THE ROLE OF CROWN COUNSEL IN CANADIAN PROSECUTIONS

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> It is true that in the receiving of justice the king stands in an equal position with the least of his kingdom. On the other hand, it is also true that in power he is superior to all. Even so, the heart of the king ought to be in the hand of God, so that his power may not be unbridled. Let him therefore apply the bridle of temperance and the reins of moderation, lest unbridled power should lead to lawlessness.
>
> BRACTON[1]

Introduction

A miscarriage of criminal justice at home may have local, national and international consequences. The same is no less true of *alleged* miscarriages. A decision by an Attorney General or prosecutor to prosecute or not to prosecute, or to enter or not to enter a *nolle prosequi*, each of which calls for the exercise of a discretion, involves considerations which go to the very root of what may be termed "the notions of justice of English-speaking peoples".[2]

"Assuredly the theory repeatedly advanced", said Commissioner Nielsen in *Janes* (*United States* v. *Mexico*),[3] "that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because, by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary". An Attorney General or prosecutor, in the exercise of his discretion in criminal proceedings, may be regarded as just at home and unjust abroad, or unjust at home and just abroad.

This article is concerned with the conduct and with the exer-

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[1] De Legibus et Consuetudinibus Angliae, ed. by Woodbine (1915), folios 107a-107b.

[2] This term seems to have become rather popular in the United States. *Malinski* v. *New York* (1945), 324 U.S. 401; *Rochin* v. *California* (1952), 342 U.S. 165.

[3] Opinions of Commissioners Under the Convention Concluded Sept. 8, 1923, Between the United States and Mexico (1926-27), pp. 108, 123, (1926), 4 U.N. Rep. Int'l Arb. Awards 82, at p. 92.

cise of the discretion of Attorneys General and crown counsel in Canadian criminal prosecutions, in the light of the Canadian Bill of Rights.[4]

The question naturally arises as to what roles justice, law and politics play in criminal prosecutions. In considering this question, I shall have occasion to refer to the position of an Attorney General, and of course of counsel for the prosecution, in England, the United States of America and Canada.

Part I of this article deals with the nature of the office of Attorney General and prosecutor, and with the local and national aspects of the exercise of their discretion in a nation that is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person in a society of free men and free institutions, and in which it is recognized that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.[5]

Part II deals with the conduct of criminal litigation, and endeavours to point out some of the main principles to which an Attorney General and counsel for the prosecution must adhere in order to ensure that an accused person shall receive a fair trial in accordance with the Bill of Rights.

The article ends with certain conclusions to be drawn from the nature of the office of Attorney General and prosecutor, and the principles which govern them in the conduct of criminal litigation.

I. *The Nature of the Office of Attorney General and Prosecutor.*

"I die the King's good servant", Sir Thomas More proclaimed from the scaffold, "but God's first".[6] A present-day Canadian Attorney General or prosecutor is not a servant of the Crown, a servant of his party, a servant of the government, a servant of Parliament, or a servant of the rigour of human positive law. Rather, he is a servant of justice. He should too, like More, be a servant of his God, and should listen to the teachings of that law which St. Paul said was written in the hearts of men.[7] I am speaking now, of course, of the position of the Attorney General or prosecutor so far as *discretion* in connection with the criminal process is concerned. It is not without significance that it is the Minister

[4] An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, S.C. 1960, c. 44.
[5] *Ibid.*, Preamble.
[6] From O'Sullivan, The King's Good Servant (1948).
[7] Aquinas, Treatise on Law, qq. 90-97, art. 5.

of *Justice* who is the Attorney General of Canada.[8] Nor is it without significance that he is a Member of Parliament and a Member of the Cabinet.

The extent to which the principles which are enshrined in the Canadian Bill of Rights[9] and the Universal Declaration of Human Rights[10] are respected and applied in the spirit, as well as in the letter, depends to a large extent upon the manner in which the powers, the duties, and the discretion of an Attorney General and prosecutor are exercised and fulfilled in practice. "What are the respective roles of justice, law and politics?"—is a fundamental question. Wrong answers can relegate the Bill and the Declaration to nothing more than words, albeit inspiring words, on paper. Moreover, as has already been indicated, not only local and national, but also international implications flow from the manner in which an Attorney General or a prosecutor conducts himself in office.

When and why should he prosecute? When and why should he not prosecute? When and why should he enter a *nolle prosequi*, or not do so? Are Attorneys General and prosecutors "the blood-hounds of the Crown" [11], or of a political party, or of the government or of Parliament? Is the term "blood-hound" appropriate, in any context, to describe the office? Whatever may have been the situation in early Stuart times, today's answer to these questions is an unequivocal, no.

It is obvious from the nature of his office that an Attorney General, and this is no less true of counsel for the prosecution, must stand above and apart from the clamour of the crowd—from the rich, and the poor, and the in-betweens. A certain person or group of persons may urge or insist that a prosecution be launched, and that it be pursued to the end that a conviction will be obtained. In other circumstances, a certain person or group may insist that a prosecution should not be launched, or if already launched that it should be discontinued. Or, even, that it should be conducted in such a way that an acquittal will be likely to result. The question immediately arises: how does an Attorney General, or prosecuting counsel, stand in relation to the matter of convictions and acquittals?

It is no secret that in England, in Canada, and in the United States of America, there have been times and circumstances in

[8] Department of Justice Act, R.S.C., 1952, c. 71, s. 2.
[9] *Supra*, footnote 4.
[10] United Nations General Assembly, 1948.
[11] Keeton, A Liberal Attorney General (1949), p. 133.

which the conduct of an Attorney General or prosecuting counsel has been deserving of criticism and censure. It is no secret either that, notwithstanding bills and declarations of rights, examples of this can be found at the present day: examples which make a mockery of "due process of law", "fair hearing in accordance with the principles of fundamental justice", "an impartial tribunal", "notions of justice of English-speaking peoples", and the like. But English-speaking peoples have no monopoly in regard to these lapses.

Mr. Emlyn in his preface to the second edition of the *State Trials* had this to say, in part, in connection with the criminal process:

> Some [members of the Bar] he will find, pressing nothing illegal against the Prisoner, nothing hard and unreasonable (however in strictness legal) using no artifices to deprive him of his just Defence, treating his Witnesses with decency and candour; being not so intent on convicting the Prisoner, as upon discovering Truth, and bringing real Offenders to Justice; looking upon themselves according to that famous Saying of queen Elizabeth, not so much retained *pro Domina Regina*, as *pro Domina Veritate* (3 Co. Instit. 79.).
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> These will appear in a different light from others, who with rude and boisterous language abuse and revile the unfortunate Prisoner; who stick not to take all advantages of him, however hard and unjust, which either his ignorance, or the strict rigour of Law may give them; who by force or stratagem endeavour to disable him from making his Defence; who brow-beat his Witnesses as soon as they appear, tho' ever so willing to declare the whole truth; and do all they can to put them out of countenance, and confound them in giving their Evidence: as if it were the duty of their place to convict all who are brought to Trial, right or wrong, guilty or not guilty; and as if they, above all others, had a peculiar dispensation from the obligations of Truth and Justice. Such methods as these should be below men of honour, not to say men of conscience: yet in the perusal of this Work, such persons will too often arise to view; and I could wish for the credit of the Law, that that great Oracle of it, the Lord Chief Justice Coke, (See the Trial of Sir Walter Raleigh, A.D. 1603.) had given less reason to be numbered among them.[12]

Attorney General Coke's performance is too well known to warrant repetition here. It is sufficient to recall that he saw fit to address Raleigh at his trial with such expressions as: "I will prove you the notoriest Traitor that ever came to the bar"; "thou art a monster; thou hast an English face, but a Spanish heart"; "You are the absolutist Traitor that ever was"; "thou Viper; for I thou thee, thou Traitor."[13]

[12] Howell's State Trials (2nd ed., 1730), Vol. 1, pp. xxiii, xxiv.
[13] *Ibid.*, Vol. 2, pp. 7, 9, 10.

Mr. C. P. Harvey, Q.C. has made the observation that the following passage from the address of counsel for the prosecution at the first trial of Alger Hiss in America, "is very much in the style in which Sir Edward Coke used to prosecute":

> And again, finally, you are the second jury to hear this story. The grand jury heard the same story. The grand jury heard this traitor and Mr. Chambers, and that grand jury indicted Hiss. It indicted Hiss because he lied. He lied to them, and I submit he lied to you. The grand jury said that he lied twice on December 15th. And as a representative of 130,000,000 people of this country, I ask you to concur in that charge of the grand jury. I ask you as a representative of the United States Government to come back and put the lie in that man's face.[14]

In a recent Canadian case Chief Justice Kerwin observed:

> It is the duty of crown counsel to bring before the Court the material witnesses, ... In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty, or when his remarks tend to leave with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty.[15]

It must be emphasized that it is not the aim of an Attorney General or of counsel for the prosecution to obtain convictions in criminal proceedings. Nor, in any case, should it be permitted even to appear that such is his aim. It is essential that this be kept uppermost in the mind when one considers the discretion that he has regarding the institution, conduct and discontinuance of criminal proceedings. For the benefit of non-Canadian lawyers it must be pointed out that in Canada, criminal law and procedure are federal matters, enforced by provincial officials in provincial courts, presided over by federally appointed judges.[16] Under the Canadian constitution, the Queen, by and with the advice and consent of the Senate and House of Commons, may make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures. It is expressly provided in the British North America Act of 1867[17] that the criminal law, except the constitution of criminal courts, but including the

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[14] Harvey, The Advocate's Devil (1958), p. 159.

[15] *Boucher* v. *The Queen*, [1955] S.C.R. 16, at p. 19.

[16] In some cases, however, the proceedings are conducted before provincially appointed magistrates.

[17] 30 Vict., c. 3, s. 91(27). This is an English statute and, at the date of writing, Canada cannot amend her own constitution.

procedure in criminal matters, is within the legislative field of the Dominion, that is, the federal authority. The provinces, on the other hand—and this of course involves the provincial Attorneys General and prosecutors—have the responsibility for the administration of justice in the provinces. The provinces attend to the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction.[18] The provinces may enact legislation dealing with the imposition of punishment, by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects in respect of which the provinces have jurisdiction.[19] The dividing line between criminal law and law of the kind just mentioned, sometimes termed quasi-criminal law, is by no means always easy to discern in particular cases.[20]

The federal Department of Justice Act[21] provides that the Minister of Justice is *ex officio* Her Majesty's Attorney General of Canada. The Attorney General is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, so far as those powers and duties are applicable to Canada. He is also entrusted with the powers and duties that, by the laws of the several provinces, belonged to the office of Attorney General of each province up to the time when the British North America Act of 1867 came into effect, so far as those laws under the provisions of that Act are to be administered and carried into effect by the government of Canada.

The Attorney General of Canada has the regulation and conduct of all litigation for or against the Crown or any public department, in respect of any subject within the authority or jurisdiction of Canada. But, as has been noticed, the administration of criminal justice is a provincial matter and, therefore, falls within the responsibilities of the provincial Attorneys General and prosecutors.

The provisions of the Department of Justice Act which relate specifically to the Attorney General raise the question: what are the powers and duties that belong to the office of the Attorney General of England? Certainly they do not now call for, if they ever did in an earlier era of the administration of criminal justice,

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[18] *Ibid.*, s. 92(14). [19] *Ibid.*, s. 92(15).

[20] Certain aspects of a subject may come within the federal field, while others come within the provincial. For example, the negligent operation of motor vehicles on highways.

[21] *Supra*, footnote 8.

the kind of inhumane performances of which Emlyn wrote in his preface to the *State Trials*. And certainly the following is not truly descriptive of the present-day office of Attorney General of England, Canada or a Canadian province:

> The nation at large must look upon the Attorney-General as a sort of ministerial spy—an informer of rather a higher rank than those who have recently (1819) become notorious, whose business is to ferret out and prosecute all who either by their actions or writings are endeavouring to displace the personages to whom he is indebted for his situation, or who are attempting to promote any reform in the system they support.[22]

When in 1820 (which, incidentally, was the year following that in which wager of battle was abolished by statute in England)[23] Sir Francis Burdett said that the Attorney General was not an officer of the Crown, and that "his situation is not permanent; he is dependent upon the administration: he is the creation of its breath, and his official existence expires with the frown of the Minister", he was reprimanded by Mr. Justice Best for these "disrespectful observations".[24]

It would seem that there was formerly a considerable difference of opinion as to the responsibility of the Attorney General to the executive. More recently, however, Lord MacDermott, Lord Chief Justice of Northern Ireland, has written:

> With some, relatively minor, exceptions the executive must leave the initiation of criminal proceedings by the Crown to the Attorney-General and those for whom he is responsible. The days are gone when a subservient Attorney could be told whom to lay by the heels or whom to spare. He must now maintain a complete independence in this difficult and sometimes delicate sphere, and if he fails to do so, the remedy lies in his dismissal or that of the Administration.
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> This segregation of powers applies as clearly to calling off prosecutions as to starting them, and is today so well settled and respected that no government wishing to remain in office is likely to ignore it. It springs from a widespread feeling that the administration of the law, and particularly of the criminal law, ought to be altogether above party politics.[25]

Sir Hartley Shawcross, now Lord Shawcross, a former Attorney General of England, has said that: ". . . in the discharge of his legal and discretionary duties, the Attorney General is completely divorced from party political considerations and from any kind of political control."[26] And Mr. Justice Devlin, in the year

[22] *Supra*, footnote 11, at p. 134. [23] 59 Geo. III, c. 46.
[24] Keeton, *op. cit.*, footnote 11, p. 134.
[25] Protection from Power under English Law (1957), pp. 31-32.
[26] *Ibid.*, p. 33.

1960, testifies to the same effect,[27] supported by the following observation in an address by the Prime Minister in the House of Commons on February 16th, 1959:

> It is the established principle of government in this country, and a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter, where a public as opposed to a private prosecution is concerned, for the prosecuting authorities to decide on the merits of the case without political or other pressure.[28]

Domestic courts may not review the motives of an Attorney General or prosecutor in the exercise of his discretion to prosecute or not to prosecute, or to continue or to discontinue criminal proceedings. There must be no judicial interference with the discretion vested in a minister of the Crown.[29]

In the United States there has been powerful criticism of the role which party politics have been allowed to play in the matter of criminal prosecutions. This is particularly the case, of course, where prosecutors are elected. Dean Pound's criticism of the American system states that the office of prosecutor is used as a political stepping stone, that prosecutors point with pride to their records of convictions obtained, and that every opportunity for sensationalism and publicity is turned to political advantage:

> . . . politics are a check in an improper sense, hindering (the prosecutor) from doing what he should. Today, political pressure upon prosecutors, except in rare intervals of political upheaval, is a weapon against society, not a shield of the innocent individual citizen. . . . Any program for bettering our administration of criminal justice must seek to take prosecutions out of politics. . . .[30]

Dienstein,[31] and Sutherland and Cressey,[32] also point out the evils of the absence of separation of prosecutions and politics, and to the vulnerability of the discretion of the prosecutor in this regard.

Despite such criticisms, *some* American prosecutors continue to point with pride to their record of convictions obtained, continue to take part in criminal investigation, and continue to have their picture and statements published in newspapers in con-

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[27] Devlin, The Criminal Prosecution in England (1960), p. 18.
[28] Hansard, Vol. 600, No. 58, p. 31.
[29] *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275, affd. 43 O.L.R. 474; *Orpen* v. *Att. Gen. for Ont.* (1925), 56 O.L.R. 327, [1925] 2 D.L.R. 366, affd. 56 O.L.R. 530, [1925] 3 D.L.R. 301.
[30] Criminal Justice in America (1945), pp. 185, 188.
[31] Are You Guilty? (1954), p. 83.
[32] Principles of Criminology (1960), pp. 228-229.

nection with reports of criminal cases. The damage which their conduct does, in the United States and abroad, is immeasurably great. They would, perhaps, be shocked at the following description of the function of counsel for the prosecution:

> Let me explain to you in a word what my position as Attorney General, or what in fact the position of any prosecuting counsel in this or in any criminal case, is. I am not here to endeavour to secure a conviction and to try to ride round and escape from the rules of fairness or anything of that sort. My task is merely to put before you as best I can the plain unvarnished facts, without rhetoric and without emotion, in order that you may be assisted to come to your decision as to whether or not these defendants are or are not guilty of the offences with which they are charged.[33]

In an address before a conference of United States Attorneys in 1941, Attorney General Robert H. Jackson emphasized the problem of selection of cases for prosecution:

> One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offence is the most flagrant, the public harm the greatest, and the proof the most certain.
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> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost any one. In such a case it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offence on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offence, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.[34]

It is evident that the discretionary power of the Attorney General, and of individual prosecutors, is such as to be capable of being made an instrument for justice or an instrument for injustice. Dean Pound has referred to it as "one of a great series of

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[33] Soonavala, Advocacy (2nd ed., 1960), p. 317.
[34] (1940), 24 J. Am. Jud. Soc'y 18, at p. 19.

mitigating agencies whereby individual offenders may be spared or dealt with leniently".[35]

In some cases individuals have attempted (sometimes with success) to use the criminal process to serve their own private ends. They have sought to make use of it where civil remedies were available to them. This has been condemned in Canada.[36] Attorney General Jackson had occasion to deal with this aspect of the criminal process in connection with criminal libel, and he adhered to the policy of declining to prosecute such cases where a civil remedy was open to the individual concerned, and where there had been no breach of the peace or other public injury done by the libel.[37]

The nature of the office of Attorney General and prosecutor requires that political, personal and private considerations shall be set aside so far as the exercise of the discretionary power which is inherent in the office, in connection with the criminal process, is concerned. The discretion must be exercised solely upon grounds calculated to maintain, promote and defend the common good.

II. *The Conduct of Criminal Litigation.*

In determining whether a prosecution should be launched and carried through to a determination on the merits, prosecuting counsel must consider the interests of society as a whole. He must keep in mind the standard of proof required in a criminal case. Failure to do this will result in an injustice to the person who has been put on trial in the face of insufficient evidence. The standard of proof, where the evidence is not wholly circumstantial, is that the accused must be proved guilty, if at all, beyond a reasonable doubt. Attempts at refinement of the term "reasonable doubt" have been, on the whole, eminently unsatisfactory. Where the evidence is wholly circumstantial it is necessary, in addition, that the tribunal be satisfied "not only that those circumstances were consistent with *his* having committed the act, but they must also be satisfied *that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person*". This is the language of Baron Alderson in *Hodge's*[38] case, and the Supreme Court of Canada has held that this language or its equivalent should be used in charging the jury. To obviate

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[35] An Introduction to the Philosophy of Law (1959), p. 66.
[36] *R.* v. *Bell*, [1929] 3 D.L.R. 931.
[37] Hearings on Nomination of Robert H. Jackson to be an Associate Justice of the Supreme Court (1941), 77th Cong., 1st sess., pp. 47-69.
[38] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.

the difficulty inherent in determining what is the equivalent, it has been held advisable to use Baron Alderson's words.[39]

To commence a prosecution or permit it to continue in the face of these requirements, where the evidence forthcoming is not such as is calculated to attain this standard, would be an abuse of discretion. It would amount to the launching of a "fishing expedition" in the hope that sufficient evidence would somehow turn up during the course of the trial. Such a procedure could not be held to meet the test of the principles which underlie the Bill of Rights.[40]

One of the most severely criticized criminal proceedings ever to take place in Canada was the espionage investigation of 1946, where a royal commission was created to investigate allegations that a spy-ring was operating in Canada. The disclosures of Igor Gouzenko, a cypher clerk in the Russian Embassy at Ottawa, were such that the Minister of Justice reluctantly invoked a secret order in council that had been inadvertently left in force after the end of the war. As a result, suspected persons were held incommunicado and were questioned *in camera* without counsel and without protection against self crimination. In the words of one speaker in the House of Commons: "Indeed, sir, Canada has now seen black days." [41] In the words of another: ". . . detaining and questioning in this fashion has never been resorted to anywhere in this Empire before." [42] And in the words of a member of the party in power, a former member of the wartime Cabinet: ". . . I cannot wish to turn back the pages of history seven hundred years and repeal Magna Charta. I cannot by my silence appear to approve even tacitly what I believe to have been a great mistake on the part of the government."[43] With the merits of the case I am not here concerned, but it is clear in any event that the Minister of Justice was in a very difficult position when news of the alleged spy-ring reached him. In his own words: [44]

> If there had been no legal way of doing it I would have felt no responsibility. But when there was a legal way, when there was a way by which it could legally be done, I could not refuse to take the advice which was given to me. I will not say that I was happy that there was a legal way of doing it. It would have been much more comfortable for me to be able to say, "This cannot legally be done."

The procedure followed in that case does not reflect the usual mode of proceeding in Canadian prosecutions. Standard proce-

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[39] *Boucher* v. *The Queen*, *supra*, footnote 15.
[40] *Supra*, footnote 4.
[41] House of Commons Debates (1946), Vol. 1, p. 88.
[42] *Ibid.*, p. 139. [43] *Ibid.*, p. 173. [44] *Ibid.*, p. 92.

dure would have required that the persons be brought before a justice, and that they be accorded the right to counsel. But detention and interrogation by the police is a broad—and difficult—subject. Under section 438 of the Criminal Code of Canada,[45] a person who has been "arrested" must be taken before a justice to be dealt with according to law within a period of twenty-four hours, where a justice is available. Where a justice is not available within that period, the person must be taken before a justice as soon as possible. "Detention for questioning" differs from arrest. Without becoming involved in a detailed consideration of this problem, for it is a matter not directly affecting the conduct of prosecuting counsel, as such, it can only be said that ". . . the law seems to leave the question of how long a suspect may be detained for questioning unanswered, excepting in terms of what is reasonable and practicable".[46] For what it is worth, however, the person has a right to keep his silence. In the words of Mr. Justice Devlin:[47]

> It is true that the law which gives freedom to the police to question equally gives freedom to the suspect not to answer. Indeed, there is virtually no obligation on anyone to give the police helpful information. If a man positively knew that a felony had been committed and refused to give the police any information about it, he might be guilty of misprision of felony, but this offence is now practically obsolete. *R.* v. *Aberg*, [1948] 1 All E.R. 601. Otherwise the policeman has no power or privilege; in the eye of the law he is only an interested questioner seeking for information. But in practice he is of course treated very differently. It is probable that even to-day, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least it will be the worse for you if you do not. Apart from this, anyone who is innocent must recognize a strong moral duty to assist the police by giving all the information in his power, and anyone who is guilty must accept the same duty if he wishes to be thought innocent.

The point which must not be overlooked, however, is that there are four main stages through which a person passes in the course of the criminal process: (1) where information is sought from him, in which case he may be termed simply an "interrogee"; (2) where suspicion fastens upon him, in which case he may be termed a suspect; (3) where the suspicion crystallizes and a charge is made, in which case he may be termed an accused; and (4) where the trial process begins, in which case he may be termed a litigant. Throughout this process the person is deemed innocent

[45] S.C., 1954, c. 51.
[46] [1959] Crim. L.R. 79, at p. 80.
[47] *Op. cit.*, footnote 27, p. 27.

until proved guilty beyond a reasonable doubt, and if counsel for the prosecution is to proceed in such a manner that an injustice is not to be done him, he must act in a quasi-judicial manner, and not as a detective or as an adversary. Some District Attorneys and prosecuting counsel in the United States take an active part in the investigation of crime in its preliminary stages. Inevitably, they place themselves in a position similar to that of a policeman or detective, and thereby become accusers rather than ministers of justice. When politics is added to this, their opportunity to act in an impartial and quasi-judicial role is seriously impaired if not, indeed, wholly eliminated.

When it has once been determined that a crime has been committed, the possible sources of injustice towards the person suspected of having committed it are almost without limit. There are the matters of confessions and of obtaining evidence by illegal means, to mention but two of the more obvious. But, in addition, at the trial itself, there is the matter of the conduct of counsel for the prosecution. Generally speaking, neither an Attorney General nor counsel for the prosecution has any greater legal rights than any other member of the Bar. They must conform to the rules, and the court exercises the same authority over them as over any other advocate. Nevertheless, a prosecuting counsel has a certain discretion to exercise if an injustice is not to be done to the accused person. For one thing, he must realize that to adopt and seek to follow a doubtful course of action that may be very close to the line, thereby putting defence counsel in the position of having to make objections, can very easily prejudice the accused in the minds of the jurors. An objection by the defence may quite understandably result in the jurors coming to the conclusion that the defence has something to hide. This may, of course, be true. But it may not!

In addition, there is the discretion of counsel for the prosecution as to what evidence he will, or will not, adduce. The judge, too, has a discretion to reject evidence, though it is technically admissible, on the ground that it would be unduly prejudicial to the interests of the accused.

Of one Canadian crown counsel it was said that he was "the thirteenth juryman".[48] This is probably overstating the case, but, properly understood, is not so exaggerated a description of the function of prosecuting counsel as might at first appear. It is only

[48] Britton Bath Osler (1839-1901). See Cushing, The Life of Sir William Osler, Vol. 1, p. 13, note 2.

in the light of considerations such as this that the provisions of the Bill of Rights[49] dealing with "due process of law", "a fair hearing in accordance with the principles of fundamental justice", "impartial tribunal" — gain real meaning. Standing by themselves, they are but general propositions. And general propositions, as Mr. Justice Holmes once pointed out, do not decide concrete cases.[50]

One of the best guarantees of the fulfillment of the principles that underlie the Bill of Rights, in a criminal trial, is a prosecutor who approaches his task in the tradition so ably described by Attorney General Sir William Jowitt, K.C., noticed earlier.[51] It is not his aim to obtain convictions, and the adversary system has no application to his work. This approach does not result in "Casper Milquetoast" prosecutors. On the contrary, it follows inevitably from the principle that the prisoner is deemed innocent until he has been proved guilty beyond a reasonable doubt. And, too, it places prosecuting counsel in a proper role between two extremes. I refer to the matter of "condonation" of crime, to which Commissioner Nielsen referred in *Janes* (*United States* v. *Mexico*),[52] on the one hand, and to tactics such as those of Sir Edward Coke in *Raleigh's* case, to which Mr. Emlyn and Mr. E. P. Harvey, Q.C. referred,[53] on the other. In the truest sense of the term, the Crown never wins or loses a criminal case. In an address to which reference has already been made, Attorney General Jackson said: "Although the government technically loses its case, it has really won if justice has been done."[54] It would be more accurate to say that the government, in criminal prosecutions, neither wins nor loses, technically, really or otherwise.

It is one thing to say that a crown counsel is a minister of justice. It is quite another thing to determine whether the theory is carried out in practice. I purpose to refer to four subjects of everyday significance in this regard, namely: (1) the matter of the obligation of counsel for the prosecution to adduce the evidence material to the case; (2) his obligations in connection with the cross-examination of the accused person, where he elects to testify; (3) or the obligation of crown counsel to refrain from commenting upon the failure of an accused to testify, where he elects not to testify; and (4) the obligations of counsel for the prosecution in connection with his address to the tribunal. In the ordinary

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[49] *Supra*, footnote 4.
[50] *Lochner* v. *New York* (1905), 198 U.S. 45, at p. 74.
[51] *Supra*, footnote 33.
[52] *Supra*, footnote 3.
[53] *Supra*, footnotes 12, 13, 14.
[54] *Supra*, footnote 24, at p. 19.

course of events, these questions must arise in every criminal case that proceeds to trial.

It is apparent that in connection with the first-mentioned matter, the obligation to adduce the evidence material to the case, counsel for the prosecution must exercise a discretion. He must ". . . not hold back evidence because it would assist an accused . . . the prosecutor is free to exercise his discretion to determine who are the material witnesses".[55] He must, it would follow, approach his task in a manner quite different from that of an advocate in a civil proceeding. The word "material" must be taken to refer to facts which are material either to guilt *or to innocence*, but in making a judgment in this situation, the crown counsel must have regard to the *reliability* of the evidence in question. To attempt to go beyond that which has been indicated, and to formulate rules that must govern the exercise of the discretion, would, in effect, be putting an end to the discretion. The consequence of this conduct would be to hinder, rather than promote, the fair and impartial administration of criminal justice. It cannot be the rule that counsel for the prosecution must call each and every person who may be in a position to testify. Mr. Justice Locke, in the *Lemay* case, asked:[56]

> . . . is it to be said that, as a matter of law, the Crown was required to call Lowes as a witness for the prosecution and thus, assuming he should join with Lemay in denying that any such transaction had taken place, assist a guilty person to escape? From a practical point of view, if that was the law, far from furthering the due administration of justice it would, in my opinion, actively retard it. In the case of those engaged in the illicit drug traffic, by working in pairs, the one making the sale would be assured at all times of having a witness with him available, in the case of a prosecution, to join in denying that anything of the kind had taken place *and whom the Crown would be bound to call.*

Assuming the accused elects to testify, the question arises as to the permissible limits of cross-examination by crown counsel. The prospect of going into the witness box is, even for an innocent person, not a pleasant one. But, pleasantries apart, it may be essential if an acquittal is to result. There are wide differences of opinion as to whether the accused's option to testify or to remain silent is a good thing. In Canada, he may be cross-examined as to previous convictions. On the other hand, if he decides not to testify, neither the judge nor counsel for the prosecution may

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[55] *Lemay* v. *The King*, [1952] 1 S.C.R. 232, at p. 241.
[56] *Ibid.*, at p. 252. Emphasis supplied.

comment thereon. Cross-examination, then, looms rather large in the minds of the accused and his counsel.

In the case of *Koufis* v. *The King*,[57] in which the accused was convicted of arson, objection was taken by the accused-appellant to the fact that counsel for the prosecution had cross-examined him as to an alleged fire at premises other than those in question. It was alleged that this prejudiced the accused with the jury. Justices Rinfret, Crocket and Taschereau held that a new trial was required:[58]

> The *Canada Evidence Act*,[59] section 12, says:
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> "A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction."
>
> If the accused admits having committed the offence, the answer, being a collateral one, is obviously final. If he denies having committed the offence, then the conviction may be proved by legal means provided for in subsection 2, . . . of section 12. The authority given to the Crown is to cross-examine the accused on *previous convictions*, but this section 12 cannot be interpreted as meaning that the accused may be cross-examined on offences which he is suspected of having committed but for which he has not been convicted.
>
> When an accused is tried before the Criminal Courts, he has to answer the specific charge mentioned in the indictment for which he is standing on trial, "and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment" (*Maxwell* v. *Director of Public Prosecutions*, [1935] A.C. 309). Otherwise, "the real issue may be distracted from the minds of the jury," and an atmosphere of guilt may be created which would indeed prejudice the accused.
>
> All these questions were obviously asked in order to convey to the jury the impression that the accused had set fire previously to another building, and to establish the possibility [*sic*-probability?] that he committed the offence for which he is now charged. The accused cannot be cross-examined on other criminal acts supposed to have been committed by him, unless he has been convicted, or unless these acts are connected with the offence charged and tend to prove it (*Paradis* v. *The King*, [1934] S.C.R. 165, at p. 169), or unless they show a system or a particular intention as decided in *Brunet* v. *The King* ((1918), 57 Can. S.C.R. 83).

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[57] [1941] S.C.R. 481.

[58] *Ibid.*, at pp. 489-490. The judgment of Chief Justice Duff and Mr. Justice Kerwin, delivered by the latter, is to the same effect on this point, (at p. 487). In *Regina* v. *Ducharme*, [1955] O.R. 824, cross-examination of the accused to bring out the fact that he was a deserter from the army (sought to be justified as going to credibility) was held "quite improper, irrelevant and highly prejudicial to the accused" (at p. 833). A new trial was ordered on this and other grounds.

[59] R.S.C., 1952, c. 307.

Even though cross-examination on previous convictions goes only to the question of credibility,[60] it cannot be said that the Canadian rule is wholly satisfactory. The English rule is preferable. It permits cross-examination only if the evidence is admissible to show that he is guilty of the offence wherewith he is then charged; or he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or he has given evidence against any other person charged with the same offence.[61] The uniform rules of evidence approved by the American Bar Association in 1953 provide that in the case of an accused-witness no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility, unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.[62] The indiscriminate use of the Canadian rule would, it is submitted, be inconsistent with the duties of crown counsel, and could very well be held to be a ground for setting aside a conviction and ordering a new trial where it could be shown that the accused was unduly prejudiced.

As was mentioned earlier, the Canada Evidence Act[63] prohibits both judge and counsel for the prosecution from commenting upon the failure of the accused to testify and this extends also to the spouse of the accused. In *Bigaouette* v. *The King*,[64] a new trial was ordered owing to the failure of the judge to obey the prohibition contained in the Act. The unanimous judgment of the court was delivered by Mr. Justice (later Chief Justice) Duff in these terms:[65]

> It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment . . . upon the failure of *la défense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood the other way, that it seems plainly obnoxious to

[60] *Regina* v. *Gaich* (1956), 116 C.C.C. 34, at p. 39.
[61] Criminal Evidence Act (1898), 61 & 62 Vict., c. 36, s. 1(f).
[62] Rule 21. See Morgan, Maguire and Weinstein, Cases and Materials on Evidence (4th ed., 1957), p. 849.
[63] *Supra*, footnote 59. [64] [1927] S.C.R. 112. [65] *Ibid.*, at p. 114.

> the enactment. . . . The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex* v. *Gallagher* ((1922), 37 Can. Cr. C. 83), in these words:
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> ". . . it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal."

These observations apply equally to the prohibition against comment by counsel for the prosecution. And, again, the Canadian rule differs from the English. The English Act prohibits comment only by the prosecutor.[66] The American uniform rules provide that counsel may comment upon the failure of the accused to testify, and that the trier of fact may draw all reasonable inferences from the failure to testify.[67] It is submitted that the English rule is consistent with the accused's *right* to keep his silence, and that it is the preferable rule.[68] As was pointed out in *Wilson* v. *United States:* "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him."[69] To compound his predicament by permitting comment by the prosecutor on his failure to testify is most unjust.

Finally, there is the matter of crown counsel's address to the tribunal. The subject was thoroughly reviewed in *Boucher* v. *The King*,[70] and, as a result of the language used by crown counsel in that case, a new trial was ordered. Chief Justice Kerwin and Mr. Justice Estey stated:[71]

> It is the duty of crown counsel to bring before the Court the material witnesses, as explained in *Lemay* v. *The King* ([1952] S.C.R. 232). In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty, or when his remarks tend to leave with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty.

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[66] *Supra*, footnote 61, s. 1(b).

[67] Rule 23(4), *op. cit.*, footnote 62, p. 850.

[68] Originally, I had thought that the Canadian rule was preferable, but one of Her Majesty's judges has since convinced me that I was wrong. I am now of the opinion that it should be open to the presiding judge to explain carefully the position of the accused in this regard to the jury. Indeed, I think it incumbent upon him to do so.

[69] (1893), 149 U.S. 60, at p. 66. See Griswold, the Fifth Amendment Today (1957), p. 20.

[70] *Supra*, footnote 15.

[71] *Ibid.*, at p. 19.

Mr. Justice Taschereau said:[72]

> La situation qu'occupe l'avocat de la Couronne n'est pas celle de l'avocat en matière civile. Ses fonctions sont quasi-judiciaires. Il ne doit pas tant chercher à obtenir un verdict de culpabilité qu'à assister le juge et le jury pour que la justice la plus complète soit rendue. La modération et l'impartialité doivent toujours être les caractéristiques de sa conduite devant le tribunal. Il aura en effet honnêtement rempli son devoir et sera à l'épreuve de tout reproche si, mettant de côté tout appel aux passions, d'une façon digne qui convient à son rôle, il expose la preuve au jury sans aller au delà de ce qu'elle a révélé.

Mr. Justice Rand observed that the irregularity in question touched:

> . . . one of the oldest principles of our law, the rule that protects the subject from the pressures of executive and has its safeguard in the independence of our courts. It goes to the foundation of the security of the individual under the rule of law.
>
> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[73]

Mr. Justice Locke reviewed a large number of authorities and observed that the duty of persons who are entrusted by the Crown with prosecutions in criminal matters "does not differ from that which has long been recognized in England", and that it is improper for crown counsel to express his own opinion as to the guilt or innocence of the accused.[74] Mr. Justice Cartwright also emphasized the *illegality* of the latter.[75]

Conclusion

The fact is that "most problems of man and society are very old",[76] and that includes the problem of the role of prosecutor. It may be thought by some that things have changed to such a degree—and here I have in mind what seems to be the growth of organized crime as a large scale operation which parallels, or almost parallels, the operations of the government itself and of

[72] *Ibid.*, at p. 21.
[73] *Ibid.*, at pp. 23-24.
[74] *Ibid.*, at pp. 25-26.
[75] *Ibid.*, at p. 31.
[76] Sutherland, The Law and One Man Among Many (1956), p. viii.

the larger corporations—that the idea that the adversary system does not apply in criminal prosecutions is no longer a tenable one. It may be thought by some that under modern conditions, it is necessary to fight fire with fire, even though that involves placing counsel for the prosecution in the position of the enemy of the man in the prisoner's dock. However, it is still essential that that man be deemed innocent until proved guilty. And so long as this is the case, it remains essential that counsel for the prosecution shall continue to act as a minister of justice, and not as an advocate in an adversary proceeding.

Attention was directed earlier in this article to the question as to what roles justice, law and politics play in criminal prosecutions. If they are to be conducted in a manner consistent with the Bill of Rights, it is essential that politics be eliminated, that the strict rigour of the criminal law shall not be applied without regard to the circumstances of particular cases and that justice shall be the governing factor. This, in turn, requires that a discretion as to when to prosecute and when not to prosecute shall be vested in someone. It cannot very well be vested in judges, and it most certainly cannot be left to politicians. It must, then, be left to prosecutors who are neither the one nor the other. The English system of prosecution places the government and the police at the mercy, so to speak, of the Bar. As Mr. Justice Devlin has pointed out: ". . . the policeman, like any other litigant, is to a large extent in the hands of his counsel; and to try to advance one's case by means of some unfair practice is not much good if one's counsel is not going to aid and abet."[77] It is true to say that this system applies in the main in Canada, but there prosecutors are generally engaged as such on a full-time basis with the result that there is the danger (sometimes fulfilled) of their becoming what may be termed "conviction-minded". In parts of the United States this danger is made much greater by reason of the political implications of the office of prosecutor.

If, in criminal prosecutions, the Bill of Rights[78] is to be put into practice, it is essential that the English approach to the criminal process be followed. It is essential that the prosecutor, to borrow from Bracton, should "apply the bridle of temperance and the reins of moderation, lest unbridled power should lead to lawlessness".[79]

Indeed, the discretion of an Attorney General and of a prose-

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[77] *Op. cit.*, footnote 27, p. 21.
[78] *Supra*, footnote 4.
[79] *Supra*, footnote 1.

cutor is, in the language of Jackson, "tremendous".[80] It is such that he could, if he should abuse his discretion, render the preamble and the operative part of the Bill of Rights a dead-letter so far as the individual is concerned. A prosecution launched in a case where the evidence is not calculated to meet the standard of proof of guilt beyond a reasonable doubt, plus the rule in *Hodge's* case[81] where the evidence is wholly circumstantial, or a prosecution viciously pursued with the sole aim of obtaining a conviction, makes the terms "dignity and worth of the human person" and "freedom . . . founded upon respect for moral and spiritual values and the rule of law" entirely meaningless for the individual who is being prosecuted.[82] We may well ask ourselves, in the language of Cardozo, whether the law, and here I refer particularly to the criminal law, has "been purged and sanctified and dignified so that Socrates and Raleigh and the witches—the ugly, the alien, the unpopular, the bothersome—would fare better at its hands today?"[83] The answer is clear: it has been purged and sanctified and dignified. But law must be administered by men, and when we speak of the criminal law, we must keep in mind that the men who are most closely connected with its administration are the Attorneys General and counsel for the prosecution. These men must be guided by that law, mentioned earlier, which St. Paul said is written in the hearts of men.

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[80] *Op. cit.*, footnote 38.
[81] *Supra*, footnote 38.
[82] *Supra*, footnote 4, Preamble.
[83] Our Lady of the Common Law, Hall, Selected Writings of Benjamin Nathan Cardozo (1947), p. 95.