecution is justified in the public interest.[296]

Proper guidelines must deal with the two issues of adequate evidence and the public interest.

As a starting point, it would seem that the prosecutor must believe that there is evidence which could result in a conviction. Beyond that comes the question of whether the evidence is sufficient to justify a prosecution, which is a slightly different question.

One standard which might be considered is that of the *prima facie* case. A *prima facie* case is one "containing evidence on all essential points of a charge which, if believed by

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291. See the discussion above at 15 in "The Attorney General and Crown Prosecutors".

292. This is not true of all the provinces. In New Brunswick, for example, where the prosecutor must approve all charges, the criteria for commencing a prosecution are published and available to the public.

293. See the discussion in A. Sanders, "Prosecution Decisions and the Attorney-General's Guidelines", [1985] Crim. L.R. 4.

294. See, *e.g.*, *Prosecution Policy of the Commonwealth* (Canberra: Australian Government Publishing Service, 1986). In addition, see a discussion of the new system introduced in 1986 in New South Wales, in New South Wales Law Reform Commission, *Procedure from Charge to Trial: Specific Problems and Proposals*, vol. 2 (Sydney: The Commission, 1987) at 540-541. This system includes a provision for the Director of Public Prosecutions to give guidelines to Crown Prosecutors with respect to exercise of specific functions, but not about specific cases. There is also provision for the publication of the guidelines as part of the annual report of the Director.

295. "The Prosecution Function", *The American Bar Association Standards for Criminal Justice*, *supra*, note 241 at 3.12. For an interesting comment on the ABA standards see H.R. Uviller, "The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA" (1973), 71 Mich. L. Rev. 1145, particularly at 1152 to 1157, concerning the problem of proceeding notwithstanding the belief that the accused will probably be acquitted and the problem of the role of the prosecutor in prejudging the credibility of prosecution witnesses.

296. *Supra*, note 240 at 128.

the trier of fact and unanswered, would warrant a conviction."[297] This test, then, does not take into account such factors as the credibility of prosecution or defence witnesses. Rather, it looks only at the sufficiency of the evidence in the abstract.

A test which does take into account the likelihood that evidence will be believed, and the likely behaviour of the trier of fact, is the "51 per cent rule" employed by some of the holders of the office of Director of Public Prosecutions in England.[298] This rule focuses on the sufficiency of evidence, looking at whether it is more likely than not that there will be a conviction. This standard is not invariable, however. A higher standard may be used where the consequences of an acquittal would be particularly inimical: for example, where an unsuccessful obscenity prosecution could result in increased publicity and sales of the publication.

A standard lower than 51 per cent might also on occasion be justified. The American Bar Association standards relating to prosecutions include this statement of principle:

> In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.[299]

Prosecution in such cases is supported not as a mere gesture, but on the basis that such tactics "can successfully alert the community to wrongdoing and raise the community conscience to rectify the offending conditions".[300]

The decision to prosecute in such cases will have been affected by consideration of the public interest. More often, however, consideration of the public interest will show reasons why, despite the probability of a successful prosecution, proceedings should not be commenced. As the American Bar Association standards note:

> The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.[301]

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297. *Mezzo* v. *R.*, [1986] 1 S.C.R. 802 at 837. The case considers a *prima facie* case in the context of a directed verdict.

298. Edwards, *Attorney General*, *supra*, note 34 at 415-416.

299. The American Bar Association, *Standards for Criminal Justice*, *supra*, note 241 at 3.54.

300. *Ibid.* at 3.58.

301. *Ibid.* at 3.54.

It would be impossible to enumerate all the circumstances where the public interest would favour not commencing a prosecution.[302] They would include the seriousness of the offence, and the age and other circumstances of the offender. Some factors, such as the race or religion of the offender, ought normally not to be relevant.

(*b*) Recommendations

22. Prosecutorial guidelines should be published by the Attorney General dealing with the initiation of criminal proceedings. These guidelines should state, in broad terms, the factors that should and should not be considered in advising whether to initiate proceedings.

23. The factors stated in the guidelines should include: (1) whether the public prosecutor believes there is evidence whereby a reasonable jury properly instructed could convict the suspect; and if so, (2) whether the prosecution would have a reasonable chance of resulting in a conviction. The prosecutor should also take into account: (3) whether considerations of public policy make a prosecution desirable despite a low likelihood of conviction; (4) whether considerations of humanity or public policy stand in the way of proceeding despite a reasonable chance of conviction; and (5) whether the resources exist to justify bringing a charge.

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302. The ABA standards (*ibid.* at 3.54) list the following as appropriate factors for consideration in determining whether to exercise the prosecutor's discretion:
    (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
    (ii) the extent of the harm caused by the offence;
    (iii) the disproportion of the authorized punishment in relation to the particular offence or the offender;
    (iv) possible improper motives of a complainant;
    (v) reluctance of the victim to testify;
    (vi) cooperation of the accused in the apprehension or conviction of others; and
    (vii) availability and likelihood of prosecution by another jurisdiction.

    Also of interest is the U.S. Justice Department document prepared by former Attorney General Edward H. Levi to heads of all Justice Department offices, divisions and bureaus, reported in (1978) 24 Crim. L. Rep. 3001. In that document Levi refers to the following as appropriate considerations in deciding whether to initiate a prosecution:
    (a) the seriousness of the offence;
    (b) the need to provide a deterrent to similar offences;
    (c) the strength of the government's case;
    (d) the person's relative culpability in connection with the offence, history with respect to criminal activity, and circumstances;
    (e) the probable sentence if the person is convicted;
    (f) the possibility of civil, administrative, or other proceedings in lieu of prosecution;
    (g) the possibility of prosecution in another jurisdiction; and
    (h) the availability of prosecutorial and judicial resources.

    Attorney General Levi also lists those considerations which should not influence a prosecutor's decision:
    (a) the offender's race, religion, sex, national origin or political association, activities, or beliefs;
    (b) [the prosecutor's] personal feelings concerning the offender or the victim; or
    (c) the possible effect of [the] decision on [the prosecutor's] personal or professional circumstances.

Commentary

We favour the publication of guidelines as a means of increasing openness and accountability in the criminal justice system. The decision to prosecute is a discretionary one lying at the heart of the system. Under our scheme, a police officer will make that decision, but will do so having been advised by a public prosecutor. To the extent possible, therefore, the exercise of that discretion should be brought into the public forum, by making the basis for the prosecutor's advice public knowledge.

We anticipate that publishing such guidelines would have a number of advantages. The directives would assist Crown counsel in their daily duties, and lessen the need for them to seek additional advice from senior officials in the Attorney General's department. This function would be particularly useful for new Crown prosecutors. By the same token, clear guidelines should lessen any temptation of the Attorney General's senior staff to interfere in the daily operations of line Crown prosecutors.

Further, with clear guidelines in place, the public will more readily be able to understand the basis for a decision to charge or not to charge. It may be small comfort to persons charged with an offence to know that their cases have been treated no more harshly than others, but this approach is preferable to one that leaves obscure the basis upon which a decision was reached. More importantly, when a decision has been made not to charge, it will be clear from the guidelines that this decision is justifiable. This factor will be important particularly in cases dealing with prominent people, such as politicians. Such persons should be treated neither preferentially nor more harshly than others. If proceedings would not have been commenced against an ordinary individual, they ought also not to be commenced against the prominent individual.[303] The existence of public guidelines both guarantees that equal treatment is given, and defends the Attorney General from charges of partiality.

In addition, the guidelines can have an educative function. Not just prosecutors, but also police and private citizens can become informed of the appropriate considerations for the laying of criminal charges. This allows both for the changing of public attitudes, as well as the potential for public input into whether the guidelines are appropriate.

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303. In 1978 the Attorney General of Ontario, Roy McMurtry, elected not to lay criminal charges against Francis Fox, the Solicitor General of Canada, who resigned when it became known that he had earlier forged the name of the husband on a therapeutic abortion consent form. The Attorney General justified this decision on the basis that a prosecution would bring "disproportionately harsh consequences to a person of good character, who has already suffered greatly as a result of his act. This bears on the circumstances of the case itself and not the fact that Mr. Fox assumed high public office after the event in question" and also that "The embarrassment and anguish to innocent parties must be weighed against any possible advantage that might result from bringing criminal charges against either Mr. Fox or the woman in question. On this consideration alone, the merits of not prosecuting far outweigh those of proceeding against the parties involved." See Ontario Legislative Assembly, *Debates* at 51-52 (23 February 1978). Mr. McMurtry noted that it would be unacceptable for a prominent person to escape prosecution where an ordinary member of the public would not, but that it would be equally unacceptable to prosecute a prominent person when the ordinary citizen would not be prosecuted.

We favour broadly worded directives. No set of guidelines can reasonably be expected to deal with the multitude of variables arising in a particular case. We also wish to avoid the potential for exploitation of highly specific guidelines by very sophisticated criminals who might tailor their activities to fall just outside the guidelines.

We have suggested a general structure within which the factors of each case must be considered. First, to advise in favour of prosecution, the prosecutor must believe that there is evidence whereby a properly instructed jury could convict the accused. This standard is based on the test for committal for trial after a preliminary hearing, and is, we believe, the appropriate starting point.[304]

It is also appropriate that the prosecutor engage in some weighing of that evidence. Accordingly, the next question is the standard of proof that should be required for a recommendation to prosecute. We have attempted to formulate a standard that will fall between the *prima facie* test rule and the 51 per cent rule.

The *prima facie* test rule, we feel, is inadequate because it allows no scope for considering the credibility of witnesses. A public prosecutor may be aware of facts making it highly unlikely that the prosecution's key witness will be believed (for example, a prior perjury conviction, a strong motive for dishonesty, or even simply a personal evaluation of the witness's credibility). It would be wrong to clog the courts with prosecutions that an experienced prosecutor fully expects to fail, simply because there is some evidence on each element of the offence. The experience of a prosecutor is an asset that should be used by the criminal justice system, to aid in assessing the sufficiency of the case that can actually be presented in court.

At the same time, however, the 51 per cent rule cannot be adopted on its own. First, the rule suggests that the likelihood of success of a prosecution can be precisely calculated; this suggestion is not realistic. More importantly, the 51 per cent rule can be too strict. Glanville Williams points out that application of the rule will mean that some prosecutions will not be brought because they are unlikely to succeed, even though bringing the prosecution might be in the public interest.[305] As an example, Williams points out that in contests between police and prisoners, juries tend to give less credence to the prisoner and to be reluctant to convict police. Because prosecutors are aware of these tendencies, the result is that "corrupt and violent policemen are not brought to book when ordinary people would be."[306]

This same reasoning is behind the ABA Standards principle that a prosecutor should not be deterred from prosecution in cases involving a serious threat to the community by a tendency of juries to acquit persons accused of the particular criminal act.

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304. The test for committal on a preliminary inquiry is set out in *United States of America* v. *Shephard*, [1977] 2 S.C.R. 1067 at 1080: "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."

305. "Letting off the Guilty and Prosecuting the Innocent" [1985] Crim. L.R. 115.

306. *Ibid.* at 116.

We are seeking, therefore, a test that avoids the deficiencies of the 51 per cent rule. Accordingly, the guidelines initially require that a prosecution should have a "reasonable chance of success": this phrase more accurately reflects the decision that a conviction is likely. Further, the guidelines should specifically allow for the commencement of a prosecution even when there is not a reasonable likelihood of success, if public-policy reasons favour bringing the charge. This provision will allow for the bringing of charges in cases such as those discussed, where essentially non-legal reasons make a conviction unlikely.

By the same token, assuming that a successful prosecution is possible, it then becomes necessary for the prosecutor to consider whether the public interest can be better satisfied without prosecution. The prosecutor must therefore also consider that question.

There are a large number of considerations that we feel would be relevant to such a decision. These considerations include that:

1. the consequences to the accused or to another participant in the proceedings far outweigh the benefit to be gained by a prosecution or the harm done by the accused;[307]

2. the prosecution is being commenced for an ulterior motive;

3. the offence is essentially a private dispute and the victim does not wish a prosecution to take place;[308]

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307. Many defence counsel have noted that the importance of this as a factor has been steadily declining in recent years and particularly with the introduction of the availability of conditional and absolute discharges in 1972. As a result it is argued that it can rarely be said that the results of a guilty verdict are so significant and so out of proportion to the harm caused by the offence that on this basis alone the prosecutor would be warranted in withdrawing the charge. Prosecutors often point out that the accused can always obtain a discharge, which in most circumstances will have very little impact on career, mobility, family, etc. Cases can be imagined, however, where even the availability of a discharge would not be sufficient. For example, where the accused is charged with a sexual offence that is ordinarily associated with homosexual activity and the accused is a married man, respected in the community and not known to have such tendencies, the mere laying of the charge could have devastating consequences.

308. The problem of "private disputes" is a difficult one. Where the complainant wishes the charge withdrawn the public prosecutor will usually accede to this request, provided the prosecutor is satisfied that the request is not the result of any improper pressure upon the complainant. However, recently guidelines have been issued in several jurisdictions which are designed to prevent the local prosecutor from exercising this discretion in certain cases, particularly those involving domestic violence. The terms of such a guideline were recently disclosed in *R.* v. *Moore* (1986), 30 C.C.C. (3d) 328 (N.W.T. Terr. Ct) at 330, as a result of the refusal of the victim to testify against the accused, her common-law husband. The terms of the policy were as follows: "All complaints of domestic violence involving spousal assault should be investigated immediately and thoroughly with a criteria of charges being laid for court prosecution, irrespective of whether the assaulted spouse wishes to proceed with the charges. . . . It is the purpose of this directive to require the prosecution of spousal assault cases where there is sufficient evidence. . .". In this case the trial judge noted that the policy of "prosecution regardless" had for a significant number of persons had a "noticeably detrimental" effect; for example, some victims may only really want a change in the situation, and therefore may be reluctant to call the police, knowing that such action will result in charges being laid.

4. the investigation employed methods that bring the administration of justice into disrepute;

5. the demonstration of compassion or mercy requires that the prosecution be stopped;

6. the prosecution is stale;[309]

7. the offender is extremely young or old;

8. the mental condition of the accused suggests that other solutions are more appropriate;[310]

9. the accused has cooperated with the authorities;[311]

10. the law is outdated and impossible to enforce on an equitable basis;

11. a conviction would have serious consequences for the administration of justice or the public interest;[312]

12. a trial might have a detrimental effect on the local community,[313] or on innocent parties;[314] or

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309. Sections 7 and 11(b) of the *Charter* have taken this factor out of the realm of exercise of mere discretion. Some prosecutions will be so stale that they are barred by these guarantees to fundamental justice and a speedy trial.

310. Because of the unsatisfactory way that the criminal law presently deals with the mentally ill offender who commits a serious offence, prosecutors are very amenable to having such an offender diverted out of the criminal justice system into the civil health-care system.

311. While it is widely recognized that the police and the public prosecutors will extend leniency to a person who has assisted the police in their investigation, B.A. Grosman found a real ambivalence among the prosecutors whom he studied concerning the withdrawal of charges against informants. He quotes several prosecutors in the following terms: "I don't like a crook buying immunity because he knows other crooks and can turn them in to save his own skin" and "The more I am pressed to withdraw, the more I push it. If the police want to protect an informer, then they shouldn't charge him" (*The Prosecutor: an Inquiry into the Exercise of Discretion* (Toronto: University of Toronto Press, 1969) at 39).

312. The example that is often given is the laying of a charge of perjury where the potential accused is said to have lied at trial. Where an accused is to be charged with perjury and then convicted after repeating essentially the same story, this could throw into doubt the verdict of acquittal in the original case. See remarks of the Director of Public Prosecutions quoted in Edwards, *Attorney General*, *supra*, note 34 at 425.

313. Edwards, *ibid.* at 427 refers to the *Bristol Riot* case, where a decision was made not to pursue a new trial because of the detrimental effects which a new trial would have on racial harmony in the city.

314. Thus in the Francis Fox affair the Attorney General stated to the House that "Turning to the individuals caught up in this case, I would emphasize that their tragedy must also be a factor to be taken into account. The woman's husband, who might be considered the most aggrieved individual in this case, has requested that criminal proceedings not be taken against Mr. Fox. It goes without saying that such a request cannot be lightly disregarded. . . . To reveal the woman's identity [at a trial if charges were laid] would cause irreparable harm to all those directly involved. The embarrassment and anguish to innocent parties must be weighed against any possible advantage that might result from bringing criminal charges against either Mr. Fox or the woman in question" (Ontario Legislative Assembly, *Debates*, *supra*, note 303 at 52.

13. only a penalty of a nominal nature is likely to be imposed.[315]

Finally, the prosecutor must consider whether the resources exist to justify bringing the charge. This factor is difficult to define precisely, but involves weighing the previous factors, as well as making a judgment whether the resources necessary to obtain a conviction are available, and whether it is appropriate to allocate them to the case. Clearly there are certain costs involved in any prosecution. Where a huge expenditure of funds would be necessary to obtain a conviction likely only to result in a nominal penalty, the proper decision may be not to lay charges. At the same time, of course, the complexity of an accused's operations, making a prosecution difficult and expensive, cannot be allowed to result in an effective immunity from prosecution. In some cases it will be appropriate to decide not to lay charges, or to lay charges only against some parties. As one British Director of Public Prosecutions has observed, "It is not necessarily in the public interest to prosecute every minnow connected with an offence, provided the whales are tried".[316]

D. Control over the Forum of Trial

1. Choice of Forum

(a) Overview

An accused charged with an indictable offence generally has the right to elect the mode of trial, choosing between trial by a judge with a jury, or a judge without a jury.[317] An accused who has elected one mode of trial may usually change this election, though in some cases the re-election requires the consent of the prosecutor.[318]

Once the accused has elected whether to have a jury, there is in some cases a further decision as to which higher court the trial shall be placed in. In Ontario, for example, a trial without a jury might take place in either the District or Supreme Court. This decision as to where the trial shall take place rests at the moment with the prosecution.

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315. Sir Hartley Shawcross put it this way: "It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigated circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed" (quoted by the Attorney General of Ontario in his speech to the legislature concerning the Francis Fox affair, *ibid.* at 51).

316. Quoted in *Attorney General, supra*, note 34 at 426.

317. Accused persons facing prosecution for certain of the more minor offences are required by s. 553 of the *Criminal Code* to be tried by a provincial court judge. Those charged with certain very serious offences, such as murder, are required by s. 469 to be tried by a superior court judge.

318. See ss. 561-562 of the *Criminal Code*.

(*b*) Recommendation

24. Where there is a choice of trial forum following an election by an accused, the choice should remain that of the public prosecutor.

Commentary

The Supreme Court has determined that there is no fundamental right to have a trial in a particular type of superior court.[319] The Crown has ready access to information regarding the systemic resources available, and is able to allocate cases in the most efficient manner. Our consultants have not indicated to us any instances of abuse of this power by the Crown, or a perception that the quality of justice differs between the different superior courts.[320]

Given the existence of different levels of court, there does not appear to be a need to reform this area at present. However, the unification of criminal courts would eliminate even any potential for problems in this area.[321]

2. Section 568 of the *Criminal Code*

(*a*) Overview

Section 568 of the *Criminal Code* permits the Attorney General personally to require a jury trial, notwithstanding the accused's election, where the offence is punishable by more than five years imprisonment. In such circumstances a preliminary inquiry must be held. The section has been challenged under the *Charter*, but has been upheld.[322]

Our consultants indicate that this power is very seldom used. Some consultants felt that it ought simply to be abolished. Most consultants, however, felt that there were exceptional circumstances in which it could prove useful. If a judge or high public official were charged with a serious offence, for example, it may be in the public interest to try the accused by judge and jury rather than judge alone. This procedure would remove any possible appearance of bias.

(*b*) Recommendation

25. When the crime charged is punishable by more than two years imprisonment, the Attorney General may personally require, notwithstanding any election by the accused, that the accused be tried by a court composed of a judge and jury. When a

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319. *Szpyt* v. *R.*, [1981] 1 S.C.R. 248.

320. However, a contrary view on whether competence varies among superior courts, at least in Ontario, may be found in the *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer for Ontario, 1987) at 83 (the Zuber Report).

321. See LRC, *Toward a Unified Criminal Court*, Working Paper 59 (Ottawa: The Commission, 1989).

322. *Re Hanneson and R.*, *supra*, note 255.

trial by jury is required under this section, a preliminary hearing will be held unless one has been held prior to the direction of the Attorney General.

Commentary

We have elected to retain this power. The only change we propose is to make the power applicable to offences punishable by more than two years' imprisonment, rather than five years' imprisonment. This change is in accordance with our classification of offences.[323]

We continue to require that this power should be exercised by the Attorney General personally. We have noted in *Control of the Process*[324] that imposing responsibility for personal decision-making on the Attorney General promotes restraint, ensures that exceptional procedures are used sparingly, and makes political accountability a reasonable alternative to judicial review. Since this power is intended only for unusual circumstances, it is appropriate to require that it only be invoked by the Attorney General personally.

3. Section 473 of the *Criminal Code*

(a) Overview

Section 469 of the *Criminal Code* places certain offences exclusively within the jurisdiction of a superior court of criminal jurisdiction. One of the effects of this provision is to prevent an accused, under section 536, from electing trial by a judge without a jury. Section 473 of the *Code* does permit an accused charged with an offence listed in section 469 to waive the jury, and choose to be tried by a superior court judge alone. However, the accused may only do this with the consent of the Attorney General.

Prior to recent amendments to the *Code*, section 473 applied only in Alberta, and had no consent requirement. The power was created to deal with the difficulty of gathering together twelve-person juries in remote areas of the Northwest Territories in the nineteenth century. Alberta requested that this special power be retained when it joined Confederation.[325] When the power was extended to all of Canada, it was altered to require the consent of the prosecutor.

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323. On the surface, this may appear to broaden the Attorney General's power. In fact, however, although s. 568 is nominally restricted to offences punishable by more than five years imprisonment, the Attorney General can cause an accused charged with any offence to be tried by a judge with a jury. The Attorney General has the power, under s. 577 of the *Code*, to prefer a direct indictment in any prosecution before a preliminary inquiry is held. Under s. 565(2) of the *Code*, the accused will then be taken to have elected trial by a judge with a jury. The accused has a right then to elect to be tried without a jury, but only with the consent of the prosecutor.

324. *Supra*, note 111.

325. The history of this section is discussed in *R.* v. *Turpin* (1987), 60 C.R. (3d) 63 (Ont. C.A.) at 71-72. The decision was upheld by the Supreme Court of Canada in [1989] 1 S.C.R. 1296.

It has been held that the ability to choose the mode of trial is of benefit to an accused.[326] It is not clear why this benefit was restricted by a consent requirement when it was made effective across the country. However, as Alberta was the only province in which the former section 473 applied, it could be argued that only the position of an accused in Alberta was worsened.

The one argument that might be made in favour of section 473 is that it is a method of preventing "judge-shopping". In some jurisdictions, all non-jury trials are conducted by one level of court, and all jury trials by another. An accused in such a jurisdiction who is charged with a section 469 offence and waives the jury will therefore be tried in the level normally hearing jury trials, but without a jury. In effect, then, an unrestricted right to waive the jury in the case of section 469 offences would allow the accused still to obtain a non-jury trial, but to avoid the particular level of court that generally conducts them.

However, we do not find this argument compelling. We suggest that an accused charged with a section 469 offence will be less able to "judge-shop" than other accused, since the trial must take place in a superior court of criminal jurisdiction.

(*b*) Recommendation

26. The exceptions in section 469 of the *Criminal Code*, placing certain offences within the absolute jurisdiction of a superior court of criminal jurisdiction, and section 473 of the *Criminal Code*, giving an accused the right to waive the jury for those offences, should be repealed.

Commentary

We do not believe that there is any value in having a requirement of prosecutorial consent before an accused may waive the jury in a trial for an offence listed in section 469. For any other indictable offence, an accused will be able to elect to have a jury, or to have a trial by judge alone. Therefore, removing the consent requirement from section 473 does not give an accused charged with an offence under section 469 a particular advantage; it merely gives that accused the same right as any other to have a jury or not, as he or she chooses.

The arguments against a consent requirement in section 473 will be particularly compelling in a unified court system, such as the Commission has proposed.[327] In such a system there will not be various levels of courts hearing criminal cases; as a result, the decision concerning whether to have a jury will not be a decision based on the level of court before which the accused appears.

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326. *Ibid.*, Ont. C.A. at 73-74.

327. *Toward a Unified Criminal Court, supra*, note 321.

Giving the accused the right to choose whether to have a jury or not for all offences can be accomplished more neatly than by removing the requirement for prosecutorial consent currently found in section 473. The only reason that the question of dispensing with the jury arises is section 469 of the *Criminal Code*, which, by removing certain offences from the jurisdiction of a court of criminal jurisdiction, prevents the accused from originally electing trial by a judge without a jury. For all other indictable offences, the accused would have the original right to elect trial by a judge alone.

If the consent requirement were removed from section 473, then an accused, whatever the indictable offence charged, would be able to have a trial either with or without a jury. However, in a jurisdiction where a unified criminal court structure is not in place, this solution would create an anomaly. An accused charged with a non-section 469 offence who does not wish to have a jury would be tried at the level of court where non-jury trials are held. An accused charged with a section 469 offence who does not wish to have a jury would still be tried at the level of court which usually holds jury trials, but without a jury. It is difficult to see that any advantage comes from this arrangement.

Rather, we suggest, if the two accused are to be put into the same position, the simpler and more straightforward solution is to abolish the exceptions in section 469, which created the original demand for a jury trial in those cases. In this event, a court of criminal jurisdiction will have the ability to hear any type of case, and so an accused will be able to elect trial by a judge without a jury in all instances. With the exceptions gone, of course, section 473 becomes redundant.

The justification generally advanced for giving exclusive jurisdiction over some offences to a superior court of criminal jurisdiction is that those offences are serious enough that a jury trial is necessary not simply for the protection of the accused, but in the public interest. We recognize that there is some force to this argument. However, we do not believe that this argument justifies requiring that every instance of every offence listed in section 469 be tried by a jury. We have recommended that the Attorney General's ability under section 568 of the *Code* to require a jury trial should be maintained. The exercise of this power will protect the public interest intended to be protected by section 469, while still allowing for case-by-case determination.

In *Classification of Offences* the Commission recommended that the division established by section 469 should be retained,[328] but indicated that dispensing with the prosecutorial consent in section 473 would be discussed in this paper. For the reasons noted, we believe that the consent should not be required, and that the simplest and most efficient method of accomplishing that aim is by eliminating the exceptions in section 469. For that reason, we differ here from the recommendation made in *Classification of Offences*.

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328. *Supra*, note 256, Recommendation 21. Sections 469 and 473 of the *Code* were at that time ss. 427 and 430.

E. Preferred Indictments

1. General

(a) Overview

An accused with the right to elect the mode of trial who does not elect trial by provincial court has the right to a preliminary inquiry. The preliminary inquiry serves a number of functions. Most importantly, it is a pre-trial device for screening out meritless prosecutions. In addition, it provides an opportunity for the accused to discover the Crown's case.

The Attorney General has, by virtue of section 577 of the *Criminal Code*, the right to prefer an indictment against an accused, thereby eliminating either or both of these benefits. An indictment can be preferred against an accused who has not yet had a preliminary inquiry, thus meaning that the accused will receive neither benefit. Equally, an Attorney General can prefer an indictment against an accused who was discharged after a preliminary, thereby removing the benefit of the pre-trial screening.

Although it is not a procedure that is frequently used, the threat of a preferred indictment is a serious one. One prosecutor described it in these terms:

> Few weapons in the armoury of the prosecutor are more feared than the preferred or "direct" indictment. It deprives an accused of an election as to the mode of trial. . . . More significantly, in a great many cases it brings the matter directly to trial without the benefit of a preliminary inquiry and the resultant "discovery" of the Crown's case. In such cases the tactical advantages to the prosecution are painfully clear. As one defence counsel put it, "Whenever I ask a question before the jury on a direct indictment, I 'duck', just in case!" Many other questions, the answers to which are unknown to the defence, doubtless go unasked.[329]

Prior to the *Charter* there was virtual unanimity in the courts that the Attorney General's decision to prefer a direct indictment was unreviewable.[330] Since the advent of the *Charter*, there have been a number of challenges to this power, but they have not succeeded in weakening it to any great extent. It has been held that, although a preliminary inquiry is a significant benefit to the accused, it is not an essential element in giving an accused a trial

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329. B. MacFarlane and J. Webster, "Preferred Indictments" in V. Del Buono, ed., *Criminal Procedure in Canada* (Toronto: Butterworths, 1982) at 320.

330. *Re Saikaly and R.* (1979), 48 C.C.C. (2d) 192 (Ont. C.A.); *Morgentaler* v. *R.*, [1976] 1 S.C.R. 616 appearing to affirm the trial judgment reported at (1973) 14 C.C.C. (2d) 435 (Que. S.C.). However, see *R.* v. *Lynch and D'Aoust* (1977), 36 C.C.C. (2d) 340 (Ont. H.C.), in which the judge concluded that the circumstances surrounding the preferment of the indictment appeared to constitute an abuse of the court's process. He effectively stayed the indictment until something akin to a preliminary inquiry was held to give the accused an opportunity to see the evidence upon which the Attorney General acted in overriding the discharge and preferring an indictment.

in accordance with fundamental justice, provided that other means of disclosure are available.[331]

However, decisions of the Executive can be challenged if they involve a real deprivation of *Charter* rights.[332] An Attorney General's decision to prefer a direct indictment, therefore, can be challenged, but only if on the facts of the particular case, the preferment is a *Charter* violation. As a recent Ontario Court of Appeal decision noted:

> the power of the Attorney-General to prefer an indictment is in accord with the principles of fundamental justice and forms part of the large arsenal of discretionary powers that the chief law enforcement officers must possess in order to effectively discharge their high constitutional duties. In the exercise of these discretionary powers the Attorney-General is accountable to Parliament or the legislature and the exercise of the power may be reviewed by a court of competent jurisdiction if it results in a denial or infringement of a constitutionally protected right.[333]

(*b*) Recommendations

27. The power of the Attorney General to prefer a charge should be retained.

28. A judge may make a termination order stopping the proceedings, if it is shown that the preferment of the charge constitutes an abuse of process.

Commentary

We accept that the Attorney General should retain the ability to prefer an indictment in some circumstances. We accept the reasoning that such an ability can unobjectionably be part of a system which is in accordance with the rules of fundamental justice.

This is not to say that the present law concerning preferred indictments is entirely acceptable. The preferred indictment is used in two distinct ways: before a preliminary inquiry, and after discharge at a preliminary inquiry. We shall consider each of these uses separately.

Further, we wish to ensure that the Attorney General will be accountable to the court for any abuse of the power to prefer an indictment. Accordingly, we have provided that in the unusual event that the circumstances of a case make the preferment an abuse of power,

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331. *Re R. and Arviv, supra*, note 105, and *R.* v. *Ertel* (1987), 35 C.C.C. (3d) 398 (Ont. C.A.). See also *Desbiens* v. *Procureur Général du Québec*, [1986] R.J.Q. 2488 (S.C.).

332. *Operation Dismantle Inc.* v. *R., supra*, note 90. See the discussion of this issue above at 22 in "The Attorney General and the Courts".

333. *R.* v. *Ertel, supra*, note 331 at 415. See also *Re R. and Arviv, supra*, note 105; *R.* v. *Moore* (1986), 26 C.C.C. (3d) 474 (Man. C.A.); and *Desbiens* v. *Procureur Général du Québec, supra*, note 331.

the court will retain an overriding jurisdiction to prevent that abuse.[334] The termination order would serve the same function as the present judicial stay.[335]

Classification of Offences[336] recommended that the distinction between summary conviction and indictable offences should be eradicated. *The Charge Document in Criminal Cases*[337] also recommended that a single charge document replace the present "information" and "indictment", and *Toward A Unified Criminal Court*[338] recommended the establishment of a single court of criminal jurisdiction to deal with all prosecutions. All of these recommendations, if adopted, will affect the current procedures for holding preliminary inquiries and for preferring indictments. We are not withdrawing here from those suggestions. However, we use the present terminology and refer to the present procedures in our discussion of preferred indictments in this paper, and would propose the particular recommendations we make here whether the Commission's earlier recommendations are accepted or not.

2. The Use of a Preferred Indictment without a Preliminary Inquiry

(a) Overview

Numerous reasons have been advanced for the use of the preferred indictment prior to a preliminary inquiry. Some of the reasons given for directly indicting an accused include:

1. the notoriety of the case is such that a quick trial of the merits is essential;[339]
2. the case is long and complex, and involves many accused;[340]
3. the accused intends to disrupt the preliminary hearing;
4. the fear that the security of the Crown's witnesses, or of other persons involved in the prosecution, is jeopardized and a speedy disposition of the case is required;

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334. The circumstances in which the use of prosecutorial discretion will amount to an abuse of process will be exceptional: see *R.* v. *Jewitt*, *supra*, note 118.

335. The Commission will recommend this order in the forthcoming Working Paper, *Remedies in Criminal Proceedings*.

336. *Supra*, note 256.

337. *Supra*, note 285.

338. *Supra*, note 321.

339. Examples of this can be found in *R.* v. *Parrot* (1979), 51 C.C.C. (2d) 539 (Ont. C.A.), trial of the head of the postal union for disobeying federal legislation to end a postal strike, and *Morgentaler* v. *R.*, *supra*, note 330, trial of a prominent physician for breach of the abortion legislation. See also *Desbiens* v. *Procureur Général du Québec*, *supra*, note 331, for a listing of the reasons advanced for the use of a direct indictment.

340. *R.* v. *Biasi* (17 October 1980) (B.C.S.C.) [unreported] taken from a comment by the Chief Justice of the British Columbia Supreme Court as reported in MacFarlane and Webster, *supra*, note 329 at 378.

5. the need to try the case as soon as possible in order to preserve the Crown's case;[341]

6. the need to avoid a multiplicity of proceedings;[342] and

7. the need to avoid unconscionable delay which cannot otherwise be remedied.[343]

Some of these justifications, it seems to us, are suspect. For example, one rationale focusses on the notoriety of the case. If notoriety were an appropriate reason to prefer an indictment, such a technique would be used in cases such as the prosecution of high-profile accused such as Dr. Morgentaler, and yet not in cases of equal or more serious gravity if the accused were not a well-known public figure. We have concluded that notoriety is an insufficient reason for distinguishing among accused, and should not be sanctioned as a justification for the use of a preferred indictment.

Similarly, that a case is long and complex may actually indicate the need for a preliminary hearing. Should the preliminary hearing fail to disclose sufficient evidence to require the accused to stand trial, the longer and more costly proceeding of a trial will be avoided. As well, it is not at all clear that avoiding the preliminary inquiry is an efficient method of bringing the complex case to trial. The result may well be that counsel may then require, and will be granted, lengthy adjournments in the course of the trial to prepare to meet new and unanticipated evidence, which would have been disclosed had there been a preliminary hearing. While Crown counsel usually ensure in a direct-indictment case that full disclosure is made, there is often no substitute for the disclosure that comes from examination and cross-examination of a witness under oath.[344]

The problem of the disruptive accused is probably a relatively minor one and can usually be controlled by the court's power to control its process rather than by resort to the preferred indictment. There ought, however, to be a power in the court to send the case on to trial where the conduct of the accused makes the holding of a preliminary inquiry virtually impossible.[345] This subject will be addressed in forthcoming working papers.

We agree that there is merit to some of these justifications. Prosecutors and police with whom we have consulted assert that it is absolutely essential in certain cases to be able to

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341. As where the witnesses are quite elderly and there is a risk that a prolonged preliminary inquiry and lapse of time until trial will affect the ability of the witnesses to testify: *Re Stewart and R. (No. 2)* (1977), 35 C.C.C. (2d) 281 (Ont. C.A.).

342. As where one of two accused has already had a preliminary inquiry and it is sought to try both of the accused together, *R.* v. *Stolar* (1983), 4 C.C.C. (3d) 333 (Man. C.A.); or where the accused has already been through other judicial proceedings that will have provided substantial disclosure of the prosecution case, *Re R. and Arviv, supra*, note 105.

343. MacFarlane and Webster, *supra*, note 329 at 374, referring to *Re Saikaly and R., supra*, note 330.

344. *R.* v. *Grigoreshenko* (1945), 85 C.C.C. 129 (Sask. C.A.).

345. A similar power is now available in the case of an absconding accused: *Criminal Code*, s. 544.

bring a case to trial quickly in order to improve the security of witnesses and other persons associated with the prosecution. They point to the cost to the state of having a prolonged period during which witnesses must be given police protection, and the terrible strain on all persons involved in such a case.

Similarly, where witnesses are quite elderly there is a risk that a prolonged period of time before trial will affect their ability to testify.[346] Section 715 of the *Criminal Code* does allow the use at trial of the evidence of witnesses given at a preliminary inquiry, where the witness is no longer available. Nonetheless this will be an unsatisfactory solution when credibility is in issue.

A difficult contention to assess is that unnecessary expense and expenditure of time will result from multiple proceedings. This situation may arise if an additional accused is charged after other accused have completed their preliminary inquiry and have been ordered to stand trial. While from the prosecution's point of view a second preliminary inquiry may seem like a waste of time and money, the person who has not had the benefit of a preliminary inquiry may not share that point of view. This is especially the case where the deprived party has not been responsible for the need for the second preliminary inquiry.[347]

Equally difficult is the need to avoid unconscionable delay. In effect an accused is being required to give up the benefits of a preliminary inquiry in order not to suffer a violation of the right to trial within a reasonable time. However, depending upon the causes of the delay and other factors, this may in certain circumstances be a reasonable justification.

Even granting the legitimacy of some of these justifications, there is a need for reform. At present no explanation need be given of why an indictment has been preferred. It is therefore difficult to know what considerations motivated the decision, and whether they were principled and proper. Increased openness in this area would enhance accountability for the use of the power.

(*b*) Recommendations

29. The Attorney General personally may prefer a charge notwithstanding that the accused has not had a preliminary hearing. The court in which the charge is preferred may adjourn the proceedings until the accused has been given full and fair disclosure of the prosecution case, including, when so ordered, signed witness statements.

30. The Attorney General shall provide the accused against whom a direct charge has been preferred reasons for the preferment.

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346. See *Re Stewart and R. (No. 2)*, *supra*, note 341.

347. The situation of an absconding co-accused who returns after the completion of the preliminary inquiry and then demands a second preliminary is to be distinguished from the case in which a second accused is not charged until after the completion of a preliminary hearing of the co-accused. For an example of the latter, see *R.* v. *Stolar*, *supra*, note 342.

31. Guidelines should be established by and published for the use of the Attorney General in deciding whether to prefer a charge when no preliminary hearing has been held. The guidelines should indicate that preferment is an exceptional procedure to be used only in rare and extraordinary circumstances, and that the Attorney General may consider, among others, the following factors:

> **(*a*) the fear that the security of the prosecution's witnesses or of other persons involved in the prosecution is jeopardized;**
>
> **(*b*) the need to try the charge as soon as possible in order to preserve the Crown's case;**
>
> **(*c*) the need to avoid a multiplicity of proceedings; and**
>
> **(*d*) the need to avoid unconscionable delay or unduly prolonged proceedings that cannot otherwise be avoided.**

Commentary

We agree that the Attorney General should have the power to prefer indictments, in certain cases, without a preliminary inquiry having been held. However, some safeguards are necessary if the accused is to be deprived of a preliminary hearing. The most obvious deprivation suffered by the accused who is denied a preliminary hearing is the use of that hearing for discovery purposes, and so we require that the accused receive full and fair disclosure. We recognize that disclosure on paper is not a substitute for the ability to observe and cross-examine witnesses, but full disclosure does substantially decrease the prejudice to the accused. This is particularly so when the accused receives signed witness statements, upon which witnesses may be cross-examined at trial. The requirement for full disclosure reflects our general commitment to improving the disclosure of the prosecution case.[348]

We also recognize that there may be cases in which there are other means of fully disclosing the prosecution's case. For example, if another accused with the same interest in the case had has a full preliminary hearing, the newly charged accused may be able to obtain most, if not all, of the needed disclosure by obtaining the transcript of the preliminary hearing.

We also propose that this power should only be available to the Attorney General personally. We noted with regard to requiring a jury trial that imposing the decision on the Attorney General personally assists in promoting restraint, ensuring that exceptional procedures are used sparingly, and making political accountability a reasonable alternative to judicial review. Since this power is also one that should be used sparingly, we feel it is not appropriate to give it to each prosecutor.

Further, we have concluded that the need for accountability when this extraordinary power is used requires that an explanation be provided. There may be cases where the safety

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348. See LRC, *Disclosure by the Prosecution*, Report 22 (Ottawa: Supply and Services Canada, 1984), particularly at 24-25.

of witnesses or others makes it very difficult to provide reasons without increasing the risk to those already in danger. However, in our consultations we were advised that such situations are very rare, and that in most cases the accused is told of the reasons for preferment even in these sensitive cases.

Finally, Recommendation 31 proposes guidelines to assist the Attorney General in determining whether to prefer a charge. Our proposals do not embody a suggestion that the seriousness of the offence, or the public pressure for a speedy trial should be significant factors favouring a preferred indictment. Public clamour or political pressure are not factors which should affect the method of proceeding. Rather, we have attempted to isolate the particular factors that might justify the use of this extraordinary power. For the most part these factors speak for themselves. The third factor — the avoidance of multiple proceedings — should only be a justification for denying the more recently charged person a preliminary hearing if the newly charged accused has substantially the same interest as another accused who has had a preliminary inquiry.

3. The Use of a Preferred Indictment after a Discharge at a Preliminary Inquiry

(a) Overview

The use of a preferred indictment after an accused has been discharged at a preliminary inquiry raises different concerns. The accused is not denied an opportunity to discover the Crown's case. However, that case having been presented, the accused is denied not merely an opportunity to have a judge screen the evidence, but the benefit of an actual judicial determination that the evidence does not justify sending the accused to trial.

There are two main reasons generally advanced in support of this use of preferred indictments. The first is that the judge at the preliminary hearing made an error of law, which the Crown believes has led to an improper discharge. Secondly, new evidence may have become known to the prosecution, which it believes would have led to a committal for trial, had it been available at the preliminary hearing.

In support of the first of these reasons, it is true that the *Criminal Code* contains no provision for an appeal from the decision to discharge the accused. The only form of review possible is that of an application to the superior court by way of *certiorari* to quash the decision of the preliminary hearing judge. This review is limited to jurisdictional errors, such as the erroneous exclusion of evidence.[349] The superior court will review the evidence to determine if there is any evidence upon which the judge would have been justified in putting the accused on trial.[350]

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349. One of the few successful Crown applications to quash a discharge at a preliminary hearing was in *Dubois* v. *R.*, [1986] 1 S.C.R. 366. In that case, the judge at the preliminary hearing had not only applied the wrong test as to sufficiency of evidence, but purported to dismiss the charge, thereby acting as if he were the trial judge.

350. *Skogman* v. *R.*, [1984] 2 S.C.R. 93. However the test on review is still quite narrow: was there any evidence before the justice presiding at the preliminary hearing upon which, acting judicially, the justice could form the opinion that the evidence was sufficient to put the accused on trial for the charge. See *Re Martin, Simard and Desjardins and R.* (1977), 41 C.C.C. (2d) 308 at 340 (Ont. C.A.); aff'd [1978] 2 S.C.R. 511.

It seems incongruous for the law to provide that the Attorney General has a right of appeal if the accused is acquitted, but no similar right of appeal if the accused is discharged after the preliminary hearing, even though this decision effectively terminates the proceedings.[351] Hence a very strong case exists for creating a mechanism to review an erroneous discharge. Whether the preferred indictment is the proper method is not clear.

The use of the preferred-indictment power when new evidence becomes available after the preliminary inquiry is more troublesome.[352] There is an important distinction to be made between cases in which genuinely new evidence becomes available, and cases where the prosecutor, for tactical reasons, chooses not to adduce certain evidence, or fails to acquire all of the available evidence with the result that the evidence adduced is inadequate to require the accused to go to trial.[353] In our view, to permit the Crown to prefer an indictment in the latter situations would be an improper manipulation of the system, amounting to an abuse of process. However, when genuinely new evidence comes forward, the interests of justice require that the proceedings continue. To deny the right to prefer in the face of fresh evidence would have the effect of inappropriately giving a finality to the discharge that it currently lacks.[354]

(*b*) Recommendations

32. When a preliminary hearing has been held, and the accused discharged, no charge may be preferred without the consent of a judge of the intended trial court. The judge shall consent only if satisfied (following submissions from the parties) that the judge at the preliminary hearing applied an erroneous legal principle, or that the accused committed a fraud on the administration of justice, which resulted in the discharge of the accused.

33. When an accused has been discharged upon the completion of a preliminary hearing and fresh evidence is subsequently discovered, an application may be made to the judge who presided at the preliminary hearing, or if that judge is unavailable, to another judge of that court, to reopen the preliminary hearing. The judge may order that the preliminary hearing be re-opened if it is shown that:

(*a*) the application was brought within a reasonable time after the discharge;

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351. *Criminal Code*, s. 676 sets out the right of appeal by the Attorney General, and does not provide for an appeal against a discharge at the conclusion of a preliminary hearing.

352. For the meaning of "new" or "fresh" evidence see *Palmer* v. *R.*, *supra*, note 267 and *R.* v. *Stolar, supra*, note 342.

353. See *R.* v. *Lynch and D'Aoust, supra*, note 330.

354. There is not at present complete agreement on the ability of the Crown to lay a new, identical information following a discharge at a preliminary inquiry. Some cases support the right of the Crown to do so: see *R.* v. *Ewanchuk*, [1974] 4 W.W.R. 230 (Alta. C.A.); aff'd [1976] 2 W.W.R. 576n (S.C.C.). However, this procedure has in certain cases — where no new evidence was available — found to be an abuse of process: see *R.* v. *Dunlop* (1976), 37 C.R.N.S. 261 (B.C. Prov. Ct) and *Re Sheehan and R.* (1973), 14 C.C.C. (2d) 23 (Ont. H.C.).

(*b*) the evidence could not have been adduced by due diligence at the preliminary hearing;

(*c*) the evidence bears upon a decisive issue, or potentially decisive issue;

(*d*) the evidence is reasonably capable of belief; and

(*e*) the evidence is such that taken with the other evidence adduced at the preliminary hearing it could reasonably be expected to have affected the result.

Commentary

When a judge at a preliminary inquiry has made a determination that there is not sufficient evidence to send an accused to trial, this decision is not one that should be lightly ignored. The decision to send an accused to trial is binding upon an accused, and so there is good reason to suppose that a discharge should be equally binding upon the Crown. Therefore we propose that the Crown should not have an unfettered right to override this judicial determination.

Of course, one notable difference between a discharge and a committal after a preliminary hearing is that the committal is not intended to be a final adjudication. An accused committed for trial still has the opportunity to establish his or her innocence at trial, and so in effect rectify any error made by the judge at the preliminary. If no review of a discharge can take place, however, then proceedings would come to an end, and any error would be unreviewable. Therefore some review of a judge's decision in this regard must be available.

The need for review does not justify giving the Crown the right simply to ignore the judicial decision. In Recommendation 32 we therefore propose that it should be open to the Crown to apply to a judge of the intended trial court for permission to prefer a charge. This permission will be granted if the Crown shows that the decision at the preliminary inquiry was based on an erroneous legal principle,[355] or obtained through a fraud on the administration of justice. This procedure will not be an appeal of the ruling at the preliminary inquiry, since that decision will not actually be overturned. The net effect will be much the same, since the Crown will then be in a position to prefer the charge, and require the accused to stand trial.

In general, we are concerned to keep distinct from one another prosecutorial and judicial discretions, and we do not regard the procedure proposed in Recommendation 32 as conflicting with this principle. It is true that the exercise of a prosecutorial discretion is being made dependent on judicial permission. However, this supervision will occur only after a prior judicial decision is made, and will function in effect as a review of that judicial decision.

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355. Note in this regard the decision of the Supreme Court of Canada in *R.* v. *Yebes*, [1987] 2 S.C.R. 168, holding that the ground of appeal in s. 686(1)(a)(i) of the *Code* (formerly s. 613(1)(a)(i)), that the verdict is unreasonable or cannot be supported by the evidence, raises a question of law.

Indeed, it would have been possible simply to recommend allowing an appeal of a discharge granted at a preliminary hearing, and some of our consultants favoured such a proposal. Other consultants felt that to allow appeals of a discharge would ultimately make necessary allowing appeals of a committal for trial; this latter development, they felt and we agree, would be undesirable, introducing potential delays into the criminal trial process without corresponding advantages. In addition, we feel that it is more appropriate to regard the decision to proceed to trial despite a discharge as part of the Attorney General's responsibility for the overall supervision of the criminal justice system. Accordingly, we have left this power as an exercise of the Attorney General's prerogative, but have introduced a measure of judicial control.

We have not required that this power be exercised by the Attorney General personally. The power to prefer a charge in these circumstances should certainly not be used routinely, and so should not be available freely to any prosecutor. Because of the requirement for judicial permission, we feel that there will be adequate measures promoting restraint.

Some consultants urged upon us the view that the Attorney General should retain a residual discretion personally to prefer an indictment, in exceptional circumstances regarding serious crimes, where the interests of justice so required. When a dismissal had been obtained through some fraud on the administration of justice, or through the negligence, error, or omission of Crown counsel in the conduct of the preliminary hearing, these consultants felt that such a power in the Attorney General could properly be exercised.

We feel that these concerns do not justify retaining a residual discretion. Circumstances in which fraud is established can at present be dealt with by an extraordinary remedy to quash the dismissal. In our recommendation, to simplify matters, we propose making it a specific ground for granting permission to prefer a charge. In cases where some fault lies with Crown counsel in the presentation of the preliminary, however, it is our view that this fault should no more justify preferring a charge than failure of Crown counsel to adequately present a case at trial should entitle the Crown to a new trial. In such circumstances, the Crown should not be able to benefit from its own mistakes.

We propose Recommendation 33 because we recognize that the discovery of new evidence after a discharge makes appropriate some possibility for continuing proceedings against an accused, despite the discharge. We do not feel that retaining a preferred indictment power in such situations is the solution.

The problem of discovering fresh evidence after a judicial determination is not unique to preliminary inquiries. New evidence may arise after a trial, which either the defence or prosecution may wish to introduce on appeal. Accordingly, the courts have created rules determining when this evidence can be introduced.[356]

In the case of a preliminary inquiry, we propose that the Crown should be entitled, upon the discovery of new evidence, to apply to have the preliminary inquiry reopened. This

356. *Palmer* v. *R.*, *supra*, note 267.

application should be made to the preliminary hearing judge, as that judge will be familiar with the facts of the case. If that judge is unavailable, the application will be made to another judge of the same court, since these judges are most familiar with the proceedings in preliminary inquiries. We have set out self-explanatory factors for the judge to consider in determining whether the preliminary should be reopened. The factors are based on those used in applications to introduce new evidence on appeal.

F. Discontinuation of a Prosecution

1. General

(a) Overview

A criminal prosecution is brought in the name of the Queen, and can only be justified on the basis that something beyond a private wrong is involved, even when brought by a private prosecutor.[357] All criminal prosecutions affect the integrity of the system. It is therefore important that some person be charged with the responsibility for overseeing the way in which criminal prosecutions are conducted. On occasion, to prevent abuse, oppression or unfairness, this will require that prosecutions be stopped.

At present there are three ways for the Crown to terminate proceedings: the prosecutor may withdraw the charges; the Attorney General or "counsel instructed by him for that purpose" may stay proceedings pursuant to section 579; or the prosecutor may offer no evidence with respect to the charge, thus leading to an acquittal. The legal effect of each procedure is different.

If a charge is withdrawn, it cannot be reactivated; rather, a new charge must be laid.[358] If by that time a limitation period has intervened, then the prosecution is barred. Many of the other details concerning withdrawals are unclear. Indeed, some cases have suggested that the right to withdraw charges was implicitly abolished by provisions for the entry of stays under the *Criminal Code*, though the practice of withdrawing charges continues nonetheless.[359] The best view of the law at present is that the prosecutor has an absolute right to withdraw the charge prior to plea.[360] After a plea has been taken at trial or evidence heard at a preliminary inquiry, however, it seems that the charge can only be withdrawn with the

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357. The generally accepted function of criminal law in modern times is the redressing of public wrongs, even if based upon private injuries. However, this view was not always held, and in 1955 Glanville Williams wrote "The courts regard the victim of the crime as having a priority of right to prosecute." See "The Power to Prosecute" [1955] Crim. L.R. 596 at 597. See also *Private Prosecutions, supra*, note 70.

358. *R.* v. *Karpinski*, [1957] S.C.R. 343; *R.* v. *Leonard, Ex parte Graham* (1962), 133 C.C.C. 230 (Alta. S.C.T.D.).

359. *R.* v. *Taylor* (1974), 19 C.C.C. (2d) 79 (Ont. Prov. Ct); *R.* v. *Grocutt* (1977), 35 C.C.C. (2d) 76 (Alta. S.C.T.D.).

360. *Re Forrester and R., supra*, note 106; *R.* v. *Grocutt, supra*, note 359; *Re Blasko and R., supra*, note 252; *R.* v. *Dick, supra*, note 250.

consent of the presiding judge.[361] The legal effect of a withdrawal is not absolutely clear. Where a charge is withdrawn prior to plea, the accused is not entitled to plead *autrefois acquit* if the charge is relaid. A withdrawal after plea but before any evidence is heard will also not justify a plea of *autrefois acquit*, but the Supreme Court has not explicitly ruled on a case where the withdrawal is subsequent to evidence having been heard.[362]

A stay of proceedings supersedes the *nolle prosequi* power at common law. One significant difference between a stay and a withdrawal is that a stay does not require the consent of the court at any stage. The effect of a stay is similar to that of a withdrawal prior to plea; it does not give rise to a later plea of *autrefois acquit*.[363] An important difference is that proceedings on the same information or indictment may be recommenced if notice of recommencement is given within one year of the stay or "before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier". After this time the proceedings shall be deemed never to have been commenced. The Crown, or a private prosecutor, is also entitled within the limitation period to commence new proceedings by laying a new information.[364] It would seem therefore that a stay under section 579 cannot prevent the limitation period from running.

When a prosecutor simply chooses to lead no evidence, this approach does not interrupt the proceedings. Rather, in effect, it allows the proceedings to move immediately to a close, with an acquittal being entered on the basis that the charges against the accused have not been proven. This result is sometimes referred to as a dismissal "for want of prosecution", which suggests that it is distinct from a dismissal "on the merits". However, it seems that there is no distinction to be drawn on this basis, and a dismissal following no evidence is an acquittal like any other.[365]

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361. However, some courts draw a distinction between cases where evidence has been heard and those where a plea has been taken. In addition to the cases in note 360, see *R.* v. *Hatherley* (1971), 4 C.C.C. (2d) 242 (Ont. C.A.). In our view, the decision in *R.* v. *Riddle*, [1980] 1 S.C.R. 380 makes clear that the significant event is the entry of a plea, not the calling of evidence, and we believe that courts would now likely hold that if the trial judge's consent is to be required then it would be following the entry of the plea, and they would not also require that evidence have been called.

362. *R.* v. *Selhi* (1985), 18 C.C.C. (3d) 131 (Sask. C.A.), aff'd March 2, 1990 (S.C.C.).

363. *R.* v. *Tateham* (1982), 70 C.C.C. (2d) 565 (B.C.C.A.). The Commission's forthcoming Working Paper *Double Jeopardy, Pleas and Verdicts* will discuss pleas of *autrefois acquit* and related concepts in greater detail.

364. *R.* v. *Judge of the Provincial Court, Ex parte McLeod*, [1970] 5 C.C.C. 128 (B.C.S.C.); *R. ex rel. McNeil* v. *Sanucci* (1974), 28 C.R.N.S. 223 (B.C. Prov. Ct).

365. In *R.* v. *Riddle, supra*, note 361, Dickson J. discussed the principle of *autrefois acquit* following a dismissal of a charge when no evidence was led. He noted at 398-399 that:

> So long as the case has proceeded to a verdict and a dismissal, that should be sufficient. . . . The term "on the merits" does nothing to further the test for the application of the *bis vexari* [twice in jeopardy] maxim. There is no basis, in the *Code* or in the common law, for any super-added requirement that there must be a trial "on the merits".

Compare, however, s. 485.1 of the *Criminal Code* (added after *Riddle*) which, by requiring the personal consent of the Attorney General or Deputy Attorney General before laying a new information following a dismissal for want of prosecution, suggests that such laying is possible.

There does not appear to be any principle at work governing the choice of one proceeding over another, save that in most jurisdictions a stay is perceived as a more formal procedure, usually requiring instructions from the Attorney General's office.[366] By contrast, the withdrawal procedure is generally viewed as a simple unfettered procedure. It is invoked on a regular basis for such matters as disposing of charges as part of a plea agreement,[367] disposing of duplicate charges, or stopping prosecutions at the request of the informant or prosecution.

Although each of these powers may be used as a means of permanently discontinuing proceedings, they are not restricted to that function. At least in the case of stays and withdrawals, the same powers can be used to temporarily discontinue proceedings, when the prosecutor intends to proceed further at a later date.[368] The purposes for which a prosecutor would wish to temporarily discontinue proceedings are quite distinct from the purposes requiring a permanent discontinuation. A prosecutor might wish to permanently discontinue proceedings as part of a plea agreement, because there was insufficient evidence, or because considerations of humanity or the public interest suggested prosecution was inappropriate: in sum, because the charges should not be proceeded with. By contrast, when the powers to temporarily discontinue proceedings are used, exactly the opposite consideration is paramount: the charges should be proceeded with, but cannot effectively be prosecuted at that time. Thus a power to permanently discontinue proceedings is needed to maintain control over the prosecution system; the power to temporarily discontinue proceedings is needed only in the context of individual prosecutions.

Our consultations have revealed a consensus in support of clarifying and simplifying the law in this area. In our view, there is no compelling justification for the retention of two procedures for permanently discontinuing proceedings. Further, any procedure for discontinuing proceedings should be immediately clear in its effect, whether it is to cause a permanent or only a temporary cessation.

(*b*) Recommendations

34. The Attorney General's statutory power to stay proceedings and common-law power to withdraw charges should be abolished. Those powers should be replaced by a statutory power to discontinue proceedings, by entering either a temporary or permanent discontinuance.

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366. The practice depends on the province. In Ontario, an assistant Crown would normally require instructions from the Attorney General's office (although not from the Attorney General personally) before entering a stay. In other provinces, particularly where the stay is routinely used (as opposed to withdrawing charges) no special instructions are required: see *R.* v. *McKay* (1979), 9 C.R. (3d) 378 (Sask. C.A.).

367. The Commission has proposed this more neutral term to replace "plea bargain", which has acquired negative connotations: see *Plea Discussions and Agreements,* Working Paper 60 (Ottawa: The Commission, 1989).

368. Both stays and withdrawals should be contrasted with adjournments. An adjournment merely creates a temporary cessation within the same proceedings; stays and withdrawals, when not intended as final resolutions of the prosecution, nonetheless require that new proceedings be commenced from the beginning. It is not open to the Crown, following a stay, to continue the trial from the point at which the stay was entered.

35. A permanent discontinuance bars any further proceedings against the accused on the same charge or for substantially the same crime that is the subject of the order.

36. A temporary discontinuance stops the immediate prosecution of charges against the accused, but allows a later prosecution on the same charge or for substantially the same crime that is the subject of the order, within an appropriate limitation period.

37. (1) A discontinuance must state whether it is permanent or temporary.

(2) If new proceedings are not commenced following a temporary discontinuance within the appropriate limitation period, the temporary discontinuance shall become a permanent discontinuance.

Commentary

We believe that the ability to permanently or temporarily discontinue any prosecution is a necessary part of the overall superintendence of the prosecution service. Permanent discontinuances are necessary to allow the Attorney General to supervise the prosecution service as a whole, and to allow individual public prosecutors to prevent the continuation of inappropriate charges. Under our proposals, prosecutors may advise police officers against laying charges, but cannot prevent them from doing so. In cases where a prosecutor feels that the evidence is insufficient to obtain a conviction, or that the charges should not be proceeded with for some other reason, the prosecutor must be able to permanently discontinue the proceeding.

Similarly, prosecutors are sometimes faced with situations in which, although charges cannot immediately be proceeded with, nonetheless a permanent discontinuance is inappropriate. Some essential piece of evidence — the testimony of a witness, for example — may be unavailable at the time, but likely to become available. Within certain limits, we feel that it should be within the discretion of the Attorney General to postpone, without permanently discontinuing, a prosecution.

The present variety of ways in which proceedings may be permanently or temporarily discontinued leads to confusion. We feel that in any given case where a prosecutor wishes to discontinue proceedings, the legal effect should be immediately clear; at present, this is not so. Stays may ultimately be temporary or permanent, and withdrawn charges can sometimes be re-laid, sometimes not. We therefore advocate the existence of two separate methods of dealing with these situations: permanent and temporary discontinuances. If a prosecution is to be permanently stopped, a permanent discontinuance is entered. If the prosecutor wishes the ability to commence later proceedings, a temporary discontinuance is entered.

A permanent discontinuance prevents any further proceedings against the accused on that charge: that is, based on the order, an accused could later plead *autrefois acquit*. In addition, we have expanded the bar from the charge itself to charges which are substantially the same, to reflect the Commission's policy on double jeopardy, explained in a forthcoming Working Paper, *Double Jeopardy, Pleas and Verdicts*.

A permanent discontinuance can only be entered at the instance of the Crown. The permanent discontinuance contrasts with a similar order we propose, to be made by the court on its own motion or that of the defence, the termination order.[369] The termination order can be sought by the defence when the continuation of proceedings will constitute an abuse of process, or will irreparably prejudice the accused in presenting a defence.

The temporary discontinuance is also only available to the prosecutor. It is used when the Crown seeks a cessation of the prosecution, but intends to proceed at a later date with the same or similar charges. To this extent, it is similar to the present stay under the *Criminal Code*, but unlike that power will only be used when there is a genuine intention to commence later proceedings.

When entering the discontinuance, the prosecution must make clear whether it is intended to be permanent or temporary. This requirement guarantees that the effect of the order is unambiguous.

We have not made any recommendation concerning discontinuing proceedings by want of prosecution. Realistically, the practice is not one that could be abolished, and in any event, we do not see a need to abolish it.

As we have noted, the failure to lead any evidence will result in an acquittal. Ordinarily there is no distinction to be drawn between a failure to lead evidence, and failure to prove the guilt of the accused beyond a reasonable doubt.[370] Thus the practice leads to a result which is clear and unambiguous.

One observation, however, is that a dismissal "for want of prosecution" is less satisfactory than a permanent discontinuance, since it will have involved unnecessarily tying up the resources of the court, preventing other matters from being scheduled for that time. We suggest it would be preferable, therefore, in any case where the Crown knows in advance that it will not proceed with charges, for a permanent discontinuance to be entered at the earliest possible stage.

Under the present law, failure to recommence a prosecution within one year of a stay ends the proceedings on that information or indictment; however, the *Criminal Code* is not explicit about whether proceedings could be commenced on a new information or indictment charging the same offence. One would expect that further proceedings would be barred, or

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369. The Commission will recommend this order, and this term, in a forthcoming Working Paper.

370. See *supra*, note 365.

there is no purpose to having a time limit of one year included in the section. Whether the doctrine of double jeopardy would prevent further proceedings is not free from doubt.[371] Under this recommendation, it is made clear that if new proceedings are not commenced within the allowed limitation period, the prosecution is not allowed to proceed. The limitation periods are discussed in Recommendation 43, below.

Some of our consultants felt that, in addition to the powers proposed here, there should be a judicial power to enter an acquittal, not merely a permanent discontinuance. They felt that there would be rare cases where the accused would not be content with a discontinuance, but would want on record an acquittal.

However, we feel that such a power is unnecessary. The real significance of an acquittal is that it resolves the question before the court in the accused's favour, freeing the accused from having to face further proceedings. A permanent discontinuance accomplishes the same thing. In addition, it should be noted that a permanent discontinuance represents a reasoned decision by the Crown that the accused should not be required to face any further proceedings. While this may not be a judicial determination of innocence, at the same time it is more significant, for example, than a decision by a private litigant not to proceed further; the decision has a more official character.

2. Permanent Discontinuances

(a) Method and Timing of Permanently Discontinuing a Prosecution

(i) *Overview*

The primary distinction between withdrawing charges and entering a stay is that the consent of the court is never needed in the case of a stay. Whether the Crown intends to recommence a prosecution or not, the right to stay proceedings is unfettered.

The main reason that no judicial consent is required is that, in staying proceedings, the prosecutor is acting in a supervisory capacity. The Attorney General, and the Attorney General's agents, must determine how the resources of the courts can best be used. In some cases, this supervisory role will require that prosecutions be stopped. Thus the Attorney General's power to stay proceedings, like the historical *nolle prosequi* power from which it is derived, does not depend on the permission of the court.

That the Attorney General can enter a stay as of right does not mean that there is no room for restrictions concerning when that stay can be entered. At present, however, the Attorney General has nearly complete freedom in this regard as well.

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371. Section 579 of the *Code* states that where proceedings are not commenced within one year, they "shall be deemed never to have been commenced." In *R.* v. *Riddle, supra*, note 361, however, the Supreme Court held that a plea of *autrefois acquit* was only available where previously "the case has proceeded to a verdict and dismissal". In *R.* v. *Tateham, supra*, note 363, the British Columbia Court of Appeal held that a plea of *autrefois acquit* was not available when new proceedings were commenced following a stay, but they were not dealing with a situation where the one-year limit for recommencement had passed.

There is no restriction on how late in the proceedings a stay may be entered; it may be entered at any stage prior to judgment. Accordingly a stay may be entered, for example, after the judge has directed a jury to return with a verdict of not guilty, but before the jury has actually done so.[372]

Subsequent to amendments to the *Criminal Code* in 1985, there now appears to be very little, if any, limitation on how early in the proceedings a stay may be entered.

From 1892 until 1985, the Attorney General had the power under the *Criminal Code* to stop proceedings using a stay of prosecution "at any time after an indictment has been found".[373] The words in the pre-1985 *Code* section were chosen to parallel the common-law power of the English Attorney General personally to enter a *nolle prosequi*. The common-law power is limited to a case to be tried by judge and jury on a bill of indictment, and can only be exercised after the indictment has been signed or found. The wording ensured that the Attorney General in England exercised this power in open court.[374]

In *Dowson* v. *The Queen*,[375] the wording in the *Code* was similarly interpreted by the Supreme Court of Canada to preclude the entry of a stay prior to process (such as a summons or arrest warrant) being issued. However, the Supreme Court noted that a stay could be entered earlier in the case of summary conviction offences, and expressed the view that it appeared "anomalous" that this power of the Attorney General in relation to indictable offences did not arise at an earlier stage.[376]

Shortly after this decision, one commentator argued that there was no anomaly, because if the justice determined that no process should issue, then there would be no need to enter a stay. However, if process was issued, and thereafter a stay is entered:

> [T]he public knows that what is being terminated or suspended is the prosecution of a person against whom a case has been made out, and so judicially determined, that requires an answer. Where the stay is directed before that determination the public never knows whether the accused is a person who could not be prosecuted anyway.[377]

Apparently accepting that there was an anomaly in the limitation concerning when the Attorney General could enter a stay of proceedings, the government amended and expanded the definition. The *Criminal Code* now states that a stay may be entered "at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment" (s. 579).

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372. *R.* v. *Beaudry*, [1967] 1 C.C.C. 272 (B.C.C.A.). Note that this case was decided before the *Charter*, and so in similar circumstances today, a new challenge to the prosecutor's action might well be made.

373. *Criminal Code*, s. 579, formerly s. 508, prior to S.C. 1985, c. 19.

374. For a discussion of the development of the power of the Attorney General to use the *nolle prosequi* see *Law Officers, supra*, note 28 at 227-237, and *Attorney General, supra*, note 34 at 444-456.

375. [1983] 2 S.C.R. 144.

376. *Ibid.* at 158.

377. A.W. Mewett, "Stay of Proceedings" (1984-1985) 27 C.L.Q. 257 at 257-258.

Although the *Code* states when summary conviction proceedings are deemed to have commenced,[378] there is no similar provision with regard to indictable offences. Therefore the amendment leaves open the question of whether proceedings are commenced the moment an information is laid before a justice, or do not commence until the decision is made to issue process: that is, whether *Dowson* has been overruled by the legislation.

In *Hébert* v. *Marx*, the Quebec Superior Court considered this question. After considering the *Dowson* decision and the 1985 amendments to section 579, the Court held that:

> [TRANSLATION]
> The purpose of the 1985 amendment was not to hinder the right of the Attorney General to intervene in the context of indictable offences, but to move forward the moment of his intervention; it was not to weaken this power of intervention, but to strengthen it and clarify it.[379]

Consequently, the court held that the power to enter a stay arose as soon as an information was laid.

We agree that section 579 has changed the law in the manner suggested in *Hébert* v. *Marx*. However, we do not feel that this change is a desirable one. An important consideration in the use of the power to permanently discontinue proceedings is accountability. The *Dowson* decision and subsequent amendment to the *Code*, in our view, decrease accountability.

The present *Code* allows a stay to be entered before a decision has been made to issue process. In any case where a justice would have refused to issue process, this power is unnecessary. Further, in such a case the accused is denied the benefit of a judicial determination that there was no case to meet. In all cases the stay can be used to stop a private prosecution, thus depriving a private complainant of the right to bring an action. This will be accomplished by the clerk of the court entering a stay, acting on the instructions of the prosecutor. Thus the procedure need not take place publicly, and no explanation for the use of the power needs to be given. Particularly where the stay is entered before process is issued, the whole procedure need come under no public scrutiny. In our view, this is unsatisfactory, and steps should be taken to increase accountability in the use of the power.

(ii) Recommendations

38. The Attorney General or the public prosecutor may enter a permanent discontinuance in any prosecution, whether it has been commenced by a police officer or a private prosecutor.

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378. *Criminal Code.*, s. 788(1): "Proceedings under this Part shall be commenced by laying an information in Form 2."

379. [1988] R.J.Q. 2185 (S.C.) at 2191.

39. A permanent discontinuance must be entered in open court, after a decision has been made to issue process but prior to verdict.

Commentary

We believe that the supervisory capacity of the Crown is appropriate, and should be maintained. Therefore, we propose that the Attorney General, or the public prosecutor, should be entitled to enter a permanent discontinuance of any prosecution. As with a stay under the *Code*, the permanent discontinuance will be available to the Crown as of right; it will be entered on the instructions of the prosecutor.

We favour the availability of this power not just in public prosecutions, but also in privately commenced prosecutions. The Attorney General is responsible for the criminal prosecution service as a whole, and, as we have noted earlier, is accountable not only for discontinuing prosecutions, but also for allowing improper prosecutions to proceed.[380] In addition, the power to discontinue private prosecutions is further justified as a necessary safeguard to ensure that the greater access to the justice system which the Commission has proposed in *Private Prosecutions*[381] is not abused.

We have not required the public prosecutor to provide reasons to the court in seeking a permanent order of discontinuance. We acknowledge that requiring reasons would enhance accountability, and we did consider the possibility. We also considered not permitting discontinuance until after the accused had appeared in court, to avoid the possibility of proceedings being discontinued in a way that did not come to public notice.[382] We have concluded that in the absence of evidence of abuse, neither of these measures is necessary. We feel that given the public nature of the act, the potential for political accountability will provide adequate protection from abuse.

The public prosecutor is not accountable to the court for the exercise of the discretion to permanently discontinue, and the court has no say over whether the permanent discontinuance is entered. In that sense, therefore, providing reasons to the court is not necessary. This is not to say that the Attorney General or the public prosecutor will not choose to provide reasons.[383] In many cases, it will be advisable and desirable for the Attorney General to make a public statement in court concerning the reasons for the

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380. See "The Attorney General and Crown Prosecutors" and "The Attorney General and Private Prosecutors" above at 15-22.

381. *Supra*, note 70.

382. For example the prosecutor could cause the information to be brought forward and withdrawn in a court where it would not ordinarily appear and at an unusual time, say 4:00 p.m. on a Friday afternoon. In this way the act of termination would not come to anyone's attention, and since the accused never appeared in court, the press in particular would likely never learn that a charge had been laid and then withdrawn, unless some disgruntled informant attempted to find out what happened and perhaps enlisted the aid of the press. However, it would probably be impossible to find it in the court records without the co-operation of the prosecutor.

383. Note, *e.g.*, *Re Dowson and R.*, *supra*, note 71, where the prosecutor read into the record, on behalf of the Attorney General, the reasons for staying that private prosecution.

permanent discontinuance; we have simply chosen not to require by statute that the Attorney General do so in every case. The Attorney General is accountable to Parliament for the exercise of this discretion, and accordingly can be questioned in the House; in the circumstances, this political accountability must be sufficient.

In addition, we feel it is important that the judiciary be independent of the prosecution. In recent years there has been an increased involvement of judges in the investigative stages of the process, reflected in their responsibilities in relation to the issuance of search warrants and electronic-surveillance authorizations. However, we are of the view that care must be taken to ensure that the distinction between the discretions exercised by the prosecution and those exercised by the judiciary does not become blurred.

Although not requiring reasons, we do propose two things to increase the accountability of the Attorney General when permanently discontinuing a prosecution. First, although entering the permanent discontinuance is essentially an administrative act, we require that it be entered in open court. This requirement will increase accountability by guaranteeing that permanently discontinuing a prosecution will be a public act. Second, we recommend a return to the situation prior to 1985 with regard to the timing of a permanent discontinuance — the power would only be available after a justice has decided to issue process.

Prosecutorial discretion will not be impaired by a return to this situation. The policy arguments in favour of imposing this limitation upon the prosecution's power were noted in the *Dowson* case by Mr. Justice Lamer:

> The power to stay is a necessary one but one which encroaches upon the citizen's fundamental and historical right to inform under oath a Justice of the Peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to "hear and consider" the allegation and make a determination. In the absence of a clear and unambiguous text taking away the right, it should be protected. This is particularly true when considering a text of law that is open to an interpretation that favours the exercise of that right whilst amply accommodating the policy consideration that supports the power to stay. When one adds to these considerations the fact that, apart from the court's control, the only one left is that of the legislative branch of government, given a choice, any interpretation of the law, which would have the added advantage of better ensuring the Attorney General's accountability by enhancing the legislative capacity to superintend the exercise of his power, should be preferred.[384]

Finally, it should be noted that we have not recommended any change with regard to how late in the proceedings a permanent discontinuance may be entered. At present, there can be cause for concern on the part of an accused when a stay is entered very late in the proceedings with the intention of recommencing new proceedings later. However, if it is known that no recommencement is intended, then there is no prejudice to the accused no matter how late the stay is entered. Accordingly we propose that a permanent discontinuance should remain available until verdict.

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384. *Dowson* v. *R.*, *supra*, note 375 at 155.

(*b*) Guidelines for Permanently Discontinuing a Prosecution

(*i*) *Overview*

The Crown may, at present, withdraw or stay charges without having to account to the court or the public for the use of those powers. Internal standards used by the public prosecutor are not subject to public scrutiny, and therefore one cannot determine whether a particular discontinuance, or failure to discontinue, was in accordance with those guidelines, or indeed whether the guidelines themselves are appropriate.

(*ii*) *Recommendation*

40. Prosecutorial guidelines should be published by the Attorney General setting out factors to be considered when permanently discontinuing a prosecution. They should state, in broad terms, the factors that may be considered in determining whether to permanently discontinue proceedings, and the factors that should not be considered.

Commentary

We have already discussed the factors that properly enter into the decision to advise for or against laying a charge.[385] All of those considerations apply equally to the decision to discontinue a proceeding. Indeed, in our proposals, the guidelines are in one sense more important to the prosecutor at this later stage. When considering whether charges should be laid, prosecutors only have the ability to advise the police. It is only after charges are laid that the prosecutors will be able to impose their opinions, by stopping the proceedings through the use of a permanent order of discontinuance.

We favour broadly worded guidelines, for the same reasons as with guidelines for commencing prosecutions. The publication of guidelines will increase the accountability of public officials, educate the public as to the factors relevant to the decision, and assist Crown prosecutors in deciding when to use the power to discontinue.

3. Temporary Discontinuances

(*a*) Method and Timing of Temporarily Discontinuing a Prosecution

(*i*) *Overview*

A temporary discontinuance can be accomplished at present through either withdrawing or staying the charges, and then later laying new charges. A stay can be entered as of right at any time, and charges can be withdrawn as of right prior to plea. After plea, the permission of the court is required to withdraw charges.

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385. See "Guidelines for the Initiation of Prosecutions" above at 76.

In cases where the prosecution does not intend to proceed with charges at a later date — a permanent discontinuance — a check on the power of the prosecutor is not necessary to ensure fairness to the accused. Where, however, the withdrawal is used as a temporary discontinuance, the accused may be prejudiced. In those circumstances, it is reasonable to have some judicial control over the power of the prosecutor.

For example, it has been held to be an abuse of process for the Crown to withdraw a charge to avoid an adverse ruling (typically a denial of an adjournment) and then re-lay the charge.[386] Withdrawing a charge upon which the Crown had elected to proceed summarily, in order to lay an identical new information and proceed indictably, has also been found to be abusive.[387] However, it is not always abusive to withdraw charges but then recommence proceedings. It is permissible for the Crown to lay a new charge, in order to describe more accurately the alleged conduct of the accused or to take account of a change in circumstance (where the victim of an assault has since died, for example). Similarly there is no abuse if the Crown withdraws a charge due to the unexpected absence of a witness and then recommences after the witness is found.[388]

The question which arises is the extent of judicial control that should be allowed over what is fundamentally a prosecutorial discretion. In our view, the courts ought not to have a general power to determine whether the prosecutor may temporarily discontinue a proceeding, even after the trial or preliminary inquiry has commenced.

Some possibility for judicial control is appropriate. First, one concern is whether the process of the courts is being abused by the act of temporarily discontinuing. Further, where a proceeding is temporarily discontinued, there is a greater possibility that the accused will not receive a trial within a reasonable time. At present there is no control over how late in the proceedings a stay may be entered; however, some control does exist with regard to withdrawals, since the permission of the court is necessary to withdraw charges after plea. Although this potential control is advisable, the present situation is unsatisfactory, in that it is always open to a prosecutor to choose to stay charges rather than allow the decision to be reviewed in an application to withdraw.

The limitations for commencing new proceedings must also be considered. At present, proceedings which are stayed must be recommenced at the latest within one year of the entry of the stay, or they shall "be deemed never to have been commenced."[389] However, the entry of a stay does not provide the Crown with any additional time for recommencement. Section 579 of the *Criminal Code* allows proceedings to be recommenced "within one year

386. See, *e.g.*, *R.* v. *Scheller (No. 1)* (1976), 32 C.C.C. (2d) 273 (Ont. Prov. Ct); *R.* v. *Hickey* (1978), 44 C.C.C. (2d) 367 (Ont. Prov. Ct); and *R.* v. *Weightman* (1977), 37 C.C.C. (2d) 303 (Ont. Prov. Ct).

387. *Re Parkin and R.* (1986), 28 C.C.C. (3d) 252 (Ont. C.A.); leave to appeal was refused by the Supreme Court of Canada, 23 June 1986.

388. *Re Ball and R.* (1978), 44 C.C.C. (2d) 532 (Ont. C.A.). Note that the withdrawal in this case was prior to plea; for a fuller discussion of the issue of the abuse of the power to withdraw charges see Gautier, *supra*, note 251.

389. *Criminal Code*, s. 579.

after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier". Thus, for example, in the case of a summary-conviction offence, proceedings must normally be commenced within six months. If proceedings are commenced but stayed, the original six-month limit will apply to commencement of any new proceedings for that offence.[390]

In our view, this approach is appropriate. There are many legitimate reasons for which the Crown may wish to delay proceedings, and so the Crown must have the right to temporarily discontinue proceedings; however, this right should not be at the expense of the accused's right to have the trial take place expeditiously. Therefore the power to temporarily discontinue proceedings must take into account the accused's right to a trial within a reasonable time.

(ii) *Recommendations*

41. The Attorney General or the public prosecutor may enter a temporary discontinuance in any prosecution of which they have carriage, whether it has been commenced by a police officer or a private prosecutor.

42. A temporary discontinuance must be entered in open court, after a decision has been made to issue process but prior to the close of the Crown's case. The Attorney General or the public prosecutor must indicate to the court the reasons for entering the temporary discontinuance.

43. When a temporary discontinuance is entered, the limitation period for commencing later proceedings shall be governed in accordance with the recommendations in the forthcoming Working Paper *Trial Within A Reasonable Time*.

Commentary

As with the present stay, we have chosen to make the temporary discontinuance available as of right to the prosecutor. The prosecutor will be able to enter a temporary discontinuance in any prosecution. In the case of privately commenced prosecutions, however, the prosecutor will first have been required to have taken over control of the prosecution, as Recommendation 17 (and the law at present) allow; we see no value in allowing the public prosecutor to interfere in a private prosecution in this manner without taking it over.

Although the temporary discontinuance will be available as of right to the Crown, nonetheless there will also be stricter controls over the use of the power than at present. As with a permanent discontinuance, the temporary discontinuance must be entered in open

390. Whether a stay has an effect on the accused's right to a trial within a reasonable time, under s. 11(b) of the *Charter*, has yet to be determined. In *Re Burrows and R.* (1983), 6 C.C.C. (3d) 54 (Man. C.A.) this issue arose, but on the facts of the case (the new charges were laid on the same day that the stay was entered, which was within six months of the date of the offence), the court held that the total time taken was reasonable.

court; this requirement will assist in making the Attorney General and the public prosecutor accountable for the use of the power. Again as with permanent discontinuances, the temporary discontinuance cannot be entered until a justice has decided to issue process. We have explained the reason for attaching this restriction to permanent discontinuances. Since temporary discontinuances can become permanent (when new proceedings are not commenced within the time limit), the same restriction must be attached to them as well.

Unlike permanent discontinuances, temporary discontinuances will not be available to the Crown throughout the entire trial. It has been recognized in the *Charter* that an accused has a right to a trial within a reasonable time. That interest, however, is not simply in having the trial commence, but in having it proceed to a final resolution.

Cases in which a prosecutorial stay is entered very late in the proceedings interfere with that interest in having a charge resolved. It seems unfair, for example, that a prosecutor who is unhappy with a judge's charge to the jury should be able at that point to stay the proceedings and begin again. Therefore we propose that at a certain point in a trial, the Crown should no longer be able to temporarily discontinue proceedings.

We feel that the natural cut-off point is the close of the Crown's case. At present, the Crown is required at this point to consider whether all the evidence necessary to establish the guilt of the accused has in fact been adduced. If a witness has been unavailable, or for some other reason the prosecutor feels that not all necessary evidence has been available, then the case should not be closed. If the prosecutor decides that all necessary evidence has been presented, then the case will be closed. By not making temporary discontinuances available after this point, we are only depriving the Crown of a second chance to consider the adequacy of its case.

Further, although the temporary discontinuance is available as of right, this does not mean that there is no opportunity for judicial supervision of the use of the power. In fact, due to the time-limitation provisions in Recommendation 43, and the right of an accused to apply for a termination order, it will be possible for an accused to have the court determine whether the entering of the temporary discontinuance was so prejudicial that recommencement should not be allowed. It is for this reason that we have required the Crown to present its reasons for entering a temporary discontinuance.

We have recommended that the limitations for commencement of new proceedings should be governed by our forthcoming Working Paper *Trial Within A Reasonable Time*. In that paper we will make recommendations concerning limitation periods in general, as well as specifically dealing with commencement of new proceedings after a temporary discontinuance.

In *Trial Within a Reasonable Time*, we will recommend limitation periods based on the seriousness of the offence charged, and other factors: for example, the limitation period for the commencement of trial will be longer if the accused has elected to have a preliminary inquiry. Under the recommendation to be made in *Trial Within A Reasonable Time*, the

proposed limitation periods are presumptive; in particular circumstances, a shorter period might be found unreasonable, or a longer one reasonable.

One of the intentions behind our time limit proposals is to prevent the Attorney General's right to temporarily discontinue proceedings from automatically overriding the right of an accused to a trial within a reasonable time. Although a temporary discontinuance may be a factor justifying an extension of the limitation period, it will not guarantee such an extension. Further, a secondary benefit of the provisions will be to provide, in effect, an opportunity for judicial supervision of the prosecutor's decision to temporarily discontinue proceedings.

If the permission of the court were to be required before entering a temporary discontinuance, one of the factors to be considered would certainly be whether the accused was still likely to receive a trial within a reasonable time. Because of the limitations in *Trial Within A Reasonable Time*, however, one of two things will occur. First, the Crown might commence the new trial within the time limit for commencing the earlier proceedings; in this event, at least with regard to having a prompt trial, the accused will not have been prejudiced by the temporary discontinuance (though as in all cases, the accused can still argue that the presumptive limit is inappropriate in the particular case). Secondly, the Crown might not commence within that original time limit, but instead might apply to the court for an extension; in this case, it will be open to the court to refuse the extension, and so a protection for the rights of the accused exists. In either case, therefore, the court has the opportunity to determine that the accused has not been prejudiced by the temporary discontinuance.

The other reason a court might wish to supervise the Crown's use of a temporary discontinuance is to determine that no abuse of process takes place. In this event, however, the accused can be adequately protected without a specific power to review the entering of the temporary discontinuance. In a future Working Paper the Commission will recommend the creation of a "termination order", to be issued by the court on its own motion or that of the accused.[391] The termination order will be available whenever commencement or recommencement of proceedings would either be irreparably prejudicial to the ability of the accused to make full answer and defence, or would amount to an abuse of the court's process. This power, though it requires the accused to take the initiative, provides another opportunity for judicial review of whether the temporary discontinuance has prejudiced the accused.

It is because of these opportunities for supervision that we require the prosecutor to provide reasons when entering the temporary discontinuance. At a later stage, the court may be reviewing whether it is appropriate to let new proceedings be commenced. At that stage, it will be important to know why the temporary discontinuance was entered. There is a great difference between a witness having been unavailable because he or she was hospitalized, and because no one had served a subpoena on that witness. We require that the reasons be provided at the time of entering the discontinuance, rather than at the stage of any later review, in order to avoid the possibility of after-the-fact rationalization.

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391. We expect to recommend this order in our forthcoming Working Paper *Remedies in Criminal Proceedings*.

(*b*) Commencement of New Proceedings

(*i*) *Overview*

At present, the entry of a stay acts to vacate any recognizance relating to the proceedings.[392] Section 579 of the *Code* indicates that proceedings may be recommenced "without laying a new information or preferring a new indictment".

However, it is also open to the Crown at present to commence new proceedings by laying a new charge. This charge can be, but need not be, identical to the previous one, and can be sworn by a different informant.[393]

(*ii*) *Recommendations*

44. A discontinuance vacates any appearance notice or undertaking made in respect of the proceedings which are discontinued. If later proceedings are commenced following a temporary discontinuance, arrangements to compel the appearance of the accused should be made in accordance with the recommendations in the Working Paper *Compelling Appearance, Interim Release and Pre-trial Detention*.

45. If proceedings are temporarily discontinued, later proceedings may be commenced either on a new charge document or on the original charge document.

Commentary

It is perhaps unnecessary to point out that, in the case of a permanent discontinuance, the accused should no longer be subject to any restraints on liberty that were imposed in connection with the charge that is now concluded. In keeping with our commitment to use restraint in the criminal law, we have concluded that the same should be true when proceedings are temporarily suspended: the accused should not be required to comply with the terms of the document compelling appearance. The Commission's recommendations in *Compelling Appearance*[394] contain proposals to arrange for attendance again should new proceedings be commenced.

Recommendation 45 reflects the concept that the temporary order of discontinuance does not end the proceedings. Any new proceedings will of course have to start again from the beginning, but nonetheless they are new proceedings on the same or a related charge. Therefore there is no need for a new charge document, although one may be used if it is administratively convenient to do so.

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392. *Criminal Code*, s. 579.

393. *R.* v. *Judge of the Provincial Court, Ex parte McLeod, supra*, note 364.

394. LRC, *Compelling Appearance, Interim Release and Pre-Trial Detention*, Working Paper 57 (Ottawa: The Commission, 1988).

CHAPTER THREE

Summary of Recommendations

1. To ensure the independence of the prosecution service from partisan political influences, and reduce potential conflicts of interest within the Office of the Attorney General, a new office should be created, entitled the Director of Public Prosecutions. The Director should be in charge of the Crown Prosecution Service, and should report directly to the Attorney General.

2. The Director of Public Prosecutions should not be a civil-service appointment. The Director should be appointed by the Governor in Council, and chosen from candidates recommended by an independent committee.

3. The Director should be appointed for a term of ten years, and should be eligible to be reappointed for one further term.

4. The Director should be removable before the expiry of a term. The grounds for possible removal should be misbehaviour, physical or mental incapacity, incompetence, conflict of interest, and refusal to follow formal written directives of the Attorney General.

5. The Director should only be removable by a vote of the House of Commons, on the motion of the Attorney General, following a hearing before a Parliamentary committee.

6. The Director should be paid the same salary and receive the same pension benefits as a judge of the Federal Court of Canada.

7. The Attorney General should have the power to issue general guidelines, and specific directives concerning individual cases, to the Director. Any such guidelines or directives must be in writing, and must be published in the *Gazette* and made public in Parliament. If it is necessary in the interests of justice, the Attorney General may postpone making public a directive in an individual case until the case concerned has been disposed of.

8. The Director should have the power to issue general guidelines, and specific directives concerning individual cases, to Crown prosecutors. Any general guidelines must be in writing, and must be published in an annual report by the Director to Parliament.

9. The Director should have all of the criminal-law-related powers of the Attorney General, including any powers given to the Attorney General personally. The Attorney General should also retain these powers.

10. The budget for the Office of the Director of Public Prosecutions should be included as a line item within the budget of the Attorney General. Control over the funds allocated to the office should rest with the Director, not with the Attorney General.

11. Ministerial responsibility for the police should not be the responsibility of the Attorney General. Policing should continue to be the responsibility of a separate minister.

12. The Department of the Solicitor General should be renamed the Department of Police and Corrections.

13. Section 2 of the present *Criminal Code*, which defines the Attorney General as including the Solicitor General, should be amended to delete reference to the Solicitor General, and reference to the Minister of Police and Corrections should not be added.

14. The Attorney General and the public prosecutor should have the power to require the police to make further inquiries once a prosecution has been launched to assist in the proper presentation of the prosecution's case and discovery of evidence tending to establish the guilt or innocence of the accused.

15. All public prosecutions should be conducted by a lawyer responsible to, and under the supervision of, the Attorney General.

16. The personal consent of the Attorney General should not be required prior to the prosecution of any crime.

17. The Attorney General and the public prosecutor should continue to have the power to take over any private prosecution.

18. Police officers should continue to have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment and subject to the Crown's right to terminate the prosecution.

19. Before laying a charge before a justice of the peace, the police officer shall obtain the advice of the public prosecutor concerning the facial and substantive validity of the charge document, and concerning the appropriateness of laying charges. Legislation setting out the duties of the public prosecutor should be amended, if required, to state this duty explicitly.

20. When seeking the advice of the public prosecutor, the police officer shall advise the prosecutor of all the evidence in support of the charge and all the

circumstances of the offence, and the prosecutor shall where appropriate advise the police officer either that the evidence is not sufficient to support a conviction for the charge, or that a different charge or no charge would be more appropriate in all the circumstances.

21. Where it is impracticable to have the charge examined by the public prosecutor, or if the public prosecutor advises against proceeding with the charge, the peace officer nevertheless may lay the charge before a justice of the peace. In such cases, the peace officer must provide reasons to the justice of the peace explaining why it was impracticable to have the charge examined, or if applicable, must disclose that the public prosecutor has advised against the laying of the charge.

22. Prosecutorial guidelines should be published by the Attorney General dealing with the initiation of criminal proceedings. These guidelines should state, in broad terms, the factors that should and should not be considered in advising whether to initiate proceedings.

23. The factors stated in the guidelines should include: (1) whether the public prosecutor believes there is evidence whereby a reasonable jury properly instructed could convict the suspect; and if so, (2) whether the prosecution would have a reasonable chance of resulting in a conviction. The prosecutor should also take into account: (3) whether considerations of public policy make a prosecution desirable despite a low likelihood of conviction; (4) whether considerations of humanity or public policy stand in the way of proceeding despite a reasonable chance of conviction; and (5) whether the resources exist to justify bringing a charge.

24. Where there is a choice of trial forum following an election by an accused, the choice should remain that of the public prosecutor.

25. When the crime charged is punishable by more than two years imprisonment, the Attorney General may personally require, notwithstanding any election by the accused, that the accused be tried by a court composed of a judge and jury. When a trial by jury is required under this section, a preliminary hearing will be held unless one has been held prior to the direction of the Attorney General.

26. The exceptions in section 469 of the *Criminal Code*, placing certain offences within the absolute jurisdiction of a superior court of criminal jurisdiction, and section 473 of the *Criminal Code*, giving an accused the right to waive the jury for those offences, should be repealed.

27. The power of the Attorney General to prefer a charge should be retained.

28. A judge may make a termination order stopping the proceedings, if it is shown that the preferment of the charge constitutes an abuse of process.

29. The Attorney General personally may prefer a charge notwithstanding that the accused has not had a preliminary hearing. The court in which the charge is

preferred may adjourn the proceedings until the accused has been given full and fair disclosure of the prosecution case, including, when so ordered, signed witness statements.

30. The Attorney General shall provide the accused against whom a direct charge has been preferred reasons for the preferment.

31. Guidelines should be established by and published for the use of the Attorney General in deciding whether to prefer a charge when no preliminary hearing has been held. The guidelines should indicate that preferment is an exceptional procedure to be used only in rare and extraordinary circumstances, and that the Attorney General may consider, among others, the following factors:

(a) the fear that the security of the prosecution's witnesses or of other persons involved in the prosecution is jeopardized;

(b) the need to try the charge as soon as possible in order to preserve the Crown's case;

(c) the need to avoid a multiplicity of proceedings; and

(d) the need to avoid unconscionable delay or unduly prolonged proceedings that cannot otherwise be avoided.

32. When a preliminary hearing has been held, and the accused discharged, no charge may be preferred without the consent of a judge of the intended trial court. The judge shall consent only if satisfied (following submissions from the parties) that the judge at the preliminary hearing applied an erroneous legal principle, or that the accused committed a fraud on the administration of justice, which resulted in the discharge of the accused.

33. When an accused has been discharged upon the completion of a preliminary hearing and fresh evidence is subsequently discovered, an application may be made to the judge who presided at the preliminary hearing, or if that judge is unavailable, to another judge of that court, to reopen the preliminary hearing. The judge may order that the preliminary hearing be re-opened if it is shown that:

(a) the application was brought within a reasonable time after the discharge;

(b) the evidence could not have been adduced by due diligence at the preliminary hearing;

(c) the evidence bears upon a decisive issue, or potentially decisive issue;

(d) the evidence is reasonably capable of belief; and

(e) the evidence is such that taken with the other evidence adduced at the preliminary hearing it could reasonably be expected to have affected the result.

34. The Attorney General's statutory power to stay proceedings and common-law power to withdraw charges should be abolished. Those powers should be

replaced by a statutory power to discontinue proceedings, by entering either a temporary or permanent discontinuance.

35. A permanent discontinuance bars any further proceedings against the accused on the same charge or for substantially the same crime that is the subject of the order.

36. A temporary discontinuance stops the immediate prosecution of charges against the accused, but allows a later prosecution on the same charge or for substantially the same crime that is the subject of the order, within an appropriate limitation period.

37. (1) A discontinuance must state whether it is permanent or temporary.

(2) If new proceedings are not commenced following a temporary discontinuance within the appropriate limitation period, the temporary discontinuance shall become a permanent discontinuance.

38. The Attorney General or the public prosecutor may enter a permanent discontinuance in any prosecution, whether it has been commenced by a police officer or a private prosecutor.

39. A permanent discontinuance must be entered in open court, after a decision has been made to issue process but prior to verdict.

40. Prosecutorial guidelines should be published by the Attorney General setting out factors to be considered when permanently discontinuing a prosecution. They should state, in broad terms, the factors that may be considered in determining whether to permanently discontinue proceedings, and the factors that should not be considered.

41. The Attorney General or the public prosecutor may enter a temporary discontinuance in any prosecution of which they have carriage, whether it has been commenced by a police officer or a private prosecutor.

42. A temporary discontinuance must be entered in open court, after a decision has been made to issue process but prior to the close of the Crown's case. The Attorney General or the public prosecutor must indicate to the court the reasons for entering the temporary discontinuance.

43. When a temporary discontinuance is entered, the limitation period for commencing later proceedings shall be governed in accordance with the recommendations in the forthcoming Working Paper *Trial Within A Reasonable Time*.

44. A discontinuance vacates any appearance notice or undertaking made in respect of the proceedings which are discontinued. If later proceedings are commenced following a temporary discontinuance, arrangements to compel the appearance of the

accused should be made in accordance with the recommendations in the Working Paper *Compelling Appearance, Interim Release and Pre-trial Detention*.

45. If proceedings are temporarily discontinued, later proceedings may be commenced either on a new charge document or on the original charge document.

APPENDIX A

Institutional Arrangements in Great Britain

1. England and Wales

The Attorney General is the law officer responsible for initiating and terminating prosecutions. As noted in the historical sketch, the Attorney General acted on behalf of the Crown, and could initiate proceedings either by laying an information in front of a justice, or through the use of an *ex officio* information. Prosecutions can be stopped by the Attorney General's use of the *nolle prosequi* power.

In addition to those duties discussed above, the Attorney General may choose to appear personally in very important prosecutions. There are also numerous offences that cannot be prosecuted without the Attorney General's consent. The Attorney General is not a member of the Cabinet. There is a convention that decisions made as to the initiation, or termination, of criminal proceedings are not subject to the usual rules of collective government responsibility, and must be made in the public interest without regard to the political consequences, whether to the Attorney General personally, or to the governing party. Advice can be sought from other members of the government, but these decisions are those of the Attorney General alone.[1]

The Solicitor General acts as the deputy to the Attorney General, performing the same functions when the Attorney General is unavailable, and providing other assistance. The Solicitor General is also an important source of legal advice to the House of Commons. Like the Attorney General, the Solicitor General is not a member of the Cabinet, but does hold a seat in Parliament.[2]

The Lord Chancellor is a member of Cabinet, and is a member of the bar. The Lord Chancellor is *ex officio* the Speaker of the House of Lords. The primary responsibilities of the post are related to the administration of the courts, and for supervision of the conduct of magistrates and circuit judges. The Lord Chancellor recommends to the Queen who should

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1. *Halsbury's Laws*, 4th ed., vol. 8 (London: Butterworths, 1974, at 789-794, paras. 1274-1282; Lord Hailsham, "Notes for a Lecture on the Law Officers and the Lord Chancellor" (1979) 17 Alta. L.R. 133 at 135-137; J.LI.J. Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services Canada, 1980) at 41; J.LI.J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 222-224.

2. *Ministerial Responsibility for National Security*, *supra*, note 1 at 21-23 and 35; Hailsham, *supra*, note 1 at 137.

be appointed to the High Court. The post also carries with it membership in the Judicial Committee of the Privy Council.[3]

The Home Secretary for England and Wales has general powers of supervision for police, coroners, fire investigations, remand centres, probation, Borstal institutions and prisons. The Home Secretary is also responsible for administering legal aid, and the organization of magistrate's courts. Petitions for the exercise of royal prerogatives for mercy come to this office.[4]

The Director of Public Prosecutions institutes, and prosecutes, some serious criminal offences. The Director is under the supervision of the Attorney General, whom the Director must advise before taking action in particularly important prosecutions. The Director must be a senior member of the bar, with at least ten years' standing.[5]

2. Scotland

Scotland's Lord Advocate performs many of the same functions as the Attorney General elsewhere.[6] The Scottish Solicitor General acts as his or her deputy, and performs the functions of the office when the Lord Advocate is unable to act. As well, the Lord Advocate can delegate specific duties to the Solicitor General. Many Solicitors General have later become Lords Advocate.[7]

The Crown agent heads the professional prosecution staff in Scotland. The office of the Crown agent generates directives to assist the procurators fiscal, who represent the Lord Advocate before the Sheriff Courts. The office is staffed by professional prosecutors, known as advocates depute. It is these officials who review reports from the procurators fiscal to determine what charges should be initiated, and whether to proceed summarily or by indictment. In Scotland the accused has no right to a trial by jury, and it is the advocate depute who makes the determination of whether a jury will try the case. In unusually important or difficult cases, the Lord Advocate or the Solicitor General may become involved.[8]

The Scottish procurator fiscal retains common-law responsibility for investigating crime, and a statutory duty to instruct the Chief Constable to investigate offences. It is important to note that the office is independent of the police. The procurator fiscal is usually present at post-mortem examinations, and often attends the scene of serious crimes to

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3. *Halsbury's Laws, supra*, note 1 at 722-734, paras. 1171-186; Hailsham, *supra*, note 1 at 133 and 139.

4. *Halsbury's Laws, supra*, note 1, at 772-776, paras. 1243-1247.

5. *Ibid.*, at 796, para. 1289; *Law Officers, supra*, note 1 at 10 and 362.

6. *Halsbury's Laws, supra*, note 1, at 789, para. 1274.

7. J.LI.J. Edwards, *The Attorney General, Politics, and the Public Interest* (London: Sweet & Maxwell, 1984) at 286-287.

8. *Ibid.* at 294-297.

oversee the collection of evidence. In most minor crimes the procurator fiscal plays no role in the investigation. The Philips Royal Commission on Criminal Procedure[9] concluded that, despite a requirement that the procurator fiscal approve cases for prosecution, in practice this was largely a formal function, and very few cases brought for their approval did not go ahead. The Philips Commission also concluded that, in practice, the line between investigative and prosecutorial functions was not clearly drawn.

9. Royal Commission on Criminal Procedure, *Report*, Cmnd 8092 (London: HMSO, 1981) at 135.

APPENDIX B

Distribution of Powers of federal and provincial Ministers of Justice, Attorneys General and Solicitors General

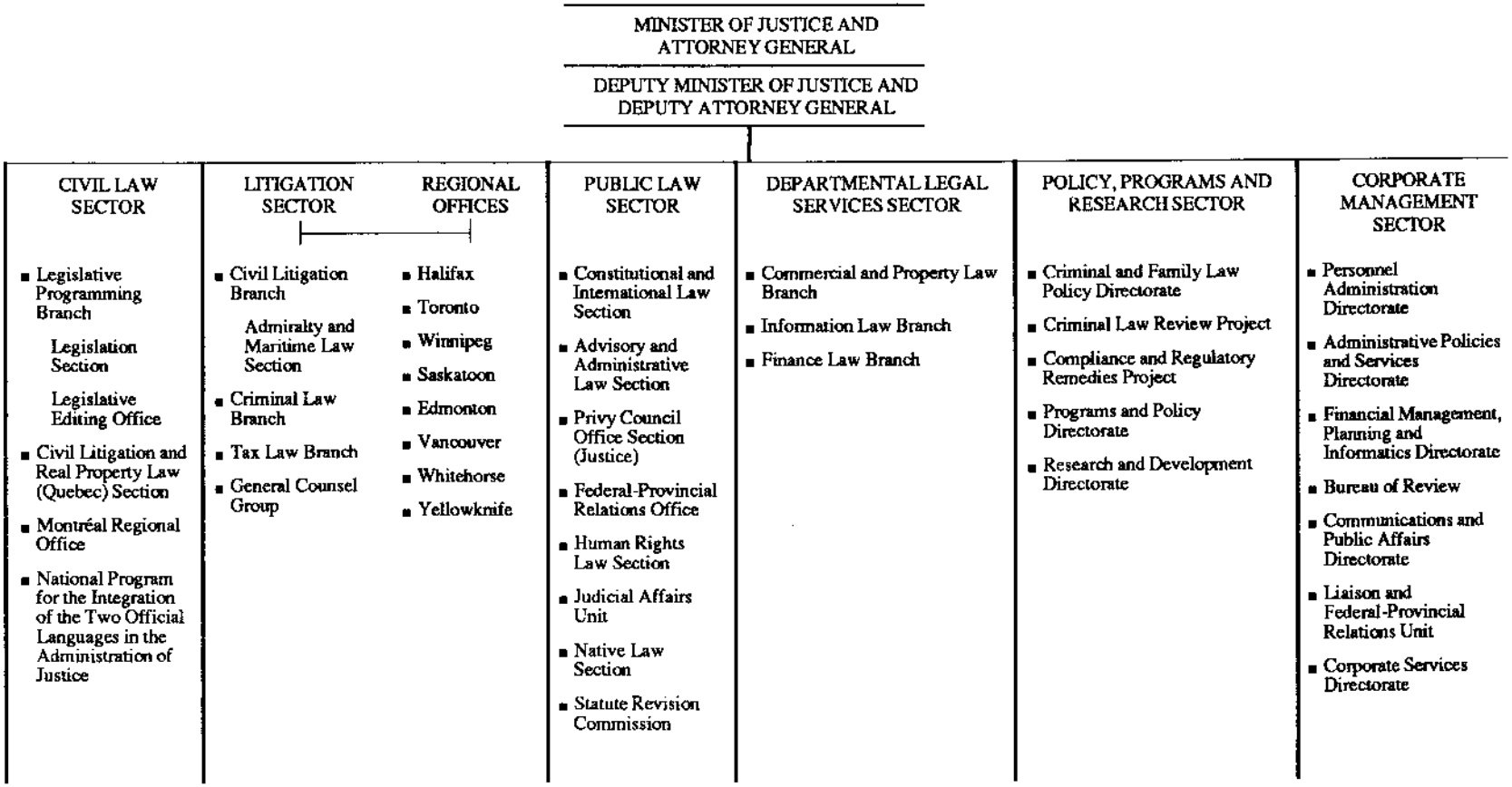
This chart only sets out divisions of responsibility established by statute. Some provinces have, on an administrative basis, assigned responsibilities to a particular law officer — in Québec, for example, the Minister of Justice is responsible for Charter scrutiny — but those assignments are not noted here. In Nova Scotia, Ontario, Manitoba, Alberta, and British Columbia, the title "Minister of Justice" is not used; in Prince Edward Island the minister is called the "Minister of Justice and Attorney General".

Abbreviations

MJ	Minister of Justice
AG	Attorney General
SG	Solicitor General
MPS	Minister of Public Security
X	Not noted

	Fed.	Nfld.	N.S.	P.E.I.	N.B.	Que.	Ont	Man.	Sask.	Alta.	B.C.
Pre-screening charges	X	X	X	X	X	AG	X	X	X	X	X
Prosecutions	AG	AG	AG	X	X	AG	AG	AG	AG	AG	AG
Other litigation	AG	AG	AG	X	X	AG	AG	AG	AG	AG	AG
Legal advice to government	AG	MJ	AG	X	X	MJ	AG	AG	MJ	AG	AG
Legal advice to Governor General/ Lieutenant-Governor	MJ	MJ	AG	X	X	MJ	AG	AG	AG	AG	AG
Legal policy	MJ	MJ	AG	X	X	MJ	AG	AG	MJ	AG	AG
Charter/Bill of Rights scrutiny	MJ	X	X	X	X	X	X	X	X	X	X
Court administration	MJ	MJ	AG	X	X	MJ	AG	AG	MJ	AG	AG
Policing/corrections	SG	MJ	SG	X	X	MPS	SG	AG	AG	SG	SG

APPENDIX C
Organizational Structure of the Department of Justice



March 31, 1989

Source:Department of Justice, *Annual Report 1988-1989*

APPENDIX D

Comparison Chart of Director of Public Prosecutions Arrangements in Other Countries*

	ENGLAND	IRELAND	VICTORIA	AUSTRALIA
Appointed by	Attorney General	Government on committee recommendation	Governor in Council	Governor General
Term	until retirement age**	fixed by Prime Minister	to age 65	set term, up to 7 years
Grounds for removal	violation of law or normal rules of conduct, inefficiency**	after a report on health or conduct	none established**	possible for misbehaviour, physical, mental incapacity: necessary if bankruptcy, unauthorized absence, outside employment, non-disclosure of interests
Removal by	rules governing civil servants**	Dáil, on report by Chief Justice, Attorney General, High Court Judge	Governor in Council, affirmed by Parliament	Governor General
Salary	set by Attorney General and Treasury	set by Prime Minister and Minister for Public Service	same as Supreme Court Judges	set by Remuneration Tribunal
Pension	individual arrangement with Treasury**	same as salary	same as Supreme Court Judges	Civil Service pension or other plan with Minister of Finance approval**
Degree of independence	under superintendence of Attorney General	independent	independent	subject to direction by Attorney General in writing
Statutory	yes	civil servant	not civil servant	yes
Required to publish	annual report of general guidelines	n/s***	general guidelines	directions from Attorney General
Budget	Director appoints staff, Treasury approves numbers	Prime Minister appoints staff, Minister for Public Service governs	Director appoints staff, controls budget**	Public Service appointments, Director has power of a Permanent Head

* New Zealand has been omitted from the chart because it does not have a formal Director of Public Prosecutions.

** Information provided by private communication.

*** Not in statute.