

Private Prosecutions in Canada: The Law and a Proposal for Change

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I. Introduction

The role of the prosecutor, whether public or private, is a very special one in any system of criminal justice. This paper¹ is concerned with an examination of the powers and obligations of the private prosecutor in Canada and with assessing the viability of retaining such a role in the light of modern judicial developments.²

For the purposes of this study, a private prosecutor is taken to be an individual, group, or corporation (other than a public authority) not acting in any public capacity.³ Although theoretically most prosecutions are "private" in the sense that they are pursued by various public officers who have no powers beyond those of the private citizen, they are not private prosecutions in the sense of the term as used here.⁴

Before turning to the Canadian position it is useful to make reference to the role of the private prosecutor in other judicial systems. In the United States there is no place for a private pro-

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² There has been very little written concerning the private prosecutor generally, and in Canada there are only two articles on the subject: Kaufman, *The Role of the Private Prosecutor: A Critical Analysis of the Complainant's Position in Criminal Cases* (1960-61) 7 McGill L.J. 102, and Berner, *Private Prosecutions and Environmental Control Legislation: A Study* (1972, Dept. of the Environment, Ottawa).

³ The actual prosecutor, of course, will be the individual member of such group who lays the information.

⁴ Cf. Howard, *Criminal Justice in England: A Study in Law Administration* (1931). At p.3, Howard refers to Maitland: "Professor Maitland thought that it was misleading to speak of the English system as one of *private* prosecutions. 'It is we who have public prosecutions', he wrote, 'for any one of the public may prosecute; abroad they have *state* prosecutions or *official* prosecutions'."

secutor at all.⁵ There the private individual is confined to the function of complainant at both the federal and state levels.⁶ France⁷ and Germany⁸ have adopted systems that exclude private prosecutors, except in setting the state's action in motion.

In Scotland, too, a system of public prosecutions pertains:⁹

The right and duty of public prosecution in Scotland lies not in the hands of the police, nor of the private prosecutor (subject to a minor qualification), but in the hands of the Lord Advocate, who discharges the responsibilities of his important office through the medium of Crown Counsel and the Crown Office. It is the Crown Office which in turn controls the Procurators Fiscal who are the Crown Prosecutors in the Sheriff Courts and the agents of the Crown Office in the investigation of crime, under the supervision of Crown Counsel The ancient right of a citizen to seek leave, with the concurrence of the Lord Advocate, to institute a private prosecution himself¹⁰ when his own personal interests

⁵ See *The Administration of Criminal Justice in the United States* (1955, Am. Bar Foundation), 84-88; Dression, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction* (1955) 65 Yale L.J. 209; Grosman, *The Prosecutor* (1969), 13-14; "The Office of the Attorney General", *Report of the National Associations of Attorneys-General* (1971), 11-22.

⁶ This has led to considerable criticism, particularly where the public prosecutor has refused to prosecute. See Dression, *ibid.* This commentator points out that in practice thirty states have decided that private attorneys may be employed to assist the public prosecutor, and it is an open question whether or not courts have the inherent power to permit private prosecution in administering justice.

⁷ See Vouin, *The Role of the Prosecutor in French Criminal Trials* (1970) 18 Am. J. of Comp. L. 483, who discusses the French Code of Criminal Procedure, 1958.

⁸ See Jeschek, *The Discretionary Powers of the Prosecuting Attorney in West Germany* (1970) 18 Am. J. of Comp. L. 508; Langbein, *Controlling Prosecutorial Discretion in Germany* (1974) 41 U. Chi. L. Rev. 439; and Herrman, *The Rule of Compulsory Prosecution; and The Scope of Prosecutorial Discretion in Germany* (1974) 41 U. Chi. L. Rev. 468.

⁹ See the *Justice Report into the Prosecution Process in England and Wales* (1970), 9-13, hereafter referred to as *Justice Report*, and reprinted in full in [1970] Crim. L. Rev. 668, 681 *et seq.*; Lord Cameron, *Some Aspects of Scots Criminal Practice and Procedure* (1971, Univ. of Birmingham; a presidential address to the Holdsworth Club); "The Public Prosecutor in Scotland", *Report of the Working Party on Public Prosecutions in North Ireland* (1971, Government of Northern Ireland, Appendix C); Normandy, *The Public Prosecutor in Scotland* (1938) 54 L.Q.R. 345.

¹⁰ This is the minor exception referred to in the extract. *The Report of the Working Party on Public Prosecutions in Northern Ireland, ibid.*, did note in its Appendix C (III) at 56 that:

The main practical exception to [the absence of private prosecutions] is that certain statutes confer the right to prosecute for breaches of the statute on private bodies (and private individuals) concerned; but, even in these instances, the concurrence of the public prosecutor or the

are directly affected, has not been formally abolished... but that right has not been successfully invoked for over sixty years and today such applications are practically unknown.¹¹

This highly centralized system of public prosecutions, which removes the investigative (police) function entirely from that of the prosecutor, is of considerable significance¹² and will be discussed later in this paper.

By contrast, under the English common law, crimes were regarded originally as being committed not against the state but against a particular person or family. It followed that the victim or some relative would initiate and conduct the prosecution against the offender.¹³ Although in Continental Europe from the thirteenth century onwards the adversary system of criminal enquiry was replaced by the inquisitorial procedure of the canon law, England retained the accusatory procedure and adapted it to its current needs.¹⁴ Trial by presentment and indictment superseded the appeal and that of petty jury encompassed the former trial by battle. The procedure, however, remained adversary in nature and was visualized as an action between parties, rather than an inquisitorial process which put the initiation of the proceedings within the jurisdiction of a public official.¹⁵

Another feature of the English common law was the view that it was not only the privilege but the duty of the private citizen to preserve the King's Peace and bring offenders to justice.¹⁶ At one stage "all men were bound to combine themselves in associations of ten, each of whom was responsible for the good behaviour of the rest".¹⁷

court is required if the breach is punishable by imprisonment without the option of a fine, unless the statute otherwise provides.

¹¹ Lord Cameron, *supra*, f.n.9, 3-4.

¹² This factor was regarded as critical in a recent important British study recommending the expansion of the role of the Director of Public Prosecutions: *Justice Report, supra*, f.n.9. The same point was taken by Lord Hunt's *Advisory Committee on the Police in Northern Ireland 1969*; Cmnd. 535 (1969), 34, para.142.

¹³ Grosman, *The Prosecutor, supra*, f.n.5, 10.

¹⁴ Holdsworth, 3 *A History of English Law* 6th ed. (1938), 619-621.

¹⁵ *Ibid.* See also Spiro, *Privacy in Comparative Perspective* (1971) 13 *Nomos* 121, 137-140.

¹⁶ In discharge of communal duties. See Dickens, *Control of Prosecutions in the United Kingdom* (1973) *Int'l & Comp. L.Q.* 1, 2.

¹⁷ Mathew, *The Office and Duties of the Director of Public Prosecutions* (1950), 4. From the fifteenth to the nineteenth century, incidents recurred involving informers who prosecuted for rewards offered by Parliament and local authorities. Cases of corrupt police officials and prearranged crimes by

Although the common law upheld the notion of the prosecution being initiated by a private party rather than a central authority, the Crown was represented by a "professional attorney"¹⁸ who sometimes prosecuted cases of special concern to the Sovereign. This function evolved in 1472 into the role of the Attorney-General of England, who was granted the power to create deputies to act for him in any court of record.¹⁹ From the reign of Henry VIII there have been numerous attempts in England to create a national system of public prosecutors.²⁰

No such system, however, was created other than the office of Director of Public Prosecutions in 1879. His "small department is responsible for conducting the most serious cases, but the cases handled in this way are relatively few in number".²¹

Accordingly, the theory of prosecutions is largely unchanged after seven hundred years. In the words of Sir James Fitzjames Stephen:

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 and who have hardly any legal powers beyond those which belong to private persons.²²

Although in theory prosecutions remain largely in the hands of private individuals, the development of modern police services led to real change in practice. In England today private prosecution is unusual²³ not merely because there are official agencies that undertake them on behalf of the community, but also because statutory enactments have become increasingly common that require initiation of prosecution by a public officer or the consent of a public

"Thief-takers" reached crisis proportions by 1800: Radzinowicz, 2 *A History of English Criminal Law* (1956), 270-346. These were commonly referred to as the "blood-money cases".

¹⁸ Grosman, *supra*, f.n.5, 11; *Report of the National Associations of Attorneys-General*, *supra*, f.n.5, 11.

¹⁹ *Report of the National Associations of Attorneys-General*, *ibid.*, 12.

²⁰ Grosman, *supra*, f.n.5, 11; Kurland and Waters, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History* (1959) Duke L.J. 493; Langbein, *The Origins of Public Prosecutions at Common Law* (1974) 17 A.J. of Legal Hist. 313.

²¹ Jackson, *The Machinery of Justice in England* 5th ed. (1967), 129. For a full discussion of the Director of Public Prosecution's role, see Dickens, *The Prosecuting Roles of the Attorney-General and Director of Public Prosecutions* (1974) Pub.L. 50.

²² Stephen, 1 *A History of the Criminal Law of England* (1883), 493.

²³ Dickens, *supra*, f.n.16, 2.

official before such a prosecution can be brought.²⁴ This disparity between practice and theory was one of the factors influencing the decision to recommend "a system of *public prosecution* broadly following the lines of the Scottish system . . ." in the *Justice Report*.²⁵ But it is significant that the *Justice Report* did not propose the abolition of private prosecutions. Instead, "it considers that the right of private persons to initiate a prosecution should be preserved, with the reservation that the Department [the proposed Department of Public Prosecutions] should have the power to take over the conduct of such a prosecution as it saw fit".²⁶

II. The Canadian Position

Canadian criminal law is derived from English law both in terms of substance and procedure. Therefore, except as altered, varied, modified or affected by the Criminal Code²⁷ or other federal enactment, the criminal law of England in force in a province immediately prior to the Criminal Code coming into effect (April 1, 1955) continues in force.²⁸ Accordingly, "the old English procedure, except as changed by [the 1955] Code, still stands and decisions on procedure under the old Code, except as they are rendered inapplicable by the provisions of the new Code, still stand good".²⁹

The main thrust of this part of this paper must accordingly be toward determining whether or not the criminal law of England with regard to private prosecutions has been altered by the terms of the Criminal Code itself. The general rule in England is a very simple one: "Under English law there is not the slightest doubt that a private prosecutor could on 19 November, 1858, and indeed can at the present day, in the absence of intervention by the Crown, carry through all its stages a prosecution for any offence."³⁰ Bearing in mind that "there is no clear statutory provision — federal or provincial — which expressly and directly either affirms or denies the

²⁴ *Ibid.*, 3.

²⁵ *Supra*, f.n.9.

²⁶ *Ibid.*, 681.

²⁷ *Criminal Code of Canada*, R.S.C. 1970, c.C-34; as amended by R.S.C. 1970, c.11, c.44 (1st supp.); R.S.C. 1970, c.2 (2nd supp.); S.C. 1972, cc.13 and 17; and S.C. 1973, cc.38 and 50.

²⁸ S.7(2) Cr.C.

²⁹ *R. v. Schwerdt* (1957) 27 C.R. 35, 38 *per* Wilson J. (B.C.S.C.).

³⁰ *Ibid.*, *per* Wilson J. citing Stephen's *Criminal Laws of England*, *supra*, f.n.22.

right to conduct a private prosecution",³¹ to what extent does the English position apply in Canada? Finding the answer to this question requires analysis of the law with reference to the ordinary criminal process.³²

(a) *Laying the Information*

All criminal proceedings are initiated by the laying of an information³³ pursuant to s.455 of the Code. That provision states:

Anyone who, on reasonable and probable grounds, believes any person has committed an indictable offence may lay an information in writing and under oath before a Justice...³⁴

A justice is obliged to take the information³⁵ if all the formal requirements are met; if he refuses on the ground that he has no jurisdiction, his decision is reviewable, the matter being a question of law.³⁶

It is interesting to note at this point that pursuant to s.2 of the Code, the term "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". Under Part 24 of the Code, concerned with summary conviction procedure, the term "informant" is defined to include a person who lays an information. In Canada the vast majority of informations are laid by police officers at the complaint of a private individual. This is significant, for if the informant is not a witness to the events constituting the alleged offence, he must have reasonable and probable grounds for his belief that it was committed by the accused. Thus, if he is acting on information, the "informant" must ensure that it is objectively reliable.

No material interest of the informant needs to have been affected to entitle him to lay the information;³⁷ it may be laid in his own name

³¹ Berner, *supra*, f.n.2, 3. There are specific exceptions; see, e.g., s.40(2) of the *Wildlife Act*, R.S.M. 1970, c.W140, which refers to private prosecution as the mode of enforcement.

³² This process also pertains *vis-à-vis* provincial offences and offences under by-laws.

³³ Other than "preferred" indictments under ss.505 and 507 Cr.C.

³⁴ The same is true of summary conviction offences as a result of s.723 of the Code.

³⁵ Berner, *supra*, f.n.2, 4.

³⁶ *The King v. Meehan* (No. 2) (1902) 3 O.L.R. 567, 5 C.C.C. 312 (Ont. H.C.).

³⁷ Berner, *supra*, f.n.2, 6.

rather than that of the Crown;³⁸ and it need not state that it is "for and on behalf of Her Majesty the Queen".³⁹

(b) *Appearance by the Accused*

Once the information has been laid, the accused is brought before a court to answer the allegations contained in it by the issuance of either a summons or warrant pursuant to s.455.3 of the Code. These provisions require a justice to hear the informant's allegations and any evidence of witnesses where he considers it desirable or necessary to do so. He is empowered to issue a summons or warrant "where he considers a case for so doing has been made out".⁴⁰

This power to issue a summons or warrant has been described as "a matter that is wholly within [the justice's] discretion. Even if the [justice] were to make an erroneous determination on the law in exercising that discretion, *mandamus* cannot lie."⁴¹ Accordingly, a prosecutor is unable to *require* a justice to issue either process to compel the accused's attendance in court.⁴² This discretion also applies to the issuing of a warrant or summons to compel attendance at a hearing where the accused has been given an appearance notice or promise to appear under the bail provisions of the Code.⁴³

It is conceivable that a justice may refuse to issue process after receiving an information from a private prosecutor. The private prosecutor may then either attempt to obtain such process from

³⁸ There had been some doubt as to this expressed by Kaufman, *supra*, f.n.2, 102-113, based on older Quebec decisions. But the decision of the Manitoba Court of Appeal in *Mandelbaum v. Denstedt* (1968) 5 C.R.N.S. 307, after a careful analysis of the case law, concluded that an information could be laid in the name of the prosecutor without reference to the Crown. It is an open question, though, as a result of this case whether or not the prosecution can be carried on in the name of a private prosecutor alone. See also *Usick v. Radford* [1974] 1 W.W.R. 191 (Man. C.A.).

³⁹ *Mandelbaum v. Denstedt*, *ibid.*

⁴⁰ S.455:3(1)(b) Cr.C.

⁴¹ *Evans v. Pesce and Attorney General for Alberta* (1969) 8 C.R.N.S. 201, 214 *per* Riley J. (S.C. Alta.).

⁴² See also: *R. v. Doz* (1968) 5 C.R.N.S. 86; *In re Parke* (1899) 30 O.R. 498, 3 C.C.C. 122; *Broom v. Denison* (1911) 20 O.W.R. 30, *aff'd.* 20 O.W.R. 244; *Blacklock v. Primrose* [1924] 3 W.W.R. 189; and *R. v. Jones ex p. Cohen* [1970] 2 C.C.C. 374 (B.C.S.C.).

⁴³ S.455.4 Cr.C.

another justice through the same information or by swearing out another information.⁴⁴

(c) *The Hearing*

The next stage in the proceedings is the hearing of the allegations against the accused.

(i) *Summary Conviction Offences*⁴⁵

All summary conviction offences⁴⁶ are dealt with by the procedure laid down in Part 24 of the Code. It is relatively clear that "there is nothing in [Part 24 of the Code] which bars the basic right, derived from English law, of a private citizen to conduct a private prosecution".⁴⁷

This is because "prosecutor" as defined in s.720(1) means "an informant or the Attorney-General or their respective counsel or agents".⁴⁸ The use of the disjunctive term "or" clearly indicates the situation may arise where the Attorney-General or his agent is not a party to the proceedings.⁴⁹ Under s.736(3) the evidence of the

⁴⁴ There is authority to suggest that the same information cannot be taken to another justice: *Barrick v. Parker* (1963) 45 W.W.R. 697 (Sask. Q.B.); but this view was not taken in the later case of *R. v. Southwick, ex parte Gilbert Stell Ltd.* [1968] 1 C.C.C. 356 (Ont. C.A.). In this case no reference was made to the *Barrick* decision. This writer agrees with Berner, *supra*, f.n.2, 8, that the approach in the *Southwick* case is preferable, although it is not a real issue since another information can be sworn out by the prosecutor.

⁴⁵ See Kaufman, *supra*, f.n.2, 103-104; Berner, *supra*, f.n.2, 8-10.

⁴⁶ These include all provincial offences and indictable offences triable summarily at the discretion of the prosecutor; see *R. v. Seward* (1966) 48 C.R. 220 (Yukon Terr. M.C.); *R. v. Paulovich* (1966) 49 C.R. 21 (Alta. S.C.). If the prosecutor at arraignment does not indicate his choice, he is deemed to have chosen to proceed by way of summary conviction: *R. v. Mitzell* (1951) 14 C.R. 170 (B.C.S.C.).

⁴⁷ *R. v. Schwerdt*, *supra*, f.n.29, 40-41 *per* Wilson J. (B.C.S.C.). See also *Re McMicken* (1912) 3 W.W.R. 492 (Man C.A.).

⁴⁸ Kaufman, *supra*, f.n.2, 103-104, points out a limitation existing in Quebec whereby, as the result of provincial legislation, it is an offence for persons other than advocates to plead before any court. The term "prosecutor" is also defined in s.2 of the Criminal Code to include private prosecutors. This definition applies to indictable proceedings.

⁴⁹ See *e.g.*, *R. v. McItrree* [1950] 1 W.W.R. 894 (B.C.C.A.), where a prohibition application was rejected when sought on the ground that an appeal notice had not been served on the Crown and merely on the private prosecutor. It was significant here that the Court found that the Crown, through its actions, had shown that it did not consider itself to be a "party" to the proceedings.

witnesses for the prosecutor must be taken by the summary conviction court where the accused pleads not guilty, and under s.737 the "prosecutor" is entitled "personally to conduct his case" and may examine and cross-examine witnesses himself or by counsel or agent. Since a prosecutor is the informant and thus a private person where the Attorney-General or his agent does not intervene, it follows that such private person can personally prosecute the case summarily or through counsel or an agent.⁵⁰

Whether or not the prosecution can be carried out in the name of the private prosecutor is a vexed question. It has been shown that the information may be laid in the name of the private prosecutor whereas, of course, the summons or warrant is in the name of the Crown. But what of the prosecution itself? There is authority to suggest that in Quebec at least proceedings for summary conviction offences may be conducted in the name of the private prosecutor,⁵¹ with conflicting authority in other jurisdictions.⁵²

The matter may be resolved by analyzing the meaning of "prosecution" in the context of criminal proceedings. In *R. v. Devereaux*⁵³ the Ontario Court of Appeal took the following view:

... The distinction between the information and the summons is an essential one and one which should be readily apparent. The information is the subject's remedy to bring to the attention of the Sovereign the alleged offence against the Sovereign. The summons is the Sovereign's

⁵⁰ See *R. v. Stoopnikoff* (1966) 47 C.R. 341 (B.C.C.A.); *R. v. Dzurich* [1966] 2 C.C.C. 196 (Sask. C.A.); and *R. v. Devereaux* (1965) 48 C.R. 194 (Ont. C.A.). Berner, *supra*, f.n.2, 13, points out that there is some authority to indicate that an informant has no status to proceed beyond laying an information. But in the light of the authorities just referred to, as well as the unambiguous wording of s.737 Cr.C., this view can no longer be sustained.

⁵¹ *Gagnon v. Morin* (1956) 116 C.C.C. 104 (Que. S.C.).

⁵² *Beauvois v. The Queen* (1956) 24 C.R. 365 (S.C.C.). This case seems merely to be authority for the proposition that where a magistrate is exercising absolute jurisdiction, no formal indictment is necessary to proceed with an otherwise indictable offence. However, Taschereau J. does appear to have adopted the rule that criminal prosecutions must proceed in the name of the Crown. This would appear to mean that provincial offences do not need to be so designated. *Campbell v. Sumida* (1965) 45 C.R. 198 (Man. C.A.) appeared to take this view too, but the recent decision of the Manitoba Court of Appeal, *Usick v. Radford*, *supra*, f.n.38, decided that *Campbell's* case was no longer authoritative. In *Usick* an information sworn out by the private prosecutor in his own name was held not to be invalid. The justice before whom it was sworn issued a summons against the defendant "in Her Majesty's name". It is interesting to note that this case itself was an appeal by way of stated case to the Manitoba Court of Appeal and was brought in the names of the private prosecutor and the defendant without reference to the Crown.

⁵³ (1965) 48 C.R. 194.

act in calling the accused before her "justice". The "prosecution" commences when the "justice" issues the summons addressed to the accused. Viewed from this angle it is clear that the laying of an information does not entail any act on the part of the Sovereign and is not required to be laid in the name of the Sovereign; it is equally clear that by the summons issued under the Criminal Code or the Summary Convictions Act ... the Sovereign intervenes, and the proceedings are carried on in the name of the Sovereign.⁵⁴

If this perspective of the commencement of the prosecution is adopted, then the question of style of action becomes meaningless since as a practical matter⁵⁵ all criminal and quasi-criminal actions are commenced by summons or warrant. Through these processes the Crown's interest is indicated and such proceedings are notionally carried on in the name of the Crown. The practice of styling documents in the name of the Crown or even in conjunction with the Crown would on this reasoning be largely *ex abundanti cautela*.⁵⁶ The same reasoning would apply equally to provincial offences that are initiated by warrant or summons.

Under s.734 of the Criminal Code, where the prosecutor does not appear for the trial, the court has no jurisdiction to proceed in his absence. It must either dismiss the charge or adjourn to such other time and on such terms as it considers proper.

(ii) Indictable Offences

It is in this area that a strong argument can be made in support of the view that the common law has been "altered, varied or modified" so as to make inroads in, if not replace, the common law. The common law is clear:

Under English law there... is not the slightest doubt that a private prosecutor... can at the present day in the absence of intervention by the Crown, carry through all its stages a prosecution for any offence...⁵⁷

The provisions in the Criminal Code dealing with the disposition of indictable offences differ in many respects from those subsisting in England, some of them being apparently inconsistent with the theory that a private prosecutor may carry the matter forward. There are three alternative modes of trial of indictable offences:

⁵⁴ *Ibid.*, 197 *per* Kelly J.A. (emphasis added).

⁵⁵ In theory, at least, it is possible for an accused to appear voluntarily to answer to an information with neither process being issued.

⁵⁶ Presumably, in the light of *R. v. McIlree*, *supra*, f.n.49, at least so far as provincial offences are concerned, the Crown can indicate that it does not regard itself as a "party" to the proceedings, even though the summons was in the name of the Crown on the information of the private prosecutor.

⁵⁷ *R. v. Schwerdt*, *supra*, f.n.29, 38.

- (a) trial before a judge and jury;⁵⁸
- (b) "speedy trial" without a jury but before a judge as defined in Part 16;⁵⁹ and
- (c) summary trial before a provincial court judge or magistrate.⁶⁰

If the trial is to be before a judge and jury or a speedy trial, a preliminary hearing is first held.⁶¹ Under sections 496 and 504 to 507 of the Criminal Code, an indictment is necessary in such cases. No such formal indictment is necessary if the accused is being tried summarily.⁶²

In *R. v. Schwerdt*⁶³ Wilson J. concluded that the rights of the private prosecutor *vis à vis* the different modes of trial of an indictable offence were:

(1) On summary trial before a magistrate, the private prosecutor is heard as of right.⁶⁴

(2) A preliminary hearing may be conducted by a private prosecutor.⁶⁵ This conclusion may be drawn from the term "prosecutor" as used in Part 15 of the Criminal Code, dealing with preliminary hearings. The meaning is that laid down in s.2 of the Criminal Code which, as was noted when dealing with summary conviction offences, includes a private prosecutor.

(3) On "speedy trial before a judge he cannot be heard unless the Attorney-General or the clerk of the peace prefer a charge, or the Attorney-General allows him to prefer a charge".⁶⁶ This is because under s.496 of the Criminal Code, where the accused elects speedy trial "an indictment *shall* be preferred by the Attorney-General or his agent, or by any person who has the written consent of the

⁵⁸ Ss. 427 and 484 Cr.C.

⁵⁹ Ss. 484, 488 and 489 Cr.C.

⁶⁰ Ss. 483, 484 and 487 Cr.C. The procedure adopted is that laid down under Part 16 of the Criminal Code

⁶¹ Under Part 15 of the Criminal Code. No preliminary hearing is necessary where an indictment has been preferred pursuant to ss.505 and 507 Cr.C.

⁶² *R. v. Beauvois, supra*, f.n.52. If the accused is being tried under Part 16 of the Criminal Code, the private prosecutor is entitled to be present at all times during the trial, and even if the accused proposes to plead guilty, the justice cannot proceed in his absence. Such private prosecutor is entitled to call evidence in aggravation or mitigation: see *In re McMicken, supra*, f.n.47.

⁶³ *Supra*, f.n.29, 46.

⁶⁴ See *Re McMicken, supra*, f.n.47. We have already dealt with the provisions of Part 24 of the Criminal Code that support this conclusion as regards summary conviction offences.

⁶⁵ *R. v. Schwerdt, supra*, f.n.29, 40; unless, of course, the Crown has intervened.

⁶⁶ *Ibid.*, 46.

Attorney-General, and in the Province of British Columbia may be preferred by the clerk of the peace". The language is mandatory and only in the event of the Attorney-General so permitting can the private prosecutor personally pursue the case. He can attempt to persuade the Attorney-General or clerk of the peace to lay the indictment and then proceed with the case himself. If such an indictment is not laid, the matter rests there.⁶⁷

(4) On trial by judge and jury the private prosecutor may be heard by leave of the court.⁶⁸ Wilson J. reached this conclusion largely through the combined effect of the term "prosecutor" appearing in a number of sections of Part 17 of the Criminal Code (such term including "private prosecutor" under s.2 of the Code) and s.507(2), whereby "an indictment under subsection (1) may be preferred by the Attorney-General or his agent, or by any person with the written consent of a judge of the court or of the Attorney-General, or in any province to which this section applies,⁶⁹ by order of the court". Wilson J. held that this provision, together with the former s.558 of the 1955 Criminal Code which distinguished between "the Attorney-General or Counsel acting on his behalf",⁷⁰ were conclusive in favour of the private prosecutor's right to proceed in jury trials. The learned Judge was of the view that we must start with "the premise that a private prosecution is lawful unless forbidden"⁷¹ and that no clause in Part 17 forbids such a prosecution either expressly or by necessary implication.⁷²

Wilson J. was also of the opinion that "if the Court can allow a citizen to prefer an indictment (pursuant to s.507(2)) it must also allow him to prosecute on it, otherwise the provision has no practical usefulness".⁷³ It should be noted that the indictments preferable under s.507(2) of the Criminal Code may be laid "even in cases where there was no preliminary enquiry or where the accused was liberated at the enquete".⁷⁴

⁶⁷ Berner, *supra*, f.n.2, 13.

⁶⁸ *R. v. Schwerdt*, *supra*, f.n.29, 46.

⁶⁹ The non-grand jury provinces: New Brunswick, Quebec, Manitoba, Saskatchewan, Alberta and British Columbia; as well as in the Yukon Territory and Northwest Territories.

⁷⁰ This section has been replaced by s.578 Cr.C., where only the term "prosecutor" is used. It does not reduce the force of Wilson J.'s argument.

⁷¹ *R. v. Schwerdt*, *supra*, f.n.29, 41.

⁷² There are provisions dealing with defamatory libel that specifically acknowledge the role of the private prosecutor. See ss.566 and 656 Cr.C.

⁷³ *R. v. Schwerdt*, *supra*, f.n.29, 41.

⁷⁴ Kaufman, *supra*, f.n.2, 106-107; see *R. v. Beaudry* [1967] 1 C.C.C. 272 (B.C.C.A.) for a full discussion of this matter.

*R. v. Schwerdt*⁷⁵ was concerned with a finite issue: in a prohibition application, can a private prosecutor conduct a summary trial or preliminary enquiry relative to an indictable offence? In affirmatively answering these questions, Wilson J. was indulging in extensive *obiter dicta* (indeed he specifically acknowledged this),⁷⁶ but his is the only judicial attempt based on a complete analysis of the Code provisions to rationalize the private prosecutor's role under the Code. It must also be borne in mind that his fourth conclusion concerning the right of the private prosecutor to proceed with jury trials is based only on the Code provisions peculiar to the provinces that have abolished the grand jury. But there seems to be little real difference in this regard between the two systems.⁷⁷ Under s.505 of the Criminal Code, a bill of indictment may be preferred by the Attorney-General or anyone at his discretion or anyone who has the written consent of the Attorney-General or the written consent of a judge⁷⁸ of a court constituted with a grand jury or of the order of a court constituted with a grand jury. Section 504 grants a prosecutor the power to prefer a bill of indictment against an accused as regards any charge founded on facts disclosed at the preliminary hearing.

*Schwerdt*⁷⁹ has been criticized⁸⁰ for not adopting the view that the provisions of the Criminal Code relating to trial procedure, at least other than summary trial, have not altered or varied the common law to the point where a private prosecutor does not have the right to conduct indictable matters, other than defamatory libel.⁸¹

Indeed, the conclusions drawn by Wilson J. appear arbitrary in relation to each other. Why should a private prosecutor's ability to conduct his case turn on the *mode* of trial which may be determined by the accused himself? Yet, as Berner has pointed out, "it is difficult to find fault with the learned judge's reasoning".⁸²

⁷⁵ *Supra*, f.n.29.

⁷⁶ *R. v. Schwerdt*, *ibid.*, 42.

⁷⁷ The only difference seems to be that before a bill of indictment can be preferred where a preliminary hearing has not been held or has been held and the accused discharged, the consent of a judge or the Attorney-General must be obtained: s.505(4) Cr.C.

⁷⁸ See *Tremear's Annotated Criminal Code* 6th ed. (1973), 838-840, for a complete survey of the cases; the judge's exercise of discretion is not appealable.

⁷⁹ Which, after all, is only a decision of a court of first instance.

⁸⁰ Kaufman, *supra*, f.n.2, 113.

⁸¹ See also Lagarde J., *Supplement au Nouveau Code Criminel Annoté* (1958), 89, referred to by Kaufman, *supra*, f.n.2, 113.

⁸² *Supra*, f.n.2, 13.

(d) *Appeals*

The area of appeals and the private prosecutor gives rise to a change of emphasis that was not apparent when dealing with trial matters. Within the framework of the trial procedure an attempt has been made to ascertain whether or not the common law rights of the private prosecutor had been altered by the Criminal Code. The conclusion reached, largely on the reasoning in *Schwerdt*, was that the common law had been altered so far as indictable proceedings were concerned. But with appeals, "it is a well-established principle that there is no inherent right to appeal from the decision of any court and that such right exists only when it is expressly given by a statute".⁸³ This has a practical effect, as one commentator has concluded:

... [W]here it is necessary to draw inferences from the legislation one must start in the one case [trial proceedings] with a kind of presumption that private prosecution is permissible unless excluded; but in considering the rights of appeal, the presumption is reversed, and it must be assumed that no such right exists unless it is expressly conferred.⁸⁴

What then are the statutory rights of appeal under the Code and do they confer "standing" on a private prosecutor? Summary conviction appeals are dealt with under the provisions of s.748 of the Criminal Code. Under paragraph (b) "the informant, the Attorney-General or his agent" may appeal from an order dismissing an information or against sentence. It follows that this provision does⁸⁵ confer on a private prosecutor the right to appeal against dismissal of the action or the sentence imposed.⁸⁶ No reference to the Sovereign needs to be made where an informant is appealing.⁸⁷

The situation is quite different, however, when dealing with indictable offences. Only the person convicted⁸⁸ or the Attorney-

⁸³ *Tremear's Annotated Criminal Code, supra*, f.n.78, 1547, citing a dictum by Hall J. in *R. v. Joseph* (1900) 11 K.B. (Que.) 211: "An appeal is not a general or common law right. It is an exceptional provision enacted by statute, and, to be availed of, the conditions imposed by the statute must be complied with...".

⁸⁴ Berner, *supra*, f.n.2, 18.

⁸⁵ See Tremear, *supra*, f.n.78, 1550, and its supplement (1972), 370-371. The same right is conferred on a private prosecutor in relation to appeals by way of stated case under s.762 Cr.C.

⁸⁶ Berner, *supra*, f.n.2, 17, considers the private prosecutor to have the right to also appeal against conviction. Although this power is confined to the defendant under s.748(a) of the Criminal Code, a private prosecutor (informant) may under s.748(b) appeal from an order dismissing an information or against the sentence passed upon the defendant.

⁸⁷ *R. v. Allchin* [1972] 2 O.R. 580; this case concerned dismissal of an information.

⁸⁸ S.603 Cr.C.

General or counsel instructed by him⁸⁹ have standing to appeal to a Court of Appeal or the Supreme Court of Canada.⁹⁰ These provisions in their terms do not grant a private prosecutor the power to pursue an appeal. Berner puts forward the view that:

... [I]t may be considered a reasonable compromise between the interest of the private prosecutor in pursuing an accused, the interest of an accused in being free from unwarranted harassment, and the interest of the state — as represented by the Attorney-General — in seeing that justice is done. The claim of the private prosecutor is satisfied by allowing him to ensure that the accused is put on trial. The accused is protected by being allowed to appeal in any event, where he is convicted; and, where he is acquitted, by being freed from the prospect of an appeal by the prosecutor personally. And the interest of the state is protected by allowing the Attorney-General his right of appeal in any case, whether a private prosecution or not.⁹¹

This is a fair rationalization of a clearly anomalous situation. But it is likely to be small comfort to an unsuccessful prosecutor in proceedings on indictment, who has a legitimate ground of appeal, to learn that his interest ceases with the trial of the accused.⁹² However, one thing is clear: a private prosecutor has no standing in appeals other than from summary conviction proceedings.

It would also seem that so long as the Crown has not intervened, the private prosecutor as a party can proceed to the extraordinary remedies in summary conviction matters but is unable to so proceed concerning those indictable offences which he may not pursue. In those indictable offences which the private prosecutor can pursue, the Crown is rendered a party for this purpose.⁹³

(e) *Miscellaneous*

(i) **Intervention by the Crown**

As has been earlier indicated, the power of a private prosecutor to pursue a prosecution is subject to the Crown's decision to "intervene". Intervention can be of two kinds:

(1) Intervention for the purpose of exercising control over the course of the prosecution at a public level. In *R. v. Leonard*⁹⁴ Kirby J.

⁸⁹ S.605 Cr.C.

⁹⁰ Ss. 618-621 Cr.C.

⁹¹ Berner, *supra*, f.n.2, 18.

⁹² The protection of the accused is extended in any event by s.612 Cr.C., granting an appeal court the summary power to terminate frivolous or vexatious appeals. This is largely nullified by s.610(3), whereby the appeal court has no power to award costs.

⁹³ See *R. v. Knowles and R. v. Wilson* (1913) 5 W.W.R. 20 (Alta. S.C.).

⁹⁴ (1962) 37 C.R. 374 (Alta. S.C.); see also *R. v. Dick* (1968) 4 C.R.N.S. 102 (Ont. H.C.).

took the view that the provincial Attorney-General as chief law enforcement officer had an inherent power to intervene and withdraw an information alleging theft laid by a private prosecutor. This discretion to withdraw is judicial in nature but the courts are most reluctant to interfere with an Attorney-General's exercise of it.⁹⁵ Such a withdrawal by an Attorney-General is not in conflict with the provisions of ss.1(b) and 2(e) of the *Canadian Bill of Rights*.⁹⁶ It is debatable whether or not the Crown can intervene to *pursue* the prosecution although, since the rationale for all such intervention at common law is "to prevent a private prosecutor, in case of abuse or unjustified proceedings against any of [the Crown's] subjects, from perpetrating an injustice",⁹⁷ there seems no reason in principle why this should not be the case.

But does the power to intervene and withdraw an information lie in the Attorney-General for both summary conviction and indictable offences? *Leonard* was concerned with an indictable offence and this class is clearly susceptible to such intervention as a result of the meaning of the term "prosecutor" in s.2 of the Criminal Code:

"prosecutor" means the Attorney-General, or where the Attorney-General does not intervene, means the person who institutes proceedings... .

This is the definition applicable to Parts 15 and 16 of the Criminal Code and clearly envisages intervention by the Attorney-General; where the Attorney-General does intervene, he or his agent becomes the prosecutor and the private prosecutor has no standing.

On the other hand, Part 24 of the Criminal Code, dealing with summary conviction, has its own definition of prosecutor:

"prosecutor" means an informant or the Attorney-General or their respective counsel or agents.⁹⁸

There is no specific mention of the power of intervention by the Attorney-General in this provision. But can it be said that this omission necessarily excludes such power? Since at common law such power was said to exist,⁹⁹ it can be argued that it has not been

⁹⁵ *R. v. Weiss* (1915) 7 W.W.R. 1160, 23 C.C.C. 460 (Sask. S.C.).

⁹⁶ S.C. 1960, c.44; *R. v. Leonard*, *supra*, f.n.94, 381-382.

⁹⁷ *Campbell v. Sumida*, *supra*, f.n.52, 39 *per* Miller C.J.M. This is without real significance since the Attorney-General could enter a stay of proceedings and reinstitute proceedings if he was of the opinion the private prosecution was abusive but the proceedings *should* be taken against the accused. It should be noted that *Campbell's* case is no longer authoritative in so far as style of action is concerned: *Usick v. Radford*, *supra*, f.n.s. 38 and 52.

⁹⁸ S.720(1) Cr.C.

⁹⁹ See the cases cited by Kirby J. in *R. v. Leonard*, *supra*, f.n.94.

excluded by this definition.¹⁰⁰ This view is strengthened when the role of the Attorney-General as chief law enforcement officer is examined. It can hardly be argued that the only prosecutions subject to abusive practices by private prosecutors are those brought by way of indictment. This being so, then it can hardly have been Parliament's objective to remove from the Attorney-General the capacity to control such practices, when he is otherwise under an obligation to do so.

(2) Intervention in order to stay proceedings. The power to enter a stay of proceedings,¹⁰¹ which is vested in the Attorney-General or counsel instructed by him, is regarded as being of particular social value where abusive private prosecutions have been initiated:

The usual occasion of granting a *nolle prosequi* or a stay of proceedings is either where in cases of misdemeanour a civil action is pending for the same cause ... or where any improper or vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence ... or if it is clear that an indictment is not sustainable against the defendant¹⁰²

Thus, where an Attorney-General deems it advisable he may order a stay of proceedings to prevent the private prosecutor from pursuing his cause of action. The term "Attorney-General" in this context is broadly confined to a provincial Attorney-General (or Solicitor-General) as a result of s.2:

"Attorney General" means the Attorney General or Solicitor General of a province in which proceedings to which this Act applies are taken and, with respect to (a) the North West Territories and the Yukon Territory, and (b) proceedings instituted at the instance of the Government of Canada ... means the Attorney General of Canada.

Accordingly, only in those situations where the Attorney-General of Canada has initiated and is proceeding against an accused under a federal statute (other than the Criminal Code) is it theoretically¹⁰³ possible for him to intervene.¹⁰⁴

¹⁰⁰ In any event, today even summary conviction offences are subject to a stay of proceedings: s.732.1 Cr.C.

¹⁰¹ S.508 Cr.C. (indictable offences) and s.732.1 Cr.C. (summary conviction offences). This was known as *nolle prosequi* at common law. See *R. v. Beaudry*, *supra*, f.n.74.

¹⁰² Archbold, *Criminal Pleading and Practise* 30th ed., 111, cited in Tremear, *supra*, f.n.78, 843.

¹⁰³ *Berner*, *supra*, f.n.2, 28, raises doubts as to the constitutional validity of this outside the territories mentioned.

¹⁰⁴ Unless the matter takes place in the Northwest Territories or Yukon Territory.

(ii) Costs of Proceedings¹⁰⁵

At common law the general principle relating to costs in litigation is that the successful party to the proceedings is entitled to costs.¹⁰⁶ But there are exceptions to this rule, including one relating directly to criminal cases: the Crown neither pays nor receives costs.¹⁰⁷ This subsidiary rule still applies today, subject to statutory modification.¹⁰⁸

The Criminal Code contains a number of such modifications, including the power to award costs to an accused in summary conviction matters.¹⁰⁹ But no such power exists to award costs on the hearing of indictable offences, and appeal courts are specifically precluded from making such awards.¹¹⁰ In practice costs are seldom awarded.¹¹¹ Again, there is no uniformity of practice discernible in the cases relating to the extraordinary remedies in Canada.¹¹²

At the present time, then, one of the primary deterrents to private prosecutions under the Criminal Code and other federal

¹⁰⁵ See Burns, *Research Paper for the National Law Reform Commission in Relation to the Matter of Costs in Criminal Cases* (October, 1972).

¹⁰⁶ *In expensarum causa victus victori condemnandus est*. For a short history of the development of costs, see Holdsworth, 4 *A History of English Law*, *supra*, f.n.14, 536-538.

¹⁰⁷ 3 *Blackstone's Commentaries* (1857), 400, note 60.

¹⁰⁸ See e.g., British Columbia which has given the subsidiary rule statutory force: *Crown Costs Act*, R.S.B.C. 1960, c.87, s.2(1); whereas in Ontario, New Brunswick and Manitoba, the common law has altered the subsidiary rule to grant courts the power to award costs against the Crown in provincial offences: *R. v. Guidry* (1965) 47 C.R. 375, [1966] 2 C.C.C. 161 (N.B.C.A.). In *R. v. Adventure Charcoal Enterprises Ltd.* (1972) 9 C.C.C. (2d) 81, the Ontario High Court quashed an order to pay costs made against a successful private prosecutor. The provincial court judge had made the order on the ground that the prosecution "served no useful purpose".

¹⁰⁹ S.744(1)(b) (trial), s.758 (trial *de novo*), s.766 (stated case) and s.610(3) (appeals to the Court of Appeal).

¹¹⁰ S.610(3) Cr.C. The only exceptions provided for are cases of defamatory libel (ss.656 and 657) and where the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count thereof (s.529(5)).

¹¹¹ See Burus, *Research Paper*, *supra*, f.n.105, 119-125.

¹¹² There is a conflict of judicial view on the question whether or not provincial courts can make rules under s.438 of the Criminal Code authorizing the imposition of costs or whether their power is confined to the regulation of costs authorized by other substantive laws. In British Columbia (*Re Christianson* (1951) 3 W.W.R. 133 (B.C.S.C.)) and Ontario (*Re Sheldon* (1972) 8 C.C.C. (2d) 355 (Ont. H.C.)), the view is that the courts do *not* have the power to make rules, whereas in Saskatchewan, the opposite opinion is held (*Ruud v. Taylor (sub. nom. R. v. Taylor; ex parte Ruud)* (1965) 51 W.W.R. 335 (Sask. S.C.)).

legislation is the near certainty that the prosecutor will have to bear his costs whether or not his case succeeds.¹¹³ This situation is presently under review and is the subject of a report of the National Law Reform Commission,¹¹⁴ which has recommended that costs be awardable to and against a private prosecutor in certain cases.

III. The Role of Private Prosecutions Today

In Canada the vast bulk of prosecutions¹¹⁵ are initiated by the police and prosecuted by a public official.¹¹⁶ Is there a role for the private prosecutor to play in the contemporary criminal justice system? One of the basic propositions set up by the Ouimet Report¹¹⁷ is that discretion should be allowed in each stage of the criminal justice process:

To implement the Committee's proposition that the criminal law should be enforced with a minimum of harm to the offender, discretion should be exercised in cases involving individuals who are technically guilty of an offence but where no useful purpose would be served by the laying of a charge. Where a charge is laid, discretion should be exercised as to the manner in which the law is applied.

This means . . . the prosecution should have the appropriate discretion to determine whether a charge is to be laid or proceeded with, and whether conviction on a lesser charge would satisfy the requirements of justice.¹¹⁸

This leads to two results. The first is that such discretionary power is probably only relevant within the framework of a system of public prosecutions.¹¹⁹ The second is that, assuming public prosecutors to have such discretionary powers, the social justification for the retention of private prosecutions is strengthened. It is only where

¹¹³ National Law Reform Commission, *A Proposal for Costs in Criminal Cases* (Ottawa, August 1973), 18.

¹¹⁴ *Ibid.*; see also Burns, *Research Paper, supra*, f.n.105, 107-111; Judex, *Awarding Costs Against A Complainant* (1970) 18 Chitty's L.J. 264.

¹¹⁵ Subject to any statutory consent requirement or other limitation.

¹¹⁶ See Grosman, *The Role of the Prosecutor in Canada* (1970) 18 Am.J. of Comp.L. 498. In many cases the prosecutor is a police officer. The trend towards centralization of prosecutions through a public prosecutor is seen in the recent (1974) creation in British Columbia of a Provincial Crown Counsel Office pursuant to ss.3 and 4 of the *Attorney-General Act*, R.S.B.C. 1960, c.21.

¹¹⁷ *Report of the Canadian Committee on Corrections* (Queen's Printer, 1969).

¹¹⁸ *Ibid.*, 16-17.

¹¹⁹ See Glanville Williams, *Discretion in Prosecuting* (1956) Crim.L.R. 222, on this subject generally, and Chasse, *Annotation to R. v. Ittoshat* (1970) 10 C.R.N.S. 385, 392-408.

a public prosecutor has failed to exercise his discretion to prosecute that a private prosecutor will feel the need to take action personally.

What then are the reasons for retaining or removing the power to privately prosecute? Glanville Williams is of the view that "the power of private prosecution is undoubtedly right and necessary in that it enables the citizen to bring even the police or government officials before the criminal courts, where the government itself is unwilling to make the first move".¹²⁰ But there is a more basic argument in favour of retaining the power of private prosecutions:

... [A] private person will normally prosecute only where his interest is deeply affected or his emotions strongly aroused, and not always even then. Even in early times when passions were stronger than they are now and the desire to retaliate was not looked upon as uncivilised, it was thought necessary to supplement the thirst for vengeance by a regular system of presentment of crime by the tithing and grand jury.¹²¹

Dression, an American commentator who is convinced that a system of private prosecutions is a necessary adjunct to a public prosecutions system, considers:

A system of private prosecutions can be justified in terms of both society's interest in increased law enforcement and the individual's interest in vindication of personal grievances. Full participation by the citizen as a private prosecutor is needed to cope with the serious threat to society posed by the [public prosecutor's] improper action and inaction.¹²²

The Ouimet Report ignores the retributive element of punishment,¹²³ but the thirst for vengeance has a real, if no longer respectable, place in our criminal justice system¹²⁴ and is likely to remain until the nature of man is altered. It could be dangerous for society to ignore this elementary facet of human personality and force men to accommodate themselves outside the law rather than within it.¹²⁵ Also, as Dression points out,¹²⁶ there is a degree of privity of interest between the harmed party and the exacting of justice; the victim will be uniquely affected by society's failure to prosecute. It is no answer to say he has a civil remedy because personal injuries are

¹²⁰ Glanville Williams, *The Power to Prosecute* (1955) Crim.L.R. 596, 599.

¹²¹ *Ibid.*, 675.

¹²² Dression, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, *supra*, f.n.5, 227.

¹²³ *Supra*, f.n.117, 15. It recognises deterrence, rehabilitation and control as the only elements of punishment properly operating to protect society.

¹²⁴ Holmes, *The Common Law* (1881), 39-42, considered vengeance a proper objective of the criminal law, referring to Stephen for support.

¹²⁵ Cohen, *Moral Principles of the Criminal Law* (1940) 49 Yale L.J. 987, 1010.

¹²⁶ *Supra*, f.n.5, 228.

not really measurable in damages (especially when deliberately inflicted) and the accused will inevitably be judgment-proof.¹²⁷

The need to channel the victim's thirst for vengeance as a justification for the retention of a system of private prosecutions is clearly open to a basic moral objection: vengeance is not a proper goal for either individuals or the state. Indeed this was the very impetus to the abortive 1854 Bill in the English House of Commons designed to abolish private prosecutions:

The object of the present Bill is to withdraw from a sphere of private animosity, compromise, and revenge, that which ought never to be left to such chances and to see that justice is properly administered.¹²⁸

But given the nature of man and his need to retaliate when victimized, it can be argued, at least on utilitarian grounds, that it is better for the legal system to channel and ritualize his revenge rather than forcing him to respond at a primordial level.

These two basic arguments in support of a system of private prosecutions generally¹²⁹ are reinforced when the first argument is viewed from a perspective outside the Criminal Code. In the Criminal Code the only offence that is recognized as being peculiarly susceptible to a private prosecution is that of defamatory libel,¹³⁰ which is concerned with protection of an interest in reputation and is thus of a personal rather than a public nature. But over the past two decades, legislation has been enacted both by the federal and provincial authorities in order to protect public interests in, e.g., consumerism and environmental quality.

This legislation usually imposes duties, the breach of which involves a criminal or quasi-criminal sanction. Yet oftentimes such breaches fail to be prosecuted. Very often the victim is unaware he has been victimized, and such breaches in any event are generally regarded as less significant by busy prosecutors who have a full calendar of "standard crimes" to cope with. Public interest groups throughout Canada have evolved to act as informal watch-dogs and they or their members have been involved in private prosecutions under the relevant legislation. They are not acting out of a real thirst for revenge since they, as individuals, have not been threat-

¹²⁷ In the same way the provision of criminal injuries compensation schemes cannot be said to do other than imperfectly compensate the victim for his injuries. See Burns and Ross, *A Comparative Study of Victims of Crime Indemnification in Canada* (1973) 8 U.B.C. L. Rev. 105.

¹²⁸ J. G. Phillimore M.P., (1854) 130 Parl. Deb., 3d Series, 666.

¹²⁹ Namely, inaction on the part of the public prosecutor and diversion of physical retaliation by the victim(s).

¹³⁰ S.265 Cr.C.

ened;¹³¹ instead they are usually acting in the public interest as they see it.

There are numerous illustrations of this class of case, particularly in the field of environmental law. For example, in a single issue of *Canadian Environmental Law News*¹³² two successful private prosecutions under the Ontario *Environmental Protection Act*¹³³ are detailed. The first¹³⁴ was brought by the Sudbury Environmental Law Association, through one of its members, against the International Nickel Company of Canada for polluting air in breach of smoke emission regulations under that Act. The actual prosecution was conducted by legal counsel for the members of S.E.L.A. An interesting feature of this case is that the private prosecution was specifically initiated on the ground that "the Ministry of the Environment was failing to take proper legal action against industries in the Sudbury area".¹³⁵

The other case¹³⁶ involved discharge of noise into the natural environment by medium of a central air conditioning unit. The prosecutor was a neighbour of the defendant and successfully showed that the air conditioning unit's noise level was in excess of the maximum level then being considered in a draft of proposed noise regulations. It was also successfully alleged in the information that the unit "impaired the quality of the complainant's home's natural environment for the normal summer-time use that is made of it, that is, for peaceful outdoor relaxation, including reading, eating, entertaining and gardening, . . ." ¹³⁷ and was thus in breach of the Act.

Dression sees the power to privately prosecute as a vital form of reinforcement of criminal justice in a system that has public prosecutors as the linch-pin of the prosecution process.¹³⁸

¹³¹ Anybody may initiate a prosecution, even though he is not the victim: *Duchesne v. Finch* (1912) 23 Cox C.C. 170; *Young v. Peck* (1913) 77 J.P. 49. It makes no difference if the offender has compensated the victim: *Smith v. Dear* (1903) 20 Cox C.C. 458.

¹³² (1974) 3 *Canadian Environmental Law News*.

¹³³ S.O. 1971, c.86.

¹³⁴ *R. ex. rel. Mackinnon v. International Nickel Company of Canada Ltd.* (1974) 3 *Canadian Environmental Law News* 75.

¹³⁵ *Ibid.* Shortly after this decision the Ministry brought a further successful prosecution against the same company: (1974) 3 *Canadian Environmental Law News* 75-76.

¹³⁶ *R. ex. rel. Johnston v. Lieberman* (1974) 3 *Canadian Environmental Law News* 77; reported earlier in the same volume at 47.

¹³⁷ *Ibid.*, 47.

¹³⁸ *Supra*, f.n.5, 225-229.

Whatever the theory of prosecutions in Canada, we clearly *do* have an informal system of public prosecutors,¹³⁹ some of whom are career appointees. Dression considers (in support of a system of private prosecutions) that "vengeance is not necessarily a more corrupting motive than political ambition".¹⁴⁰ The same can surely be said of personal ambition where, as in Canada, public prosecutors are appointed rather than elected as in the United States.

The *Justice Report*¹⁴¹ recommended the establishment of a centralized Department of Public Prosecutions and the retention of the capacity of the private citizen to initiate and proceed in the criminal process, subject to a general power of the Department of Public Prosecutions to take over the prosecution as it sees fit. Dression refers to the English objections to a centralized system of public prosecutions:

Those opposed to the threatened innovation [public prosecution] pointed to the experience of other countries where, they charged, the control of the machinery for administering criminal justice had fallen necessarily into the hands of political parties and was being used by hordes of unscrupulous politicians to promote private or political ends. Private prosecutions were infinitely preferable... to an enforcement of the criminal law which made the liberty of citizens dependent on the caprice or venom of party managers...¹⁴²

The same general view has been expressed by a former Director of Public Prosecutions himself who favoured the retention of the private prosecutor:

Suggestions are made from time to time that the scope of [his] Department might with advantage be extended, and the tendency in recent years has been to add to the responsibilities of the Director, both in practice and by statute... [I]n dealing with the administration of the criminal law, proposals that tend in degree to lessen the sense of the responsibility of the individual citizen actively to assist in the day-to-day enforcement of the laws should be critically examined before they are accepted. Economy and even efficiency are not necessarily adequate reasons for making changes that may disturb the foundations upon which our system of criminal justice has been built... .

The lesson to be learned from a study of the history of the criminal law is that we have secured and preserved our individual liberty and security by evolving a system under which these still depend ultimately not upon an executive, however benevolent, nor upon a judiciary, however wise,

¹³⁹ Grosman, *supra*, f.n.116.

¹⁴⁰ *Supra*, f.n.5, 229.

¹⁴¹ *Supra*, f.n.9, 681.

¹⁴² Dression, *supra*, f.n.5, 234 at f.n.130, quoting Howard, *The Conduct of Criminal Prosecutions in England*, (unpublished), cited in Moley, *Politics and Criminal Prosecution* (1929), 201.

but upon the active support and the final judgment of our fellow citizens.¹⁴³

What then are the arguments against permitting private prosecutions and instituting a system whereby such prosecutions are left to public officials, whether elected or appointed? Basically, opponents are concerned that private prosecutions may be motivated by personal gratification, private gain or malice.¹⁴⁴ The revenge factor plays its part here: is revenge a proper reason for initiating a criminal prosecution? Many people would think not. Again, the power to privately prosecute may give rise to blackmail situations, with the potential prosecutor demanding some advantage from the potential accused to not prosecute his case. This can hardly be a real objection, though, as most jurisdictions have criminal sanctions against such demands.

From an administrative viewpoint it is probably true to say that there is maximized economy and efficiency if prosecutions are left to public prosecutors, particularly if the administrative machinery is centralized. This view was expressed by Lord Cameron in defence of the Scottish practice. He saw three desirable results from a centralized system of public prosecutions:

- (1) the almost complete disassociation of the police from a decision to prosecute;
- (2) a measure of uniformity of practice within the jurisdiction; and
- (3) a central control of decision as to the court in which prosecution is to proceed.¹⁴⁶

Whether or not the uniformity and central control referred to by Lord Cameron is possible within the Canadian context must be regarded as doubtful. Only at a provincial level could the Scottish system be emulated except in so far as federal offences other than Criminal Code offences are concerned. To a certain extent this type of "public prosecutor" system is utilized by the federal government through the prosecution section of the Justice Department. The argument in favour of a public prosecution system based on removing the police from the prosecution function is a strong one. But surely this end can be secured without removing the rights of all persons other than the public investigators to prosecute.

¹⁴³ Sir Theobald Mathew, *supra*, f.n.17, 16.

¹⁴⁴ *Meister v. People* 31 Mich. 99 (1875).

¹⁴⁵ See s.305 Cr.C., dealing with extortion.

¹⁴⁶ Lord Cameron, *Some Aspects of Scots Criminal Practice and Procedure*, *supra*, f.n.9, 4.

The problem of the malicious private prosecution is one that must also be considered. What protection should an accused have against this class of case?¹⁴⁷ Protection should at the very least include an adequate set of costs provisions in the Criminal Code and appropriate provincial legislation;¹⁴⁸ however, at the present time it cannot be said that the necessary protection does exist.

Another argument in favour of the professional public prosecutor is that, having an independent public status and being a professional man, he is able to bring an objectivity to bear on the matter at hand as well as the necessary expertise to understand the complexity of modern society and contemporary laws.¹⁴⁹ This is a very strong argument so far as it bears on the removal of the investigating officer from the decision to prosecute. But does the same force apply to a private prosecutor in the real sense of the term? The negative may be argued, particularly where the decision of the prosecutor is not to proceed with the charge. Here we are also concerned with the wider role of the citizen in the criminal justice system and his need to be satisfied that his injury (real or fancied) can be properly accommodated by it.¹⁵⁰

IV. Conclusions and Suggestions for Change

The basic conclusion reached in this paper is that in Canada the private prosecutor is granted considerable power to pursue his case, although it is very rarely exercised. A comment by Glanville Williams seems equally appropriate to the Canadian context:

English lawyers may sometimes be heard to claim that we have no public prosecutions; although this is little more than a form of exhibitionism, it

¹⁴⁷ See Glanville Williams, *supra*, f.n.120, 678.

¹⁴⁸ The tort remedy of malicious prosecution should not be regarded as a complete protection since it is very difficult to succeed in such cases. On the other hand, the tort of abuse of process has recently been resurrected and may provide an accused with a civil remedy in certain cases: *Guilford Industries Ltd. v. Hankinson Management Services Ltd. et al.* (1974) 40 D.L.R. (3d) 381 (B.C.S.C.).

¹⁴⁹ *Justice Report, supra*, f.n.9, 679.

¹⁵⁰ An interesting case is *R. v. Commissioner of Police of the Metropolis ex. p. Blackburn* [1973] 1 Q.B. 241 (C.A.), where the appellant unsuccessfully attempted to have mandamus issued against the respondent police commissioner to enforce the English pornography laws. The Court of Appeal held that the police had a discretion in carrying out their duty with which the courts will not interfere. The courts will intervene only where it can be established the police are *not* carrying out their duty: *R. v. Metropolitan Police Commissioner ex. p. Blackburn* [1968] 2 Q.B. 118. This was the same Mr Blackburn who was then attempting to have mandamus issued against the Commissioner to enforce the law against gaming houses.

is true to say that no country leaves more to the private prosecutor if he chooses to act.¹⁵¹

The summary of the law in Part II of this paper reveals that, as regards indictable offences, considerable anomalies exist depending on the mode of trial selected by the accused. Assuming that it is considered desirable to retain the status of private prosecutor, the anomalies could be readily remedied.

In those cases where a preliminary hearing has occurred and the judge or magistrate decides to commit the accused for trial, the two Criminal Code provisions that cause difficulty are s.496(1) (speedy trial) and ss.505(1) and 507(2) (judge and jury). Section 496(1) could be altered to read:

496(1) Where an accused elects under section 464, 484 or 492 to be tried by a judge without a jury, an indictment in Form 4 shall be preferred by the Attorney General or his agent, or by any person who has the written consent of the Attorney General, *or by any person who has the written consent of a judge of a court of superior criminal jurisdiction*, and in British Columbia may be preferred by the Clerk of the Peace.

A new subsection (2) would be required along the following lines:

(2) Where [a judge or magistrate] finds that an accused should be committed for trial after preliminary hearing, a judge of a court of superior jurisdiction shall grant on application permission in writing to the prosecutor to prefer an indictment in accordance with subsection (1) of this section.

This would give a private prosecutor the *right* to pursue his case in the absence of intervention by the Attorney-General. If it were felt that the "consent of the court" provision as suggested above would place an undue administrative burden on judges of courts of superior criminal jurisdiction,¹⁵² then that provision could be replaced by the phrase "judge or magistrate of the court other than the judge or magistrate conducting the preliminary hearing". However, since the suggested s.496 is drafted in mandatory terms, there is really no point in separating the two functions and the provision could merely read "judge or magistrate of the court", so that the same judge or magistrate who held the preliminary hearing could grant written consent to the prosecutor.

¹⁵¹ Glanville Williams, *supra*, f.n.120, 596-597. In Canada there are procedural restrictions that do not apply in England, but there is no doubt the private prosecutor's powers here are quite wide. Recent examples are *R. v. Kennedy* [1972] 2 O.R. 754 (Ont. C.A.) and *Regina ex rel McNeill v. Sanucci* (1974) 28 C.R.N.S. 223 (B.C. Prov. Ct.).

¹⁵² This is suggested merely to add formality to the private prosecutor's application and to remove it from the court which took the preliminary hearing.

The same general change could be made to s.507(2) by adding a new subsection (3) along the following lines:

(3) Where an application to prefer an indictment has been made by the prosecutor to a judge or magistrate of the court pursuant to subsection (1), consent shall be granted where a preliminary hearing has been held and there is a finding that the accused should be committed for trial.

This, too, would grant the prosecutor the *right* to pursue his case in trials before a judge and jury.

Whether or not it is considered desirable to extend the private prosecutor's powers to appeals will depend largely on what is regarded as being the proper scope of his function. At the present time, appeals from summary conviction decisions *can* be taken by a private prosecutor as a result of the language of s.748 of the Criminal Code; no such power exists in relation to indictable proceedings. Berner has suggested¹⁵³ that this is a reasonable compromise, *i.e.*, the private prosecutor has been able to take the case to trial; the accused is protected from being pursued further so unwarranted harassment ceases; and the state's interest is protected by the ability of the Attorney-General or counsel instructed by him to appeal the acquittal or sentence.¹⁵⁴ If this argument is accepted, then no modification of the existing law need be made, except perhaps to remove the private prosecutor's right of appeal in relation to summary conviction offences.

On the other hand, assuming the desirability of retaining the right of appeal, it could be argued that this right should be reinforced by granting the private prosecutor full status to pursue his case through appeal proceedings (in the absence of intervention by the Attorney-General).¹⁵⁵ This right, if granted, would probably have to be contingent on appropriate changes to the Criminal Code concerning costs. It would be a deterrent to frivolous or malicious private prosecutions if the private prosecutor could be rendered personally responsible for the costs of the accused in appropriate situations.¹⁵⁶

Section 605 could be amended to read:

(1) The Attorney General or counsel instructed by him for the purpose, or where the Attorney General does not intervene, the informant or prosecutor may appeal to the court of appeal

¹⁵³ Berner, *supra*, f.n.2, 18.

¹⁵⁴ S.605 Cr.C.

¹⁵⁵ The desirability of retaining the Attorney-General's power to stay proceedings lies outside the purview of this study.

¹⁵⁶ This is the recommendation of the National Law Reform Commission in its *Costs Proposal*, *supra*, f.n.113, 18.

Section 621, dealing with appeals to the Supreme Court of Canada, could be amended in similar fashion, extending the appeal power to a private prosecutor in the absence of intervention by the Attorney-General.

A second major conclusion of this paper is that a criminal justice system that makes provision for private prosecution of criminal and quasi-criminal offences has advantages over one that does not. These advantages have been referred to in Part III, *supra*, and do not bear repeating.¹⁵⁷ In any system of law, particularly one dealing with crimes and quasi-crimes, it is of fundamental importance to positively involve the citizen. Giving him the opportunity of presenting his case before a court, even where a public official has declined to take up the matter, is one way of ensuring such participation.

Of course there may be offences having subject matter that, for other policy reasons, should not be rendered susceptible of private prosecution. Such offences ought therefore to be so drafted as to require a public official to pursue them or to prevent private prosecution in the absence of specified consent.¹⁵⁸ Certain classes of offences, many of recent origins, are more likely to prove susceptible of private prosecution than others. Offences relating to environmental quality and consumer protection, both at the federal and provincial level, are those which most readily spring to mind. In both of these areas there is widespread "civic activism"; large groups of people are committed to the enforcement of the values contained in this type of legislation. Yet it is this type of crime or quasi-crime (most often the latter) that is likely to be "low-priority" in a public prosecutor's scale of importance.

This is not, however, to reduce the importance of achieving access to prosecutorial opportunities *vis-à-vis* "true" crimes. It is merely argued that cases of private prosecutions in the latter area will be heavily outnumbered by those in the former. Certainly such a prosecution is not without its problems; apart from procedural difficulties and the cost of launching a private prosecution, other equally practical problems exist. The first is that of actually gath-

¹⁵⁷ It is noteworthy that in France, Germany and Scotland — all countries pointed to as paradigms of the public prosecutorial method — administrative alternatives have had to be structured to cope with the situation of non-prosecution by the appropriate public official.

¹⁵⁸ See *e.g.*, the *Lord's Day Act*, R.S.C. 1970, c.L-13, s.16, whereby proceedings require the consent of the Crown.

ering evidence for presentation in court;¹⁵⁹ another is the possibility of apathy or even antipathy of Crown agencies that may have material relevant to the case.¹⁶⁰ In such cases it is unlikely that a private prosecutor will succeed in obtaining such material.¹⁶¹

Accordingly, it is likely to be only the most determined and aggrieved of persons who will attempt to pursue the criminal law in a private capacity. It is suggested that it is desirable that they should be able to do so: the law should be altered to enable this to occur where it cannot presently be done.

¹⁵⁹ Laymen are unlikely to appreciate the many types of evidence necessary for a successful prosecution.

¹⁶⁰ Antipathy could lead to "intervention" either by a stay of proceedings, or by the Crown taking over and continuing the prosecution.

¹⁶¹ See Berner, *supra*, f.n.2, 22-26, for a full discussion of this matter.