The Charter, Government and the Machinery of Justice

JOHN Ll.J. EDWARDS*

The following is the text of an address delivered on the occasion of the Tenth Viscount Bennett Memorial Lecture, 16 October 1986, in the Faculty of Law, University of New Brunswick. It examines the conflicts inherent when the offices of Attorney-General and Minister of Justice are held by one individual. Within this framework the author considers both the current New Brunswick context and the varieties of statutory reform undertaken in a number of Commonwealth countries to resolve this conflict — most notably through creation of a separate office of Director of Public Prosecutions. *J.Ll.J.E.*

L'article qui suit représente le texte intégral de la conférence présentée le 16 octobre, 1986 à la faculté de droit de l'Université du Nouveau-Brunswick lors de la dixième "Viscount Bennett Memorial Lecture". L'auteur examine les conflits inhérents résultant de la fusion des postes de Procureur Général et de Ministre de la Justice dans une même personne. Dans les bornes du discours il considère d'une part la situation existante au Nouveau-Brunswick et d'autre part les réformes statutaires qu'ont été entreprises dans divers pays du Commonwealth, notamment la création d'un poste distinct de Directeur des Poursuites Publiques.

To be invited to participate in this widely recognised series of Memorial Lectures, commemorating one of New Brunswick's most famous sons, is an honour of which I am very much aware. The lecture series happily complements the Viscount Bennett Fellowship in Law with which, from time to time, I have had a passing familiarity in supporting worthy candidates. I hasten therefore to emphasize my delight in at last discharging a promise to visit the U.N.B. Law School that I made nearly 30 years ago when I first came to Canada and joined the faculty at Dalhousie Law School. It is a visit that has been too long in being fulfilled.

My choice of subject for this year's Viscount Bennett Memorial Lecture deserves some explanation. In the late 1970s the then Minister of Justice and Attorney-General of this province came as an unexpected visitor to my office in the University of Toronto Law School. The purpose of his visit was soon

*Of the Faculty of Law and Founding Director, Centre of Criminology, University of Toronto.

[1] J. Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell, 1984) at 62, 354.

(1987), 36 *UNB LJ* 41.

revealed. In conveying to me his worrisome perception of a growing public disillusionment with the administration of justice in New Brunswick, the Minister was anxious to discover what alternative legislative or administrative solutions should be explored to restore public respect for the justice system. As it so happened I had examined this same problem at the meeting of Law Ministers of the Commonwealth held in Winnipeg in 1977. In the course of a discussion paper entitled "Emerging Problems in Defining the Modern Role of the Office of Attorney General in Commonwealth Countries" I reviewed the existing sytems of justice operating among the 50 member states.[1] These included the United Kingdom, Canada, Australia and New Zealand, as well as those countries which have achieved independence since the Second World War.

One conclusion that firmly emerged from this review was the bewildering number of alternative approaches to defining the respective roles of the Law (or Justice) Minister, the Attorney-General and, where the office exists, the Director of Public Prosecutions. These appointments are no esoteric embellishments of the state's authority. They relate to some of the most sensitive aspects of government in all its three branches. Why, you may ask, has resort been had to so many different solutions? Each of the distinctive approaches, it is important to recognise, reflects the political aspirations, experience and attachment to democratic ideals of the individual countries concerned. Those with unitary forms of government at least appear to have evaded the familiar tensions associated with constitutions that attempt to delineate the federal and provincial spheres of jurisdiction in the area of criminal justice. Any precipitate decision to effect by a single stroke the transplanting of any one of these alternative models into a province like New Brunswick, with its indigenous political and social cultures, would almost certainly produce a worse situation than that which exists at present. Any disposition to seek a quick, straightforward remedy should be firmly rejected.

The constitutional differences of which I speak go to the very heart of any system for administering public justice. In some countries we find the Attorney-General drawn from the ranks of elected politicians. He is a member of the governing party. In other jurisdictions the office is held by a non-elected public official whose tenure is not related to the political fortunes of the government of the day. Again, in some countries the Director of Public Prosecutions exists as a separate office but is made subject to the directions and control of the Attorney-General. In only a very few instances is the chief prosecutor subject to the directions of the President of the country and no other person. More frequently, the Director of Public Prosecutions is totally protected from external pressures, the constitution expressly providing that the director is not to be subject to the direction or control of any other person or authority. These fundamental differences of approach cannot be explained in wholly abstract terms. It requires an understanding of the political circumstances of each individual country. I mention these notable differences to underscore again the dangers of seeking a simplistic solution to whatever real or perceived problems beset the administration of justice in this or any other part of Canada.

Over the past twenty years I have had an opportunity to become acquainted with the machinery of justice in most of the Commonwealth jurisdictions. I have also enjoyed the privilege of discussing with ministers and public officials the special problems encountered in adhering to the constitutional provisions that should govern the discharge of their official duties. It may be small comfort to be reassured that New Brunswick's recent experience, assuming that it can be totally substantiated, is by no means unique on this or any other continent. Certain events that have taken place in this province in recent years — I refer in particular to the circumstances leading up to the inquiry in 1978 presided over by Chief Justice C.J.A. Hughes and the more recent fallout from the handling of the investigation and prosecution of Premier Richard Hatfield — have only served to fuel widespread questioning as to whether the entire decision-making process in the criminal justice system is flawed and in need of major reform.

Perhaps the biggest obstacle to providing satisfactory answers to these questions — answers that would satisfy the uneasy conscience of society — is the degree of public ignorance that exists throughout every Commonwealth country (I make no exceptions) as to the essential role and functions of the Office of Attorney-General. To speak in the same breath of the Minister of Justice, a portfolio that is often combined with the position of Attorney-General, is apt to create added confusion in the public mind. Reading the parliamentary debates, public journals and newspapers of the respective Commonwealth countries exhibits little of substance by way of public explanation of the Attorney-General's special responsibilities as the avowed guardian of the public interest. Our law schools have no better record in this regard. There is a singular absence of any serious attention being given to this historic office in the teaching programme of the vast majority of law schools throughout the English speaking world. Little wonder then that the great mass of lawyers, to say nothing of the ordinary public, lack any perception of the delicate tightrope which the Attorney-General of every jurisdiction, national or provincial, must walk between the adjacent fields of mainstream politics and independent, non-partisan judgments.

Regrettably, an opportunity to examine these questions was lost when, in 1980, the Government of New Brunswick, failed to execute the final instrument that would have set up a royal commission to examine and make recommendations with respect to the role and functions of Minister of Justice and those that derive from the Office of Attorney-General. Particular attention was to be paid to the major responsibilities of the Department of Justice for the police and prosecutions, and to the relationships between the Attorney-General and the provincial cabinet, the Legislative Assembly and the judiciary. After much reflection and discussion pertaining to the inquiry's terms of reference, I agreed to serve as sole commissioner in charge of the royal commission. In doing so I was conscious that the issues involved in the proposed inquiry were of concern to every province in Canada, as well as at the federal level. Had the New Brunswick initiative of 1980 been put into effect it would have represented the first such governmental study of the subject in the entire Commonwealth. The only parallel that I know of is the internal review inaugurated by Attorney-General Griffin Bell in 1978 with the aim of designing a

more independent United States Department of Justice. The outcome of that exercise confirmed the difficulties in effectuating major changes with respect to the constitutional responsibilities of the Office of Attorney-General. Nevertheless, the conference convened at the University of Virginia Law School in 1980 and attended by many of the past holders of that office, achieved its principal aim of openly questioning the theoretical underpinnings that have guided successive Attorneys-General in that country since 1789.

The United States experience is not so very different from the Canadian approach to these questions. This will quickly become evident to anyone who cares to read the proceedings of the Virginia Conference. It will also assist those in the political mainstream in Canada who believe that fundamental changes must be made if we are to restore a substantial measure of public trust in the handling of criminal prosecutions. In 1980 I viewed the invitation of the Government of New Brunswick as a challenge to contribute something concrete towards both the alleviation of the crisis of confidence that existed at that time and also to assist in developing greater public awareness of what should be expected from those who come to occupy the Office of Attorney-General, as well as those who serve as agents and representatives of the Justice Department in whatever capacity. This lecture will make some amends for the opportunity that was lost several years ago. I take great encouragement from the present initiative of the province's Department of Justice in organising a forum on the Office of Attorney-General.[2] The need to improve public understanding is chronic but there must first be a readiness to listen to the problems, the possible solutions and the pitfalls to be avoided.

To revert for a moment to the stillborn royal commission in 1980 and the significance that such a move represented on the part of the provincial government, a careful look at the terms of reference drawn up for the public inquiry will confirm the Justice Department's firm grasp of the sensitive and conflicting areas of responsibility that contributed to the crisis of confidence. I was particularly struck at the initial readiness of the government, in the words of the proposed order in council:

> [to order] that the officers and employees of the Executive Council and of the Department of Justice provide such information, documents and assistance as in the opinion of the Commission are necessary to the conduct of this inquiry and that no claim of Crown or ministerial privilege be advanced by or on behalf of the Government of New Brunswick with respect to any document or proceedings of the Executive Council relevant to the inquiry.

It is not for me to hazard an opinion as to the reasons behind the last-minute withdrawal of the government from its commitment to undertake this extraordinarily courageous examination of the Justice Department. Identifying wrongful acts or wrongdoings of individual persons was not the essential goal of the commission. Indeed, any such witch-hunt was deliberately excluded from the areas of responsibility to be covered by the commission. Rather the purposes of the inquiry were to evaluate critically the existing order and to point to those problem areas where change, however fundamental and far-

[2] A forum on "The Role of the Attorney-General in the Administration of Justice" held 17 October 1986 at the University of New Brunswick, Fredericton.

reaching, might best contribute to a restoration of public trust in the activities of the Department of Justice.

Before I leave the events in 1980, and their relevance to every other part of Canada which faces similar problems, it may be useful to extract from the proposed order in council the principal topics that were identified as requiring a fresh look with respect to the existing constitutional arrangements. Not even the severest critics of the government of the day, I surmise, could find fault with the breadth of the approach to this challenging task. Thus, among the agenda items contained in the commission's terms of reference were directions to determine:

> Whether constitutional and/or legislative provisions should be created respecting the office of Attorney General, including the method of selection and appointment, standard of conduct, tenure and his relationship to the Legislative Assembly, the Cabinet and the party political processes of the Province;
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> Whether constitutional and/or legislative provisions should be created respecting those officers employed in the Office of the Attorney General and connected with the administration of justice, such as the Deputy Attorney General, the Director of Public Prosecutions and the Crown Prosecutors, including the method of selection and appointment, standard of conduct, and tenure;
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> The process by which the decisions or advice of the Attorney General in the administration of justice are determined, and whether or not the existing process should be altered to ensure that his decisions or advice are determined free of improper political, personal or other considerations;
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> Any steps which may be taken to encourage or create the widest possible acceptance within the Province that improper considerations do not influence the decisions or advice of the Attorney General in the administration of justice.

So as to leave no possible area for doubt as to the lengths to which the commission of inquiry was expected to direct its mind when considering recommendations for government implementation, specific answers were called for as to whether the Attorney-General should be a member of the Legislative Assembly, a member of the cabinet, a member of the government, or a member of a political party. As every student of Canadian legal history should know, since the advent of responsible government the Attorney-General has always been drawn from the ranks of the elected members of the Legislative Assembly or of Parliament. This continues to be the constitutional practice in the United Kingdom, Australia, New Zealand and some, but not all, of the new Commonwealth states. This is not the pattern adopted in the United States where, at the federal level, the appointee is nominated by the President, as is the case with all the other members of the executive branch. With every change in the occupancy of the White House, a new executive must be chosen by the incoming President. In many other Commonwealth countries, such as India and Pakistan, the Attorney-General is a public servant, not an elected politician. In recent years notable voices have been heard in England, including that of Lord Shawcross (a former Attorney-General), advocating an end to the centuries-old character of this constitutional office. I detect similar sentiments in the remarks uttered in this law school in April, 1986 by Frank McKenna, New Brunswick's Leader of the Opposition, when he stated:

> [N]o matter how political we are in every other area, the public have to feel that our system of justice is sacred and separate. For that reason I want this province to seriously consider whether we should build in that institutional safeguard of separating the Minister of Justice in some way from the role of the Attorney-General.

I have some sympathy with this philosophy since it embodies a position that I attempted to expound in a public lecture at the University of Toronto twenty years ago. Through no influence on my part, I am sure, shortly thereafter reform along these lines was executed by the federal government (in 1966) and by the governments of Ontario (in 1972) and Alberta (in 1973). It rejects as unacceptable the combination in the one minister of the Crown of responsibility for the three constituent branches of the administration of criminal justice — the police who enforce the criminal law, the prosecutors who prosecute in the name of the Crown, and the provincial judiciary who adjudicate in the criminal courts. I must decry the solution adopted initially by the Government of Canada, copied by Ontario and Alberta and followed most recently by Quebec, in which the Office of Solicitor-General has been brought out of the cupboard to head a separate ministry with responsibility for the police functions in government. I view this move as an unnecessary and fundamental distortion of the historical foundations of the Office of Solicitor-General as the principal deputy to the Attorney-General.

Where the one Department of Justice is responsible for supervising the entire administration of justice, the relationships between the police and the prosecutors can sometimes touch highly sensitive questions of authority. Of these, nothing is potentially more significant than the respective roles of the police and the prosecutors in the critical step of instituting criminal proceedings — of setting the criminal law process in motion. The handling of the latest *Morgentaler* case in Ontario — in which the reasons for the entry of a stay of proceedings, following the police decision to lay an information, were delivered publicly in open court — illustrates an adherence by the Attorney-General of that province to a set of principles that are at variance with those provinces (including New Brunswick) where not only are all potential charges by the police sanctioned by the Crown prosecutors before they are laid before a justice of the peace but, in the case of serious offences or in complicated investigations, the right of the police to lay an information is subject to the prior approval of the public prosecutions branch of the Justice Department.[3] I beg leave not only to question seriously the advisability of such a departmental policy but, more importantly, to doubt its constitutional validity.

On the subject of separating the Office of the Attorney-General from that of the Minister of Justice, some thought may have to be given to emulating the long experience of Australia and New Zealand where the Solicitor-General is a permanent, non-political appointment in the Department of Justice. As head of the Crown Law Office he is accountable directly to the Attorney-General but, in the main, the incumbent is accustomed to making independent decisions in the course of representing the Crown in all civil and criminal proceedings. As I look across Canada I observe a growing concern with defining the true role of the Attorney-General in such a way as to demonstrate the in-

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[3] *R.* v. *Morgentaler* (1985), [1986] 52 O.R. (2d) 353 (C.A.).

dependence of prosecution decisions. Prominent among these discussions is the case for establishing a non-elected statutory Office of Director of Public Prosecutions. Underlying these expressions of dissatisfaction with the existing state of things are the inherent difficulties in convincing the ordinary person that an elected politician, when placed in charge of the machinery of prosecutions, will be capable of casting aside all forms of partisan political pressures when determining whether or not the criminal law should be allowed to follow its normal course. Uppermost in the minds of those who place a high premium on safeguarding the independent and impartial exercise of prosecutorial decision making is the vital necessity of resisting improper political pressures.

In all of my writings on the Office of the Attorney-General I have endeavoured to express the reasons why I subscribe fully to this fundamental proposition. At the same time, I have also been at pains to explain why I regard it as essential to clarify the precise meaning that is to be accorded the term "politics" when speaking in the present context. This task is essential if serious misunderstandings are to be avoided and acceptable boundaries drawn between, on the one hand, those political considerations to which it is proper for an Attorney-General, a Director of Public Prosecutions or any Crown prosecutor, to have due regard and, on the other hand, those kinds of political considerations which should never be countenanced. Unless this basic line of demarcation is recognised and care exhibited in defining the meaning that is attributed to the term "politics" when discussing this central issue, confusion and misconceptions will continue to impede any progress towards solving the underlying problems.

The terms "politics" and "political matters" when invoked in association with the handling of criminal investigations or criminal prosecutions inevitably generate suspicions as to the impartiality of the entire proceedings. Perhaps this should not be, but the public mind is often governed by irrational emotions coupled with a deep seated desire to see higher ideals prevail among those invested with enormous power over the lives of its citizens. If particular events are seen to foster this strange mixture of cynicism and hope, it is well that I attempt to clarify the relationship of politics to the criminal law. This relationship embraces not only the responsible minister, the Attorney-General, but also those subordinate officials, including a Director of Public Prosecutions and the Crown prosecutors, who make decisions in the name of the Attorney-General. When therefore I speak of the Attorney-General my remarks extend to those who act in the name of the Senior Law Officer of the Crown. It may also touch upon the duties associated with the police and the courts.

Constitutional doctrine, deeply embedded in English parliamentary practice, dictates that anything savouring of personal advancement, of personal sympathy or hostility felt by an Attorney-General towards a political colleague, political supporter or opponent, or which relates to the political fortunes of his party or the government in power, should not be tolerated if adherence to the principles of impartiality and integrity are to be publicly manifested. In short, the introduction of partisan politics into the criminal process is totally unsupportable. The lessons derived from the famous *Campbell* affair in 1924, which resulted in the downfall of the first Labour Government in the United Kingdom, are imprinted on the minds of every British

parliamentarian, Attorney-General, Solicitor-General and every other minister of the Crown, as well as those who come to occupy the position of Director of Public Prosecutions.[4] This does not, of course, mean that the Attorney-General or the Director of Public Prosecutions should not have regard to political considerations in the non-partisan interpretation of the term "politics". Drawing this dividing line may be extremely difficult at times and I am the first to recognise that the interpretation of the relevant political considerations may well be a reflection of the political philosophy of the government of the day and of the law officers who are part of that government. Let me illustrate what I mean by legitimate political considerations. Included within this criterion I envisage situations where what is at stake is the maintenance of industrial peace and the necessity for having regard to the danger of exacerbating a labour dispute by invoking or not invoking the criminal law at a particular juncture. Other circumstances would embrace the exercise of judgement as to when and what steps should be taken to reduce strife between different ethnic groups. Yet another example would have regard for the maintenance of harmonious relations between sovereign states or on an inter-provincial level.

I fully recognise the difficulties in actually defining in advance what is meant by "the wider interests of the public at large", but I suggest that any problem the solution to which is capable of eliciting bi-partisan support is bound to come close to meeting the test of which I speak. Taking such soundings may be wholly impractical and I do not for one moment advocate inter-party discussions as a means of resolving the dilemmas that confront an Attorney-General in office. What I do support is the propriety of an Attorney-General or his agents having regard to these kinds of non-partisan "political" considerations when reaching decisions whether (or when) to initiate criminal proceedings and, an even more sensitive question, whether (or when) to discontinue a criminal prosecution once it has been launched. The attainment of universal approbation for the handling of these difficult problems is an unrealistic objective within any parliamentary democracy. Demonstrating, however, a conscious adherence to the principle that rejects any place for politically partisan considerations should be a basic tenet that pervades every action that involves the Attorney-General and his representatives.

We in Canada — and the same pertains to Australia and New Zealand — are accustomed to seeing the incumbent Attorney-General sit as a full member of the cabinet. There are those who maintain that this regular involvement with the resolution of the political issues of the day is hardly conducive to generating confidence in the Attorney-General's ability to distance himself from the partisan views of his cabinet colleagues when he is faced with making what are sometimes loosely described as quasi-judicial decisions. In these circumstances, if the right kind of constitutional principles are to be maintained, it may become necessary for the Attorney-General to stand up against the first minister as well as his other cabinet colleagues in the event that they oppose his intended course of action. Such evidence as I have seen, from the federal and provincial parliamentary records in Canada, points towards the erroneous

[4] *The Attorney General, supra,* note 1 at 310 ff.

assumption that the doctrine of collective ministerial responsibility extends to prosecutorial decisions made by the Attorney-General. If left unchallenged this would mean that the final decision-making power, even in controversial cases, rests with the cabinet, who can force the Minister of Justice, in his capacity as Attorney-General, to conform to the will of the collective cabinet or else pay the constitutional penalty of resigning his portfolio. I know of no such sacrificial precedent in Canadian political history but in Australia, as recently as 1977, the then Commonwealth Attorney-General, Robert Ellicott, resigned his office rather than be dictated to by the cabinet, who were insisting that he, as the Senior Law Officer of the Crown, take over and terminate a private prosecution launched against former Prime Minister Gough Whitlam and some of his ministerial colleagues. A full account of this extraordinary episode in Australian legal history is to be found in my recently published book *The Attorney General, Politics & the Public Interest* (1984).[5] In it I examine the divergent approaches that various prominent Attorneys-General in England have expressed as to what should be the proper advisory role of the office they hold in the shaping and execution of government policies. The marked disparity in these interpretations of the Attorney-General's role — coupled with public criticism of the handling of such notable episodes as the apparent immunity from criminal prosecution associated with violations of the *Rhodesia oil sanctions*, the publication of the *Crossman Diaries*, the enactment of a bill of indemnity arising out of the *Clay Cross affair* and the classic confrontation in the famous *Gouriet case* between the Attorney-General (Sam Silkin) and the redoubtable Master of the Rolls (Lord Denning) — all these events contributed to the widely publicised cry made by Lord Shawcross in 1977 for converting the Office of Attorney-General in England and Wales into a non-political appointment.[6] If for no other reason than the classical statements of principle relating to the independence of the law officers of the Crown associated with the name of Shawcross and made in the British House of Commons in 1951 when he was serving as Attorney-General, special importance must be attached to any pronouncements by him as to the essential qualities of that office.

In a letter to the editor of *The Times* published on 3 August 1977 Shawcross developed a forbidding scenario of what will ensue if no thought is given to the problems associated with a highly politicised Attorney-General and an uncritical, compliant legislature. "Responsibility to Parliament", he wrote,

> means in practice at the most responsibility to the party commanding the majority there which is the party to which the Attorney General of the day must belong. ... That the present Attorney General has acted in the utmost good faith is not the question. But it requires no great stretch of the imagination to assume that at some future date we might have a majority in Parliament of extreme left or extreme right persuasion with an Attorney General of similar view. True to the well known Leninist (which was also the Fascist) strategy, such a Law Officer might well consider it his duty to manipulate the law so as to further the philosophy in which he believed or at least decline to enforce it in a way which would be thought inappropriate by his political colleagues.

[5] *Ibid.*

[6] *Ibid.* at 325-53.

You may find this kind of negative philosophy impossible to associate with the current state of Canadian politics, or as descriptive of the political scene in New Brunswick. What I can confirm is that in at least one of the Caribbean jurisdictions that I recently visited I experienced no difficulty in recognising the realities of Lord Shawcross's analysis. I have also encountered traces of the same phenomenon in other parts of the Commonwealth but, what is I think more significant, they bore no relationship to the constitutional arrangements in the countries concerned or to the antiquity or otherwise of the nation's experience in independent government. Given a thorough understanding and respect for the principles that I delineated above, on the part of ministers, politicians, public servants and those who shape public opinion, there would be good reason to look with confidence to the sustaining of these vital elements in each country's administration of justice. Regretfully, I cannot say that I have found such respect and understanding to be commonplace.

The experience of both the older and newer members of the Commonwealth confirms my deep-seated conviction that, no matter how entrenched constitutional safeguards may be, in the final analysis it is the strength of character, personal integrity and personal commitment by the holder to the independent character of the Offices of Attorney-General (or Solicitor-General in some countries) and of the Director of Public Prosecutions which is of abiding importance. Furthermore, the identification of these qualities, at least in my experience, is by no means associated exclusively with either the political or non-political nature of the Office of Attorney-General. Instances of indefensible distortion of the Attorney-General's powers can be documented in countries which have adopted the public servant model of that office, equally with the occupancy by elected politicians of the portfolios of Minister of Justice and Attorney-General in other countries of the Commonwealth.

According to Lord Shawcross the time has come to question whether:

> the once great Office of the Attorney General should now become one wholly outside the political arena and enjoying in the task of law enforcement the status and independence of a Judge. Of course [he went on] the Government would still require Law Officers to supervise and conduct Government litigation... . But the enforcement of the rights of the public and the rule of law would then be given not only the reality (which I hope it still has) but also the appearance (which it now lacks) of complete detachment from party politics. And the holder would be entitled to consider without fear or favour the effect which, for example, a prosecution might have "upon public morale and order."[7]

This is a forceful presentation of the case for following in the footsteps of such countries as India, Pakistan, Kenya, Singapore, Sri Lanka, Malta, Cyrpus, Botswana, the Bahamas and the Seychelles, all of them sovereign states which subscribe to this kind of public-servant Attorney-General. Contrasted with this model is the long established tradition to be found in Australia (both in the respective states and its Commonwealth government), in New Zealand, and throughout Canada, where the Attorney-General is drawn from the ranks of the elected politicians but where, as in Australia and New Zealand (but not in Canada), the Solicitor-General, the principal deputy to the Attorney-General, is a public official.

[7]Lord Shawcross, Letter to the Editor, *The [London] Times* (3 August 1977) 4.

Useful as this kind of comparative exercise can be it is not capable, in itself, of producing clear answers to the problems experienced domestically. However attractive the alternative model may be of a public-service Attorney-General, with no political ties or connections to the ruling party, I want to point out what I consider to be a fundamental weakness of adopting such a policy. Nowhere in Lord Shawcross's exposition of the need for change is there any answer to the crucial question as to who is to be ultimately accountable to Parliament for the decisions that are made concerning public rights or the institution or withdrawal of criminal proceedings. Assuming for the moment that the elements of independence and impartiality can be assured by transforming the Office of Attorney-General into a public-service appointment, what is to be gained if there is a corresponding absence of accountability in the forum where ultimately all government actions are subject to public scrutiny? Whether we are speaking of foreign policy, defence strategies, the independence claimed for certain police decisions, or the policies of the Canadian Broadcasting Corporation, no serious case has ever been advanced for completely isolating the decision making process in these variegated bodies from parliamentary or legislative examination. The appropriate minister of the Crown must answer on the floor of the legislature as a central feature of the constitutional doctrine of ministerial responsibility.

In my view, this constitutional principle is too critically important to entertain any special exemption being created with respect to the exercise of the prosecutorial powers that would be conferred upon a non-elected Attorney-General. There will remain the necessity of having a Minister of Justice (or Minister of Legal Affairs or some such title) with a seat in the House of Commons or the provincial legislature, and of defining his authority in relationship to the non-elected Attorney-General or Director of Public Prosecutions. We shall ignore at our peril any attempt to insulate totally the responsible minister from the independent public officials who might be charged with the duty of supervising the state's machinery of criminal prosecutions. Accountability and independence are not intrinsically inconsistent goals. Both are attainable even in the practical world, but it requires a shared commitment on the part of the political head of the Department of Justice and the accountable public servants to respect each other's roles and the obligations associated with those functions.

A move in this direction that I believe as almost inevitable is the establishment, federally and provincially, of a statutory Office of Director of Public Prosecutions. That elusive element, public confidence, to which I have referred earlier in this lecture, will not be satisfied by the creation of what amounts to no more than an administrative appointment in the ordinary civil service hierarchy. If the constitutional relationship of the DPP's office to the Attorney-General (or the Minister of Justice) is to be clearly understood and the impartial nature of the director's decisions accepted by everyone concerned, there must be enshrined in legislation the kind of provisions that have marked the evolution of the original Office of Director of Public Prosecutions in England and Wales, commencing with the *Prosecution of Offences Act,*

1879.[8] The latest statute to be enacted in that jurisdiction, the *Prosecution of Offences Act 1985,* marks the establishment for the first time in British history of a single, national Crown Prosecution Service for England and Wales under the overall direction and control of the Director of Public Prosecutions.[9]

Scotland has had a centralised system of procurators fiscal for centuries and has been urging the English to follow suit since time immemorial. The dawn of a new era in Britain in terms of policing and prosecutions has truly begun. Under the new arrangements the Attorney-General remains as the minister responsible to Parliament for the new service. Its creation now is directly attributable to the recommendations of the Royal Commission on Criminal Procedure which visited Canada in the late 1970s and noted an increasing attachment in this country to full time prosecutors. Meanwhile, there has been a flurry of legislative activity in this same field in Australia. Both in the federal jurisdiction (in 1984) and in the states of Victoria (1983) and Queensland (1985) a statutory Office of Director of Public Prosecutions has been established as an essential part of the administration of justice.[10] There are also rumbles to be heard in one of the Canadian provinces that a more visible divorce of the government and, in particular, the political Attorney-General, from day-to-day decision making in the field of criminal prosecutions can best be demonstrated by the creation of a statutory, and thereby independent, Director of Public Prosecutions. The central question — how independent? — is rarely understood in its fullest ramifications and yet this is the nub of the public accountability debate that quickly surfaces when dissatisfaction is expressed with the handling of highly publicised prosecutions.

To respond intelligently to the arguments surrounding the degree of independence that should be accorded to any state official it is necessary to have careful regard to the language used in originally defining the powers associated with that office and the reporting relationships of the office holder to his political superiors. This becomes increasingly evident when the duties and powers are the subject of legislative action incorporated in an act of parliament or an act of the appropriate legislature. Whether it pertains to the Attorney-General, the Director of Public Prosecutions or the Office of Crown Attorney, the determination of the precise scope of independent authority must be found in the statutory language used in each case. The creation within a Department of Justice or Department of the Attorney-General (whatever the nomenclature that is used in a particular jurisdiction) of a civil-service position designated as the "Director of Public Prosecutions" or "Director of Crown Attorneys" contains little, if any, independent discretion other than that which is delegated to the official by the minister in charge of that government department. Thus, in Saskatchewan, New Brunswick and Ontario — those provinces which have created a DPP's office or its equivalent by executive decree — the director is a public servant whose status and powers, including his relationship to the Crown prosecutors, is dependent on his rank within the

[8] *Prosecution of Offences Act, 1879* (U.K.), 42 & 43 Vict., c. 22.

[9] *Prosecution of Offences Act 1985* (U.K.), 1985, c. 23.

[10] *Director of Public Prosecutions Act 1983* (Aust.), 1983, no. 113; *Director of Public Prosecutions Act 1982* (Victoria) 1982, no. 9848; *Director of Public Prosecutions Act 1984* (Queensland) 1984, no. 95.

department. The absence of express statutory authority means that the director derives all his authority from the Office of the Attorney-General and is, therefore, directly accountable to, and subject to, the instructions of the Attorney-General and the Deputy Attorney-General.

Detailed analysis of the various formulae to be found in the statutes of other countries is out of the question in this lecture. There are, however, some pertinent lessons to be drawn from other countries that I would like to inject into the ongoing public debate surrounding the role of the Attorney-General in the area of criminal prosecutions. With more than a century of experience in having a statutory Office of Director of Public Prosecutions it may be especially valuable to understand the constitutional position that has always governed the respective responsibilities of the director and the Attorney-General in England and Wales. The basic concept is that of "superintendence" of the director and the Department of Public Prosecutions by the Attorney-General. Standing alone, the term "superintendence" might suggest a lack of precision that could spell trouble when put to the test in a controversial case. It is the meaning accorded to the principle of superintendence, and subscribed to by successive holders of these key offices of State, that tells the real story and it was explained authoritatively to the House of Commons on 13 December 1979 by Attorney-General Sir Michael Havers, when he stated:

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

Since that time, the *Prosecution of Offences Act 1985* has been placed on the Westminster statute book, creating a national prosecution service.[11] In conferring upon every Crown prosecutor the powers of the Director of Public Prosecutions, as to the institution and conduct of criminal proceedings, the 1985 Act expressly provides that those powers shall be exercised "under the direction of the Director". Does this mean that the Attorney-General's position, as expounded to the House of Commons in the passage I have just quoted, has changed dramatically? On the contrary, his ultimate authority has remained untouched and were the present Attorney-General asked to interpret the significance of the major changes incorporated into the *Prosecution of Offences Act 1985* I am confident that the governing principle would remain that: "The Director still carries out his duties under my superintendence and I still have the power to direct in particular cases". In other words, while delegating the maximum degree of *de facto* authority and independence to the Director of Public Prosecutions the residual and final word rests constitutionally in the hands of the Attorney-General.

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[11] *Prosecution of Offences Act 1985* (U.K.), 1985, c. 23.

In sharp contrast is the language resorted to by the Republic of Ireland when it created a statutory chief public prosecutor. Its *Prosecution of Offences Act 1974* states: "The Director [of Public Prosecutions] shall be independent in the performance of his functions". The same Act envisages that the Attorney-General and the DPP "shall consult together from time to time in relation to matters pertaining to the functions of the Director".[12] Consultation, however, is not to be equated with any right to give directions as to how the head of the prosecution arm of government should perform his functions in relation to particular cases or generally. Elsewhere, I have concluded that:

> If the experience of other Commonwealth countries, which have adopted into their constitutions a similar model of an unaccountable public prosecutor, is any pointer to what lies in store for the Republic of Ireland it is only a matter of time before the fundamental questions of control and accountability force themselves before its elected Parliament for intense debate.[13]

At the beginning of this lecture I mentioned the intense activity in the field of public prosecutions that has been a feature of the Australian political scene in recent years. It all stemmed from intense public dissatisfaction with the handling of a series of investigations and prosecutions involving corruption on a massive scale by elected public officials. Leading the way in responding to these pressures for change were the Commonwealth Government of Australia and the State of Victoria, both of which have placed their faith in the establishment of a statutory Office of Director of Public Prosecutions. In the main their approach is similar but a closer look at the respective enactments reveals some very significant differences with respect to the issuance of directives embodying the principles to be taken into consideration when making decisions to institute, continue or terminate criminal proceedings. These directives or guidelines are intended to govern the manner in which the police and locally based prosecutors make decisions and are to be issued in the name of the Director of Public Prosecutions. So far as Australia is concerned, there is no question of not making the contents of these prosecution guidelines accessible to the general public. This goal is taken as self-evident, thus following the precedents set earlier by the Attorney-General of the United States and the Attorney-General of England and Wales.

These initiatives demonstrate an important development in the doctrine of public accountability as it pertains to criminal prosecutions. In another recent public lecture I have argued the case in favour of following the Australian, British and American initiatives here in Canada. To neglect to do so will, in my view, prompt a challenge in the courts based upon the government's failure to observe one of the principles of fundamental justice enshrined in section 7 of the *Charter of Rights and Freedoms*.[14] Public accessibility to such prosecutorial guidelines is ensured in Australia by imposing a statutory obligation to publish the contents in the *Official Gazette*. Not all of us regard this standard government publication as our prime form of leisure reading but it is always there for the purposes of ascertaining accurate, detailed information

[12] 1974 22.

[13] *The Attorney General, supra,* note 1 at 268.

[14] Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

about the activities of government and government agencies. The English approach, provided for in the *Prosecution of Offences Act 1985*, is more circumspect and, in my view, less satisfactory, being content to have the guidelines included in the DPP's annual report to Parliament. The time factor may not be that important, but if it should prove to be otherwise then the obligation to disclose the contents of new directives promptly is a better safeguard for ensuring effective questioning by the members of the Legislature.

So far I have been referring to formal directives that incorporate general considerations — the kind of policy factors that will have different applications to varying circumstances. Debate as to the abstract merits of this or that combination of variables in hypothetical cases, however, rarely evokes the kind of repercussions that actual cases can be counted upon to generate. If the accused is a political or other public figure — and questions of non-prosecution or non-enforcement become known — public reaction is likely to be magnified proportionately. It is in these exceptional situations that confidence in the doctrine of ministerial accountability is put to its most severe test. The State of Victoria, sensitive to the perceptions of political interference, has by its legislation denied the newly-established Director of Public Prosecutions any right to issue guidelines or directives in relation to a particular case. Furthermore, there is an equally explicit prohibition forbidding the DPP in the State of Victoria from becoming involved in the conduct of any individual case. He must be content with the formulation of general policy directives.

In striking contrast to this insulation of the most senior public official in the Public Prosecutions Department from the handling of individual cases, the Attorney-General of Australia is expressly authorised to give the federal DPP directions in relation to particular cases. These must always be made in writing. What at first sight, however, may seem like the conferring of a potentially dangerous discretion assumes a very different character when it is noted that, in addition to the requirement that the written directive be published in the *Official Gazette*, the Attorney-General is also under a duty to notify Parliament expeditiously of any instructions that he decides to issue to the Commonwealth Director of Public Prosecutions. Wisely, the Australian legislation takes heed of the necessity, that may arise in some cases, to delay the release for public scrutiny of the Attorney-General's reasons for intervening, where he is satisfied that the interests of justice require that the contents of his written directions not be disclosed at once. Such postponement will have to be justified before the House of Representatives when the case has finally been disposed of.

Difficult as this balancing exercise may turn out to be — adhering to the principle of openness while at the same time having due regard to the protection of the interests of the accused or potential witnesses — I see many positive advantages to following the system of accountability incorporated in the Commonwealth of Australia legislation. A wise Attorney-General, no matter what overriding constitutional authority is attached to his office, will refrain from interfering with the day-to-day decision making process that is carried out by his subordinates. The same policy should govern the stance of the Director of

Public Prosecutions with respect to the Crown Attorneys daily exercise of their discretionary powers. If the right policy guidelines are prepared in collaboration with the Crown's line prosecutors it should be truly exceptional to find a DPP or the Attorney-General becoming personally involved in handling the course of particular criminal proceedings. That remote eventuality, however, must be safeguarded if the position of the Attorney-General and the Director of Public Prosecutions are not to become empty constitutional shells incapable of discharging in full the obligations associated with the doctrine of ministerial responsibility.

I sense an increasing boldness on the part of Canadian courts, perhaps only coincidentally with the advent of the *Charter*, in giving substance to the doctrine of judicial review as it pertains to the actions of the Attorney-General and his agents. The confirmation in *R. v. Jewitt* (1985) by the Supreme Court of Canada that the abuse of process doctrine is now an established part of Canadian law derives added force (not its *raison d'être*) from the legal rights enumerated in the *Charter.*[15] There is no indication in the *Jewitt* decision that the Supreme Court justices intended to encourage a liberal recourse to this inherent judicial power; it has been stated both by the House of Lords (where the doctrine first emerged, in the ringing declaration of Lord Devlin in 1964 that "The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused".) and the Supreme Court of Canada (in *Jewitt*) that the power is to be exercised only in "the clearest of cases" and "in the most exceptional circumstances".[16]

I doubt that the courts, in asserting the viability of the abuse of process doctrine, have in mind the effectual displacement of the legislative assembly as the proper forum in which to call into account questionable acts of discretionary power by the Attorney-General and his agents. On the contrary, as evidenced by the decision in *Dowson v. The Queen* (1983), the Supreme Court of Canada has acted in a manner that is deliberately designed to heighten, not to lessen, the Attorney-General's accountability to the legislature.[17]

In determining the significance of the *Charter* to the subject of my lecture I draw your attention particularly to the terms of section 32. That provision imposes upon the courts of this land the duty of scrutinising all governmental action, from whatever source of legal authority it derives, if it can be established that any of the *Charter's* enumerated rights and freedoms have been infringed or imperilled by the pertinent legislative or governmental body. The language of section 32 makes it abundantly clear that the potential reach of the *Charter* extends to the activities of the executive branch of government at both levels, federal and provincial. Cabinet decisions, as well as the acts of individual ministers and the departments over which they preside, are now subject to review by the courts to ensure that they are in accordance with the dictates of the *Charter*.

[15](1985), [1985] 2 S.C.R. 128.

[16]*Connelly* v. *Director of Public Prosecutions* (1964), [1964] 2 All E.R. 401 at 442.

[17](1983), [1983] 2 S.C.R. 144.

As the *Operation Dismantle* (1985) case clearly shows, the *Charter* has effectively extended the power of the courts to review both statutory and prerogative decisions by the executive branch and this perforce must include the wide range of prerogative powers exercisable by the Attorney-General.[18] The high-water mark previously represented by the decision of the House of Lords in the famous *Gouriet* case — upholding the exclusive right of the Attorney-General to represent the public interest and declining to review the Attorney-General's decision in a matter involving public rights including the enforcement of the criminal law — has now to be viewed, so far as Canada is concerned, in the fundamentally different circumstances represented by the terms of our *Charter of Rights and Freedoms.*[19] The consent of the Attorney-General, provincial or federal, is not a precondition to pursuing a *Charter* remedy. The question of standing to bring proceedings under the *Charter* is no longer governed by the *Gouriet* principles.

Theoretically, section 32 of the *Charter*, coupled with the Supreme Court of Canada decision in *Operation Dismantle*, represents the potential for a dramatic change in the position of the Attorney-General so far as his accountability to the courts is concerned. Nevertheless, as I have endeavoured to explain in a separate paper on "The Attorney General and the Charter":

> [M]ajor obstacles face the prospective litigant who seeks the intervention of the court to subject the prosecutor's actions to a substantive or procedural reassessment. To overcome these obstacles the plaintiff will have to adduce evidence establishing bad faith, personal bias or other grounds of abuse of the discretionary power. Alternatively, the evidence must point to the particular decision having been dictated by extraneous or improper considerations to such an extent that the basic principles of fairness have been violated. ... If reviewability is to be entertained the focus of attention must be on the *process* of exercising the discretionary authority [and not on the merits of the *decision* itself.] Permitting this extremely limited access to the courts for judicial review should not be seen as an erosion of the Attorney-General's traditional position in relation to the Bench. On the contrary, it should be viewed as a legitimate avenue for the citizen to pursue and one that is entirely consonant with the accountability of the Attorney General to the legislative body for a full explanation and defence of his immense constitutional powers.[20]

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[18] *Operation Dismantle* v. *R.* (1985), [1985] 1 S.C.R. 441.

[19] *The Attorney General, supra,* note 1 at 325-53.

[20] J. Ll. J. Edwards, "The Attorney-General and the Charter of Rights" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) c. 3 at 67-68.