Law Reform Commission of Canada

Commission de réforme du droit du Canada

CRIMINAL PROCEDURE

control of the process

Working Paper 15

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1975

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

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

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I A Procedural Perspective

Definitions make dull beginnings. They also confuse. So we shall not long detain the reader in an unrewarding and impossible search for a precise definition of the phrase, "criminal procedure". In its broadest sense, the procedural part of the criminal law is concerned with methods by which the state, through its officials and institutions, reacts to a violation of the prohibitions of the criminal law. The field of criminal procedure is, therefore, both broad and complex. It encompasses such matters as police powers, bail, legal representation, collection and presentation of evidence, trials and appeals. On such diverse and important topics there is much that can be said; there is much that we do not know, and there is much further research to be done.

Society responds to crime in many ways. The method that most readily comes to mind is the traditional prosecution in which the trial plays the central role. The majority of criminal incidents, however, do not result in trials. The commission or suspected commission of an offence does not automatically bring into operation the trial or any other standard, predetermined procedure. The mode of reaction to an offence will depend on a multitude of factors, including the decisions made by the various actors in the process: victim, offender, police, justices of the peace, prosecutors, judges, correctional authorities and others. A thorough understanding of crime and of our reaction to it demands an appreciation of all the factors that determine the methods of dealing with crime and criminals. Such a wide ranging study of law, society and human behaviour will not be attempted in this Paper.

Our scope of inquiry is much less ambitious, and will deal with what may be loosely described as the official reaction to crime by agents and institutions of the state. Even thus restricted the topic remains one of unmanageable size, offering a variety of approaches for discussion. One could examine the basic steps in a standard prosecution, or the fundamental rights of an accused. A Working Paper structured along those lines would be a profitable exercise. We have, however, chosen a different perspective from which to view what we conceive to be fundamental issues in Canadian criminal procedure. We have selected the control of the process as the focus of our discussion.

The process that we shall examine is the Criminal Code procedure for the prosecution of federal crimes. Procedure in relation to juvenile offenders, which raises difficult and specialized problems, will not be discussed. Non-prosecutorial methods of disposition are excluded from our discussion except in so far as they relate to our central theme. In previous Working Papers we have recommended that whenever possible non-prosecutorial methods of disposition should be used. We nevertheless feel justified in assuming that the traditional type of prosecution will continue to be a significant feature of our criminal justice system, and therefore an appropriate subject for separate discussion.

By "control" we mean the power to select or direct the procedures that determine the course of a case through its various stages.

The emphasis will be on the division of responsibility between the Crown and the judiciary. We shall make only incidental reference to other participants in the process, such as, the victim, the offender, witnesses, the jury, the police and justices. Some of these persons do not control procedure, and hence an examination of their roles is not essential for the purposes of this Paper. The jury, for example, decides the ultimate issue of guilt or innocence, but has no authority to direct the procedure at trial. Others, such as the police and the accused, exercise considerable control over procedure. Police enforcement and charging practices are among the most significant factors influencing the manner in which criminal justice is administered. The decisions of the accused may

also control procedure. His plea of not-guilty, for example, amounts to a demand that the Crown prove the charge; he thus asserts his right to a trial and to the procedural safeguards associated with it. In order to limit the size and complexity of this Paper we shall not undertake a detailed discussion of the procedural control exercised by persons other than the Crown and the judiciary.

We attach fundamental significance to the issue of the allocation of the power of control between the judiciary and the Crown for a variety of reasons. It raises matters of constitutional importance. It clarifies the discretionary aspects of the administration of justice, and places in proper context our proposals in previous Working Papers relating to the exercise of this discretion. The issue of control also has a direct bearing on a host of other issues, such as the rights of the victim and of the accused.

The present law does not have a coherent theory or practice governing the division of responsibility between the Crown and the courts. Statutory rules and judicial pronouncements deal with the issue of control in a piecemeal fashion with no readily discernable guiding philosophy. Answers to the basic questions posed by the central theme of this Paper must, therefore, be extracted by examining various features of the criminal process. We begin this task in Part II with a discussion of the basic characteristics of our procedural law and practice that have the most direct bearing on the role of the Crown and the courts. In Part III we shall explore the rationale behind these characteristics, and propose a theoretical basis for the allocation of responsibility. The conclusions thus formulated will then be applied in the discussion of specific problems in Part IV.

II Some Basic Characteristics of the Present System

(a) Trial Procedure

Although only a minority of criminal incidents go to trial, the trial process exercises an influence on many aspects of procedure. This is especially true of the manner in which authority over the conduct of a case is divided between the judiciary and prosecution.

Our criminal trial is an adversary proceeding. In several respects it differs from the adversary system in civil cases. As we shall explain in greater detail in the next Part, some of these differences flow from the Crown's non-adversarial, quasi-judicial role as the impartial representative of the public welfare in the administration of criminal justice. Also, the heavy burden of proof imposed on the Crown, and the accused's right of silence enable the accused to play a less active part in the proceedings than the typical defendant in a civil suit. Nevertheless, as we explained in our Working Paper on *Discovery*, the criminal trial, like the civil trial, is structured as a dispute between two sides, the Crown and the accused. The formulation of the legal and factual issues in the dispute and the presentation of the evidence on those issues is the responsibility of the parties, a task that primarily falls to the prosecution. Apart from ensuring that the rules of procedure are observed by the contestants, the judge does not play an active role in the definition or presentation of the dispute. His is the task of rendering a decision on the issues before him. The assumption is that the quality of justice administered by the court is measured not merely by the wisdom of the judge but also by his impartiality.

In the trial context, this means that the judge must not espouse the cause of either contestant. If he has any "cause" it is not one that identifies him with one of the parties; it is rather the more abstract goal of administering justice according to law.

In so far as we are committed to the adversary system we are also committed to the concept of judicial impartiality, and this in turn, as we shall explain in Part III, places limitations on judicial authority.

(b) The Charging Process

A criminal prosecution is not an open-ended inquiry into the conduct of the accused to ascertain whether or not he has indulged in undesirable behaviour. The principle of legality as applied in our adversary system restricts the scope of a prosecution through two fundamental rules. First, no one may be prosecuted except for an offence created by statute or by statutory authority. Secondly, and more significantly for present purposes, an offender may only be brought to trial and convicted for the offences specified (or included) in the charge laid against him. Thus, if a person is charged with, and tried for, assault, and the evidence proves not assault but theft, he must be acquitted. Hence the charge is the basis for determining all issues in the proceedings. Control of the charging process is, therefore, of crucial importance.

It would be perfectly consistent with the model of the adversary system presented above to state that charging decisions are the responsibility of the Crown. Our law and practice do not, however, present so simple a solution. Responsibility for charging decisions is in fact dispersed in such a manner as to defy either brief description or easy rationalization. In part, the complexity of the present arrangement is the product of history; its retention perhaps represents an instinctive reluctance to bestow upon any one individual or authority the broad powers inherent in the charging process.

To understand the charging process one must understand the nature of the document known as the "information", and the procedures associated with it. The "charge" is synonymous with the information, except in the relatively few cases tried in higher courts, where the accused will be tried on an indictment; but even these cases are, in the absence of a "direct" indictment, commenced by an information. Apart from invoking certain methods of compelling the appearance of the accused, the laying of an information is generally the first formal step in the launching of a prosecution. In cases where there is no indictment, the information is the document that specifies the offences with which the accused is charged; it is the basis for the court's jurisdiction over the accused; and it is the basis for formulating the legal and factual issues.

Under the Criminal Code, "Any one who, on reasonable and probable grounds, believes that a person has committed" an offence may lay an information before a justice.* The laying of the information before a justice is simply the process whereby the accuser swears before the justice his belief in the truth of his allegation that the accused has committed the offence described in the document.

Thus the theory expressed in the Code is that this initial step in the charging process is the act of an individual and not of the state, the only exceptions being a relatively few instances where by statute, the consent of the Attorney General, or some other designated official is required to institute proceedings. In practice, there is a form of official intervention in the laying of the information in that the majority of charges are laid by police.

The information does not acquire the status of an enforceable charge, or, to put it another way, a prosecution is not officially commenced until a justice exercises his Code jurisdiction, after hearing the allegations of the informant and such other witnesses as he deemed desirable, to determine whether or not a case is made out for compelling the appearance of the accused to answer the charge. Where he considers that a case has been made out on

* "Justice" is defined in s. 2 of Code as "a justice of the peace or a magistrate"; "magistrate" includes, *inter alia*, a judge of the sessions of the peace and a provincial court judge. In most jurisdictions informations are laid before justices of the peace.

the basis of the allegations of the informant or other witnesses he will issue a summons or warrant or confirm the appearance notice, promise to appear, or recognizance, as the case may be. At this point the procedure is no longer merely the allegation of a private citizen; the justice has invoked the authority of the state to command the appearance in court of the accused. Thus, for example, when a justice issues a summons the operative words commence with the statement, "This is therefore to command you, in Her Majesty's name to attend court" at a specified time and place.

The accepted theory is that the justice at this stage is acting in a judicial capacity, and that the procedure outlined above is designed to ensure that no one is arrested under warrant or otherwise compelled to appear before a court in the absence of a judicial determination to that effect. In actual practice this stage in the process is little more than an administrative act; seldom does the justice hear allegations other than those of the informant. When he does exercise his discretion to hear other witnesses, the hearing (*pré-enquête*) is conducted in the absence of the accused and hence the justice is unlikely to receive either a complete or an unbiased version of the facts.

Only in relation to indictable offences, other than those tried summarily, does the Code confer specific, although not exclusive, charging authority on the Crown. In the ordinary course of events a trial on indictment in higher courts will be preceded by a preliminary inquiry into the charges in the information. If the accused is committed for trial an indictment must be preferred by the proper authority before trial. If the accused has elected trial by judge alone the indictment "shall be preferred by the Attorney General or his agent, or by any person who has the written consent of the Attorney General, and in the Province of British Columbia may be preferred by the clerk of the peace". For jury trials the indictment may be preferred by the Attorney General or his agent, by any person with the written consent of a judge of the court or of the Attorney General, or by order of the court. The power to indict bestowed on the trial court has theoretical implications that are difficult to reconcile with the model of the adversary process presented above. The right of any

person to prefer an indictment with the consent of the Attorney General or of the court enables a private prosecution on indictment. In the vast majority of cases, however, indictments are preferred by agents of the Attorney General.

In non-grand jury jurisdictions, the preferring of the indictment by the proper authority is all that is necessary to confer jurisdiction to try the accused. In provinces that still retain the grand jury, the indictment is preferred before the grand jury, and the finding of a true bill by the grand jury is required in order to bring the accused to trial. In practice, the grand jury seldom refuses to return a true bill, so that the charging decision is in reality that of the authority who preferred the indictment, usually the agent of the Attorney General.

The statutory authority of the Attorney General with respect to preferring indictments is relevant only in that small percentage of indictable offence cases where the trial is to be by judge alone or by judge and jury. The vast majority of indictable offences are tried in "summary trials" by courts exercising the jurisdiction of a magistrate* under Part XVI of the Code. For these cases and for all summary conviction matters the charge is embodied in the information.

Where then does the Crown, represented by the Attorney General and his agents, fit into the process of laying an information? As noted above, the Code is silent on this matter, except in the rare instances where the consent of the Attorney General is required for the initiation of a prosecution. The involvement of the Crown in charging decisions prior to court appearance depends more on local law and practice than on rules of criminal procedure. The ministerial responsibility for the police possessed by some provincial Attorneys General enables them to exercise some influence over police charging policy, but this will seldom

* The judicial officer exercising the jurisdiction of a magistrate in the summary trial of indictable offences is a provincial appointee and his official title varies from province to province: "magistrate", "judge of the Magistrates' Court", "provincial court judge", or "judge of the sessions of the peace" are the titles in current use. In the Province of Quebec a judge of the sessions of the peace may exercise the Part XVI jurisdiction of either a magistrate or of a judge without a jury. In other provinces those exercising the jurisdiction of a magistrate do not have the authority to exercise the Part XVI jurisdiction of a judge without a jury.

take the form of instructions on individual cases. In the majority of cases, the involvement of the Crown in charging decisions will depend upon the working relationship between local Crown counsel and the police. In many large, urban areas, initiation of the prosecution is primarily a police function; the Crown prosecutor will be consulted only in cases of exceptional importance or difficulty. In other areas consultation with the Crown prosecutor prior to the laying of charges is the standard practice.

Where charging decisions are left to the police, it may be difficult for the prosecuting lawyer to exercise properly his responsibilities for the conduct of the case, especially if, as frequently occurs, he is not briefed on the case before the first court appearance. If charges have been laid on insufficient evidence, the wrong charge is laid, the form of the charge is defective, or for any other reason the police have made an incorrect charging decision, the prosecutor will have no opportunity to correct the mistake until court appearance, either in the pre-trial or trial stages. That the law should permit this is strange in view of the importance of the charge in all stages of a prosecution.

(c) The Prosecutorial Status of the Attorney General* and His Agents

All crimes are in theory offences against the state, represented by the Crown. The English common law tradition does not, however, reserve the right of prosecution to agents of the Crown; tradition recognizes not only the privilege but also the duty of a citizen to bring the offender to justice. In the 19th century, Stephen summarized the position as follows:

> In England, and, so far as I know, in England and in some English colonies alone, the prosecution of offences is left entirely to private persons or to public officers who act in their capacity of private persons who have hardly any legal powers beyond those which belong to private persons.

* In some provinces the Attorney General is known as the "Minister of Justice" or "Solicitor General". Except for the purposes of ss. 505(4) and 507(3), any reference in the Code to the "Attorney General" includes his lawful deputy; Criminal Code, s. 2.

Even today in England, although the majority of prosecutions are public in the sense that they are initiated by the police, the influence of the past is still apparent in the practice of the prosecuting lawyer being retained by the police, and not by a central prosecuting authority, except in relatively few cases conducted by the Director of Public Prosecutions or other government departments.

In Canada the role of the private individual is still recognized in his legal authority to lay an information, and in his limited and ill-defined authority to conduct the prosecution of certain categories of cases. Neither in theory, nor in practice, however, would it be legitimate to regard the average prosecution as "private". As pointed out previously, most prosecutions are initiated by informations laid by the police. The conduct of the case in court is not generally the responsibility of the police or a private individual, but of lawyers representing the Attorney General.

From earliest times the King of England was regarded as the fountain of justice, a fountain which was eagerly tapped as the source of constitutional authority for the prosecution of criminals, a procedure not only for keeping of the peace, but also for augmenting royal power and revenue. Prosecutions are still to this day in England and Canada conducted in the name of the Sovereign. The Sovereign's traditional chief law officer and representative in court is the Attorney General. Although no longer simply a servant of the Queen, the English Attorney General is still regarded as the state's chief prosecutor; he has statutory authority to control the initiation of prosecutions for a variety of offences; he is the minister in charge of the department of the Director of Public Prosecutions, which is responsible for the conduct of the prosecution of the more serious, but relatively few, cases, and he retains the overriding common law power to terminate a prosecution on indictment by entering a *nolle prosequi*.

In Canada, however, we have gone much further in formalizing and exploiting the prosecutorial status of the Attorney General. Under our constitution, law enforcement is primarily the responsibility of the provinces, and in all provinces the Attorney General is the chief law enforcement officer of the Crown. The exercise of this power is not reserved, as it is in England, to a

residual category of exceptional cases. The day-to-day administration of the criminal law is under the control of the Attorney General's department. The vast majority of prosecutions in this country are conducted by lawyers acting on behalf of and answerable to the Attorney General of the province. The method of appointment and supervision of Crown counsel varies in different parts of the country. Increasingly, however, the trend is towards a full-time, salaried, prosecutorial service under the control of the Department of the Attorney General. A prosecution service also exists on the federal level answerable to the Attorney General of Canada, the Minister of Justice; the authority of federal prosecutors is limited by the Code to the conduct of prosecutions in the Territories and the conduct of non-Criminal Code prosecutions initiated by or on behalf of the federal government.

Explicit recognition is given to the "public" nature of our prosecutions in some provincial statutes, in numerous provisions of the Code bestowing express powers on the Attorney General or his agents, and in the Code definitions of the term, "prosecutor". Section 2 states:

> "prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them.

Similarly, the term is defined for the purposes of summary conviction proceedings as "an informant or the Attorney General or their respective counsel or agents".

It is also significant that the Attorney General of the province is not merely chief counsel for the Queen with statutory authority to conduct prosecutions. As we shall explain in Part III, he is also a minister of the Crown who, in most provinces, has broad responsibilities for many aspects of the administration of justice, including the court system, the police and corrections.

(d) Powers of the Attorney General and His Agents

The extent of the prosecutorial powers of the Attorney General and his agents must now be examined. To catalogue

all of these, whether conferred by statute or common law, would not be feasible or particularly useful. The prosecutor, as counsel for the Crown side, has the innumerable duties and privileges inherent in his role as a party to adversary proceedings, and as a person with special responsibilities for the proper administration of justice. Thus when an accused who is detained in custody is taken before a justice the prosecutor must show cause why he should not be released on an undertaking without conditions. At the preliminary inquiry stage he must convince the justice that there is sufficient evidence to put the accused on trial. At trial the Crown is responsible for the formulation of the issues arising out of the charge and for the presentation of evidence sufficient to prove guilt beyond a reasonable doubt.

The most relevant powers of the Crown for the purposes of this Paper are the following:

(a) As previously noted, the law does not formally recognize any special status of the Crown prosecutor in the laying of the information. The extent to which he influences the initiation of the prosecution depends on the working relationship between the prosecutor and the police, and on the local practice in relation to the laying of private informations. Where his first contact with the case is at the time of first court appearance, his charging decisions must obviously be made either on the spot or at a later stage in the proceedings. Regardless of when the prosecutor accepts responsibility for the case, it is recognized that, except in the most simple and uncontested cases, he should review the charge with a view to determining whether to proceed, what charges to proceed with, the form of the charge, whether to charge several offences jointly, or separately, and whether to charge several accused jointly or separately. Although the court may eventually interfere with the Crown's discretion in relation to joinder of charges and accused persons, and order seperate trials "in the interests of justice", it will not readily override the prosecutor's decisions in these matters.

(b) The Attorney General exercises direct control over the laying of a charge in relation to a few offences where

consent of the Attorney General is required by statute for the institution of proceedings. Thus, for example, charges relating to corruption or bribery of judicial officers cannot be instituted without the consent in writing of the Attorney General of Canada. Consent to prosecute by the provincial Attorney General is also required for several offences, such as the offence of giving contradictory evidence with intent to mislead, or the publication of indecent matter in relation to judicial proceedings.

(c) An application for the preventive detention of an habitual criminal requires the consent of the Attorney General of the province in which the accused is to be tried.

(d) Even where a prosecution is initiated and conducted by a private individual, the Code and the common law clearly recognize that the Attorney General or his agents may intervene to take over the conduct of the case, and either proceed or put an end to the prosecution.

(e) In relation to "mixed" offences, that are either indictable or summary conviction, it is the prosecutor, and not the accused or the court, who has the unfettered discretion to decide which way to proceed.

(f) As explained above, the role of the Crown prosecutor in charging is expressly recognized in the Code provisions conferring authority on the Attorney General and his agents to prefer indictments for trials in higher courts. The indictment need not be limited to the charge on which the accused was committed for trial; it may be a charge founded on the facts disclosed by the evidence taken on the preliminary inquiry. The authority of the grand jury and courts with respect to the preferring of indictments is seldom exercised in practice so as to thwart the wishes of the Crown. Even if a grand jury refuses to indict, the Crown is entitled to prefer a fresh bill before a subsequent grand jury.

(g) The preliminary inquiry as a check on the Crown's prosecutorial power is available only in the relatively few indictable offence cases destined for trial by a court other

than one constituted with a magistrate. A discharge at the preliminary inquiry will normally put an end to the prosecution. But the Code allows the Crown to avoid the normal consequence of a discharge. Sections 505(4) and 507(3) provide that a so-called "direct" indictment may be preferred by the Attorney General (and not by his agent) or with the written consent of a judge of the court; this procedure permits the indictment of the accused without a preliminary inquiry or after a discharge at a preliminary inquiry. Furthermore, there is some authority to the effect that the Crown, faced with a discharge at the preliminary inquiry, may require another preliminary inquiry on the same offence in the hope of securing a committal for trial.

(h) Although the mode of trial for most indictable offences is determined by the election of the accused, the Crown has exceptional powers that may be used to circumvent the accused's wishes. The direct indictment procedure referred to above may be used not only to bypass the preliminary inquiry, but also to require a jury trial in any indictable case. In addition, the Code empowers the Attorney General or his Deputy to require a jury trial in any case where the accused is charged with an offence punishable by imprisonment for more than five years.

(i) The accused who has elected a certain mode of trial is permitted by the Code to change his mind and to re-elect for a different mode of trial. Under certain circumstances this right of re-election is subject to the consent of the Attorney General or his agent.

(j) As explained in greater detail in our Working Paper on *Discovery*, the amount of information conveyed to the accused before trial is, with few exceptions, within the discretion of the Crown. Hence, at the preliminary inquiry the prosecutor is required merely to establish a *prima facie* case, and is under no obligation to make full disclosure of all evidence he may use at trial.

(k) Where a matter proceeds to trial the Crown's decisions as to tactics and evidence to be presented are subject

to few rules. In theory the Crown is obliged to present all material evidence essential to the unfolding of the narrative, but the courts have stated that they will not interfere with the exercise of the prosecutor's discretion in this respect except where the Crown is activated by some "oblique" motive.

(l) Having launched a prosecution, the Crown is under no legal obligation to carry it through to a conclusion. The Crown's power to withdraw a charge, although subject in theory to judicial consent, is seldom questioned by the courts. Apart from applying for a withdrawal, the Crown can simply decline to present any evidence, thus forcing an acquittal. Whether a withdrawn charge or an acquittal based on a refusal of the Crown to present evidence will bar a subsequent prosecution for the same offence is a matter of controversy too complicated to explore here.

(m) The statutory power of the Attorney General or counsel instructed by him for the purpose to enter a stay of proceedings is an administrative act not subject to the control of the court, and is no bar to subsequent proceedings for the same offence. The frequency with which this power is exercised, the stage of the proceedings at which it may be invoked, and the extent of the Attorney General's personal responsibility for the decision are matters on which legal opinion and practice vary in the country. Where a stay is entered with no intention of resurrecting the prosecution, the only prejudice suffered by the accused is the denial of the possibility of having his innocence established. Where the stay is used merely to provide an opportunity to the Crown to correct its errors, or to circumvent an adverse ruling by the court, questions of abuse of discretion arise. However it may be used, the stay is one of the most obvious examples of the Crown's discretionary powers.

(n) Plea bargaining in its various forms is a significant prosecutorial power that limits judicial control of the conduct of a case. There is generally no judicial involvement in negotiations leading to a plea bargain. The presiding judge who receives a negotiated plea of guilty is presented with a *fait*

accompli. The case is thus resolved on grounds having no necessary relation to the merits of the Crown's case, and in a manner that places practical constraints on the court's sentencing authority.

(o) Although a discussion of the topic is beyond the scope of this Paper, the Crown's right to appeal and to apply for prerogative remedies represent important aspects of the Crown's control over prosecutions.

(e) Control of the Discretionary Powers of the Crown

To present a complete and accurate account of how a criminal case is managed would require balancing the foregoing outline of Crown discretionary powers with a discussion of how other participants in the process may influence the course of a prosecution. As explained in Part I, the procedures adopted and the disposition of a case depend on innumerable factors and on the decisions taken by various persons. The accused's decisions with respect to statements made to the police, election as to mode of trial, plea, participation in plea bargaining, tactics at trial, and other matters involve a large measure of control over the case, with a corresponding limitation on the authority of the prosecutor.

The judiciary also has broad authority over many aspects of criminal procedure. This judicial power is conferred in a variety of ways. In many instances the law expressly confers on the judge authority over certain aspects of procedure, such as his discretionary power to grant or refuse an adjournment. In other matters, the judge's power to control proceedings is indirectly, but nevertheless effectively, bestowed on him through his duty to see that procedural as well as substantive rules of law are observed. Thus any procedural right of the accused, such as his right to elect the mode of trial in most indictable offence cases, not only enables him to exercise control over his fate; it also places the matter under judicial control, in the sense that it is the judge's duty and right to ensure that the election procedure is observed. An exhaustive discussion of the matters that are subject to judicial decision or review would require

a textbook on criminal procedure. In developing the central theme of this Paper, however, we need not undertake such a task. An understanding of the fundamental issues can best be achieved by concentrating attention on the judicial role in relation to the discretionary powers of the Crown discussed in the preceding section.

The cumulative effect of these discretionary powers is significant in its impact on the accused, and in the manner in which it influences the allocation of responsibility between the Crown and the judiciary. How does the law seek to control these discretionary powers of the Crown? In general, the courts have been reluctant to interfere where the law has conferred a discretionary power on the Attorney General or his agents. Neither the statutory laws nor judicial pronouncements have produced a coherent or accepted doctrine of judicial review.

Where the conduct of the case by the Crown can be construed as a denial of the accused's codified right to make "full answer and defence", courts will interfere to protect the interests of the accused; but even this right of full answer and defence is interpreted subject to the more clearly defined rights of the Crown.

Efforts by the defence to review prosecutorial discretion through the prerogative writ proceedings have not been noticeably successful.

Similarly, the due process and other procedural rights enshrined in the Bill of Rights, although frequently invoked in support of challenges to the legality of Crown procedures, have seldom been used as a basis for the exercise of judicial control over the Crown's discretionary powers. When confronted with a statutory or common law rule conferring authority on the prosecutor, the tendency of the courts has been to interpret the procedural rights in the Bill subject to such rules. Whatever potential may exist for future developments under the Bill, up to now it has not been a significant factor in this field.

The first sign of a significant break in this pattern of judicial restraint has occurred in the last decade with the assertion by certain courts of an inherent jurisdiction to refuse to permit a prosecution to continue, where in the opinion of the court, the procedures

adopted by the Crown have been oppressive. When exercised, this jurisdiction to stop or "stay" a prosecution has been justified on the ground that unfair or oppressive procedures are an abuse of the judicial process.

Although presented with an opportunity to do so in its 1970 decision in *Osborn,* the Supreme Court of Canada has not yet ruled on the validity of this doctrine of abuse of process. Two judgments were delivered in the case, each concurred in by two other justices; the seventh member of the court agreed in the result without reasons. Hall J. held that on the facts it was unnecessary to consider the question of abuse of process. Pigeon J. decided that the trial judge had no discretion to stay the indictment on the grounds alleged. On a strict application of the rules of *stare decisis* this latter judgment merely holds that the courts cannot stay a prosecution on a correct charge following an acquittal on an incorrect charge arising out of the same facts. There are, nevertheless, statements in the judgment that can be interpreted as a rejection of any abuse of process rule. This attitude is best reflected in the following passage:

> It is basic in our jurisprudence that the duty of the Courts is to apply the law as it exists, not to enforce it or not in their discretion. As a general rule, legal remedies are available in an absolute way *ex debito justitiae.* Some are discretionary but this does not destroy the general rule. I can see no legal basis for holding that criminal remedies are subject to the rule that they are to be refused whenever in its discretion, a Court considers the prosecution oppressive.

Although the validity of the abuse of process doctrine was not resolved by the Supreme Court in the *Osborn* case, subsequent decisions of other courts across Canada do lend support to the view that a court may put an end to a prosecution where the Crown has exercised its legal powers in a manner deemed to be unjust or oppressive. Although in most instances our courts have avoided deciding the issue by ruling that on the facts there was no abuse, the doctrine has been applied in a few cases. The grounds on which such decisions are based are varied, but the practices that have most frequently been held to amount to an abuse are lengthy delays attributable to the Crown, police entrapment, and the relaying of charges following the withdrawal or staying of charges by the Crown. Pro-

cedurally, the doctrine has been used in a variety of ways: through motions to stay or quash at the trial, through prerogative remedies, as a ground of appeal against conviction, and even on a motion to quash prior to election and plea.

With the limited, but potentially significant exception of the abuse of process principle, the prevailing judicial attitude towards prosecutorial discretion is still one of non-intervention. Whether or not this is desirable will be explored in greater detail later, but it is important first to explore the many reasons, theoretical and practical, advanced as justifications for the present state of the law relating to the division of authority between the Crown and the judiciary.

III The Search for a Rationale

Our objective in this Part is to discover a rational basis for the division of responsibility between the Crown and the judiciary. Before stating our own position, we shall summarize, with a minimum of comment, first, arguments in favour of the discretionary powers of the Crown, and second, arguments supporting judicial control of procedure. The solution we propose as a means of reconciling these apparently conflicting views is explained in sections (c) and (d).

(a) Arguments in Support of the Powers of the Crown

(i) Administrative necessity and convenience

The reluctance of the courts to supervise and review the exercise of prosecutorial discretion is sometimes based on considerations of administrative expediency. The legal process does not operate on its own momentum. Someone must decide when to invoke it, and how to proceed from one stage to the next. This under our system has been primarily the responsibility of the Crown. Indeed, in advocating restraint in the use of the criminal sanction we have in previous Working Papers argued in favour of an expanded use of discretion by both police and prosecutors in order to screen cases out of the court stream. To subject each decision of the Crown to judicial scrutiny would place an intolerable burden on the judiciary, and present the theoretical, if not real, possibility of endless litigation.

This acceptance of the practical necessity of prosecutorial discretion appears to be part of the rationale behind the recent Supreme Court of Canada decision in the *Smythe* case. In affirming

the legality of the Attorney General's power under the *Income Tax Act* to decide whether to prosecute by indictment or by summary conviction, and in rejecting the contention that this constituted an infringement of the Bill of Rights' principle of equality before the law, Chief Justice Fauteux, delivering the judgment of the Court, observed:

> Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power. The following statements made in the *Lafleur* case . . . are to the point and I adopt them.
>
> "I cannot conceive of a system of enforcing the law where some one in authority is not called upon to decide whether or not a person should be prosecuted for an alleged offence. Inevitably there will be cases where one man is prosecuted while another man, perhaps equally guilty, goes free. A single act, or series of acts, may render a person liable to prosecution in more than one charge, and someone must decide what charges are to be laid. If an authority such as the Attorney General can have the right to decide whether or not a person shall be prosecuted, surely he may, if authorized by statute, have the right to decide what form the prosecution shall take."

(ii) The adversary system and judicial impartiality

The adversary trial system and its corollary of judicial impartiality also place restraints on the degree of control the judiciary can exercise over the conduct of the prosecution. If a judge were to bear the ultimate responsibility for decisions as to whom to charge, what to charge, what cases to take to court, and how to present the case in court, he would, of course, no longer be the impartial referee between two contestants. He would become one of the contestants. The dilemma facing every prosecutor of how to reconcile his public duty and his adversarial role would become the dilemma of the judge. On what basis can we assume that the judiciary would be better able to resolve this legal schizophrenia? Even if the judicial temperament were able to overcome the demands of conflicting roles, judicial resources would not. To supervise all aspects of prosecutorial powers would demand that they have access to the same information as the Crown, and this in turn would bring them into

the same close association with the police as is now typical of the prosecution. Such a system is possible. Some might even argue that it is desirable. But it is not the system we have. It would destroy the appearance and probably the reality of judicial independence and hence command little support among the judiciary, legal profession, or general public.

Some of the objections to judicial control of charging decisions and trial tactics described above could be avoided by the creation of a separate, non-trial branch of the judiciary to discharge such responsibilities. The trial judiciary would thus maintain its detachment from the formulation of the issues in dispute. But the new class of judges assuming what are presently prosecutorial responsibilities would likely differ from prosecutors in name only. It is difficult to envisage significant advantages in such a system; it is easy to see that such a system would be a costly and radical change.

(iii) Constitutional principles and conventions

Our written constitution, the British North America Acts, and, to a lesser extent, the Bill of Rights, place restrictions on the powers of our legislative bodies. Subject to these limitations, parliamentary sovereignty remains a fundamental constitutional doctrine. This has an important and obvious impact on the control of the process. In the division of power between the courts and the executive the will of Parliament and the legislatures is supreme. We do not in this country have a doctrine of separation of powers, conferring inalienable powers on the judiciary. Parliamentary sovereignty restricts the power of judicial control by requiring the judiciary to respect the statutory authority of the Crown.

As we explained in Part II, Parliament and the legislatures have conferred broad powers on the Crown. These are, of course, subject to change through statutory revision and repeal. Judicial control of the process could be increased at the expense of Crown discretionary powers. Arguments based on administrative expediency, judicial impartiality, and the adversarial process militate against such a transfer of power. Equally important, the powers of the Attorney General and his agents are supported by the view that

there is a political, as well as a legal, aspect to the administration of justice.

The Attorney General is not merely an official with statutory powers. He is a politician, a member of Parliament or of a legislature, and a cabinet minister with responsibilities for many aspects of the administration of justice. Decisions as to how law is administered, what laws to enforce, and how the resources of the criminal justice system are to be allocated, all involve important considerations of public policy. These are not merely legal matters; they are also highly political. Hence it is appropriate that they be entrusted to someone with political authority, responsibility and accountability.

In the exercise of their authority in the administration of criminal justice the Attorneys General and their agents are not free from all controls. If judicial activity has not been prominent in this area it is partly because other restraints operate as a check on Crown power. These are the political accountability of the Attorney General, and the quasi-judicial status of the Attorney General and his agents.

The Attorney General is politically accountable to the head of his government and to his legislative body for the manner in which he and his subordinates exercise their powers. Ultimately the Attorney General and his government can be held accountable to the will of the electorate. How frequently this political control of Crown powers is actually exercised will depend on many factors. The availability of political control as a substitute for judicial review is, nevertheless, a recurring theme in the jurisprudence in this area.

The political accountability of the Attorney General is, however, qualified by another constitutional principle which we have inherited from England, and which is said to act as an independent control on the Crown. In discharging his prosecutorial authority in individual cases the Attorney General exercises a quasi-judicial responsibility that carries with it an independence not usually associated with cabinet membership. The tradition of his ancient office is that he must exercise his independent judgment as to what is in the public interest, immune from the pressures of partisan consid-

erations or of his colleagues in the legislature or the cabinet. Hence the political accountability of the Attorney General is limited to a review of his general policy or administration and to a review of individual prosecutions after the event.

This notion of the independence and quasi-judicial powers of the Attorney General is also reflected in the law's view of the role of the agents of the Attorney General who conduct the majority of prosecutions in this country. Though he functions within an adversary system, he is an adversary with a difference. His primary duty is not to act as the instrument of the police or to secure convictions by exploiting the opportunities afforded him by the rules of the process. The ethics of his profession demand that he, like any counsel, be an officer of the court in the sense that his presentation of the case in support of the charge be tempered by a respect for the rules of law, and by a desire to assist the court in arriving at a just result. In addition, however, as an agent of the Attorney General, he represents the public interest in the proper administration of the criminal law. Hence he is sometimes referred to as a "minister of justice" who is expected to discharge his responsibilities with an impartial and unemotional commitment to the common good. "The role of prosecutor", Mr. Justice Rand once observed, "excludes any notion of winning or losing; his function is a matter of public duty . . . It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

(b) Arguments in Support of Judicial Control

The preservation of the principles underlying the authority of the Crown is slight comfort to the accused or perhaps the victim who feels he has been unfairly treated. There are practical restraints on the effectiveness of the remedy of political accountability in individual cases. In the first place, the typical Attorney General is a busy man. Obviously, therefore, he does not personally supervise the conduct of each prosecution. This is the task delegated to Crown counsel. The law permits this delegation except in a few instances, for example, where his personal intervention is required for the initiation of prosecutions, the preferring of direct indictments,

and, according to one view, the entry of a stay of proceedings. It is not, therefore, realistic to assume that the Attorney General's judgment will be a check against error and abuse in all cases, or that the legislature or the electorate will have the time or the inclination to hold him politically accountable for all the actions of his subordinates. Only rarely where there is a case of special importance or one that has received wide publicity, will he personally exercise his authority and be held accountable to the legislature or to the public.

As explained above, the tradition that the Attorney General and his agents in the conduct of individual cases must act independently of outside pressures is a further limitation on the effectiveness of parliamentary or political control. That this independent judgment must be exercised in a quasi-judicial manner is not a guarantee against error or abuse in all cases. Crown counsel are individuals, not infallible personifications of the even-handed minister of justice. They are prone to error, intellectual and moral, have biases, and can succumb to the temptation to "win" the case. Identification with the cause of suppressing crime does occur, and, as has been frequently noted, the danger of this is particularly great where a lawyer is employed full-time as Crown counsel.

Even where Crown counsel is scrupulously fair in the performance of his duties, he cannot be expected to act as attorney for both sides. Once a decision to prosecute has been made he must assume an adversary stance. He does have the responsibility to prove the charge. His judgment alone cannot be relied on to protect the rights of the accused when his primary obligation is to the public.

The view that the political and other controls on the prosecution may not be an effective check on error and abuse in individual cases has been one of the main reasons for the assertion by some courts of a power to stay prosecutions they regard as abusive. This approach was illustrated recently in the Northwest Territories Magistrate's Court where a magistrate held that he had jurisdiction to quash a charge that had been relaid after several delays attributable to the Crown, and after an intervening civil commitment of the accused. Although the decision was reversed

on the facts by a higher court, it is difficult to fault the practical wisdom of the Magistrate's justification for his action:

> This is not to say that a Magistrate need always have a better-tuned sense of fairness than a Crown Attorney, but surely if there is a strong doubt in the Court's view of the matter, that view should not be suppressed? If the Court is in error, there is always a higher Court to correct it. But if the Courts are to be precluded from considering such matters, even in obvious cases, to whom can a defendant appeal from the decision of the Crown Attorney? Certainly, in the Northwest Territories, the Attorney-General is generally in Ottawa, over 1,500 miles away, concerned with matters of national moment. Is an accused in the Northwest Territories to take his appeal from a prosecutor's decision to the High Court of Parliament at Ottawa? Or is he to be allowed to raise it directly with the Court that is hearing his charge, and before which he is appearing in person or with counsel? Surely to leave matters to Parliament, for the Territorial Council has no function in relation to such matters, is to say in effect—you have no one to whom you can address your appeal from the prosecutor's decision.

The views expressed in the above passage are consistent with principles supporting judicial authority that are just as much a part of our constitution as the doctrines of parliamentary sovereignty and ministerial authority and responsibility.

The most basic source of this authority is that, by virtue of the constitution, statutes and common law, the job of the judiciary is to adjudicate. Adjudication necessarily involves some control over the conduct of the prosecution process.

The cherished tradition of the independence of the judiciary likewise implies judicial control over proceedings. Independence means that in the performance of their duties judges must be immune from the control of Parliament, the executive, or other sources. The judge determines the applicable law, procedural and substantive, and in non-jury trials he also decides the facts. Thus, when a case involves a dispute as to the procedures adopted by the Crown, judicial review of Crown powers is inevitable in so far as the court must determine the extent of these powers, and their

applicability to the case. Suppose, for example, that the Crown has launched a prosecution for an offence following a previous acquittal or conviction arising out of the same incident, and that the defence has challenged the legality of the proceedings. Although the court before which the issue is raised does not have the charging authority of the Crown, it must nevertheless adjudicate on the legality of the proceedings by deciding whether or not the prosecution violates the statutory or common law rules relating to double jeopardy.

Support for judicial authority over the conduct of a prosecution is also found in the tradition that judges have a special responsibility for the protection of the rights of the individual. If carried to extremes, the function of the judiciary as the champion of individual rights would imperil the impartiality of our courts. This has not occurred, and the tradition is an entrenched feature of our legal system. It is inherent in the principle that the judiciary must be independent of control by the executive. It is supported by the public's view and expectations of the judiciary. The Canadian Bill of Rights is a statutory recognition of this judicial responsibility.

The preceding discussion demonstrates that the judicial role in the control of the process rests on a variety of recognized principles. That this jurisdiction over procedure has not been abused so as to usurp the powers of the Crown is due to several factors. In the first place, the judge is not free to decide a case according to his personal feelings. The rules of his profession dictate that he be guided by the law as laid down by statute and previous decisions. As explained in Part II, the tendency to date has been to interpret the law in such a way as to recognize the existence of broad Crown discretionary powers. Secondly, the decisions of a judge, including those relating to issues of control, are generally subject to review in higher courts. Thirdly, procedural disputes are seldom presented as a contest between Crown and judge; the true adversaries are the Crown and the defence. The impartiality of the judge qualifies him for the task of resolving the dispute in a manner that is fair to both the Crown and the accused.

(c) Fundamental Goals and Principles

In our search for a satisfactory method of allocating responsibility between the Crown and the courts we are attempting to provide a technique that will further the fundamental goals of the criminal justice system. These fundamental goals must therefore be examined as a preliminary step to formulating a rational basis for the solution of the problem of control.

Procedure, substantive law and corrections are inextricably interwoven components of the criminal justice system. When Parliament creates a crime, it does not merely add a new item to the substantive law; it creates a new set of procedural and correctional problems. Similarly, changes in procedural law have their impact on the other parts of the law. Thus, for example, a restriction on police powers of investigation may render certain prohibitions of the substantive law unenforceable. Hence there is a need for harmony among the various laws and institutions of the criminal justice system. In previous Working Papers we have expressed the philosophy we believe will produce this harmony.

The criminal law is only one of many methods by which behaviour is controlled and the character of society determined. The elimination of crime is important to society, but it is not an end in itself; it is one method of attaining the higher goals of maximizing human freedom and potential in a democratic state. The capacity of the criminal justice system to contribute to the realization of these goals is limited; its effectiveness in preventing undesirable behaviour is also limited. Yet the price of the criminal justice system is high in both economic and human terms. Hence we have urged that the criminal law should be used with restraint. At all levels of criminal law policy-making and at all levels of the administration of the criminal law the onus should be on those who wish to use this instrument to demonstrate that it is the most suitable response to the problem in question.

This is the approach we have suggested in previous Working Papers dealing with the selection of appropriate sentences or methods of disposition, and the question of what conduct should be subjected to criminal prohibition. This is also the approach that

should characterize the enforcement of the criminal law and the formulation of procedural rules.

In the realm of procedure, therefore, the principle of restraint demands that those entrusted with the discretion to enforce the law should invoke the process as a last resort. For this reason we have suggested in our Working Paper on *Diversion* that both police and prosecutors should be encouraged to screen out of the prosecution stream cases appropriate for some other method of disposition; they should also be prepared to justify their decision to prosecute.

If the criminal process should be used sparingly, it must nevertheless still be invoked when no alternative exists. We must therefore have a procedural law governing prosecutions. According to what principles should this law be constructed? We reiterate our view that the fundamental goal of the system is the maximization of human freedom and potential in a democratic society. This goal is admittedly vague; it does not by itself solve the host of problems confronting us. But its vagueness is also its virtue. It is a warning that the task of constructing a rational procedural law is not a simple one. Crime control or the protection of the rights of the accused are narrower and more easily understood goals, but they are not the ultimate goals. If one of these secondary goals is pursued with an uncompromising rejection of the other, the criminal justice system is distorted, if not destroyed. Our desire to eliminate crime must be tempered by a concern for the interests of the accused. Similarly, in protecting the individual we must not sacrifice the interests of society as a whole.

The balancing of one set of interests against another so as to produce an acceptable compromise that will further the fundamental goals of society is the task we face. Only in this way can we produce a rational procedural law. Consider by way of illustration the privilege against self-incrimination and the onus on the Crown to prove its case beyond a reasonable doubt. These are rules that frequently enable offenders to escape conviction. Why do we tolerate the existence of such rules? A popular answer is that it is better that a hundred guilty persons should go free than that one innocent man be punished. This expresses the sincere humanitarian concern and sense of justice of many, and

it is an attitude that deserves a prominent place in the law of procedure. But the *cliché* defeats the purpose of those who utter it. It draws attention to what is the strongest argument of the advocates of a procedural regime more favourable to the cause of the prosecution. Why, they are entitled to ask, should the criminal justice system be structured for the protection of the one unfortunate, innocent accused rather than for the protection of the countless actual and potential innocent victims of the hundred who are guilty? To counter the legitimate appeal of arguments based on the statistical probability of guilt, one cannot rely solely on our desire to protect the innocent accused. That is not the basic or the only goal of the system; if it were we could readily achieve it by prosecuting no one.

The rights of the accused do not exist in a vacuum; they are part of a system in which the Crown, representing the public interest, also has rights. The accused has his right of silence, but the prosecution has the right to introduce as evidence against him his voluntary statement. Each has a right to a fair hearing; neither is guaranteed perfect accuracy in the fact-finding process.

To understand or reform our present system we must not restrict our attention to the secondary aims of the process or to the rights and interests of parties to a prosecution. We must evaluate procedural rules in terms of their impact on the entire system of criminal justice, and ultimately in terms of their potential to contribute to the realization of our society's fundamental goals. In evaluating a procedural rule we should not simply ask: Will this rule protect the accused against the power of the state? Nor should we be obsessed with the impact of one particular rule. Our inquiry should be more general: Does this procedural law in conjunction with all others strike the proper balance between the value of law enforcement and the value of individual freedom?

Procedural rules favourable to the accused that impede the successful prosecution of criminals should not be viewed as generous concessions to criminals, designed to give them a sporting chance to avoid their just deserts. Such rules exist, and must exist (although not necessarily in their present form) as a check on the otherwise limitless powers of the state, its institutions and officials.

Thus for example, the rule requiring the Crown to prove its case beyond a reasonable doubt does not merely act to protect the innocent against conviction. It is a rule that influences the general administration of justice by motivating the police to exercise diligence in their investigations, and by forcing the Crown to use restraint in laying charges. Hence what appears at first glance to be a technical rule of procedure or evidence is in fact a fundamental limitation on the power of the state versus the individual.

Conversely, a rule operating in favour of the Crown should not be judged solely in terms of its potential to bring offenders to justice. We should also test its ability to assist in achieving the level of general obedience to the law we think desirable.

Criminal procedure is not, therefore, the exclusive concern of the legal profession. Rules of procedure do not merely govern the conduct of those engaged in a prosecution. They determine the character of the criminal justice system, and of the society it serves. The decision to accept or reject a particular rule of procedure is a decision affecting the quality and quantity of freedom in our society. It is a decision that cannot be left solely to lawyers. A criminal trial is often compared to a theatrical event. In a sense it is, and as such it has a symbolic and educational value for the parties and the public. But the drama in the courthouse presents only one scene from a much larger script. The pre-trial scene, although not presented in court, involves some of the same principals. The major portion of the script, however, is not concerned with the persons now in court. Its theme is the operation of the entire criminal justice system and its impact on society. In this unstaged drama we are all principals.

Having thus stated our general approach to the law of criminal procedure, we return now to our central theme.

(d) Redefining the Roles of the Crown and the Judiciary

When the arguments for and against judicial or Crown control of the conduct of the prosecution are weighed it becomes clear that there is no simple solution. The problem is complex, but not insoluble.

To begin with the obvious, both the judiciary and the Crown have a legitimate role to play in the management of a prosecution. The task, of course, is to determine precisely what those roles should be.

Whereas parliamentary sovereignty restricts the powers of the Crown and the courts under the present law, it presents no obstacle to proposals for a reallocation of responsibilities. What Parliament has given, Parliament can take away. Parliament, in the exercise of its jurisdiction over criminal procedure, but subject to whatever limitations exist by virtue of provincial jurisdiction over the administration of justice, is free to redefine the respective roles of the Crown and the judiciary.

What principles should govern this division of power between the courts and the Crown?

This question is to be resolved, we believe, by distinguishing between the political and non-political aspects of the administration of justice. If this distinction can be drawn, then a basis for the solution of specific problems emerges. A political issue in this context is one possessing one or more of the following characteristics: it involves a decision whether or not to enforce a particular law; it involves the question of allocation of resources in terms of money, facilities and personnel; it is an issue amenable to solution according to public opinion of a particular time and place; it is one that subjects the decision-maker to these pressures of public opinion and to the possibility of a sanction, such as accountability to the legislature or the electorate, or dismissal from office.

An analysis of the discretionary powers presently possessed by the Crown reveals that many of these powers have important political aspects in the sense described above. By way of illustration, charging decisions, including the decision whether to enforce a particular prohibition, whom to charge, what to charge and whether to continue a prosecution, are pre-eminently political. Many criminal offences remain on the books long after they have served their purpose. In other cases, invoking the machinery of criminal justice involves balancing factors peculiar to that case, such as the hardship to the accused compared to the benefit to society derived from

a prosecution, or the necessity to sacrifice one potentially successful prosecution to increase chances of success in another more important case, or the need to satisfy the demands of a public sympathetic to the cause of the accused. The vigour with which laws are enforced is, or should be, a reflection of the relative importance of the laws in preserving public order and the moral imperative of the legal system. In all cases, the decision to prosecute or not is one affecting the allocation of resources.

Decisions relating to these matters with important political overtones should generally be within the discretionary powers of the Attorney General and his agents. The exercise of this discretion should not be subject to judicial control. Various techniques could be invoked to bring such matters under judicial control, but none, in our view, would be desirable or feasible. As stated above, it is essential to the proper administration of justice to confer on some authority some degree of discretion to decide matters, such as, whether or not to prosecute. The infinite number of variables that affect such decisions would defeat any attempt to eliminate discretion by creating a code of detailed legal rules to govern the decision-making authority. Even if possible, formal legal rules as a substitute for discretion would eliminate from the system the flexibility that is essential in order to permit dispositions appropriate to the particular circumstances of the offence, the offender, the locality and the times.

If it is impossible to eliminate prosecutorial discretion in relation to matters that we have characterized as political, it would likewise be undesirable and impractical to subject the exercise of this discretion to judicial review, and thus, in a sense, substitute judicial discretion for prosecutorial discretion. This would impose upon the judiciary an onerous task that could only be performed if the size of the judiciary were significantly increased and if the system were radically changed to put them in possession of information necessary for such decisions. As explained above, such a system would jeopardize their impartiality in the adversary process, and involve them in matters both political and controversial that would imperil their independence and reputation. Though the political accountability of the Attorney General and

the other restraints on Crown power are far from being a perfect guarantee against mistakes, they are, we believe, preferable to the unnecessary politicization of the judiciary.

If politics is the realm of the Crown, adjudication is the realm of the judiciary. We recognize that political and justiciable issues are not mutually exclusive. To a certain extent there will always be an overlapping of the two. The judiciary cannot, and should not, be insensitive to policy or political considerations. In sentencing, for example, a judge will be influenced by society's view of the seriousness of the offence, and by considerations relating to the allocation of the resources of the correctional system. We are not suggesting a system of mechanical jurisprudence that would require the judiciary to ignore such matters. What we do propose is one that will exclude from the adjudicative function those political issues that can best be resolved by the Crown. In excluding such matters we seek, not to belittle the judicial process, but rather to strengthen it by preserving judicial impartiality and independence.

The primary objective of adjudication should be to see that justice is done in individual cases. This objective can only be achieved if our judiciary is, and is seen to be, impartial and independent. Dispensing justice in a manner that is fair to both sides of a dispute is, of course, the traditional role of the judiciary. It is the task they perform daily in interpreting and applying rules of substantive and procedural law and in the fact-finding and sentencing process.

The central problem is to devise a system that will maximize the chances of doing justice in individual cases without infringing on the legitimate political authority of the Crown. The task of adjudicating fairly cannot be left to the Crown, an adversary in the process. On the other hand, for reasons discussed above, we do not think it desirable or feasible to grant to the judiciary a general power to review the manner in which the Crown has exercised its discretion. The solution, we think, is to define as clearly as possible in the procedural law the respective roles of the Crown and the judiciary. This definition should reflect the funda-

mental goals of the system, and the distinction between the adjudicative and political aspects of the administration of justice.

Courts have the right and the obligation to ensure that the Crown has acted according to law. The law, in turn, should bestow upon the judiciary sufficient authority to ensure that procedural justice is accorded to both parties. The tradition that recognizes the special judicial role in the protection of the rights of the individual against the power of the state should find expression in the law of procedure; this can be done, for example, through burden of proof rules without impairing judicial impartiality or the political responsibility of the Crown.

Prosecutorial powers that are not essential to the discharge of the Crown's responsibilities and impede the fair disposition of cases should be abolished and replaced by formal legal rules. The observance of these rules will then be under judicial control.

In the scheme we are proposing the Crown will retain many discretionary powers that will not be subject to judicial control. There are, however, non-judicial controls that can act as a check on error and abuse. These we shall discuss in greater detail in the next Part.

Ensuring that justice is done in individual cases is only one aspect of the judicial role. We have argued in the preceding section that the administration of justice should be oriented not only to the resolution of individual cases, but also to the preservation of a system that in its entirety reflects fundamental goals. Both the Crown and the judiciary have responsibilities to see that this is achieved. The judicial role in preserving the goals of the system comes to the fore once a case has proceeded to its adversary stage in court. A court appearance exposes a prosecution to public scrutiny. What happens in open court, therefore, creates the image of justice. The image of justice thus portrayed is a powerful determinant of the public's attitude toward the law. The attitude will be unfavourable and detrimental to the purposes of the law, unless the judge is perceived to act in an impartial manner. His impartiality will be judged by the degree to which he acts independently of the demands of either the Crown or the accused.

Although we do not advocate that all aspects of procedure should come under exclusive judicial control once the prosecution has reached the stage of court appearance, the arguments in favour of judicial control become more persuasive at this point. The trial judge, for example, should not decide what witnesses to call, but he should closely supervise the examination of witnesses to ensure that the rules of evidence are observed.

IV Basic Issues

(a) Introduction

In this Part we shall direct our attention to the practical problem of how to achieve a division of responsibility between the Crown and the judiciary that will reflect the fundamental goals of the system, and the principles governing the question of control. We cannot hope, within the compass of this Working Paper, to present answers to all problems. We shall, however, attempt to test the rational strength of our theoretical position by applying it to the solution of some selected problems. The scheme that will emerge will not be a guarantee of perfect justice. All we can hope to achieve is a system that minimizes the possibility of injustice by allocating responsibility to those deemed best suited to discharge it.

If we fail to convince others of the wisdom of our proposals, our minimum expectation is that we will have convinced them of the necessity of resolving the issue of control. The proper administration of justice requires the rationalization and definition of the roles of the participants. The criminal prosecution is inevitably a contest between the Crown and the accused. We do not wish to see the judiciary added as a third contestant in a battle for supremacy between the Crown and the courts. We urge, therefore, that the respective roles of the Crown and the judiciary be defined with as much precision as humanly possible.

(b) Federal and Provincial Responsibilities

A discussion of the division of authority between the Crown and the judiciary, and of Crown discretionary powers inevitably involves questions relating to the constitutional division of responsibility. Attitudes, social conditions, crime patterns and law en-

forcement practices vary from province to province, and from locality to locality within a province. Procedural law must recognize these variations, and permit a differential response to crime that reflects these differences. The division of powers under the British North America Acts permits this in assigning to the federal Parliament jurisdiction over criminal law and procedure, while giving to the provinces responsibility for the administration of justice. The administration of justice within a province includes the investigation and prosecution of Criminal Code offences. Apart from the relatively narrow category of non-Code offences where the federal authorities may initiate and conduct prosecutions, the discretionary powers examined in this Paper are, therefore, those of the provincial Crown.

Although never defined with precision, the federal legislative power in relation to criminal law and procedure appears to be extensive, and if exercised to the fullest would seriously reduce provincial authority over the administration and enforcement of the law. This is apparent when one considers the intimate connection between federally enacted rules of procedure and the exercise of discretion by the provincial Crown. Each federal rule of procedure restricts the scope of provincial administrative or discretionary freedom. In our view the proper role of Parliament in the exercise of its constitutional powers in relation to the criminal justice system is to establish through legislation minimum standards applicable throughout the country. These legislative standards will be, as they are now, subject to judicial control. Within the limits thus imposed by federal laws of procedure, provincial authority over the political aspects of the administration and enforcement of the criminal law should be maintained through the discretionary powers of the provincial prosecuting authorities. Determination of the exact limits of provincial and federal authority is beyond the scope of this Working Paper. We do not, however, envisage any substantial realignment of federal and provincial responsibilities.

(c) Restructuring the Charging Process

Decisions on the questions of whom to charge, what to charge, and what cases to prosecute in court are, as we have tried to demon-

strate, of central importance to the issue of control. In our view these decisions involve important political considerations, and for that reason should be mainly the responsibility of the Crown. Neither present law nor practice facilitates the exercise of this responsibility by the Crown prosecutor until first court appearance. In our view the prosecutor should have both the right and the duty to intervene at an earlier stage. The present situation, that permits compelling court appearance of a suspect through the combined action of the informant (usually a policeman) and the justice of the peace without the concurrence of the Crown prosecutor, is in our opinion unsatisfactory. As a matter of principle it appears to be irrational to permit a case to proceed to the stage of court appearance before the prosecution has been approved by the party who will bear ultimate responsibility for prosecutorial decisions. On the practical level the present system has no advantages except to save the time of overworked prosecutors prior to court appearance. We do not wish to suggest changes that the resources of the provincial prosecution services are unable to bear. But would review of all charges before court appearance significantly increase the workload of prosecutors? We suspect that it might only involve a rescheduling of activities, and hopefully a reduction in total time spent on a case. If mistakes have been made by the police in charging a suspect, either in the wording of the charge, or in launching a prosecution without sufficient evidence, or without considering a host of other factors that militate against prosecution, these mistakes will eventually have to be corrected by the Crown, if they are to discharge their responsibilities. We see no advantage in inconveniencing the Crown, the court, the accused and the police by requiring court appearances to correct these errors. The system would operate more smoothly and rationally if these mistakes were corrected before deciding to compel the appearance of the accused.

We recommend, therefore, subject to the exceptions noted below, that no prosecution should be permitted to advance to the stage of court appearance without the consent of a Crown prosecutor.

Any person, including a private citizen or a policeman, would continue to have the right to lay an information.

The authority of a justice to approve or disapprove compelling the accused's appearance should also be retained, at least as an interim measure. The justice's role is the only judicial intervention in the initial stages of the charging process. We are not convinced that judicial involvement is essential. Nor are we convinced that the justice's consideration of the case acts as a significant safeguard of the rights of the individual in the majority of cases. Nevertheless, we refrain from recommending his elimination from the charging process for a variety of reasons. The appointment and status, as well as many of the functions of a justice, fall under provincial jurisdiction. We are reluctant to suggest any change in federal law that might have an undesirable impact on the administration of justice in the provinces. We require more data on justices, and their work before making a final evaluation of their role in the charging process.

Although the justice will continue, in effect, to have the power to veto compelling the accused's appearance, his decision to order appearance will not be sufficient. We propose that after an information has been laid and the justice signifies his assent to a continuation of the prosecution, the case should be referred to a Crown prosecutor for his decision. The Crown prosecutor would then have the authority either to terminate the prosecution, to seek a non-prosecutorial method of disposition, or to compel the accused's appearance by approving the issue of summons or warrant or by confirming the appearance notice, promise to appear or recognizance. In deciding whether or not to continue the prosecution, Crown counsel would also be required to decide what is the correct charge and the correct form of the charge. If he believes that the wrong charge has been laid or that the form of the charge is defective he should have the authority to change the charge. He should be required to consult the informant before making any change in the charge, but the final decision on the charge and its form should be made by Crown counsel without further reference to the justice. In other words, when the accused eventually appears in court, the charge he will face will be that approved, with or without changes, by the prosecutor.

The only exceptions we envisage to the above procedure would be in cases where the accused is in custody, and in cases involving private prosecutions. The latter category of cases we discuss separately below. Where the accused has been arrested without warrant and is in custody, he should have the right to a prompt court appearance and decision relating to release. The existing rule requiring that he be taken before a justice within twenty-four hours, or as soon as possible, should be retained. A delay by the Crown in processing the case should not be allowed to jeopardize this right. The normal rule should be that if the Crown has not approved the charge by the time the accused is brought to court, he should be discharged.

If the proposals outlined above are to achieve their objective, law and practice have to be modified to ensure that prosecutors do not merely rubber stamp police decisions. The flow of information from the police to the prosecutors must be prompt and complete. Courts should be able to impose some type of sanction against the Crown to induce prosecutors to properly exercise their responsibilities before consenting to a prosecution. This could be done, for example, by refusing an adjournment, or by requiring greater precision and accuracy in the wording of the charge.

The requirement that the Crown intervene in charging decisions before court appearance would not only facilitate the performance of Crown counsel's adversary role, it would also be a mechanism through which the Crown could exercise its discretionary powers relating to diversion. If as we have suggested, the criminal process should be used with restraint, the Crown should be able to exercise this restraint at the earliest point in time, so that in appropriate cases the costs of invoking the process would be minimized.

In our Working Paper on *Discovery* we recommended that the preliminary inquiry be abolished, and replaced by a system of pre-trial discovery. The early intervention by Crown counsel will facilitate the discharge of his discovery obligations. The discovery proposal implies the abolition of the indictment and attendant procedures. The grand jury will no longer serve as an instrument of indictment. The Code provisions granting to the Attorney

General and his agents the right to prefer indictments will be repealed. We will be left with the information or something equivalent as the only form of charge, and the procedure by information will acquire even greater significance than at present. This in turn suggests a further reason for the early intervention of the Crown in the charging process.

One incidental effect of the abolition of the indictment procedure will be the disappearance of the Code provisions empowering a judge to prefer an indictment. As indicated in Part II, the existence of this power is difficult to reconcile with the judicial role in the adversary process. It is a power that may prove useful, for example, to facilitate the prosecution of government officials where the Attorney General refuses to prosecute. However, if such situations do arise, we believe that the recommendations we make below concerning private prosecutions will provide a satisfactory alternative to the present judicial power to indict.

Finally, we believe that, in imposing on the Crown the duty to review all charges before court appearance, the relationship between the police and the prosecutor will be clarified and rationalized. The police will continue to play the most active role in the initial stages of the process. As we recommended in the Working Paper on *Diversion*, the police should exercise discretion in deciding whether to charge a suspect or to seek a non-criminal disposition. If a charge is laid, responsibility for the conduct of the case will shift to the Crown prosecutor.

(d) Plea Bargaining*

Plea bargaining is now an established practice in many parts of the country. Some regard it as a perversion of justice. Others welcome it as an alternative to the adversary system. Still others claim that, whatever its merits or defects, it is essential to the efficient administration of the criminal law. Detailed information on the prevalence of plea bargaining and on the manner in which it operates does not exist. Enough is known of the practice,

* This section is based in large part on a study paper, "Plea Bargaining: Directions For Canadian Reform", prepared for the Commission by Darrell W. Roberts and Gerard A. Ferguson, and subsequently published in 52 Canadian Bar Review 497 (1974).

however, to enable us to conclude that it has become a significant factor in the administration of justice. What we know also compels us to condemn plea bargaining.

Much of the controversy surrounding plea bargaining results from disagreement as to what the practice is. We define a plea bargain as any agreement by the accused to plead guilty in return for the promise of some benefit. The parties to the agreement will usually be the accused and Crown counsel, but it is also possible for the police or the court to be party to the bargain. We shall concentrate our discussion on the form of plea bargaining that appears to be most common, namely, a bargain made with Crown counsel, and then briefly state our position on police and judicial bargaining.

A plea bargain between the Crown and the accused is made possible by the accused's right to plead guilty, and by the Crown's discretionary powers, particularly in charging. The accused relinquishes his right to trial by pleading guilty in return for some concession by the Crown. The Crown has a variety of inducements to offer; these include: reducing the number or seriousness of the charges, proceeding by summary conviction rather than by indictment on mixed offences, and making recommendations as to sentence favourable to the accused. The accused's motive in striking a bargain will usually be to obtain a lighter sentence; the Crown's motive will usually be its desire to dispose of the case with a minimum of delay, cost and effort.

We believe that the objections to plea bargaining are overwhelming. It detracts from the pursuit of the legitimate goals of the criminal justice system. It destroys the appearance and the reality of justice.

So long as the practice exists, parties will adopt tactics to maximize their bargaining strength. The Crown will be tempted to overcharge, or to exaggerate the strength of its case. The defence may use delaying tactics, elect a jury trial to obtain a bargaining advantage, exaggerate the strength of the defence, or refuse to plead guilty even where there is no hope of an acquittal. The entire pre-plea process thus becomes a ritual bearing no relationship to the realities of the case. The sentencing process is also

distorted. In so far as the Crown has adopted tactics that guarantee a lenient sentence to the accused, the court has been deprived of its power to impose a sentence appropriate to the offence and the offender. If the Crown has made promises as to sentence that depend on the discretion of the judge, the accused may be deprived of the benefit he hoped to purchase by his guilty plea.

Neither the public interest, nor the interests of the parties can be properly served by a system in which the merits of the case take second place to the bargaining strength and skills of the parties. The accused's interest will not be served if he is pressured to plead guilty by his lawyer's failures in negotiation. In extreme cases he may even be persuaded to plead guilty to an offence he did not commit. The public's interests will not be protected if administrative expediency is the principal factor governing the exercise of Crown counsel's discretion. A dangerous criminal should not be let off with a minor conviction and penalty just because he is willing to plead guilty, and thus save the state the time and expense of a trial. Nor does society benefit from a negotiated plea of guilty by a petty offender who should not have been prosecuted.

The evils of plea bargaining are magnified by the fact that it is generally conducted in secret. Involuntary pleas by accused persons, or unethical conduct by counsel can occur in the bargaining process. These will not be brought to light in court. What is disclosed in court will, at best, be an incomplete story; at worst, it will be an inaccurate story. Nor can the interests of the public or of the victim be protected if all major decisions in a case are made in secret negotiations.

Above all, we object to plea bargaining because it is contrary to the entire notion of justice. Justice should not be, and should not be seen to be, something that can be purchased at the bargaining table. Neither the public nor the offender can respect such a system. Once the Crown has decided in the public interest to prosecute a charge, bargaining for a plea should not be used as a substitute for judicial adjudication on guilt or sentence.

Plea bargaining is supported by some as a desirable method of achieving compassion and flexibility in the administration of the

law by providing an alternative to the "all or nothing" adversary contest. We do not agree. Flexibility, compassion, and non-adversarial methods of disposition are essential. They may be achieved, without resorting to plea bargaining, by the rational use of Crown discretionary powers. If, for example, it is in the interests of the accused and of society to charge a minor offence, carrying a light penalty, then the Crown should so charge; it has the power to do so without exacting the price of a guilty plea by threatening the accused with a more serious, less appropriate charge. We are not condemning the exercise of prosecutorial discretion. We are condemning, as unnecessary and as wrong in principle, the practice of making the exercise of the discretion dependent on the accused's plea of guilty, and on administrative expediency.

It is urged by many that plea bargaining is necessary in order to maintain a high proportion of guilty pleas, without which the administration of justice would grind to a halt.

A significant decrease in the number of guilty pleas would place strains on the resources of the criminal justice system. Long delays and "assembly line" justice are evils that must be avoided. Plea bargaining may give us a quick and cheap method of avoiding these problems, but it also impairs the quality of the system. If society places a value on justice, it should be prepared to pay the price by allocating sufficient resources to the criminal justice system. Also, within the limits of available resources, there are many procedures not involving plea bargaining, such as diversion, that may be employed to reduce the work of the courts.

Furthermore, we suspect that the casual connection between plea bargaining and a high percentage of guilty pleas has been exaggerated. Persons plead guilty for a variety of reasons. There are many ways in which guilty pleas can be encouraged without resorting to plea bargaining. As indicated above, some of the pressures encouraging plea bargaining are generated by the expectation of bargaining. Both sides adopt extreme positions to increase their bargaining strength. The attitude of the parties would be more realistic if they did not have to prepare for negotiations. If the Crown refrains from overcharging and adopts a positive, non-puni-

tive approach to sentencing, guilty pleas will be more readily entered. Full discovery of the Crown's case before trial may also induce more guilty pleas by persuading the accused of the futility of going to trial.

We are not convinced, therefore, that plea bargaining is an administrative necessity. The evidence is scarce and inconclusive. Even if the necessity of the practice were conclusively demonstrated, we would legitimize it as part of the procedural law only with that reluctance that inevitably accompanies any sacrifice of principle to expediency. Plea bargaining may save time and money. We doubt that the saving is worth the cost.

The objections to plea bargaining by the Crown apply also to bargaining by the police. In addition, bargaining by the police has the added disadvantage of involving the police in charging and other prosecutorial decisions that should be the responsibility of the Crown.

Judicial participation in plea bargaining is rare. Some critics of Crown bargaining have proposed, however, that judicial supervision of the practice might eliminate its undesirable features. Many forms of judicial involvement have been suggested. None in our view is satisfactory. Some of the proposals would imperil judicial impartiality, and require the judiciary to decide matters that are properly the political responsibility of the Crown. Certain forms of judicial review might have the merit of eliminating the secrecy surrounding plea bargains, and of protecting the rights of the accused. But these and other possible advantages are minor improvements that would not compensate for the basic evils of the practice. In a sense, judicial involvement in plea bargaining is the worst possible approach to the problem. It is an approach that would legitimize as a legal institution a practice which degrades the administration of justice.

We recommend, therefore, that plea bargaining be eliminated. This can be accomplished without legislation, if the Attorneys General issue directives to this effect to their agents, and if judges use their influence to discourage the practice.

(e) Private Prosecutions

Although the vast majority of prosecutions are presently conducted by representatives of the Crown, the law does permit a private individual to lay an information and conduct a prosecution, either personally or through counsel. His legal authority to prosecute in the name of the Sovereign is beyond dispute in summary conviction matters, and recognized by most authorities in the summary trial of indictable offences and at the preliminary inquiry stage of cases destined for higher court trial. The procedure for preferring an indictment dictates that a private prosecutor cannot take an indictable offence case to a higher court trial without the concurrence of either the Attorney General, his agent or the court.

Should the law accord any prosecutorial status to the private individual beyond the laying of an information? Although the problem does not arise frequently, there are situations where a private individual may have a legitimate interest in promoting a prosecution where the Crown has not undertaken the case. The case of the victim of a crime who wishes to see an offender brought to justice is one such situation. There may also be cases where an individual, although not personally a victim, may disagree with the Crown's reluctance to prosecute a particular offender; prosecution of government officials, of trade offences, or of environmental protection offences are examples of cases where there may be a legitimate demand for the right of private prosecution in the face of Crown inaction.

We think, therefore, that private prosecutions should be possible. But the procedure must ensure that a private prosecution cannot be used as a means of harassing the accused, or of circumventing the Crown's ultimate responsibility to act as the guardian of the common good. In order to achieve an acceptable compromise between the general responsibilities of the Crown for law enforcement, and the particular interests of the private prosecutor, we recommend the following procedure.

The right of anyone to lay an information should be retained. The procedure to be followed should depend on the status of

the justice who receives the information. If the justice is also a magistrate or a judge he should, before issuing process at the request of a private informant, give the Crown prosecutor an opportunity to present evidence and to make representations; he could in his discretion also permit the accused to be heard. The decision of the judge or magistrate on whether to allow or disallow the private prosecution would be final. If he approves of the prosecution he would issue process in the usual manner.

Where the justice who receives the information is not a magistrate or judge, the accused should be compelled to appear to answer the charge where both the justice and the local Crown prosecutor approve the prosecution. If either the justice or the Crown prosecutor refuse to consent to the prosecution, the private informant should be able to request a hearing of the matter by a judge or magistrate. At such hearing the informant, the prosecutor, and (with the consent of the judge or magistrate) the accused should be entitled to appear, present evidence and make representations. The decision of the judge or magistrate on whether to approve the prosecution and issue process would be final.

Where a private prosecution has been approved in the manner described above, the informant would be entitled to conduct the prosecution through all its stages, subject to what is said below as to the right of the Crown to intervene. Where a private individual has assumed responsibility for a prosecution, we believe that justice demands that a scheme should be devised to permit payment of his costs out of public funds.

In all private prosecutions, however, the ultimate authority of the Crown should be preserved. The Attorney General or his Deputy should have the power to personally authorize agents to intervene to enter a stay or to take over the prosecution. Even though we admit the importance of recognizing the interests of the individual, particularly of the victim, we recommend the retention of this control so that important matters of public policy remain under the supervision of the chief law enforcement officer. The necessity to preserve secrecy in relation to investigations that may be imperilled by the evidence in a private prosecution, or the political decision not to enforce a particular law are examples of

situations that justify this restriction on the right of private prosecution. A restriction on the right of private prosecution might also encourage crime prevention and non-prosecutorial methods of disposition. Corporate victims of minor offences, for example, should not be permitted to misuse the criminal process to deal with problems that could be handled more satisfactorily through improved internal security or out-of-court settlements.

The requirement that the Attorney General or his Deputy personally make the decision to intervene or to stay, coupled with the fact that they will generally be most reluctant to reverse a judicial decision approving the prosecution, are, we believe, adequate safeguards against abuse of this power.

Although we advocate restrictions on the right of private prosecution, this will affect the victim only in the adversary stages of the criminal process. In non-adversary proceedings, including diversion and compensation schemes, our proposals in previous Working Papers would permit the victim to play a central role.

(f) The Personal Responsibility of the Attorney General

The criminal justice system could not function if the Attorney General were required to personally supervise or conduct every case. Obviously he must delegate many of his powers to his agents. Such delegation does not, however, relieve the Attorney General of his overall responsibility for the administration of criminal justice. This must be maintained through indirect methods of supervising Crown counsel. The hiring of competent lawyers, requiring local prosecutors to periodically report to the Attorney General on their activities, and efficient management are techniques that will make supervision effective.

We also suggest that the Attorney General issue directives to his prosecutors establishing the policy to be adopted in the exercise of discretion. These policy guidelines will serve to increase the Attorney General's authority over Crown counsel. They can also be used to make the Attorney General politically accountable for his administration of the criminal law. To accomplish this we recom-

mend that these policy guidelines be published. They will be of interest and importance to the public. Although we do not suggest that they have the force of law subject to judicial review, they should be subject to public scrutiny and debate so that the Attorney General can be made politically accountable for his policies.

In a limited number of situations the Code does impose personal decision-making responsibility on the Attorney General or his Deputy. From the point of view of control, these laws have several advantages. They ensure that decisions are made by the chief law enforcement official who is presumably best qualified to exercise whatever political judgment is required. Some of these laws, such as those stipulating that the Attorney General must consent to the initiation of a prosecution, promote the principle of restraint. Others, such as the Code provisions requiring the Attorney General to personally prefer a direct indictment, ensure that exceptional procedures that may be detrimental to the accused are used sparingly. Most significantly for the purposes of this Paper, these requirements make political accountability a practical alternative to judicial review of the exercise of prosecutorial discretion.

We believe, therefore, that the technique of imposing personal responsibility on the Attorney General should be retained and exploited as one method of solving the issue of control. Obviously the technique is not appropriate for routine matters of daily occurrence. It must be reserved for exceptional and important matters. Practical considerations probably dictate that in some instances the law should permit the delegation of responsibility to the Deputy Attorney General.

In the following paragraphs we present examples of situations where we believe it is appropriate to impose personal responsibility on the Attorney General or his Deputy. Some are taken from the present law; others will involve changes in the law.

Any Crown power that permits a departure from standard procedures to the possible serious detriment of the accused should require the personal decision of the Attorney General, or, at least, of his Deputy. Any requirement of a jury trial against the wishes of the accused should be subject to this safeguard. As explained in

Part II, the present Code provides that a direct indictment may be preferred with the consent of a judge or by the Attorney General (and not his Deputy) where a preliminary inquiry has not been held, or where there has been a discharge at the preliminary. This procedure is useful to the Crown as a method of avoiding delay and expense in bringing a matter to trial, and to remedy errors made at the preliminary inquiry. Where, however, the accused insists on his ordinary right to a preliminary inquiry, or on adherence to the ordinary consequences of a discharge, the direct indictment procedure must be viewed as a serious infringement on standard procedural safeguards. If it is necessary to retain this procedure, its use should continue to be subject to the present requirement of the consent of either the court or the Attorney General. If the preliminary inquiry and indictment procedure is abolished, as we have suggested in our Working Paper on *Discovery,* then, of course, this issue becomes academic.

We also favour statutory provisions requiring the consent of the Attorney General or his Deputy for the prosecution of certain offences. Space does not permit the discussion of particular offences that might be made subject to this requirement. The requirement of consent is a convenient method of ensuring uniformity in enforcement practices. It may also be used to promote restraint in the prosecution of offences involving politically sensitive issues or of offences on which public opinion is divided. As applied to the offence of public nudity, for example, the rule acts as a check on overzealous or puritanical prosecutors. As applied to corrupt practices by holders of judicial offices, the consent rule prevents the harassment, and therefore preserves the independence of the judiciary.

Preventive detention is one of the most drastic sanctions available in our law. In our Working Paper on *Imprisonment and Release* we recommended the abolition of this sentence. So long as it is retained it should be used sparingly. Hence we favour the rule requiring the Attorney General or his Deputy to approve all applications for preventive detention.

The right of the Crown to appeal should continue to be subject to the approval of the Attorney General or his Deputy. This

rule acts as a restriction on public expenditures on appeals. It protects the accused against unnecessary litigation. It is also an effective method of supervising the work of Crown counsel.

In a previous section we suggested that a judicially approved private prosecution should be taken over or stayed by the Crown only with the personal consent of the Attorney General, or his Deputy.

Any doubt as to the law relating to stays should be removed by making it clear that a stay may only be entered with the personal consent of the Attorney General or his Deputy. This is a procedure of special significance to the issue of control because it is perhaps the most visible interference with a matter already before the courts. Hence the power to enter a stay should be used with great restraint so as not to destroy the appearance of justice or judicial independence.

We wish also to suggest the possibility of using another technique of transferring personal responsibility to the Attorney General. So far we have confined our remarks to statutory rules requiring the personal decision of the Attorney General or his Deputy in relation to specified matters. Would it not also be possible to give the judiciary the power to require the consent of the Attorney General as a condition for the continuation of a prosecution? We have in mind situations where the Crown has exercised its powers in accordance with strict legal requirements, but in a manner that is either oppressive to the accused, or brings the administration of justice into disrepute. If the court is of the opinion that the discretionary powers of the Crown have been improperly exercised, the court could adjourn the matter for the opinion of the Attorney General. The judge would then forward a report on case to the Attorney General, requesting the latter to decide whether or not to continue the prosecution. The review by the Attorney General would not be an adversary proceeding, but he would be free to consult anyone, including the parties to the case. The Attorney General would have the unfettered discretion to require the prosecution to continue. An alternative procedure would be to permit the trial judge to adjourn the matter for the opinion of the Chief Justice of

the superior trial court, who, if he deems the procedures oppressive, could in turn refer the case to the Attorney General for his decision.

This procedure of referring a case to the Attorney General as a condition of the continuation of a prosecution would have several advantages. It would avoid transferring to the judiciary matters that should remain the responsibility of the Crown. It would also avoid the difficult problem of attempting to codify rules empowering the judiciary to review the exercise of Crown powers. By way of example, we think most reported abuse of process cases could have been satisfactorily resolved through this technique. The procedure would be a safeguard against arbitrariness by either the Crown or the judiciary. Courts would be reluctant to refer trivial matters to the Attorney General. If a case were referred to him, the Attorney General would be loath to require the continuation of a judicially disapproved prosecution, except on grounds of overwhelming public importance.

(g) Restricting Crown Discretion

Certain discretionary Crown powers under the present law do not serve any fundamental goals of the system or the legitimate political authority of the Crown. Some seem to exist simply by reason of the fact that the courts and Parliament have not created legal rules governing the matters in question. The substitution of statutory rules for Crown discretion should, in our opinion, be undertaken by Parliament whenever there is a potential for abuse of discretion, and when no vital interest of the Crown is at stake.

We have already recommended in our Working Paper on *Discovery* that the Crown's discretion in communicating information to the accused before trial should be replaced by formal rules of discovery. Under these proposals, supervision of discovery will be in the hands of the judiciary.

It is impossible within the scope of this Paper to analyse in detail all the other discretionary powers that might be replaced by formal legal rules. We tentatively suggest, however, that the following matters should be considered for treatment in this fashion.

The frequency with which the issues are litigated suggests that the law relating to successive and multiple prosecutions is in need of reform. Several abuse of process cases have dealt with these problems. The law appears to be unnecessarily vague, with the result that the discretion of the Crown is unnecessarily broad. The statutory pleas of *autrefois acquit* and *autrefois convict* have been narrowly construed so that they do not solve many problems that arise in this area. Common law principles relating to double jeopardy have not developed to the stage of producing precise rules restricting Crown discretion in charging a multiplicity of offences or in bringing successive prosecutions arising out of the same incident.

Similar uncertainty surrounds the withdrawal of charges and dismissals by reason of the Crown's failure to present evidence. A recent decision holding that neither the Crown nor the court has the right to withdraw a charge, indicates, at the very least, the need for clarification of the law. Rules governing the termination of a prosecution, and the effects of such termination should be stated in the Code. The procedure before court appearance has been outlined in a previous section dealing with the charging process. Under our proposal, Crown counsel would have the discretion to terminate any prosecution in its initial stages, subject to the rights of a private prosecutor. Once a case has reached court, some controls should be placed on the power of termination. In cases of exceptional importance the existing Code procedure by way of stay could be used; as we suggested earlier, the personal decision of the Attorney General or his Deputy should be required as a safeguard against abuse. In other cases some form of judicial control is advisable. We do not think it possible to force the Crown to continue a prosecution against its wishes. Nevertheless, the court should be empowered by the Code to determine the effect of the termination on possible future proceedings against the accused. The Crown, for example, could be required to state reasons for requesting a withdrawal or for not presenting evidence. The judge would then decide whether or not future prosecutions of the accused for the same offence or for the same incident should be barred. The court should also be empowered to award costs to the

accused if the case is terminated without an adjudication on the merits.

The law relating to the wording of charges should also be examined. The purpose of reforming this aspect of procedure would not necessarily be the restriction of the Crown's charging powers. Rather, the primary objective should be clarification and simplification. Any elimination of the technicality and confusion surrounding problems of "duplicity" and "sufficiency" would, we believe, be welcomed by all concerned. Such restrictions on the Crown's discretion that would be incidental to a clarification in the law would not impair the legitimate powers of the Crown. Reform in this field would, we believe, be facilitated by our previous suggestion that Crown counsel should participate in charging decisions prior to first court appearance.

V Conclusion

Our central theme in this Paper has been the division of responsibility between the Crown and the judiciary for the control of the prosecution process. We have attempted to demonstrate the importance of the issue of control, and to provide a rational basis for defining the roles of the Crown and the judiciary. We have drawn a distinction between the political and non-political aspects of the administration of justice. So far as possible, political decisions should be made by the Crown. The primary function of the judiciary is adjudication. Adjudication requires an impartial and independent judiciary. In suggesting how authority should be divided between the courts and the Crown we have, therefore, tried to strengthen the independence and impartiality of the judiciary while maintaining the political responsibility of the Crown.

The main emphasis in the Paper has been on Crown discretionary powers in relation to the adjudicative function of the courts. The problem of the abusive exercise of Crown discretion has been one of our main concerns. We have advocated two principal methods of solving this problem. First, the personal responsibility and political accountability of the Attorney General should be increased. Second, non-essential discretionary powers that present the possibility of abuse should be replaced by formal legal rules, bringing the matters involved under judicial control.

We have considered, and rejected the possibility of giving the judiciary a general power to review the exercise of Crown discretion. Our reasons are the following: First, we think such a power of review would impose on the judiciary a burden its

resources could not bear. Second, it is not possible to put the judiciary in possession of all the information they would require in order to properly review prosecutorial decisions. Third, judicial review of Crown discretion would involve the judiciary in undesirable political controversy, and identify them too closely with police and prosecutorial functions.

Lastly, we believe that judicial review of Crown discretion is unnecessary. The existing law, coupled with the reforms we have suggested in previous parts of this Paper, will be adequate to permit the judiciary to fulfil its responsibilities to see that justice is done. A judge's power to interpret and enforce rules of substantive and procedural law, and his fact-finding role in non-jury trials give him considerable control over the conduct of a prosecution. The wide discretion the trial judge has in sentencing, particularly in his power to grant a discharge, gives him ample scope to mitigate any harshness of prosecution procedures. If our proposal to refer cases of alleged abuse to the Attorney General for his direction were adopted, the courts would have an effective method of dealing with most cases of misuse of Crown powers.

The proposals made in this Paper may not be greeted with universal acceptance. A concensus on fundamental issues in criminal procedure is not possible. We do hope, however, that our efforts will stimulate further discussion of these issues.