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INEQUALITIES OF THE CRIMINAL LAW

During the Thirty-seventh Annual Meeting of the Canadian Bar Association held at Ottawa from August 29th to September 3rd, 1955, the Section on the Administration of Criminal Justice presented a panel discussion under the title, "Inequalities of the Criminal Law". The discussion, which was under the chairmanship of Mr. Edson L. Haines, Q.C., of Toronto, attracted a large audience—as similar ones have in the past—and the Canadian Bar Review is happy to respond to the suggestion that it be made available to a wider audience. The members of the panel, besides Mr. Haines, were:

HIS HONOUR JUDGE LUCIEN H. GENDRON.....*Montreal*
JOSEPH SEDGWICK, Q.C.....*Toronto*
ARTHUR E. MALONEY, Q.C.....*Toronto*
G. ARTHUR MARTIN, Q.C.....*Toronto*
JOHN G. DIEFENBAKER, Q.C., M.P.....*Prince Albert*

THE CHAIRMAN: Ladies and gentlemen, I welcome you to this meeting of the Section on the Administration of Criminal Justice. We have gathered together a panel of eminent jurists and lawyers who are to discuss the subject of inequalities in the criminal law. The panel intends to avoid idle criticism for the sake of criticism. We shall try to be as constructive as possible. Perhaps the best way to convey the purpose of the programme is to quote from the address of the late Mr. Justice Holmes at the dedication of a new hall of the Boston University School of Law in 1897:

> I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. . . . I trust that no one will

> understand me to be speaking with disrespect of the law, because I criticise it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. . . . But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it.

Our object this afternoon is to examine some of the apparent inequalities in the criminal law and its administration, and to offer constructive suggestions to remove them.

We have invited no Crown attorneys to sit on the panel. Perhaps some of you may wonder why. The reason is that it might embarrass men in official positions to take part in a programme during which we shall be deprecating certain existing procedures. Perhaps they would feel called upon to justify some of the practices in their own offices. At the conclusion of the panel, however, we shall invite the Crown attorneys to come forward—in fact, anyone to come forward—to comment on what the members of the panel have had to say.

Now, ladies and gentlemen, the man who has the most direct interest in the administration of criminal justice is the accused: he is the one who suffers most from any inequalities that exist. The other day Mr. J. Alex Edmison, Q.C., who was for some time the Executive Director of the John Howard Society of Ontario, and is now Assistant to the Principal of Queen's University, telephoned me to say that the editorial staff of the "The Kingston Penitentiary Telescope", the magazine published by the inmates of Kingston Penitentiary, would like to express their views on the twenty-one questions we are discussing this afternoon. I told him that their opinions would be most welcome. The editors have prepared a brief, which we have had copied, and it will be distributed among you. From time to time during the discussion I shall be referring to it, but now I want to read, if I may, two paragraphs from the introduction:

> We deem it a great honour that the Canadian Bar Association should have been interested in our opinions. Most, indeed nearly all, of these questions are of vital importance to the men and women in Kingston, and to have given us this opportunity to express our views, and perhaps mould some of your members' opinions, is a truly splendid gesture.
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> We have not hesitated to speak frankly because we feel that we are speaking to friends. After all, some of us wouldn't be where we are, if it weren't for some of you.

I think you will agree, when you have read the brief, that it contains some very useful observations.

May I now introduce the members of the panel to you. Between them, during their practice at the bar, they have appeared in over one hundred and twenty-five murder cases, besides countless other criminal trials of less seriousness. We are fortunate to have been able to assemble so experienced a group of men.

On my immediate left is His Honour Judge Lucien H. Gendron, a judge of the Sessions of the Peace in Montreal. For forty years he practised at the criminal bar, before his appointment to the bench, and he is Professor of Criminal Law at the University of Montreal.

Next to Judge Gendron is Mr. Joseph Sedgwick, Q.C., of Toronto. For many years Mr. Sedgwick was with the Attorney-General's Department there and acted as special prosecutor in criminal cases. In 1937 he reformed and joined the defence bar. Among his many activities, he is chairman of the Discipline Committee of the Law Society of Upper Canada.

Next to him is Mr. Arthur E. Maloney, Q.C., also of Toronto. Mr. Maloney is chairman of the Section on the Administration of Criminal Justice of the Canadian Bar Association and an outspoken opponent of capital punishment. Even those who disagree with him acknowledge his sincerity of purpose and the valuable contribution he has made to a public understanding of this important issue.

Then comes Mr. G. Arthur Martin, Q.C., of Toronto. Mr. Martin is the only member of the panel who devotes his whole time to the practice of criminal law. He is a lecturer in criminal law at the Osgoode Hall Law School. He has one other distinction: he is also the only bachelor on the panel.

At the far end of the table is Mr. John G. Diefenbaker, Q.C., M.P., of Prince Albert, Saskatchewan. Mr. Diefenbaker has had a brilliant political career and needs no introduction to a Canadian audience anywhere. We, as lawyers, know him as one of Western Canada's leading counsel, a man who is an able and resourceful criminal lawyer. Gentlemen, we shall now proceed with our discussion. The first question is:

QUESTION 1

Should the results of scientific investigations made by experts in the employ of the Crown be disclosed to the defence before trial?

What are your views on that point, Mr. Martin?

MR. MARTIN: Mr. Chairman, I think it is obvious that, in order to ensure a fair trial for an accused, the results of all scientific investigations made by experts should be given to the defence. I would go further and say that under the general principles of criminal procedure the Crown is obligated to furnish the defence with such information. I was not intending to cite any authorities today, but I think the following passage from the 1952 edition of Kenny's *Outlines of Criminal Law* so well sets out the principle that I might refer to it:

> Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him. Hence if anyone who was not produced before the committing justice is to be called as a witness, full information should be furnished to the accused, both as to his name and as to the evidence he will give. If this has not been done, his evidence should not be pressed at the trial if the accused objects (*per* Hawkins, J., in *R.* v. *Harris* (1882), C.C.C. Sess. Pap. xcv, 525). The same principle applies to letters or other documents.

I believe that the accused is entitled to know the results of scientific investigations made by Crown experts and, if they are withheld from him after they have been asked for, the trial judge may order them to be produced. I should like to say that in actual practice the Crown does inform the defence.

THE CHAIRMAN: Mr. Maloney, has that been your experience?

MR. MALONEY: No.

THE CHAIRMAN: Would you care to develop that answer?

MR. MALONEY: I think immediately of one case in my experience where information was not made available to the defence, a case that occurred as recently as the fall of 1954 in Northern Ontario. The Crown, in an attempt to determine whether or not the accused man had in fact been at the scene of the crime—the charge was murder—took some earth from his boots and had an expert compare it with earth taken from the scene of the crime. The investigation established that the earth on the boots of the accused did not correspond with the earth from the scene of the crime. I heard about this experiment by a mere accident. No one connected with the prosecution had the slightest intention of revealing to me that very crucial piece of evidence. As I say, I found out about it quite by accident. That is only one example from my personal experience; I am sure many more could be given.

THE CHAIRMAN: Judge Gendron, what is your practice in Quebec?

JUDGE GENDRON: In a case which has become famous in Canada—the trial of the Abbé Delorme—an experiment was made to find out if a bullet had been shot from a certain revolver. The prosecution gave all the facts to the defence and, as a matter of fact, gave them every opportunity to test the revolver and the bullet. This shows that the Crown was anxious to see that the accused should have a fair trial. In effect the result was to strengthen the Crown's evidence very much. I believe it is the only fair practice. After all, a criminal trial is not a game in which *A* tries to defeat *B* and *B* to defeat *A*: it is a process designed to arrive at the truth, and the results of any scientific investigation should be given to the defence attorney.

THE CHAIRMAN: Gentlemen, the question is: In practice *are* they given to the defence? Do you find they are, Mr. Diefenbaker?

MR. DIEFENBAKER: My experience has been that Crown prosecutors in general are fair: they do furnish the defence with what information is available to them. It has never been my experience that anything in the nature of an injustice to the accused has been done in this regard.

THE CHAIRMAN: Perhaps we might go on to the next question, gentlemen, because the same theme recurs in the first three questions. The second question contains a quotation from a statement made by Mr. W. B. Common, Q.C., Director of Public Prosecutions in Ontario. This is what he said:

> . . . usually, in all criminal cases, there is a complete disclosure by the prosecution of its case to the defence. To use a colloquialism, there are no 'fast ones' pulled by the Crown. . . . They [the defence] know exactly what our case is and nothing is hidden or kept back.

The question is:

QUESTION 2

Has this been the experience of counsel in the other provinces?

Now, gentlemen, before I put the question to you, let me quote from what your clients have to say.

MR. MALONEY: They are not necessarily our clients. [Laughter]

THE CHAIRMAN: In answer to the second question, this is what the editors of the "Telescope" say:

> In our experience the 'complete disclosure by the prosecution' comes only during the trial. Regarding Mr. Common's statement that 'nothing is hidden or kept back'—either this statement is false or our lawyers in the past have been mis-informing us by stating that they don't know what the Crown is going to 'pull'.

Mr. Maloney, would you take over from here?

MR. MALONEY: I know Mr. Common believes what he says in the quotation and I am sure that, when Mr. Common made that statement before the joint committee of the Senate and House of Commons inquiring into capital punishment, it was his understanding that his representatives and subordinates throughout the province carried out that policy. But the actual fact is that in a great many cases they do not.

I can think of another experience of my own in a celebrated murder case. I was called into the case about three days before the commencement of the trial. The preliminary hearing had already taken place, at which two or at the most three witnesses had been called. At the trial, if I remember correctly, there were some forty-five witnesses, and I hadn't the slightest idea of what the nature of the testimony of any one of them was to be. I applied to the Crown counsel who conducted the trial for a summary of the evidence they were to give. I was refused it. I spoke to the leading witness for the Crown—a police officer—about the nature of his evidence and he declined to discuss it with me. So, in that case at least, I was clearly not given the treatment that Mr. Common seems to think is accorded in all criminal cases in Ontario. There are other cases in which I had a similar experience. So I say that I do not agree that Mr. Common's representatives, or the representatives of his department, throughout the province carry out the policy he obviously must instruct them to follow.

THE CHAIRMAN: What do you say about this, Mr. Sedgwick?

MR. SEDGWICK: My experience has been more like that of Mr. Martin and Mr. Diefenbaker. I have found the Crown cooperative. I have often been surprised, but of course at times so is the Crown surprised, at what its witnesses say. I think that, if you ask the Crown for information, ordinarily they give it to you. At least I have generally been able to get it.

THE CHAIRMAN: Would you care to look at question 3, Mr. Sedgwick, and let us have your views on it? Here we have the late Mr. Justice Riddell speaking in the case of *Rex* v. *Chamandy* (1934), 61 Can. C. C. 224, at p. 227:

> It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.

QUESTION 3

Does this statement express the practice in all the provinces? If not, how should it be implemented?

MR. SEDGWICK: Of course it is a counsel of perfection, but I think it is observed by the older and more experienced Crown officers. The younger and more zealous ones are often anxious to keep a score: they count their triumphs and losses, which I don't think the Crown should do. Prosecutors might keep in mind the old saying of Dick Ritchie—J. A. Ritchie, Q.C.—when he was Crown Attorney here in Ottawa, "The Crown never wins, and the Crown never loses". But, still, you cannot get away from the fact that a trial is a battle; people who go into court must necessarily be combatant or they would not be there. I suppose you cannot prevent Crown counsel from feeling that his job is to succeed. But I think the older and more experienced ones do bear in mind Mr. Justice Riddell's advice, which I say is a counsel of perfection.

It must be remembered, too, that his comments are to be viewed in the light of the case in which they were made. It happened that in that case the prosecutor was a gentleman who was not a Crown officer, and Mr. Justice Riddell added to the words you have quoted, that when cases were prosecuted by experienced Crown officers one found that they were conducted without animosity. He was really criticizing the practice of having as prosecutor a person who has some interest in the case, which was the fact in the *Chamandy* case.

THE CHAIRMAN: In a word, Mr. Sedgwick, has this not been the situation, that a great deal depends on the fortune or misfortune of an accused person in the Crown prosecutor he draws?

MR. SEDGWICK: That will always be so.

MR. CHAIRMAN: Judge Gendron, what is the practice in Quebec?

JUDGE GENDRON: I believe that today in Quebec the private prosecutor is not used to as large an extent as he was some years ago. I agree with Mr. Sedgwick that when private prosecutors are used they tend to overplay their hands, especially when they are convinced that the accused is guilty.

THE CHAIRMAN: Then you agree with Mr. Sedgwick that Mr. Justice Riddell's words are a counsel of perfection?

JUDGE GENDRON: No doubt.

THE CHAIRMAN: The practice is somewhat different.

JUDGE GENDRON: I doubt the perfection.

THE CHAIRMAN: Gentlemen, we come now to question 4, which begins with the words of the present Chief Justice of the High Court of Ontario in *Rex* v. *Gibbons* (1946), 86 Can. C. C. 20, at p. 28:

> I do not know of any rule that a defence counsel cannot interview a witness that may be called for the Crown. . . . because the Crown may call a witness, it does not interfere with the counsel for the defence interviewing the witness.

QUESTION 4

In your experience does counsel for the Crown usually co-operate to enable you to interview its witnesses?

Mr. Diefenbaker, what answer would you give to this question?

MR. DIEFENBAKER: Mr. Chairman, I know of no rule that would deny defence counsel the right to examine Crown witnesses, but I think it would be a most dangerous course to follow. If I were to interview any Crown witness, I think I should want to do it in the presence of a representative of the Crown attorney to the end that the probability, or possibility, of misunderstanding would be avoided. Without such a safeguard I think it would be a most inappropriate step to take and in general, even with the safeguard, I am opposed to the practice.

THE CHAIRMAN: What are your views, Mr. Martin?

MR. MARTIN: Like Mr. Diefenbaker, I agree that it is proper in law to interview a Crown witness. In fact, there is no such thing as a Crown witness: every witness is simply a witness, and the Crown has no property in him. He may be called for the defence as well as for the prosecution. I have found that generally no impediment is thrown in my way when I want to interview a witness previously subpoenaed by the Crown. There is, however, a hostility on the part of certain police officers towards the defence. They refuse to talk to you. I have known Crown attorneys to tell witnesses that, while the defence has a right to interview them, they do not have to answer the questions put to them. This does not happen often, but I think it is very improper for the Crown attorney to give that advice, because it interferes with the preparation of the defence. Like Mr. Diefenbaker, also, I think that just because you have the legal right to interview Crown witnesses it does not follow that it is always a wise policy to do so.

THE CHAIRMAN: But quite often it might be necessary?

MR. MARTIN: Quite often it might be necessary. There may be a witness you believe to be disinterested and impartial. You would like to check to see if he knows certain facts, and the only way you can find out is to interview him. I think that is why the names of witnesses are endorsed on the indictment, so that they can be interviewed. But you have to use discretion as to the witnesses you interview, and you must avoid any suggestion that you have tampered with them. I always prefer, when I interview Crown witnesses, to have some other member of the bar present with me, and to take a full note of what each witness says.

I might tell you an amusing story about that. About ten years ago in the refresher course lectures at Osgoode Hall I said that it was proper to interview Crown witnesses so long as there was no question of tampering with their evidence. At that time the propriety of the procedure was not as generally recognized as it is today. Shortly afterwards I got a letter from a Manitoba lawyer who said, "I read your lecture, and I interviewed a Crown witness. I am now accused of being unethical. Have you got any authority to cite in addition to your own?" Fortunately, the judgment of Chief Justice McRuer to which you have referred, *Rex* v. *Gibbons*, had just been published, and I was able to refer him to it.

THE CHAIRMAN: You have another case, I think, from England.

MR. MARTIN: Yes. It would appear that a solicitor in England, in 1943, was reprimanded by Mr. Justice Lewis for interviewing a Crown witness and taking a statement from him. The story is told in the Law Society's Gazette, Volume 41, the January issue for 1944, at page 8. Under the heading, "Interviewing a Witness", it reads:

> Members may have seen a report in *The Times* for the 15th July, 1943, of a case at Manchester Assizes in which Mr. Justice Lewis is reported as having stated 'For a solicitor, or his clerk, when instructed by a prisoner to interview a witness for the prosecution is most reprehensible. I take so serious a view of it that I propose to get a transcript of the girl's evidence and send it to The Law Society. I am not saying whether the girl's evidence is true or not, but The Law Society should know that this statement has been made on oath. If it is true I take an extremely serious view of it, and if it is not true, the solicitor ought to be cleared of such a charge.'
>
> On the proposition stated in the first sentence of this quotation the Council have always held the view that there is no property in a witness and that so long as there is no question of tampering with the evidence of witnesses it is open for a solicitor for either party to

civil or criminal proceedings to interview and take a statement from any witness or prospective witness at any stage of the proceedings, whether or not that witness has been interviewed or called as a witness by the other party.

The papers in this case were in due course forwarded to the Council by Mr. Justice Lewis with a covering letter which made it clear that he was not fully reported and was, in fact, addressing his remarks to the case of suspected tampering with a witness referred to in the latter part of his statement. The Council have investigated the conduct of the solicitor and are satisfied on the facts before them that there was no question of tampering with the witness, and that there was no impropriety on the solicitor's part and the Council have so informed his Lordship.

So you see that the Council of the Law Society was quick to intercede on behalf of a solicitor who had interviewed a witness for the prosecution, and justified what he had done, in the absence of any tampering with the witness's testimony.

THE CHAIRMAN: Thank you, Mr. Martin. Does any other member of the panel wish to comment further on that question? If not, we will turn to question 5:

QUESTION 5

Is there a duty on Crown counsel and officials connected with the investigation and prosecution of a crime to bring to the attention of the court evidence favourable to the accused, even though they disbelieve it?

May I again turn to the brief from the men of Kingston Penitentiary and read you what they have to say about this. Perhaps you will have some comments on what they say:

The last five words of this question made us smile. However, all we can say is that we do not know if it is a duty officially but we do know that in practice it is not done.

We recall one specific case where a girl was one of the key witnesses against a man charged with bank robbery. She had been walking down the street when she saw two men running. She identified the accused as one of the men. It later developed that her girl friend, who had been walking with her, had been equally positive that the accused was not one of the men. The Crown never mentioned this other girl and it was only during cross-examination that her existence was discovered by the defence.

The Crown should be required to submit all evidence to the court, whether favourable or unfavourable to the accused. When the prosecution does not believe the evidence uncovered it should be left to the court to decide.

> Frequently, ten eye-witnesses to a crime will attend a police line-up, but invariably only those who picked out the accused will appear as Crown witnesses in court.

What do you think about that, Mr. Diefenbaker?

MR. DIEFENBAKER: Mr. Chairman, I do not think there is any legal duty requiring Crown counsel to bring to the attention of the court evidence favourable to the accused, although in a recent judgment of the Supreme Court of Canada, *Boucher* v. *The Queen*, [1955] S.C.R. 16, one of the judges rather indicated that it was. However, I do believe that Crown counsel should bring to the attention of the accused or his counsel any evidence favourable to the accused whether he believes it or not.

THE CHAIRMAN: Are you drawing a distinction between disclosing to counsel for the accused evidence that is unfavourable to the Crown's case, and therefore favourable to the accused, and disclosing it to the court?

MR. DIEFENBAKER: I do not think that Crown counsel is under any duty to disclose it to the court. Crown counsel should not be placed in the position of having to put evidence before the court on which he places no reliance himself. There is no need to put him in the position of having to do that, provided he places the evidence before the accused and his counsel. The accused may then, if he sees fit, follow up the lead and call the witness if so advised.

THE CHAIRMAN: Does any member of the panel care to comment further?

MR. MARTIN: Broadly speaking, I think the Crown prosecutor should have a discretion as to the witnesses he will call. That discretion must be wisely and judiciously exercised, and generally speaking I think it is. Let me give an example to illustrate what I mean. Suppose a man is charged with bank robbery. It happens that two bank employees were in the bank at the time the robbery took place, and both had an equally good opportunity to observe the robber. Both these witnesses go to a police line-up, one picks out the accused and says, "That is the man who robbed the bank"; the other says, "The accused is not the man who robbed the bank". Now, in those circumstances, I do not think it would be fair for the prosecutor to call only the witness who identified the accused and not to place before the jury the one who did not. But there may well be cases where statements are given to the police officers investigating a case which the Crown honestly feels are unreliable. I think in those circumstances the

prosecutor, in the exercise of his discretion, may refuse to call the witnesses, though he must inform the accused of their evidence so that the accused can call them.

THE CHAIRMAN: Must the Crown bring the witnesses to the court-room?

MR. MARTIN: I do not know that its duty goes that far.

THE CHAIRMAN: You don't think so?

MR. MARTIN: I don't think so. But if their names are on the indictment as witnesses, then of course the Crown must make them available. It does not have to call them, even though their names are on the indictment, but it must have them available.

THE CHAIRMAN: They must be in the court-room?

MR. MARTIN: Absolutely.

THE CHAIRMAN: Then do we not come down to this? You are saying that if Crown counsel does not believe the witnesses he need not put their names on the indictment and, if he does not put their names on the indictment, he need not have them available in court. All he must do is disclose their existence to the accused. If he does that, counsel for the defence can go and find them, even if he cannot afford to bring them to the court-room. Now is that being fair?

MR. MARTIN: In practice, it does not work out that way. I think that if a witness can give material evidence, and if defence counsel applies for funds to bring the witness to court, he will usually be supplied with them—I think the Crown would bring the witness. There is a tendency on the part of counsel to sit back and think that the Crown attorney is going to walk down with his file and tell them all about his case. But he won't do that. If counsel will make diligent inquiry and ask for these things, he will get them.

THE CHAIRMAN: Do you say that all counsel who go to Crown attorneys get a complete disclosure?

MR. MARTIN: I think, generally speaking, they get complete disclosure. I am sure Mr. Common's statement clearly reflects his own attitude to his duty, and I think it reflects the attitude of the members of his staff. But, at the same time, there are perhaps individual Crown attorneys who really do not accept the notion that it is the prosecution's duty to make full disclosure to the defence; and that attitude is reflected in the manner in which they prosecute cases. There are a few of that type, but I think, generally speaking, counsel who is diligent and makes a proper inquiry will get the desired information, and if he does not, it is often his own fault. It may be a lack of knowledge or a failure to

put the request properly, but I am convinced that if Crown counsel were to refuse to disclose material information, and later to endeavour to bring it forward at the trial, he would be subject to criticism by the trial judge, and probably an adjournment would be granted to permit the defence to study the evidence.

MR. CHAIRMAN: Mr. Maloney, the last part of what the men in Kingston have to say to this question is this:

> Frequently, ten eye-witnesses to a crime will attend a police-line-up, but invariably only those who pick out the accused will appear as Crown witnesses in court.

What has been your experience?

MR. MALONEY: I have seen cases in which that has actually happened. On the other hand, I have seen cases, as Mr. Martin has pointed out, in which Crown counsel has brought forward all the evidence. Where it has happened, it is because the Crown prosecutor has refused to accept as his duty what Mr. Common has outlined his duty to be.

THE CHAIRMAN: Mr. Sedgwick?

MR. SEDGWICK: The suggestion that Crown counsel must call all evidence favourable to the accused is ridiculous. Crown counsel calls the evidence that is consistent with the case he is presenting. Let me give you a hypothetical example. Let us suppose that a close relative of the accused is interviewed by the police and tells them a story wholly favourable to the accused, not a word of which the Crown can believe, and every word of which is quite inconsistent with the other evidence the Crown proposes to call. Is the Crown in those circumstances compelled to call that near relative? I should think not.

THE CHAIRMAN: But the relative might be telling the truth.

MR. SEDGWICK: All right, let the defence call him and then the Crown can test his evidence in cross-examination. I can think of no sensible rule that compels the Crown in those circumstances to call such a witness. The defence can call him. We are apt to forget that the defence has just as broad a right to call witnesses as has the Crown, and we must not make it too hard to convict a malefactor.

THE CHAIRMAN: But you have taken a very extreme case as an illustration. Let us suppose another case where there are seven witnesses, four of whom will testify as to facts suggesting guilt, and three to the contrary, and the Crown attorney makes up his mind to prosecute. This is a vastly different situation from the one you have described. Why should not the Crown attorney call

all seven witnesses and bring them into the court-room? What do you think, Judge Gendron?

JUDGE GENDRON: I think you must leave a word for the defence; they should call those three witnesses and let the jury decide whether they are to believe the four on the one side or the three on the other.

THE CHAIRMAN: One further thing the men in Kingston said in their brief:

> In cases where the Crown presents witnesses to testify to the bad part of an accused's character it should also be willing to spend an equal amount of money for transportation and wages of witnesses willing to testify to the good part of his character.

What if those three witnesses are hundreds of miles away and the accused cannot afford to bring them to court? What about making them available to the defence? Is there any duty on the Crown to bring them at least as far as the court-room?

JUDGE GENDRON: I don't believe so.

MR. DIEFENBAKER: Alluding to the instance you have referred to, the case of the seven equally reputable witnesses, three of whom say the identification of the other four was wrong. The names are given to counsel for the accused, but the Crown does not call them. I should just like to be able to put that up as my defence: I would say these three witnesses have given their statements to the Crown, and the Crown does not see fit to call them. I think you could pretty well depend on the sound judgment of the jury in a case like that.

THE CHAIRMAN: But if there is no jury?

JUDGE GENDRON: You still have your witnesses.

MR. MALONEY: I think in fairness, and especially since some criticism has been made about our failure to include on the panel a spokesman for the prosecution, it should be said that in Ontario—I don't know whether it is the practice in other provinces—if a situation like that were to arise, that is to say, where material evidence could be given by someone out of the province, and some expense would be involved in bringing the witness to the province to testify, Mr. Common's department would, in an appropriate case, see to it that the evidence is made available.

A striking illustration of this in Ontario is to be found in the well-known case of *Reg.* v. *Kaipiainen*, [1954] O.R. 43. In order to assist the defence to establish insanity at the second trial of the accused after a new trial was ordered, and on the recommendation of Mr. Common, the province, in collaboration with the

Law Society, saw to it that the material testimony was taken on commission in Finland, and it was taken at considerable expense. That is an illustration of how very fairly in one case this precise matter was dealt with in Ontario.

MR. MARTIN: My experience has been similar to Mr. Maloney's. Actually, another striking illustration has occurred in the last few months. I was defending a man who had been identified by four witnesses as the person who had committed an offence. He was convicted, despite his own denial of it, and the alibi that on the day of the crime he was working in a barber shop. The Court of Appeal dismissed the appeal, I think on the ground that the accused should not be re-tried after four witnesses had identified him. Mr. C. P. Hope, of the Attorney-General's Department, still was not satisfied that the accused was guilty. He had the Royal Canadian Mounted Police make a thorough investigation, including an analysis of the accused's handwriting. Their report was to the effect that the accused was probably not the man who wrote the document alleged to have been written by the thief. As a result of that report the accused was released.

Now of course the R.C.M.P. handwriting expert of the Scientific Investigation Laboratories was not available to me as defence counsel, because they do not do private work; but at the request of the Department of the Attorney-General the investigation was carried out and it resulted in the release of the accused man. I do not think I could have procured unaided, with the resources I had available to me, the necessary investigation.

THE CHAIRMAN: Thank you, Mr. Martin. Now the next question:

QUESTION 6

Counsel has the right to question any witness as to his previous convictions. To enable counsel to exercise this right, should the prosecution be required, upon the request of the defence, to furnish particulars of the previous convictions of Crown witnesses?

What we have in mind, gentlemen, is this. As you know, when you call a witness for the defence, the Crown has all the records available and can use them in cross-examination, regardless of their relevancy. The Crown may be calling a witness who you suspect has a record. Can you get his record so that you also can use it in cross-examination? What is the practice? Mr. Maloney, what do you say?

MR. MALONEY: If you inquire through official channels whether or not a particular person has a criminal record, you are refused the information, so that the right of cross-examination on previous convictions really does not mean very much to the defence. The question can be best answered by an illustration from my personal experience. I had a trial some years ago in which Crown counsel apparently did not subscribe to Mr. Common's philosophy. I wrote him to ask if any of the witnesses for the Crown had a criminal record. This case, I may say, involved the robbery of a gaming house while a game was in progress and there were some eight eye-witnesses. The Crown counsel in question replied that, of the eight eye-witnesses, four had criminal records, and he told me what the records were. I was rather surprised to get that information from him of all people. So, when I appeared at the trial, I was fortified by the realization that I was armed with the material with which to cross-examine those four witnesses on their records—the information Crown counsel had so magnanimously seen fit to give me. But—alas—he did something I had failed to foresee—he just called the other four, and they, it seems, were of unimpeachable character. [Laughter]

THE CHAIRMAN: Gentlemen, what is your view, should the Crown be required to disclose the records of its witnesses?

MR. SEDGWICK: I think so. The Crown always has that information available about your defence witnesses; I think you should have the same information about the Crown witnesses.

THE CHAIRMAN: What do you think, Judge Gendron?

JUDGE GENDRON: Yes, I think so. But I still wonder why you are allowed to ask a witness about his previous convictions.

THE CHAIRMAN: Mr. Martin?

MR. MARTIN: You should, no doubt, have available to you the previous record of any Crown witness.

THE CHAIRMAN: Mr. Diefenbaker, what do you say?

MR. DIEFENBAKER: I will join in making it unanimous.

THE CHAIRMAN: The next question:

QUESTION 7

Do you believe that innocent people sometimes refuse to testify because of the Crown's right to cross-examine them on their previous convictions?

What do you say, Judge Gendron?

JUDGE GENDRON: Yes, I do.

THE CHAIRMAN: Mr. Sedgwick?

MR. SEDGWICK: I do, in certain circumstances.

THE CHAIRMAN: Mr. Maloney?

MR. MALONEY: Yes, I do, especially in a case where the defence is not, say, a denial of any participation in the crime at all. For example, in a murder case, where a man might secure an acquittal on the ground of self-defence or accident, he is deterred from putting forward the defence because of his criminal record. I think there are persons in that position who are convicted of manslaughter and given substantial terms of imprisonment who might otherwise have been acquitted completely if they had felt free to go into the witness box, knowing they would not be cross-examined on their previous convictions.

Indeed, I recently represented a client charged with murder. The circumstances, as he convincingly related them to me, established that he had acted in self-defence. He is now serving a fifteen-year prison term for manslaughter because he had a record of eight previous convictions and it was impossible to call him as a witness.

THE CHAIRMAN: Mr. Martin?

MR. MARTIN: I do not think that many innocent people refuse to testify because of the Crown's right to cross-examine on previous convictions, but I do believe that many innocent people who give evidence are gravely prejudiced.

THE CHAIRMAN: Mr. Diefenbaker?

MR. DIEFENBAKER: I believe that an innocent person, faced with a conviction in the past, would certainly not strengthen his case by testifying. After all, there is nothing more devastating, no matter how just the defence case is, when such a person gives evidence and one of the first questions asked by Crown counsel is —in an attitude that this is something he doesn't like to bring up —"Are you the John Brown who six years ago, on May 27th, was convicted . . .", and so on. The probability of an acquittal after that would be very small.

MR. SEDGWICK: Particularly if your defence is an alibi.

MR. DIEFENBAKER: If I may, I should like to add a suggestion, as a parliamentarian. I think that Parliament should amend the law so as to deny the Crown the right to cross-examine an accused person on his previous record unless the accused's good character is put in issue by himself. Such a change would, of course, require an amendment to the law in keeping with the British practice, whereby the failure of an accused to testify could be made the subject

of reference by the Crown. In general the failure of an accused to testify is regarded by the jury with some suspicion. That being so, I should like to see a change in the Canada Evidence Act to deny indiscriminate cross-examination of the accused on his previous record.

THE CHAIRMAN: May we go on to the next question:

QUESTION 8

If seven out of twelve jurors entertain a reasonable doubt, why should not a verdict of 'not guilty' be returned?

Before I ask you to discuss this question, may I read you the observations of the men in Kingston. Here's what they have to say:

> Should the proposal be adopted, the great danger would be that the Crown might decide that what's sauce for the goose is sauce for the gander, and the first thing you'd know, a majority decision would be all that is needed to find an accused guilty. Even now, majority decisions rule in the appeal courts even when it is to the detriment of the accused.
>
> If we could feel confident that the reverse would not apply, we would approve. But we do not feel confident, and the knowledge that the right of trial by jury no longer exists for those charged with being habitual criminals makes us even more sceptical of any suggestions for altering the present jury system.
>
> However, one acceptable change would be this: Where there is a hung jury, a poll could be taken and if it were discovered that the majority of the jurors favoured acquittal, the Crown would then be deprived of the right to re-try the accused.

I wonder, Mr. Sedgwick, if you would care to deal with this question?

MR. SEDGWICK: May I answer it summarily? When I was a member of the royal commission which revised the Criminal Code, I took this line. I said that a unanimous verdict should be required in order to convict, and a majority—I am not sure that seven out of twelve is enough—to acquit. I prefer to put it this way: for a complete acquittal, you should have a unanimous jury; however, if you have a majority, say nine out of twelve, who think that an accused should be acquitted, and three or less who think that he should be convicted, then I do not think the man should be re-tried. I suggest that some intermediate verdict, such as the old Scottish verdict of "not proven", should be permitted in these circumstances. In Scotland, I believe, they have a fifteen-man jury and, where at least ten jurors are for acquittal, the verdict is "not proven" and the accused is not to be re-tried.

THE CHAIRMAN: Would someone care to add anything further on this subject?

MR. MALONEY: I agree with Mr. Sedgwick.

MR. MARTIN: I would agree also. It might be interesting to note that Sir James FitzJames Stephen, whom Lord Chief Justice Goddard recently referred to as the greatest institutional writer on criminal law in the nineteenth century, approved of allowing the jury to acquit by a majority but not of allowing a majority to convict. The only objection I have to any change in the present system is that, if we relax the rule requiring unanimity by permitting a majority to acquit, it might turn out to be the thin edge of the wedge. We might find the law subsequently changed to permit a majority to convict.

THE CHAIRMAN: We will turn now to the ninth question:

QUESTION 9

Should counsel for the accused have (a) the right to open to the jury at the beginning of the case, and (b) a right of reply when he has addressed the jury first?

As you know, ladies and gentlemen, counsel for the accused may open his case to the jury only after the Crown's case has been put in. In the first part of this question we are asked whether the accused's counsel should have the right, as in American courts, to open his case to the jury immediately after Crown counsel has opened his case, so that the jury will have the two theories before it from the outset, before it begins to hear the evidence. What do you say, gentlemen of the panel? Let me poll the panel. What do you think, Judge Gendron?

JUDGE GENDRON: I am against it.

THE CHAIRMAN: Mr. Sedgwick?

MR. SEDGWICK: I don't think the right to open at the beginning of the case would be any advantage to the defence. The right of defense counsel to open after the Crown's case is in is quite adequate.

THE CHAIRMAN: Mr. Maloney?

MR. MALONEY: I think there are certain cases in which it would be an advantage to the defence to be able to explain the theory of the defence at the outset. For example, where the evidence is wholly circumstantial and Crown counsel in opening has invited the jury to draw an inference favourable to the Crown's point of view, it might be to the advantage of the defence if counsel

could, at that stage, invite the jury as they listen to the testimony to find in it inferences favourable to the point of view of the defence. It is a right the accused should have, but it is probably not a right that would be exercised very often.

THE CHAIRMAN: Would you suggest that defence counsel be allowed to open, alternatively, either immediately after the Crown has opened or, as now, immediately before he calls evidence?

MR. MALONEY: I don't think the present right to open immediately before he calls evidence should be interfered with.

THE CHAIRMAN: Mr. Martin?

MR. MARTIN: Since I cannot imagine availing myself of the suggested right I don't think it would be much of an advantage. Sometimes at the opening of the case defence counsel is not quite sure what his defence is to be; he would not want to commit himself in making an opening statement.

THE CHAIRMAN: Mr. Diefenbaker, what do you say?

MR. DIEFENBAKER: I see no particular advantage in the suggestion. I think Mr. Martin may be oversimplifying the question in saying that counsel for the defence sometimes does not know what his defence is to be when the case begins. But certainly, as the evidence for the Crown goes in, one's views do change. One may say to oneself at the beginning of the case, "I am going to call the accused", or call certain witnesses, only to find a little later that the Crown's case as presented to the court has removed the necessity for calling them. A statement setting out the proposed defence and the witnesses to be called would require the plan to be followed because the jury might regard with suspicion any change in the course of the trial.

THE CHAIRMAN: Let us take the second part of the question: Should counsel for the accused have a right of reply when he has addressed the jury first?

JUDGE GENDRON: Yes.

MR. SEDGWICK: I think so. Of course I have always thought that the Crown should not have the right to reply. It is quite shocking that when the accused calls no evidence, and goes to the jury last, anyone who happens to act for the Crown should have a right to reply. I don't think it was ever intended that he should have.

THE CHAIRMAN: Mr. Maloney?

MR. MALONEY: Yes, I think we should have the right to reply when we address the jury first.

THE CHAIRMAN: Mr. Martin?

MR. MARTIN: Neither the attorney-general nor the defence should have a right of reply. Their positions should be equalized. If the accused's counsel calls no evidence, then he addresses the jury last, without any right of reply; but if he calls evidence, the prosecution has the right to address the jury last.

THE CHAIRMAN: You would remove the present right of the Crown?

MR. MARTIN: Yes, to reply to the speech of counsel for the defence, when the defence has called no witnesses.

THE CHAIRMAN: Mr. Diefenbaker, what do you say?

MR. DIEFENBAKER: What Mr. Martin has said represents my attitude.

THE CHAIRMAN: The next question:

QUESTION 10

Should not the right of the Crown to stand jurors aside be abolished and instead the Crown have the same rights of challenge as the accused?

At a jury trial, as you know, the Crown may stand aside an unlimited number of jurors and require the accused's counsel to exercise his challenges first. What do you think of this procedure?

JUDGE GENDRON: I am against it.

THE CHAIRMAN: Do you mean you are against the Crown's right to stand aside jurors?

JUDGE GENDRON: Definitely.

THE CHAIRMAN: Mr. Sedgwick?

MR. SEDGWICK: I think the Crown and the accused should be on the same footing. The Crown should make up its mind either to challenge or not to challenge.

THE CHAIRMAN: Mr. Maloney?

MR. MALONEY: I agree with Mr. Sedgwick.

THE CHAIRMAN: Mr. Martin?

MR. MARTIN: I agree too.

THE CHAIRMAN: What is the accused's present right to challenge, having regard to the nature of the case being heard? How many peremptory challenges has he?

MR. MARTIN: In a capital case, twenty; in a case punishable by more than five years, twelve; in a case punishable by less than five years, four.

THE CHAIRMAN: Have you any comments, Mr. Diefenbaker?

MR. DIEFENBAKER: I think a word should be said on behalf of

Crown counsel. It was suggested at one point that there were too many defence counsel on this panel. I think most Crown counsel would welcome the removal of their right to stand jurors aside. Anyone who has had the experience of standing aside a number of jurors, and then being obliged to accept them after defence challenges have exhausted the panel, would agree that the jurors he must now accept are not apt to be unbiased.

THE CHAIRMAN: Does not the Crown attorney avoid the possibility of that situation arising by requiring the sheriff to summons a sufficiently large number of petty jurors?

MR. DIEFENBAKER: That is true, but from the point of view of the lawyer who practises in a small center, as I do, where perhaps only forty-eight jurors are called, and particularly in a capital case, occasionally the panel is used up and the stand-asides are recalled. Jurymen are human and when they have been stood aside they seem to have an antipathy to the Crown.

THE CHAIRMAN: We'll turn to the next question:

QUESTION 11

To enable defence counsel to exercise his right of peremptory challenge, should he not be permitted to interrogate jurors under the supervision of the presiding judge?

What do you think, Judge Gendron?

JUDGE GENDRON: It is done every day in the province of Quebec. If a man is challenged by the defence, he is called in and examined before trial as to his ability to sit and to find out if he has any bias in the case, or if he is familiar with certain important issues in the case. For instance, it may happen in a motor manslaughter case.

THE CHAIRMAN: Mr. Martin, you can do the same thing in Ontario, but is it a right that is often exercised?

MR. MARTIN: In Ontario, the procedure is that the right of peremptory challenge may be exercised only after there has been a challenge for cause; then you may investigate the partiality or otherwise of the juror. But once you have challenged a man for cause and failed, unless you are going to challenge the whole panel, you pretty well have to challenge him peremptorily.

THE CHAIRMAN: He is insulted because you have challenged him for cause?

MR. MARTIN: Yes.

THE CHAIRMAN: I am thinking of the situation prevailing in

the United States, where you can examine jurors as to their impartiality between the People and the accused. Do you think some limited right such as that might be of value in Canada? Mr. Sedgwick?

MR. SEDGWICK: I don't think it helps to interrogate the jurors. My old friend, Charlie Bell, said, "The first twelve men are just as good as any other twelve", and I think he was right.

MR. MARTIN: I have talked to members of the American Bar and they tell me that they are rapidly coming to the view that they would just as soon take the first twelve.

THE CHAIRMAN: We will go on to the next question. It begins with a quotation from a judgment of Chief Justice Sloan of British Columbia:

> . . . a Judge sitting with a jury is to a large degree an umpire and ought not to usurp the functions of Crown counsel or appear to the spectators as a crusader for the conviction of a man on trial for his life. [*R* v. *Paulukoff* (1953), 106 Can. C. C. 249, at p. 265]

QUESTION 12

Should the right of a judge to express opinions on the facts be subject to greater limitations than it is?

I think you would be interested in hearing, ladies and gentlemen, what the editors of "Telescope" have to say to this question. I will read it to you:

> The judge's right to express opinions in front of a jury should not merely be restricted but abolished. Either that or a camera and tape recorder should be put in every court-room so that the court of appeal might hear and see the trial judge as he addresses the jury.
>
> Permit us to submit a brief example of the manner in which a judge may abuse the right of addressing a jury.
>
> There are two inmates in Kingston Penitentiary who are serving sentences of twelve and fifteen years respectively. They were jointly charged with armed robbery. They had a jury trial with a well-known justice on the bench. Their defence was based on an alibi, and they put eight witnesses on the stand who testified that the accused were elsewhere at the time of the crime.
>
> The judge addressed the jury thus: 'Gentlemen, you have heard the witnesses for the Crown and you have heard the witnesses for the defence. You must believe one side or the other. You can believe the witnesses for the Crown or you can believe the witnesses for the defence.' He then went on to give an impartial review of the evidence. Everything appears quite above board and fair, does it not? Apparently the appeal court thought so too, for they dismissed the appeal. Now, let us tell you what actually transpired in that courtroom.

> When the judge commenced his address he gazed upon the jury most seriously and spoke in a grave tone. When he reached 'you must believe one side or the other' he emphasized the 'must'. He leaned forward and looked at the jury very deliberately as he said 'you can believe the witnesses for the Crown', and then he relaxed, leaned back in his chair, smiled broadly, and in a jocular voice added, almost in an aside, 'or you can believe the witnesses for the defence'. [Prolonged laughter]
>
> Since the law concedes that juries have sufficient intelligence to sit in judgment upon their fellow-men, it should also concede that they have enough intelligence to make their decisions without any aid or advice from the judge.

Now, gentlemen, what is your reaction?

MR. SEDGWICK: Mr. Haines, I would not restrict the right of a judge to comment on the facts. He is of course expressing only a personal view and the facts are always for the jury. You must bear in mind that your friends in Kingston, who have written this excellent brief, are all losers—they were all convicted—and it is also to be remembered that not infrequently the judge, in commenting on the facts, does so in a way that is quite favourable to the accused. That has certainly happened in my experience and I am sure in the experience of all of you. The judge is bound to leave the facts to the jury and, if he does not emphasize that sufficiently, you will of course remind him. I would not restrict the right. Sometimes it works for the accused, sometimes against him.

THE CHAIRMAN: When it works against the accused, is not the judge usurping the function of the jury?

JUDGE GENDRON: I agree that no judge should deal with the facts in such a way as to take them away from the jury.

MR. SEDGWICK: I agree with that of course.

THE CHAIRMAN: Mr. Martin?

MR. MARTIN: I think that if the trial judge follows the principle set out in Chief Justice Sloan's judgment, there will be no difficulty. While I do not think that the judge should be deprived of all opportunity to comment on the facts, he should not comment on them in such way as to indicate to the jury that he is convinced of the accused's guilt.

THE CHAIRMAN: You are constantly taking cases to the court of appeal, gentlemen. Is this not one of the grounds on which you often appeal—that the judge has over-stepped the bounds of propriety and tried to influence the jury?

MR. MARTIN: Yes, and sometimes the judge is reversed by the court of appeal for that reason.

THE CHAIRMAN: Then these men at Kingston are talking about something that does happen?

MR. MARTIN: It does sometimes.

MR. DIEFENBAKER: But it is interesting to note, Mr. Haines, that the appeal in the case in which Chief Justice Sloan made his declaration was dismissed and the accused was executed. The declared principle did not apply to that particular trial.

If you will permit me for a moment to cite the House of Commons. Speeches there are often characterized by satire and sarcasm, yet when they appear in cold print in Hansard they seem to record high praise. What makes the difference is that the intonation of the spoken word is lost in print.

I recall an instance some years ago when Mr. Mackenzie King, the then Prime Minister, spoke derisively of a certain member in the House of Commons. Amongst other things he said in effect: "Now what course should be followed, Mr. Speaker? On the one hand, there is that advanced by the very distinguished Honourable Gentleman, who always speaks with authority, and the alternative which most other members support". Well, the gentleman in question did not interrupt. These words appearing in cold print the next day appeared as the highest of praise. He had copies of that speech published during the next election to indicate the high regard in which he was held by the Prime Minister. [Laughter]

THE CHAIRMAN: Thank you, gentlemen. We turn next to question 13:

QUESTION 13

Should defence counsel have the right to be present at any conference between the trial judge and Crown counsel at which the particular case is discussed?

I am thinking particularly of a situation like this. A judge arrives at an assize and the Crown attorney goes to see him, outlines the facts to him, tells him how long the cases will last, and perhaps gives him information to enable him to charge the grand jury. Or perhaps during the trial the judge talks to the Crown attorney. What do you think of this, Mr. Martin?

MR. MARTIN: I suppose you have to rely a great deal on the judge and on the particular Crown attorney. But, generally, I do think it is undesirable that there should be any conference between the trial judge and Crown counsel at which the accused is not represented. Pre-trial conferences at which both counsel are present are very desirable however. The judge gets a concise de-

finition of what the issue is, and what the defence is likely to be. As a result the evidence is more understandable when it is presented.

THE CHAIRMAN: Do you recommend that both counsel be present?

MR. MARTIN: I would think so.

THE CHAIRMAN: Mr. Maloney, have you anything to add?

MR. MALONEY: I think it is a matter of ethics. In a civil case, where there are two opposing lawyers, one lawyer would not think of going privately to the judge. The judge would not allow him into his chambers. I do not see that any different rule should apply in criminal cases.

THE CHAIRMAN:

QUESTION 14

Should the number of offences triable by jury be increased?

JUDGE GENDRON: I believe so.

THE CHAIRMAN: What do you think, Mr. Sedgwick?

MR. SEDGWICK: I am in favour of the jury system and I do not like to see it whittled away. In my view, if a man is charged with an offence for which he can be sent to prison for any period longer than six months, he should have the right to have his fate decided by a jury of twelve men.

THE CHAIRMAN: You would put a limit on the maximum sentence a magistrate may impose?

MR. SEDGWICK: Yes, I think six months. If the sentence might be over six months, I think the accused should have a right to trial by jury.

JUDGE GENDRON: As in England.

MR. SEDGWICK: Yes.

THE CHAIRMAN: If there are multiple charges, which means that the accused's consecutive sentences might run to more than six months, would you still suggest that he be tried by jury?

MR. SEDGWICK: I have not considered that point.

THE CHAIRMAN: What do you think about the question, Mr. Maloney?

MR. MALONEY: I agree with Mr. Sedgwick.

THE CHAIRMAN: Mr. Martin?

MR. MARTIN: I also agree with Mr. Sedgwick. His suggestion is the only practical compromise. Speaking from an ideal point of view, I should like to see every man who is charged with anything

have the right to choose a trial by jury. I know that is not practical, but Mr. Sedgwick's suggestion is a good one.

THE CHAIRMAN: What sentences may be imposed by a magistrate?

MR. MARTIN: There is no restriction under the new code, except that provided for in the statute creating the offence.

THE CHAIRMAN: Mr. Diefenbaker?

MR. DIEFENBAKER: I think the process of whittling away the jury system has gone too far. Ninety-four per cent of the criminal cases in Canada are tried by magistrate, four per cent by county- or district-court judge, and two per cent by jury. Believing in the value of the jury system, I think it is being whittled away to too great an extent. I entirely agree with the other members of the panel, that any person liable to a penalty of more than six months should have the right to trial by jury. What has been done by Parliament recently to increase the summary jurisdiction of magistrates has resulted in depriving many accused persons of their right to a jury trial.

THE CHAIRMAN: We must move along now to the next question:

QUESTION 15

In our civil courts the rights of persons under twenty-one years of age are always protected by the appointment of a guardian. In our criminal courts there is no such protection. Do you consider this anomalous situation requires correction?

In other words, gentlemen, if I sue a boy under twenty-one for damaging my motor car I cannot proceed against him until a guardian *ad litem* has been appointed. Yet, he can be charged with a serious crime, executed or sentenced to life imprisonment, and we do not require the appointment of a guardian. Before I ask the panel to discuss this question, I should like to read what the editors of "Telescope" have to say—and you will note, gentlemen, that I am not referring to them as your clients:

> The answer to this question is self-evident. In fact, what our courts and prisons do to the delinquent children of Canada is scandalous. In the past eighteen months, two boys have hanged themselves in Guelph prison. What has the Canadian Bar Association done about it? And to say that it is not the Association's concern is not sufficient: several questions on your agenda prove that you are concerned.

What do you think, gentlemen?

JUDGE GENDRON: I don't believe a guardian should be appointed in criminal cases.

THE CHAIRMAN: Mr. Sedgwick?

MR. SEDGWICK: I don't think it would help. If an offender is under sixteen, we have the Juvenile Delinquents Act, which looks after him; and if the offender is over sixteen, I think it is preferable that he deal directly with his counsel. If a guardian were appointed, from whom would counsel take instructions, the guardian or the accused?

THE CHAIRMAN: You would confer with both.

MR. SEDGWICK: Suppose they disagree?

THE CHAIRMAN: But you have that problem in practice every day. Two clients may disagree, but you do your best and give them your advice.

MR. SEDGWICK: Yes, that may be true in a civil case, but in a criminal case you are dealing with life and liberty.

THE CHAIRMAN: Then is the need for a guardian not correspondingly greater in a criminal case?

MR. SEDGWICK: I do not think anyone should come between the accused and his counsel.

THE CHAIRMAN: Do you not believe that in all cases involving serious crime boys between sixteen and twenty-one would receive more careful attention on the average if, in addition to counsel, they had a guardian *ad litem* who came along to help them? When they appear before the magistrate, if he looks down and sees standing beside them one of the business men of the city, who is interested in the boy, do you not think the administration of justice to adolescents would be improved?

MR. SEDGWICK: In my view the Salvation Army do a pretty good job already.

THE CHAIRMAN: But is the Salvation Army in every court?

MR. SEDGWICK: They are in most courts I go into.

THE CHAIRMAN: But surely that is only true of the big cities?

MR. SEDGWICK: I practise in a big city. I can never remember not seeing a Salvation Army officer in the Toronto police court, and I pay a well-deserved tribute to what they have done in looking after unfortunates.

THE CHAIRMAN: I am sure all of us do. If the Salvation Army appeared in every court for every boy between sixteen and twenty-one, you would be happy?

MR. SEDGWICK: I think I would.

MR. MALONEY: Thinking, as I usually do, from the point of

view of the accused, I believe he would be better off without a guardian. Every person who appears before the courts, especially for a serious crime, should be fully and adequately advised. I think it is the duty and function of the court and the Crown to see that he does get adequate advice. But, as a defence counsel, I shudder to hear that I might have some businessman or non-professional man, who had been appointed guardian for my client, advise me on what course I should pursue in defending my client. In the long run the accused would only be prejudiced.

We have probably all had cases in which a client admitted his guilt to us. We are, of course, prohibited from making any disclosure of that to anyone. But what if the juvenile, for whom a guardian has been appointed, lays bare his crime in all its detail to the guardian? It would undoubtedly end up to his prejudice because the guardian, not being under any ethical duty to keep the information to himself, would probably disclose it all.

THE CHAIRMAN: Are you not talking about the rare case? We have in mind the average boy who arrives in court without knowing what to do. He has no money to hire a lawyer; he is sometimes given a lawyer, who will not get much of a fee, and how much time will that lawyer spend in preparing the boy's case? Are these boys not often advised to plead guilty, whereas if there were time and somebody were interested in them, an adequate defence would be prepared?

MR. MARTIN: I am not in favour of having a guardian appointed. The responsibility is primarily the bar's, and also of course the presiding magistrate's and Crown counsel's, to see that the youth is properly represented. I cannot conceive for a moment that because some third person is watching over a lawyer he would spend any more time on behalf of the accused.

THE CHAIRMAN: What do you think, Mr. Diefenbaker?

MR. DIEFENBAKER: I have no decided opinion. My experience has been that the youthful offender does receive considerable protection from the judge and Crown counsel. Youthful offenders, at least in general, do not suffer from lack of compassion in the consideration given to their cases. That being so, I am not one of those who would favour departing from what we have to something new, unless it can be established by the experience of other jurisdictions, where there is provision for the appointment of a guardian, that a marked reduction in the number of crimes committed by juveniles has resulted.

THE CHAIRMAN: Thank you, gentlemen. We turn now to the next question:

QUESTION 16

Is there a tendency on the part of some judges to be more severe than others, generally and against particular types of crime? Should there not be some means of equalizing sentences?

What do you think, Mr. Diefenbaker?

MR. DIEFENBAKER: This brings up the whole problem of the administration of criminal justice. What should be done? What are the advances that have taken place elsewhere in recent years? Are they being applied to our penal institutions? By and large, I am one of those who believe that many improvements in Canada's penal system should and could be achieved.

Unchallenged statistics reveal that the average number of persons convicted each year in this country and sent to jail runs as high as 99,000, that the population in penitentiaries is around 4,700, that some 71% to 76% of the inmates of our penal institutions are recidivists, by which I mean that at some previous time the repeaters had committed other offences, not necessarily penitentiary offences. Some 38% of the recidivists had undergone previous penitentiary sentences.

Tremendous advances have been made in Canada since 1938 when the Archambault Commission met. It did splendid work and its recommendations brought about many improvements. But in the past twenty years vast changes in criminology have taken place. I think this question of uniform punishments is one of the problems that might well be considered by a royal commission, on which would sit representatives of the Dominion, the provinces, social agencies, psychologists and others, with a view to making applicable to Canada the advances that are apparent in various states of the American Union.

As an example, in the state of California the numbers of recidivists have been reduced by about 17% to 19% as a result of the application of new penal principles. One of the methods adopted in California is a board which endeavours to equalize sentences. It does not re-try cases, but rather, after a guidance study of each first offender, determines what degree of punishment is necessary and at what point punishment constitutes tyranny and denies rehabilitation.

I think that the adoption of similar boards in the several provinces of Canada would reduce recidivism considerably. Putting people in prison and keeping them there beyond a reasonable length of time ceases to make for potentially good citizens. I be-

lieve that a royal commission should be set up to investigate the whole field of penal reform, so that recommendations can be made for such changes as have proven beneficial in other jurisdictions with similar conditions.[1]

THE CHAIRMAN: Thank you, Mr. Diefenbaker. Mr. Martin, correct me if I am wrong, but does it not happen in almost every large community, where you have three or four magistrates trying the same kinds of cases, that some magistrates acquire a reputation for imposing severe sentences and others for being more lenient? For example, take motor-car cases: a driver who has been drinking may be sent to jail by one magistrate and let off with a fine by another. Does not this condition of affairs in fact exist?

MR. MARTIN: I think it is inevitable that some magistrates and judges will tend to take a more severe view of certain types of anti-social conduct than others. That is a result of the human equation, and I do not know what you can do about it. The court of appeal does, of course, attempt to standardize sentences to some extent; that is, in cases where sentences are flagrantly excessive or flagrantly low, they endeavour to rectify them. But, of course, no two cases are ever the same: circumstances vary infinitely, and persons vary.

THE CHAIRMAN: It seems to me very unfortunate when a boy arrives at a reformatory to do two years for the theft of $100.00 and finds next to him a boy doing three months for the theft of $100.00. We meet these striking variations particularly in motor-car offences.

MR. MARTIN: Those cases do occur, but the courts are powerless to avoid them entirely. The court of appeal would probably rectify the one boy's sentence of two years, but he may not wish to appeal or know what his rights are.

THE CHAIRMAN: Or have the funds?

MR. MARTIN: Or have the funds possibly, though I don't think the lack of funds would really be a hindrance. The only remedy, I think, is a permanent board of review to examine all sentences and make a recommendation for remission, if it finds a sentence to be excessive.

THE CHAIRMAN: Mr. Maloney?

MR. MALONEY: There clearly is a tendency on the part of some judges to be more severe than others in punishing particular types

[1] Interested readers are reminded that in November 1949 the Canadian Bar Review devoted a special number to penal reform under the title, "Penal Reform in Canada". The number appears in the 1949 volume at pages 999 and following. — The Editor

of crimes. The results are unfortunate. The inmates start comparing notes. You have one inmate who says he is serving a sentence of two years for a crime not unlike the one for which his cellmate is serving four or five years. It must be very harmful to the maintenance of prison discipline, and I think something should be done about it.

The responsibility lies first with the judge himself to disabuse his mind of any prejudice he has against a particular type of crime, and, secondly, we should clearly devise some means of rectifying or equalizing sentences. As you know, the state of California has a sentencing board—in other words, sentencing there is not the problem of the judge or trial tribunal but of a board of review—and I often wonder if we should not study the operation of their system. If we do not institute a similar system, our present Remission Service in the Department of Justice at Ottawa should see to it, by the exercise of its powers under the Ticket of Leave Act, that sentences are equalized.

THE CHAIRMAN: We have now arrived at the point where we think something should be done about inequalities in sentences.

JUDGE GENDRON: No doubt about that.

MR. SEDGWICK: I think there should be a board of review, but of course judges are human and they are not always able to divorce their judicial functions from their personal feelings. You will never get absolute consistency. I well remember the attitude of the late Chief Justice of Ontario, Sir William Mullock, who was somewhat kindly disposed towards people who had been drinking too much, and who was not inclined to be overly critical of people charged with certain sex offences. But he was death on people who stole chickens—he had some chickens!

THE CHAIRMAN: Thank you, Mr. Sedgwick. Now we come to the next question:

QUESTION 17

Should not some independent agency be available to the court, after conviction and before sentence, to investigate and make recommendations as to the rehabilitation of the accused?

As I understand it, there are such agencies in British Columbia, Ontario and Nova Scotia, but not in the other provinces. What are your views, Mr. Maloney?

MR. MALONEY: In Ontario the probation system is now working very well. We have in this province ninety-two probation offi-

cers; in Nova Scotia I understand there are only four, and in British Columbia, only seventeen. There are no probation officers at all in the other provinces. The situation, as I say, works well in Ontario. Certainly it is my view, and I am sure the view of the other members of the panel, that the existing facilities should be enlarged in Ontario and that probation should be fully utilized in other provinces as well. Probation officers are usually well qualified to advise the court before sentence is imposed.

THE CHAIRMAN: Thank you. Judge Gendron, what do you think?

JUDGE GENDRON: Most of the accused persons who have appeared before me in Quebec are from sixteen to twenty-five years of age. I think their cases should be investigated upon their arraignment and following it by a suitable agency.

THE CHAIRMAN: You would recommend the use of probation officers?

JUDGE GENDRON: Oh, certainly.

THE CHAIRMAN: Let us go on to the next question:

QUESTION 18

To what extent should the rehabilitation of the accused be the responsibility of the convicting magistrate and counsel? If there is such a responsibility, is our present system adequate?

This question is intended to refer to the responsibility before sentencing; we are not talking about following up a man after he has been sentenced and gone to prison. Mr. Diefenbaker, you were talking about this matter a few moments ago.

MR. DIEFENBAKER: I would give as my answer to that question a categorical "No". I cannot understand why rehabilitation should be in any way the responsibility of the convicting magistrate and counsel. Rehabilitation is, after all, outside their jurisdiction and outside their responsibility.

THE CHAIRMAN: But counsel, when his client is about to be sentenced, can produce evidence on his future prospects, on his job and what might happen to it, and so on. Is that not rehabilitation?

MR. DIEFENBAKER: I understand that basically no adequate or effective consideration can be given by magistrate or counsel to the ultimate restoration of a convicted individual in private life.

THE CHAIRMAN: Don't you think that that is part of their obligation?

MR. DIEFENBAKER: I don't think a magistrate can do it. That is why I suggest consideration of the system that has proven so effective in other jurisdictions. Each individual, after conviction, goes before a guidance board. The board investigates the individual case, they interview him to determine the degree of punishment adequate as punishment and at the same time not so severe as to defer or deny rehabilitation.

THE CHAIRMAN: I know Mr. Martin is very adept at making recommendations to the magistrate for the reformation of a young man; it is part of his court technique and he has developed it to a high degree of perfection. What do you think about this, Mr. Martin?

MR. MARTIN: Of course, under our present system, a magistrate has a responsibility for the rehabilitation of an accused to this extent, that rehabilitation rather than punishment should be foremost in his mind. Within the limits of the system under which he operates, he should endeavour to plan the convicted man's future in a way that will best restore him to society as a useful member of the community.

THE CHAIRMAN: How can counsel aid him in that objective?

MR. MARTIN: Counsel can aid the magistrate by supplying him with the necessary information about the accused's background. For instance, if medical treatment is needed, he can suggest it; he will see what plan the boy's family have for his future, if he has a family, and inform the magistrate. The responsibility of counsel in this respect, however, has been greatly diminished in Ontario by the appointment of probation officers, who make a pre-sentence report when requested by the magistrate, and the magistrate usually requests one. Thus when the magistrate comes to sentence the accused he usually has a good idea of what should be done. If the accused is released on suspended sentence, he is placed during the period of the sentence under the supervision of a probation officer, whose duty is to assist and encourage him to rehabilitate himself. I think that system has succeeded very well in Ontario. It has become a vital force in the administration of criminal law. And for every person who is put on the road to a normal life the state saves a large sum of money by not having to incarcerate him.

THE CHAIRMAN: Does anyone care to add further to this subject? The next question is number 19:

QUESTION 19

Should the law provide compensation for persons convicted of crimes of which they are subsequently found to be innocent?

Judge Gendron, what do you think of that?

JUDGE GENDRON: I don't believe so. It would mean that everyone who is acquitted by a court would ask for compensation—and they can always find reasons why they should be compensated. True, there are exceptional cases where the attorney-general of the province or the Department of Justice at Ottawa could properly advise some kind of compensation. But you cannot provide really adequate compensation for a man who has been charged with murder or some other serious crime. He might be allowed compensation for the out-of-pocket expenses he incurred and, in exceptional cases, that matter could be looked into.

THE CHAIRMAN: Gentlemen, take the case of a man who has been charged with a serious crime: it may well be that his counsel fees alone, for his trial and the appeal, will run into hundreds of dollars. He may lose his job, and frequently he loses his position in society. What do you think, Mr. Sedgwick? Should we not consider compensating him if he is innocent?

MR. SEDGWICK: I don't know what is meant by "innocent". Speaking generally, I agree with what I take to be Judge Gendron's view that merely because a man is finally acquitted, frequently on a technicality, does not mean that he is innocent—he may have been just lucky. But there are some cases in which compensation should be made. I am thinking of the *Slater* case in England and of the *Misener* case here: these were cases in which the wrong man had been prosecuted. In such cases I think the departments concerned should consider making some fair compensation to the accused. Inevitably, under any system of justice, there will occasionally be errors, and those errors should be corrected. But merely because a man has been acquitted does not mean that he should be compensated—he may just have had a clever lawyer.

JUDGE GENDRON: Or a good judge.

MR. SEDGWICK: Yes, or a good judge. Very slight doubts, indeed, may have been resolved in his favour.

THE CHAIRMAN: Would anyone care to add anything further?

MR. MARTIN: I agree generally with Mr. Sedgwick's views: because a man has been acquitted, that should not automatically entitle him to compensation; it may mean no more than that he has not been proven guilty within the requirements of the law.

THE CHAIRMAN: But take the case of the innocent man.

MR. MARTIN: I am coming to him. There have been people who have been wrongfully incarcerated, sometimes for months and sometimes for years, and it has later been proven conclusively that they were completely innocent of the offence with which they were charged. In England—I am thinking of the famous case of Adolf Beck—an act of Parliament was passed to indemnify him for the years he spent in custody. But I have a feeling that here perhaps something in the nature of a permanent commission or board attached to the Attorney-General's Department, which could consider these cases when they arise, would be desirable. I have no conviction on the matter.

THE CHAIRMAN: You suggest that some machinery should be set up so that these people can apply as a matter of right without making a political issue of it?

MR. MARTIN: Yes. Perhaps there are more cases each year in which innocent people are convicted than the public or even the courts recognize; I don't suggest that there is a great number of them, but in the province of Ontario there may be a few convicted persons—perhaps two or three each year—who later prove conclusively that they were not guilty. I believe that some permanent machinery for dealing with these people should be established.

THE CHAIRMAN: Thank you, Mr. Martin.

MR. DIEFENBAKER: This is a matter for the provinces, Mr. Chairman. It is their responsibility to make *ex gratia* payments by way of compensation to persons who have been found innocent—and by being found innocent I mean that the Crown admits their innocence. In such cases I believe there should be compensation.

There was a case in Manitoba a few years ago of a man, a member of the Armed Forces, who was convicted on several charges and spent some time in jail. After investigation he was proved to be innocent. Yet, no compensation was given to him. If after conviction a man is found to be innocent, he deserves compensation from the state, though certainly he can never be fully compensated. In the famous cases of Adolf Beck, which Mr. Martin has mentioned, and Archer-Shee, compensation was paid *ex gratia*, although the state had no legal responsibility to do so. I believe that we, in this country, should follow those precedents. It is not just or fair that an innocent person who has been dragged through the courts, convicted, stigmatized and, after serving part or all of his term, been found to be innocent should be denied some compensation for the wrong that has been done him.

THE CHAIRMAN: Let us now consider the next question:

QUESTION 20

What views do you hold on the adequacy or otherwise of the present system of parole and ticket of leave in Canada?

Mr. Maloney?

MR. MALONEY: I share the view of many people that the present system in Canada is very inadequate. But, as I need not remind you, there is now a royal commission, presided over by Mr. Justice Fauteux of the Supreme Court of Canada—among whose members are Mr. W. B. Common, Q.C., and Mr. J. A. Edmison, Q.C.—which is now considering what might be done about parole and ticket of leave. It is expected to report later this year. A good deal of the criticism now being levelled against our system may, in a short time, be purely academic.

As most lawyers know, parole is only possible in two provinces, Ontario and British Columbia. These provinces are the only two whose courts have power to impose indeterminate sentences, and parole may be applied for only where the applicant is serving an indeterminate sentence. Application is made in each of the two provinces to a board of parole.

Ticket of leave, on the other hand, is the means by which an accused person may be released before he has served his full sentence when he has been sentenced to a definite term. The result is the same as in the case of parole, though the means are different. A man who is serving any determinate sentence—say, six months, ten years or even a definite term of life imprisonment—may apply for release on a ticket of leave to the Department of Justice at Ottawa. His application is sent to the Remission Service of that department.

The present system, which I respectfully suggest is indequate, operates in this manner. If I wish to make an application to the Remission Service for the release of an offender on ticket of leave, I write first of all to the Director of Remission Service, Department of Justice, Ottawa. On receipt of my letter, the service communicates with the Royal Canadian Mounted Police to determine what, if any, previous criminal record the man has. It writes also to the institution where he is being held, and to the institution's staff, that is, the psychologist and criminologist. It writes as well to any social agencies that function in the community in which the accused resides to find out what assistance they can give in the event the applicant is released. Ordinarily release on a ticket will not be granted until after at best one-half of the definite sentence has been served.

Vancouver and Montreal are the only two cities in the country where the Remission Service has a permanent representative. A person who gets into difficulties in those cities has an opportunity of a personal interview with the permanent representative of the service. Otherwise the department sends a representative twice yearly to the penal institutions across the country to interview the applicants for ticket of leave. This is not a very satisfactory system. My hope is that, first of all, the distinction between provincial and federal institutions will be abolished; that also the distinction between parole and ticket of leave will disappear; and that ultimately we will have in this country a permanent board of parole which will tour the various institutions, hear evidence if need be, and take all the time necessary to consider the merits of each application. That, I hope, will some day be the result achieved in this country, because the present system is, as I say, very inadequate.

THE CHAIRMAN: Thank you, Mr. Maloney. The next question is the last:

QUESTION 21

Should there be an appeal as of right to the Supreme Court of Canada in every capital case?[2]

As you know, if you are involved in a civil lawsuit in which more than $2,000 is at stake, you may go as of right to the Supreme Court of Canada, both on the facts and on the law; but in a capital case —and you will correct me if I am wrong—unless you get leave or there is a dissent in the court below, you cannot appeal to the Supreme Court of Canada. Do you think this arrangement is a proper one? What do you think, Judge Gendron?

JUDGE GENDRON: I believe it is proper.

MR. SEDGWICK: I think the system works. Why single out capital cases? Let us deal with criminal cases generally.

THE CHAIRMAN: No, let us stick to the capital cases, because I am drawing a comparison between property and life.

MR. SEDGWICK: But ten years is a large piece of life. Why should you separate capital cases from other criminal cases? As it is now, in capital cases a man is invariably tried by a judge and a jury, and almost invariably there is an appeal. And almost invariably—certainly in Ontario—the appeal is heard by a five-

[2] See also on this question a recent comment by Professor Bora Laskin, Supreme Court of Canada—The Coffin Case—Appellate Jurisdiction—Power of Executive to Exercise Clemency or Order New Trial—The Courts and the Executive (1955), 33 Can. Bar Rev. 1059.—The Editor

judge court. If any one of those five judges dissents, the accused has the right to go to the Supreme Court of Canada and, if the judges below are unanimous, he may still go by leave. I think there is ample protection already for any person convicted of a capital crime.

THE CHAIRMAN: Do you think the man who is denied leave shares that view, or that his relatives and friends do?

MR. SEDGWICK: Very often he does not have any views at all.

THE CHAIRMAN: I want to bring you back to the issue, and I am thinking of ourselves as people who have an important part in the administration of justice throughout Canada. Gentlemen, how can we justify the system prevailing today, under which you may go to the Supreme Court of Canada as a matter of right in a lawsuit involving more than $2,000 and may not in a capital case?

MR. MALONEY: Perhaps we should abolish the right in civil cases.

THE CHAIRMAN: No, the issue is not abolition of civil rights. Mr. Martin, how can we justify the existing state of affairs in the eyes of the public?

MR. MARTIN: In practice I think the present system works very well: you may go to the Supreme Court of Canada on any point of law, with leave of a judge of the Supreme Court. The general principles of criminal law have been pretty well established over the centuries and if any doubt exists on a legal point, there is likely to have been a dissent below, or leave will be granted by a single judge. Of course, in a criminal case, you cannot appeal to the Supreme Court on a question of fact anyway. The number of legal points which are still in doubt, above the level of provincial appellate courts, is very small, Mr. Haines.

THE CHAIRMAN: I ask you to think of this, if you will, Mr. Martin, from the point of view of the man in the street, the object of the administration of justice. How can we justify the present system to him?

MR. MARTIN: I don't know whether the man would be happier just because he had a right of appeal, if his appeal were dismissed.—

THE CHAIRMAN: But take into consideration all the men who have been executed in capital cases. Can you honestly say that if they had had an appeal as of right the result would not have been different in even one case?

MR. SEDGWICK: Who knows?

MR. MARTIN: Nobody can say.

MR. MALONEY: On this question, Mr. Haines, my belief is that

there should not be an appeal as of right to the Supreme Court of Canada in every capital case. But I also believe that the present system, which requires you to apply for leave to a single judge, should be changed to require that applications for leave be presented before a court composed of not less than three judges of the Supreme Court. We are discussing capital cases, but I believe the same procedure should be followed in all cases involving convictions for indictable offences. My reason for the suggestion is that obviously judges differ in their attitudes towards various legal problems that arise in the field of criminal law. There would be a greater chance of equality before the law, especially in capital cases, if an application for leave were to be heard by more than one judge.

I was anxious to say what I have just said, because on an earlier occasion—in March 1954—I gave evidence before the Joint Committee of the Senate and House of Commons on capital punishment. There I was asked this very question by one of the committee members, whether or not I thought there should be an appeal as of right in capital cases. I expressed the view then that I thought there should be. I have since, on more mature reflection, decided that that would not be practicable: instead, the application for leave should be made not to one but to not less than three members of the Supreme Court.

THE CHAIRMAN: You specify three—would you not in practice be getting the opinion of the court?

MR. MALONEY: Pretty well.

THE CHAIRMAN: Then why not abolish the requirement of leave and give a right of appeal direct to the court?

MR. MALONEY: But you have to consider that the Supreme Court of Canada is the highest court in the land and since 1949 has been the court of last resort in civil as well as in criminal cases. While Canada may be today a country of only fifteen million people, we have every reason to believe that its population will increase very substantially within the next twenty-five to fifty years. The Supreme Court of Canada is composed of nine judges who are not superhuman. To impose too great a burden of work on them would inevitably affect the calibre of their judgments. To permit an appeal as of right in all capital cases would, even with our present population, add at least twenty cases to the court's annual list. We must all be frank to admit that many capital cases—so far as their legal aspects are concerned—are quite lacking in merit, whatever their merits may be in the field over which the executive has jurisdiction.

If an automatic right of appeal were given in capital cases, there is not a single convicted person who would not take advantage of it, no matter how hopeless his case might be. It strikes me that from everybody's point of view this would be undesirable. Among other things, it would delay the administration of justice, which, as we all know, functions best when it functions not only fairly but also swiftly.

Having in mind, what must be the anxiety of all of us, that the Supreme Court of Canada should have ample time to devote to the consideration of the many important cases coming before it annually, it is my sincere hope that all necessary amendments will be made to the Supreme Court Act to the end that the court's presently wide jurisdiction in civil cases is curtailed. I am of the opinion that there should be no appeal in civil cases without leave and it should be enough to have applications for leave heard by a court composed of at least three judges.

THE CHAIRMAN: An additional twenty cases? Life is at stake! Are you saying that the convenience of the court is something we should place in the balance against a life?

JUDGE GENDRON: But in capital cases a plea for clemency is sometimes made to the Cabinet, and they discuss it there.

THE CHAIRMAN: Oh, yes, but how much satisfaction is a decision discussed and taken in camera to the man who must suffer the penalty, or to his family, or to the public?

MR. SEDGWICK: The court makes its *decision* in camera.

MR. DIEFENBAKER: I don't think there should be an appeal as of right to the Supreme Court in capital cases. The sittings of the Supreme Court should not be cluttered up with frivolous murder appeals. Leave should be secured, but the decision as to leave ought not to rest on the opinion of only one judge.

If I may digress for a moment: when the House of Commons was dealing with the new Criminal Code, many of us felt, and were led to believe by the representations that were made, that in any case where there was a real doubt or a major principle at stake leave to appeal to the Supreme Court would be granted. Certainly the decision should not be left to one judge. In my opinion the hearing for leave should be heard by at least three judges.

THE CHAIRMAN: Thank you, gentlemen. Before we conclude this panel discussion, I should like to ask Mr. W. B. Common, Q.C., Director of Prosecutions in Ontario, and anybody else who wishes, to come forward and express his views. Mr. Common?

MR. COMMON: Mr. Chairman and members of the panel, be-

fore I make any comments at all, may I express my congratulations to the chairman this afternoon? Speaking for myself, and I am sure for all present, I thought it a very informative meeting. Please do not think that in anything I am about to say I am reflecting on the quality of the discussion that has just taken place. I have a few comments to make, and I trust they will not be offensive.

I may be said to be like the Irishman who was "agin the government". I am against certain things that have taken place today. I object to the title of this panel discussion, to the constitution of the panel, and to some of the questions that were discussed.

Dealing first with the title, "Inequalities of the Criminal Law", I was rather shocked when I first read it, because it is of course a misnomer. I asked myself: Inequalities for whom, the Crown, the accused, or for both? From the nature of the majority of the questions on the agenda, I take it that "inequalities" refers to alleged deficiencies in the criminal law in so far as the rights of an accused are concerned and that, if the so-called inequalities were removed, the acquittal of accused persons would be facilitated, regardless of their guilt under the existing law. Let us be realistic, please. Would it not have been more to the point, having regard to what has turned out to be the nature of the discussion, to have entitled it, "A panel discussion with the ultimate aim of amending the Criminal Code (a) to make it much more difficult for the Crown to convict; and (b) to make it much easier for the defence to secure an acquittal"?

Now, with the greatest respect for the members of the panel, and by way of a little good-natured banter, I think the choice of the majority of the panel for this discussion somewhat unwise. Let me run down the list:

John G. Diefenbaker, Q.C., M.P.—an outstanding defence counsel, a jury spellbinder, whose success as defence counsel is possibly equalled only by his qualities of statesmanship;

G. Arthur Martin, Q.C.—nationally known defence counsel *par excellence;*

Arthur E. Maloney, Q.C.—champion of the malefactors, probably the most vocal defence counsel in Canada today on the alleged unfairness of the criminal law to accused persons, a man who would declare an open season on Crown prosecutors;

Joseph Sedgwick, Q.C.—my old classmate and former colleague, who since resuming private practice many years ago has

won a national reputation as defence counsel, although he has, on one or two occasions, accepted a brief for the Crown;

His Honour Lucien H. Gendron, who is of course sacrosanct and beyond the pale of any criticism of mine. He can therefore be considered as the only impartial member of the panel.

While not in any way reflecting on the ability of the panel jointly or severally, I am persuaded that it would have been better balanced if there had been at least a token representation of the prosecution. I would move, therefore, even at the risk of not obtaining a seconder, that if a similar panel discussion is ever contemplated in the future, at least one active and experienced Crown prosecutor be included on the panel.

Quite seriously, I am deeply concerned about the eventual reaction of the public to this discussion. Society, which after all has the paramount interest in the proper administration of the criminal law, might with some justification gain the impression that the sponsoring committee is concerned only with making it easier for a comparatively few lawyers who specialize in criminal law to secure the acquittal of their clients, without any regard for the rights of society as a whole.

I hasten to concede, of course, that this is not the purpose of the Section on the Administration of Criminal Justice, but unless any future panel on suggested changes in the criminal law is impartial as between the prosecution and the defence I am afraid that the public will be somewhat contemptuous of this section and the Canadian Bar Association.

I reiterate my own personal thanks for the way in which the meeting has been conducted this afternoon. It has been an instructive meeting and the criticism I have offered will, I know, be accepted in the proper spirit. I do not intend to go through all the questions: I am going to touch only one, because many of them will come before the commission mentioned earlier, of which Mr. Justice Fauteux is chairman and of which I have the honour to be a member. The last question on the agenda, regarding appeals to the Supreme Court of Canada, draws attention to a situation that has always struck me as anomalous. In a summary conviction matter, under the Supreme Court Act, leave to appeal may be obtained from the full court, but in a capital case leave may only be obtained from a single judge. It seems to me that the positions ought to be reversed, and something should be done about it.

THE CHAIRMAN: Thank you, Mr. Common. Ladies and gentlemen, is there anyone else who would like to speak at this time? If not, the meeting is adjourned.