Department of Justice

STATEMENT

OF

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CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON HUMAN RESOURCES
COMMITTEE ON THE POST OFFICE AND CIVIL SERVICE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE PRESIDENT'S PROGRAM TO FOSTER A
DRUG-FREE FEDERAL WORKPLACE

ON

SEPTEMBER 25, 1986

Mr. Chairman and Members of the Subcommittee--

I appreciate the opportunity to be here this morning to talk about the serious drug problem facing our nation and the President's goal of establishing a drug-free federal workplace. Although the war against illegal drugs can and must be fought on many fronts, the President's program recognizes that we cannot devote our efforts solely to law enforcement--we must also reduce the demand for illegal drugs. The administration believes that the federal government has a duty to adopt a leadership role in reducing the demand for illegal drugs by attaining a drug-free federal workplace. We must make clear that drug use by federal employees--whether on or off duty--is unacceptable conduct that will not be tolerated. The Administration's program, as set forth in Executive Order 12564, is designed to achieve not only a drug-free federal workplace, but also to serve as a model for similar programs in the private sector. We also hope that the federal initiative will provide an incentive for state and local government to initiate their own programs that will serve the unique needs of their local communities.

I would also like to note at the onset that the drug testing program I will address today is only one means by which the Executive Order will help us to achieve a drug-free workplace. The Executive Order requires agency heads to develop plans that must include a statement of agency policy, Employee Assistance Programs, supervisory training programs, and procedures to put

drug users in contact with rehabilitation services. Drug testing is a diagnostic tool to be used along with other evidence of drug use that could be used to identify drug users. Of course, an aggressive program of public education would be continued to warn of the dangers of illegal drug use.

The Federal government is just one of an increasing number employers who have recognized a need to create an environment of zero tolerance for drug use by drug testing employees. In fact, "testing" is a very effective way to treat drug abuse in the workplace. When Dr. Charles R. Schuster, Director of the National Institute on Drug Abuse, testified before Congress last summer, he emphasized that "the integration of drug screening into programs of treatment, prevention and drug education will prove to be a highly effective way to manage substance abuse problems in industry."[1] Dr. Schuster also pointed out that testing can be an extremely useful tool within the context of an overall program or policy.

Because of the high rate of illegal drug abuse in our society and its debilitating effects on the workforce, both public and private employers are increasingly instituting drug testing programs to deter employee's use of illegal drugs. In private industry, approximately 30 percent of the Fortune 500 companies, including Ford Motor Company, IBM, Alcoa Aluminum, Lockheed, Boise Cascade and the New York Times have instituted

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[1] Statement of Dr. Charles R. Schuster before the Select Committee on Narcotics Abuse and Control, U.S. House of Representatives on May 7, 1986, at p.6.

testing programs using urinalysis for drug detection. Testing programs such as these have been enormously successful resulting in fewer-on-the-job accidents, increased productivity and improved employee morale.[2] Consequently, their use is growing. It is estimated that an additional 20 percent of Fortune 500 companies will institute drug testing programs within the next two years. The success of these programs gives us real cause to hope that a carefully implemented program of drug testing can lead to real progress in the war on drugs.

Before turning to the specifics of the program under the Executive Order, I would like to reiterate a point stressed by the President in his recent address to the nation: no matter how much the government does about the problem of drug abuse, in the long run, it is up to each American to make the drug-free decision. As the President stressed:

> As much financing as we commit, however, we would be fooling ourselves if we thought that massive new amounts of money alone will provide the solution. Let us not forget that in America people solve problems and no national crusade has ever succeeded without human investment. Winning the crusade against drugs will not be achieved by just throwing money at the problem.
>
> Your government will continue to act aggressively, but nothing would be more effective than for Americans simply to quit using illegal drugs. We seek to create

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[2] Employees who use drugs have three times the accident rate of non-users, double the rate of absenteeism, higher job turnover rates and cost three times as much in terms of medical benefits. See The Conference Board Research Report, "Corporate Strategies for Controlling Substance Abuse", The Conference Board, Inc., 1986; Peter Bensinger, "Drugs In The Workplace: Employer's Rights and Responsibilities"; National Institute on Drug Abuse National Household Survey.

> a massive change in national attitudes which ultimately will separate the drugs from the customer--to take the user away from the supply. I believe, quite simply, that we can help them quit.

Americans can beat the drug problem if we all work together as managers of the federal workplace, and guardians of public health and safety, it behooves us to begin with the problem in the federal workplace itself.

I

Let me turn now to the specifics of the President's program to foster a drug-free workplace. The Executive Order, by its very nature, sets forth a general authorization for a drug testing program without specifying in great detail how such a program would be conducted. While the details on how the Order will be implemented have yet to be decided, I would like to take this opportunity to elaborate on the sort of program which we envision and stress some of the protections which are to be included.

1. Employees Covered by the Random Testing Requirement. Under the President's Executive Order, the head of each agency can order testing of any employee where there is reasonable suspicion of drug use, in the course of a safety investigation, or as a follow-up to a rehabilitation program. Random or uniform drug testing would only apply to "employees in a sensitive position", defined in section 7(d) of the order by reference to

five separate catagories. These would include law enforcement personnel, employees designated Special-Sensitive, Critical-Sensitive and Noncritical-Sensitive under federal personnel rules, all presidential appointees, all employees with a secret and top secret security clearances and any other employees whom that agency head determines hold positions "requiring a high degree of trust and confidence."

Because of the great number of employees who necessarily must hold a top secret or secret security clearance, that category alone would extend coverage to a substantial number of employees. However, the total number the of persons falling into these categories is not an accurate measure of how many persons ultimately will be tested because, as the Executive order makes clear, the head of each agency will decide how many of the covered employees would actually be tested, based on the agency's mission, its employees' duties, the efficient use of agency resources and the danger to the public health and safety or national security that could result from the failure of an employee to adequately discharge the duties of his or her position.

In addition, the testing could take the form of random testing of only a fraction of covered employees each year. Our program will be flexible--testing frequency can be adjusted based upon extent of drug use and degree of job sensitivity. Most of these issues have yet to be resolved, but my point is that it is

misleading to imply that millions of employees will automatically be tested.

Of course, voluntary testing programs will be set up for non-sensitive employees. Finally, the order authorizes any applicant for a job to be tested for illegal drug use. Section 3(d).

2. **Reliability of Testing Procedures**. Many critics of drug testing have alleged that the "false positive" [3] error rate for the most commonly used drug tests can be as high as 20%, clearly an unacceptable level given the serious consequences which can follow a finding that an employee has used drugs. And there have apparently been abuses in the private sector, where employers have discharged employees based solely on a single, positive result from an unreliable first screening.

However, the Administration's proposal contains numerous safeguards to ensure reliability and fairness. First and foremost, the administration will not base any action on an initial test. Instead, following a positive test result indicating drug use, we would test the same sample using a second, much more reliable devices, such as the gas chromatography/mass spectrometry (GC/MS) test. This test is somewhat more expensive than the initial screening, but, as the

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[3] "False positive" refers to a test result which erroneously concludes that a subject is using drugs. A "false negative" means that a test failed to detect the actual presence of drugs in a specimen.

Office of Technology Assessment (OTA) has recognized, is virtually 100% reliable. We would agree with OTA's recent statement before this subcommittee that "when positive results from the screening tests are confirmed with a specific test such as GC/MS, the results are highly reliable and difficult to dispute." Testimony of Lawrence Miike, at pp 13-14.

Moreover, the order would require that, before conducting a drug test, the agency shall inform the employee of the opportunity to submit medical documentation that may support a legitimate use of a particular drug. Section 4(b). And all such information, as well as test results themselves, would be kept confidential. Section 4(c). In addition, the order provides that employees may rebut a positive drug test by introducing other evidence that an employee has not used illegal drugs. Technical and scientific guidelines are being drawn up by the Department of Health and Human Services. I can assure the Subcommittee that we have an unshakable commitment to ensuring the absolute integrity of our program.

Of course, there would be no way to detect a "false negative", short of performing the GC/MS in every case, which we do not see as cost-effective. However, a properly run testing program, such as that of DOD, only produce results in false negatives in 5% to 10% of samples, an acceptable number.

3. <u>Privacy Concerns</u>. Because there is a danger of an individual attempting to adulterate or substitute a specimen,

many firms which have used the urinalysis test, require that the sample be provided in the presence of, and under observation by an attendant. Obviously, this is a significantly greater infringement on an individual's privacy than if he or she is permitted to provide the sample behind closed doors, as is routinely the case in most physical examinations.

In an attempt to minimize the intrusiveness of the required drug test, the administration's Executive Order provides that "[p]rocedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided." Section 4(c). Although this might make it easier to adulterate a sample, it has been our experience under testing programs, that the mere fact that a test is required will ensure a significant deterrent effect. The percentage of employees who are sufficiently committed to illegal drug use that they are prepared to chemically tamper with a specimen, or to substitute a "clean" specimen, is so low as to have only a marginal effectiveness on the effect of the program.[4] We feel that with this single change, the program will be no more intrusive on an individuals privacy than an ordinary visit to the doctor.

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[4] After the 60 day general notice, testing need not be announced in advance, making it difficult to be prepared every day. Also, we could test for chemical tampering and where it is indicated, retest with observation.

4. **The Non-Punitive Nature of the President's Program.** Our program is premised on the President's strongly-held belief that federal employees who are found to be using drugs should be offered a "helping hand" to kick their habit. Each agency would be required to establish Employee Assistance Programs to ensure an opportunity for counseling and rehabilitation, Section 2(b)(2), and to refer employees to counseling if found to be using, illegal drugs. Section 5(a). The sixty-day warning period prior to implementation of a drug testing program would allow casual users to cease and addicts to come forward and request treatment. Moreover, no disciplinary action would be required for an employee who comes forward voluntarily and agrees to be tested, obtains counseling or rehabilitation, and refrains from illegal drug use in the future. Section 5(b).

Obviously, agencies must have the discretion to relieve employees in sensitive, and potentially life-threatening positions, of their assignments where drug use is indicated. Section 5(c). However, even here, the agency head would have the discretion to allow an employee to return to a sensitive assignment as part of a rehabilitation program.

Testing pursuant to the Executive Order cannot be done to gather criminal evidence and agencies are not required to report any such evidence.

5. **Procedural Protections.** Career employees in the civil service are protected by statute from preemptory dismissal or

discipline by their superiors. Instead, due process protections included in the Civil Service Reform Act ensure them of the right to notice and opportunity to respond before any adverse personnel action is taken and the right to an impartial adjudication of any subsequently filed appeal. None of these rights would be abrogated by the President's Executive Order, which expressly provides that "[a]ny action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act." Section 5(g).

II

Having outlined the President's program for fostering a drug-free workplace, I would like to turn now to the constitutional issues raised by the Order, and the use of drug testing generally. We are confident that Executive Order 12564 fully complies with all legal requirements.

Many critics of the President's program allege that drug testing contravenes the Fourth Amendment. The Justice Department recently filed a brief in support of the constitutionality of the Boston Police Department's drug testing program which sets forth our position on this issue in great detail. (A copy of our brief in that case, Guiney v. Roache, has been provided to the Subcommittee.) In that brief we explain that drug testing does

not implicate Fourth Amendment interests and that, even if it does, the reasonableness of random testing of employees in sensitive positions fully comports with the Fourth Amendment. A copy of the brief is attached to this testimony.

The President's program has been carefully designed to protect the interests of employees and, as such, satisfies even the strictest Fourth Amendment analysis. The government's weighty interests are recited in the preamble of the order and include the successful accomplishment of agency missions, the need to maintain employee productivity and the protection of national security and public health and safety. By requiring testing only for employees who occupy sensitive positions, the Executive Order ensures that the government interest will be substantial in every instance. Individual privacy interests are accommodated by the provision of the Executive Order which ensures that individuals must allowed to produce urine samples in private unless reasonably suspected of intending to alter the sample. Unobserved urine testing is no more intrusive than other devices routinely employed to test a federal employee's fitness for duty--including physical examinations, fingerprint checks or background investigations. Moreover, as noted above, the Executive Order contains an advance notice requirement, an opportunity to submit documentation to support legitimate medical use of drugs, and procedures to protect the confidentiality of those medical records, as well as test results.

III

Let me now turn to two statutory issues raised by the President's drug testing program: the so-called "nexus" requirement contained in the Civil Service Reform Act and the application of the Rehabilitation Act.

With respect to the first issue, we believe that a drug-free requirement for federal employees is reasonably related and furthers "the efficiency of the service" because illegal drug use - whether on or off duty - is inconsistent with the nature of public service, undermines public confidence in the government and entails unwarranted costs in terms of employee productivity.

The statutory issue arising from an application of the Civil Service Reform Act, is closely related to the Fourth Amendment balancing test question. As a general proposition, federal personnel law provides that adverse action can be taken against a covered federal employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). The Civil Service Reform Act of 1978 further barred discrimination against any covered employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. §2302(b)(10). Taken together, these two provisions are understood to require a

"nexus" between employee misconduct for which severe sanctions may be imposed and the employee's performance of his job.[5]

Within these constraints, the President has broad authority to define conditions of employment. Under 5 U.S.C. §3301, the President may prescribe regulations for the admission of employees that "will best promote the efficiency of the service," as well as "ascertain the fitness of applicants" for employment. This authority is contained under 5 U.S.C. §7301 which explicitly recognizes the President's authority to prescribe "regulations for the conduct of employees in the executive branch." These provisions afford the President broad discretion to define conditions of employment that will best promote the efficiency of the service. The President exercised his power under these authorities when Executive Orders were issued freezing federal hiring in 1981, and later barring the reemployment of air traffic controllers for participating in an illegal strike. The imposition of a drug-free requirement for federal employees is no less of an action to further the efficiency of the service.

First, there is no logical reason why federal service which turns on public trust requires tolerance of on-going illegal

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[5] The protection afforded by 5 U.S.C. §7513 applies to employees in the competitive service and certain preference-eligible employees in the excepted service whereas 5 U.S.C. §2302(b)(10) covers employees in the competitive service, career appointee members of the Senior Executive Service and most of the excepted service but for Schedule C employees and Presidential appointees. Because Schedule C appointees are not covered by either of the statutes, there is no nexus issue for these employees should a drug-free requirement be imposed by the President.

behavior by public servants. As noted above, the courts have recognized that "where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance," Allred v. Department of Health and Human Services, 786 F.2d 1128, 1131 (Fed. Cir. 1986). Similarly, "Congress expressly permitted removal of employees whose actions might disrupt an agency's smooth functioning by creating suspicion, distrust, or a decline in public confidence." Borsari v. Federal Aviation Authority, 699 F.2d 106, 112 (2d Cir. 1983). The illegal use of drugs by a federal employee--whether on or off duty--is inconsistent with the nature of public service and undermines the general confidence of the public in government. It also creates suspicion and distrust that is inimical to the cooperation among employees necessary for the efficient operation of an agency. See Wild v. United States Department of Housing and Urban Development, 692 F. 2d 1129, 1133 (7th Cir. 1982).

Second, employee drug use imposes an extraordinary cost on the government in terms of the safety of the workplace and employee productivity. Studies by the National Institute on Drug Abuse document that employees who use drugs have three times the accident rate as non-users, double the rate of absenteeism, higher job turnover rates and cost three times as much in terms of medical benefits. These high costs provide a sufficient foundation for any requirement that federal employees abstain from the use of illegal drugs, and demonstrate that there is a

clear nexus between drug abuse, employee productivity and the "efficiency of the service."

These concerns are expressly set forth in the Executive Order as Presidential findings to dispel any uncertainty over the fact that there is a nexus between drug abuse and the efficiency of the service.

Now let me turn briefly to the Rehabilitation Act, 29 U.S.C. §791, and its effect on the President's Executive Order. That Act prohibits discrimination against, and requires accommodation of persons suffering from handicapping conditions. Current regulations include drug addiction as a handicapping condition. 29 C.F.R. §1613.702. The Executive Order contains provisions to ensure that an employee who is addicted to drugs will receive counseling and therapy, Section 5(a), as required by the Rehabilitation Act. The level of accommodation provided is, we believe, adequate to satisfy the requirements of the Act.

Moreover,the Act applies only to drug "addicts"; it has no bearing on recreational users. Hence, individuals who could cease using illegal drugs but have not done so are not entitled to any protection under the Act.

Section 103 of the Administration's bill would provide that an individual could not be handicapped merely by reason of his or her drug addiction. (Those with other, physical, handicaps, would still be considered "handicapped" under the Act even if they are also drug users.) This change is needed because of the propensity of some courts to adopt an overly broad reading of the

Act, requiring repeated offers of rehabilitation before allowing the government to take action against drug addict who is unable to perform his job. See Whitlock v. Donovan, 598 F. Supp. 123 (D.D.C. 1984); Healy v. Bergman, 609 F. Supp. 1448 (D. Mass. 1985). It makes no sense to permit an employee to seek treatment, come back to work, fall off the wagon and resume drug use and then seek treatment again and again and again.

IV

Finally, I would like to discuss the various pieces of legislation which have been introduced bearing on the issue of drug testing. First, we have the administration's bill, which I understand will be introduced in the Senate by Senator Robert Dole and in the House by Congressman Shaw. While not expressly authorizing a drug testing program, it would make a useful contribution by clarifying current law to make clear that neither the Rehabilitation Act nor the Civil Service Reform Act would affect our program. I should stress at the outset that we feel that the President's program, as set forth in Executive Order 12564 is fully consistent with the requirements of those two statutes, for the reasons set forth above. However, we can foresee legal challenges based in whole or in part on those statutes, and we feel that Congress ought to amend the law to set those issues to rest.

Two other bills would also authorize or require drug testing in some measure. Congressman Clay Shaw's bill, H.R. 4636, would require that each federal agency and member of Congress institute a drug testing program for employees having access to classified information. This bill is premised on the sound recognition of the fact that employees with drug habits are particularly susceptible to blackmail and the temptation to sell classified information to agents of foreign government in order to get money to buy drugs.

Congressman Charles Schumer recently introduced H.R. 5530, a bill to extend many of the protections which will be included in the administration's drug testing program to similar programs in the private sector. While considerations of federalism and other limitations on federal authority may preclude us from supporting a sweeping federal regulatory scheme in this area, we are heartened by Congressman Schumer's recognition that a carefully tailored program of drug testing can play a major role in reducing the scourge of drug use. We also share his view that any program of drug testing must be carefully designed to include basic protections to ensure accuracy and fairness. A second confirmatory test if an initial screening indicates drug use and an opportunity for the employee to examine test results are clearly essential to any effective program. It is our hope that firms in the private sector would voluntarily adopt these protections without the need for federal legislation.

Finally, we come to H.R. 5531, Mr. Chairman. This legislation would bar any use of drug tests in the federal service except where two of an employee's supervisors concur that his performance is impaired and that the impairment is due to his "then being under the influence of a controlled substance." Thus, this approach would not only bar random testing, but would also bar testing where a supervisor concluded that there was a reasonable suspicion of off-duty drug use. We cannot share the view that the use of illegal drugs is acceptable behavior as long as it is not done on the job. The President feels that there is too much at stake to permit federal employees with the responsibility for public health, safety and national security the unrestricted right to use marihuana, cocaine, heroine or PCP as long as they not do it at the office.

This bill would effectively block most existing drug testing programs; only the CIA and NSA would be exempted from its restrictions. We cannot share the belief that illegal drug use by agents of the FBI and DEA--and both of these agencies recently instituted drug testing programs--is not something we should be trying to detect and halt.

Moreover, even the limited testing which the bill purport to authorize--upon reasonable suspicion of the employee then being under the influence of drugs--would not be effective. By authorizing suit against the government for any infringement of rights under the statute, the bill would have a chilling effect on any exercise of this authority.

We do not believe that H.R. 5531 is premised on a realistic recognition of the very real problems of drug use. Instead it seems to accept and countenance drug use by federal employees, by codifying a right to be free from discipline for such behavior. We simply have no sympathy for that view Mr. Chairman. And we do not feel that the American people share it either.

That concludes my prepared statement. I would be happy to answer any questions which the Subcommittee might have.

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Law Reform Commission
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Working Paper 52

PRIVATE PROSECUTIONS

1986

Notice

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

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

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CHAPTER ONE

Introduction

"It is the essence of a crime that it is a wrong of so serious a nature that it is regarded as an offence, not merely against an individual but against the State itself."[1] In the modern Canadian criminal justice system, adherence to this basic proposition has led to the creation of the office of the Crown attorney or public prosecutor, it being believed that offences against the state should be prosecuted in the name of the state by state officials. These public officials conduct and oversee the vast bulk of the prosecutions of criminal offences in Canada. The residual cases, although comparatively few in number, nevertheless are of some concern to those engaged in the administration of criminal justice in Canada. The rights and standing of a private prosecutor in the prosecution of criminal offences are an issue possessing an importance greater than its modest area of practical operation would indicate.

The role of the prosecutor, whether public or private, is a very special one in any system of criminal justice. This Working Paper seeks to examine and analyse the powers and obligations of the private prosecutor in Canada primarily for the purpose of assessing the desirability of retaining such a function at this point in our legal and social history. Consequently this Working Paper is concerned with the role, both actual and potential, of the private prosecutor in Canada.

For the purposes of this Working Paper, we understand a private prosecutor to be an individual, or group or corporation (other than a public authority) not acting in any public capacity. Although theoretically most prosecutions are "private" in the sense that they are pursued by various public officers who have no powers beyond those possessed by the private citizen, they are not private prosecutions in the sense of the term as used in this Paper.[2]

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1. F. Kaufman, "The Role of the Private Prosecutor: A Critical Analysis of the Complainant's Position in Criminal Cases" (1960-1), 7 *McGill L.J.* 102, citing *Tremeear's Annotated Criminal Code of Canada*, 5th ed. (1944), p. 1.

2. Cf. P. Howard, *Criminal Justice in England: A Study in Law Administration* (New York: 1931). At page 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.' "

There has been very little written on the subject of the private prosecutor. In Canada there are only three substantial Papers on this subject.[3] Indeed, remarkably little has been written on the status of the prosecutor generally, whether private or public.[4]

The prosecutor has a pivotal role to play in our adversary system. As we have explained in our Working Papers on *Discovery*[5] and *Control of the Process*,[6] the criminal trial is structured as a dispute between two sides: the prosecutor (usually the Crown) and the accused. The formulation of the legal and factual issues in the dispute and the presentation of the evidence on those issues are the responsibility of the parties, a task that owing to allocation of the burden of proof in criminal trials falls primarily to the prosecution. The trial judge does not play an active role in the definition or presentation of evidence. It is his task to ensure that the rules of procedure are observed by the contestants and to render a decision on the issues before him.

It would be perfectly consistent with the model of the adversary system presented above to state that charging decisions should be solely the responsibility of the Crown. Our law and practice do not, however, present so simple a solution. Responsibility for charging decisions is in fact dispersed in such a manner as to defy either brief description or easy rationalization. In part, the complexity of the present arrangement is a product of history; its retention perhaps represents an instinctive reluctance to bestow upon any one individual or authority the broad powers inherent in the charging process. This is because control of the charging process is of crucial importance. If a person is charged with, and tried for, assault and the evidence proves not assault but theft, he must be acquitted. An offender may only be brought to trial and convicted for the offences specified (or included) in the charge against him. The charge, over which the prosecutor has control, forms the basis for determining all issues in the proceedings. This is an outgrowth of the principle of legality which indicates that no one may be prosecuted except for an offence created by statute or by statutory authority. The corollary of this is that no one may be convicted except for an offence specified in the charge which comes before the trial court.

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3. See: P. Burns, *Private Prosecutions* (1973, unpublished LRCC Paper); Kaufman, *supra*, note 1; and S.H. Berner, *Private Prosecution and Environmental Control Legislation: A Study* (commissioned by the Department of the Environment, September 1972). See also: LRCC, *Criminal Procedure: Control of the Process* [Working Paper 15] (Ottawa: Information Canada, 1976); P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975), 21 *McGill L.J.* 269; and P. Burns, "The Power to Prosecute" in J. Atrens, P. Burns and J. Taylor, eds., *Criminal Procedure: Canadian Law and Practice* (Vancouver: Butterworths, 1981), Chapter V, pp. 8-34.

4. For an excellent and detailed account of prosecutorial authority in Canada see P.C. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986). The classic work in the field has long been recognized to be J.L. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964).

5. LRCC, *Criminal Procedure: Discovery* [Working Paper 4] (Ottawa: Information Canada, 1974).

6. LRCC, *supra*, note 3. Portions of the ensuing discussion in this chapter have been culled from this publication.

In Canada the role of the private individual within our prosecution system is recognized in his ability to bring charges (or in the legal vernacular, to "lay an information") and in his limited and ill-defined authority to conduct the prosecution of certain categories of cases. In the pages that follow, we will discuss the role of private prosecutions within our system and examine the competing policies which affect the shape of potential reform in this area. Also, in order to better assess the specific kind of reform which is necessary, we have devoted attention to the present law governing private prosecutions in Canada today.

As will become evident, it is our belief that a criminal justice system that makes full provision for private prosecution of criminal and quasi-criminal offences has advantages over one that does not. In any system of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity for a citizen to take his case before a court, especially where a public official has declined to take up the matter, is one way of ensuring such participation.

Of course there may be, as a matter of policy, offences that owing to their peculiar subject-matter, should not be susceptible to private prosecution. However, this difficulty may be easily resolved in a number of ways; for example, by drafting such offences so as to require a public official (namely the Attorney General) to pursue them, or perhaps by statutorily barring private prosecution of such offences in the absence of specified consent.

Certain kinds of offences may be more likely to inspire a citizen or a group to launch a private prosecution. Offences relating to environmental quality and consumer protection (while not the actual focus of this Paper) are those that most readily spring to mind. In both of these areas we have seen the phenomenon of civic activism. Large groups of people are committed to the enforcement of the values contained in this type of legislation. For reasons which are developed within, it is this type of quasi-crime or regulatory offence that seems most likely to be given a lower priority in the public prosecutor's or Crown attorney's scale of importance. In making this observation we are not thereby denigrating the importance of granting access to prosecutorial opportunities to ordinary citizens in relation to so-called "true" crimes. But we do believe that it is a reasonable speculation that private prosecutions of true crimes will be heavily outnumbered by private prosecutions of regulatory offences. True crimes and the mechanisms for their prosecution within the criminal justice system, however, remain the primary concern of this Working Paper.

We have come to support expanded rights of private prosecution because of the particular view which we take of the optimum role to be played by the victim and citizen in the criminal justice process. In so doing we are mindful of the fact that a private prosecutor will often encounter significant procedural difficulties and expense in choosing to launch or to bring a private prosecution. Undeniably, significant practical problems exist. First among these is that of actually gathering evidence for presentation in court, while another is the possibility of apathy or even antipathy of the Crown agencies that may have material that is relevant to the case which he wishes to pursue.

If the Crown proves to be unco-operative, it is possible that a private prosecutor will not succeed in obtaining the desired material. (We are advised that the usual practice in cases which are pursued privately is for the police investigators to turn their information and files over to the Crown prosecutor's office rather than to provide the aggrieved individual directly with the material.) The Crown attorney then has the responsibility to determine how much disclosure is to be made to any individual who wishes to prosecute a case privately. Accordingly, it is likely to be only the most determined and aggrieved of individuals who will attempt to pursue the criminal law in a private capacity. Given the existing safeguards (which we do not seek to diminish) reflected in the Crown's power to intervene, it is our submission that the private prosecution has a practical, responsible and real role to play in our criminal legal process. This role should be overtly recognized, and as well, formal aspects of it ought to be directly incorporated into the rules of criminal procedure in the *Criminal Code*.

Our conclusions have not been reached in a vacuum. We have examined the comparative experience of other countries and other societies. We have not restricted ourselves to the common law experience, but have examined the position of the prosecutor in both civilian and common law systems. Although the role of the private prosecutor shifts and has different manifestations from jurisdiction to jurisdiction, the weight of the evidence has compelled us to conclude that the private complainant should have a vital role to play in the Canadian criminal justice system. Since we believe that the product of our historical and comparative research is highly relevant to an informed consideration of this subject, we are presenting some of it in an Appendix to this Working Paper. In general we have concluded that the retention and expansion of the right of private prosecution in Canada would respect a value that is reflected in the ideological history of the criminal law itself. Also, we believe that this approach is consistent with the basic principles which ought to activate an effective criminal justice system; namely, economy, accountability and restraint. Moreover, we view private prosecutions as an appropriate adjunct to the fair and humane administration of justice.

For reasons which follow we have concluded that, as nearly as possible, the private prosecutor ought to enjoy the same rights as the public prosecutor in carrying his case forward to trial and ultimately to final disposition on appeal. This is a modest proposal but an important one, since it underscores our belief in the value of citizen/victim participation in the criminal justice system and serves to reinforce and demonstrate the integrity of basic democratic values.

CHAPTER TWO

The Law Governing Private Prosecutions in Canada Today

The major problem in investigating the law relating to private prosecution in Canada is a real scarcity of authority on the many important questions that arise.[7]

Canadian criminal law is derived from English law in terms of both its substance and its procedure. Therefore, *Criminal Code* subsection 7(2)[8] states that, except as altered, varied, modified or affected by the *Criminal Code* or any other federal enactment, the criminal law of England that was in force in a province immediately prior to April 1, 1955 (the date of the last comprehensive revision of the *Criminal Code*) continues in force. Accordingly, to a considerable extent the old English procedure still holds sway in Canada and "decisions on procedure under the old *Code*, except as they are rendered inapplicable by the provisions of the new *Code*, still stand good."[9]

The question then is whether the criminal law of England with regard to private prosecutions has been altered in the Canadian context by the terms of the *Code* itself or by the Canadian judicial decisions of the last thirty years. The general rule in England is very simple: "Under English law there is ... not the slightest doubt that a private prosecutor could on 19th 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."[10] Having regard to the fact that "there is not clear statutory provision — federal or provincial — which expressly and directly either affirms or denies the right

7. Berner, *supra*, note 3, p. 29.

8. All references to the *Code* or the *Criminal Code* are to R.S.C. 1970, c. 34, as amended.

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

10. *Ibid.* But even in 1957 when Wilson J. made this assertion, not all such offences were capable of being "carried through": Royal Commission on Criminal Procedure, *Prosecutions by Private Individuals and Non-Police Agencies* [Research Study No. 10] Appendix F (London: HMSO, 1980).

to conduct a private prosecution,''[11] one must then ask, 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.[12]

I. Laying the Information

All criminal proceedings are initiated by the laying of an ''information''[13] (a technical term referring to a form of criminal charge) pursuant to section 455 of the *Code*. That provision states:

> Any one who, on reasonable and probable grounds, believes that a person had committed an indictable offence may lay an information in writing and under oath before a justice ....[14]

A justice is obliged to receive the information[15] if all the formal requirements are met; if he refuses on the ground that he has no jurisdiction, his decision is reviewable by a superior court, the matter being a question of law.[16]

At this point it is worth while noting that pursuant to section 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; ....'' [Emphasis added] Under Part XXIV of the *Code*, which is concerned with the summary conviction procedure which governs minor criminal offences, 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 behest or complaint of a private individual. This is significant, for the informant need not be a witness to the events constituting the alleged offence. However, he must have reasonable and probable grounds (that is, objectively reliable information) for his belief that it was committed by the accused. No material interest of the informant needs to have been affected to entitle him to lay the information.[17] He or she need not be the victim of the crime. The information may be laid in his or her

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

12. This process in general terms also pertains to provincial offences and offences under by-laws.

13. Other than ''preferred'' indictments under sections 505 and 507 of the *Code*.

14. *Criminal Code*, s. 455. The same is true of summary conviction offences as a result of section 723 of the *Code*.

15. Berner, *supra*, note 3, p. 4.

16. *R. v. Meehan (No. 2)* (1902), 5 C.C.C. 312, 3 O.L.R. 567 (H.C.).

17. Berner, *supra*, note 3, p. 4.

own name rather than that of the Crown;[18] and the document need not formally state that it is "for and on behalf of Her Majesty the Queen."[19]

II. Appearance by the Accused

Once the information has been laid, the accused is compelled to attend before a court to answer the allegations contained in it. The *Criminal Code* contains provisions which require a justice to hear the informant's allegations and possibly also the evidence of witnesses where he considers it desirable or necessary to do so before compelling the appearance of the accused by issuing process. He is empowered to issue (a summons or a warrant) or confirm process "where he considers that a case for so doing has been made out, ..."[20]

This power to issue or confirm process has been described as "a matter that is wholly within [the magistrate's] discretion. Even if the [magistrate] were to make an erroneous determination on the law in exercising that discretion, *mandamus* cannot lie."[21] Accordingly, a prosecutor is unable to *require*, through resort to judicial review, a justice to issue process to compel the accused's attendance in court.[22]

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 another justice (using the same information) or by swearing out another information before another justice.[23]

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18. There had been some doubt as to this expressed by Kaufman, *supra*, note 1, pp. 102-13, based on older Québec decisions. But in the decision of the Manitoba Court of Appeal in *Mandelbaum* v. *Denstedt* (1968), 5 C.R.N.S. 307 (Man. C.A.), after a careful analysis of the case-law, the court concluded that an information could be laid in the name of the prosecutor without reference to the Crown. However, it is an open question whether or not, as a result of this case, 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.).

19. *Mandelbaum* v. *Denstedt*, *id.*, p. 313.

20. *Criminal Code*, ss. 455.3(1)(*b*), 455.4(1)(*b*).

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

22. See also: *R.* v. *Doz* (1968), 5 C.R.N.S. 86 (Alta. S.C.); *Re E.J. Parke* (1899), 3 C.C.C. 122, 30 O.R. 498 (H.C.); *Broom* v. *Denison* (1911), 20 O.W.R. 30, *aff'd* 20 O.W.R. 244 (C.A.); *Blacklock* v. *Primrose*, [1924] 3 W.W.R. 189 (Alta. S.C.); and *R.* v. *Jones, Ex parte Cohen*, [1970] 2 C.C.C. 374 (B.C. S.C.).

23. 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 Steel Ltd.*, [1968] 1 C.C.C. 356, 2 C.R.N.S. 46 (Ont. C.A.). In this case no reference was made to the *Barrick* decision. This writer agrees with Berner, *supra*, note 3, p. 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.

III. The Hearing

A. Summary Conviction Offences[24]

All summary conviction offences[25] are dealt with by the procedure laid down in Part XXIV of the *Code*. It is now perfectly clear from the wordings of section 720 of the *Code* that "[t]here is nothing in Part XXIV which bars the basic right, derived from English law, of a private citizen to conduct a private prosecution."[26] The law was not always so unambiguous.

This was because the definition of "prosecutor" contained in the pre-1985 version of *Code* subsection 720(1) was said to include "an informant or the Attorney General or their respective counsel or agents; ...."[27] The use of the term "or" was believed to contemplate the situation where the Attorney General or his agent was not a party to the proceedings.[28] Section 720 now provides that " 'prosecutor' means the Attorney General, or where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them."

Under *Code* subsection 736(3), the evidence of the witnesses for the prosecutor must be taken by the summary conviction court where the accused pleads not guilty, and under section 737 the "prosecutor" (as defined above) is entitled "personally to conduct his case" and may examine and cross-examine witnesses himself or by counsel or agent. Since a "prosecutor" includes an "informant," a private person can personally prosecute the case summarily or prosecute through counsel or an agent.[29]

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24. See: Kaufman, *supra*, note 1, pp. 103-4; Berner, *supra*, note 3, pp. 8-10.

25. These include all provincial offences, summary conviction federal offences and indictable offences triable summarily at the discretion of the prosecutor; see *R.* v. *Seward* (1966), 48 C.R. 220 (Y.T. 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.).

26. *Schwerdt*, *supra*, note 9, pp. 40-1, *per* Wilson J. (B.C. S.C.). See also *Re McMicken* (1912), 3 W.W.R. 492 (Man. C.A.).

27. Kaufman, *supra*, note 1, pp. 103-4, points out a limitation existing in Québec 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 section 2 of the *Code* to include private prosecutors. This definition applies to indictable proceedings.

28. See, for example, *R.* v. *McIlree*, [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, but 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.

29. That is, in the absence of intervention by the Attorney General or his agent. 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.); *R.* v. *Devereaux* (1966), 48 C.R. 194 (Ont. C.A.); *MacIsaac* v. *Motor Coach Industries Ltd.* (1982), 70 C.C.C. (2d) 226 (Man. C.A.). Berner, *supra*, note 3, p. 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 *Code* section 737, this view can no longer be sustained.

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. By contrast, the summons or warrant (which signals the authority of the state) issues in the name of the Crown. But what of the prosecution itself? There is authority to suggest that in Québec, at least, proceedings for summary conviction offences may be conducted in the name of the private prosecutor.[30] There is conflicting authority in other jurisdictions.[31]

In one case, *R.* v. *Devereaux*,[32] 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 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 therefore it 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.[33] [Emphasis added]

If this view of the commencement of the prosecution were to govern, then the question of setting forth the names of the parties in the style of cause is meaningless since, as a practical matter, all criminal and quasi-criminal actions eventually involve documents such as the summons or warrant which indicate the Crown's interest in the proceedings.[34] By this view all proceedings are notionally carried on in the name of the Crown, even though the Crown may not regard itself as a party to the proceedings. The practice of styling documents in the name of the Crown or even in conjunction

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30. *Gagnon* v. *Morin* (1955), 116 C.C.C. 104 (Qué. S.C.).

31. *Beauvais* v. *The Queen*, [1956] S.C.R. 795. 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 procesutions 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* (1964), 45 C.R. 198 (Man. C.A.) appeared to take this view too, but the decision of the Manitoba Court of Appeal (*Usick* v. *Radford*, *supra*, note 18) decided that the *Campbell* case was no longer authoritative. In *Usick* an information sworn out by the private prosecutor in his own name was held to be valid. 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.

32. *Devereaux*, *supra*, note 29.

33. *Id.*, p. 197, *per* Kelly J.A. See also *MacIsaac* v. *Motor Coach Industries Ltd.*, [1982] 4 W.W.R. 436 (Man. Co. Ct.); *aff'd supra*, note 29.

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

with the Crown would exist, on this reasoning, largely out of an abundance of caution.[35]

Under section 734 of the *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.

B. Indictable Offences

It is in the area of indictable offence procedure that a strong argument can be made in support of the view that the common law has been "altered, varied, modified, or affected" so as to make inroads in, if not replace, the common law. The common law is relatively 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.[36]

The provisions in the *Code* dealing with the disposition of indictable offences differ in many respects from those presently existing in England, some of them being apparently inconsistent with the theory that a private prosecutor may carry the matter forward. There are presently three alternative modes of trial of indictable offences: (1) trial before a judge and jury;[37] (2) "speedy trial" without a jury but before a judge as defined in Part XVI;[38] and (3) summary trial before a provincial court judge.[39]

If the trial is to be before a judge and jury or a speedy trial, a preliminary hearing is ordinarily convened.[40] Under sections 496 and 504 to 507 of the *Code*, as amended by 1985, c. 19, s. 111, proclaimed in force December 2, 1985 (hereinafter also referred to as the *Criminal Law Amendment Act, 1985*), the public prosecutor or Crown attorney may prefer an indictment against any person who elects to be tried before a judge and jury or who has been ordered to stand trial. Where a preliminary inquiry has not been held, or has been held but the accused has been discharged, an indictment shall not be preferred without the personal written consent of the Attorney General or

35. Presumably, in the light of *McIlree*, *supra*, note 28, 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.

36. *Schwerdt*, *supra*, note 9, p. 38. This is subject to some exceptions: see Royal Commission on Criminal Procedure, *supra*, note 10, Appendix F.

37. *Criminal Code*, ss. 427, 484.

38. *Criminal Code*, ss. 484, 488, 489.

39. *Criminal Code*, ss. 483, 484, 487. The procedure adopted is that laid down under Part XVI.

40. Under Part XV of the *Code*. No preliminary hearing is necessary where an indictment has been preferred pursuant to sections 505 and 507 of the *Code*.

his deputy, or the written order of a judge of the court. A formal indictment is unnecessary if the accused is being tried summarily.[41]

Where the prosecutor is other than the Attorney General and the Attorney General has not intervened, the law now requires that the private prosecutor must obtain a written order of a judge of the court in any case before an indictment is preferred.

In *Schwerdt*,[42] perhaps the leading case on the status of the private prosecutor in Canada prior to the enactment of the *Criminal Law Amendment Act, 1985*, 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.[43]

(2) A preliminary hearing may be conducted by a private prosecutor.[44] This conclusion may be drawn from the term "prosecutor" as used in Part XV of the *Code*, dealing with preliminary hearings. The meaning is that laid down in section 2 of the *Code* which, as was noted in the discussion on 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."[45] This is because under section 496 of the *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 Attorney General, and in the Province of British Columbia may be preferred by the clerk of the peace." The language is mandatory and only if the Attorney General so permits 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.[46] (This particular holding, while accurate until very recently, is no longer authoritative. Recent legislative amendments to sections 504 and 507 of the *Code* repose the power to consent to the preferment of an indictment in a judge of the court rather than in the Attorney General.)

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41. *Beauvais* v. *The Queen*, *supra*, note 31. If the accused is being tried under Part XVI of the *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 *Re McMicken*, *supra*, note 26.

42. *Supra*, note 9, p. 46.

43. See *Re McMicken*, *supra*, note 26. We have already dealt with the provisions of Part XXIV of the *Code* that support this conclusion as regards summary conviction offences. Note that the judicial officer conducting summary trials is now a provincial court judge, not a magistrate.

44. Unless, of course, the Crown has intervened. *Schwerdt*, *supra*, note 9, p. 40.

45. *Id.*, p. 46.

46. Berner, *supra*, note 3, p. 13.

(4) On trial by judge and jury the private prosecutor may be heard by leave of the court or the Attorney General.[47] Wilson J. reached this conclusion in 1957 largely through the combined effect of the term "prosecutor" appearing in a number of sections of Part XVII of the *Code* (such term including "private prosecutor" under section 2 of the *Code*) and then subsection 507(2), whereby "[a]n 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[48] or of the Attorney General or in any province to which this section applies, by order of the court." Wilson J. held that this provision, together with the former section 558 of the 1955 *Code* which distinguished between "the Attorney General or Counsel acting on his behalf"[49] 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"[50] and that no clause in Part XVII forbids such a prosecution either expressly or by necessary implication.[51] (Here again the law has recently been altered by legislative amendment. The statute is now clear as to the private prosecutor's right to prefer an indictment in cases involving trial by jury so long as the written order of the court has been obtained. The option of obtaining a consent from the Attorney General no longer exists.)

Wilson J. was also of the opinion that "if the Court can allow a citizen to prefer an indictment [pursuant to then subsection 507(2)] it must also allow him to prosecute on it, otherwise the provision has no practical usefulness."[52] It should be noted that the indictments preferable under section 507 of the *Code* may be laid "even in cases where there was no preliminary inquiry or where the accused was liberated at the *enquête*."[53] This situation remains unchanged under the current law.

Schwerdt[54] was concerned with a finite issue: Can a private prosecutor conduct a summary trial or preliminary inquiry relative to an indictable offence? In affirmatively answering these questions, Wilson J. in his judgment went beyond the strict confines of the issues raised and indulged in extensive *obiter dicta* (indeed he specifically acknowledged this),[55] but his is the only judicial attempt based on a complete analysis

47. *Schwerdt*, *supra*, note 9, p. 46.

48. A court should only grant consent to a private prosecutor to prefer an indictment: (a) if a preliminary hearing has been held, only when it is needed to prevent a miscarriage of justice, and (b) if there has been no preliminary hearing, only if there are urgent and other persuasive reasons: *Re Johnson and Inglis* (1980), 52 C.C.C. (2d) 385 (Ont. H.C.).

49. This 1955 section has been replaced by section 578 of the *Code*, where only the term "prosecutor" is used. The change does not reduce the force of Wilson J.'s argument.

50. *Schwerdt*, *supra*, note 9, p. 41.

51. There are provisions dealing with defamatory libel that specifically acknowledge the role of the private prosecutor: sections 566 and 656 of the *Code*.

52. *Schwerdt*, *supra*, note 9, p. 41.

53. Kaufman, *supra*, note 1, pp. 106-7. See *R.* v. *Beaudry*, [1967] 1 C.C.C. 272 (B.C. C.A.) for a full, though somewhat dated, discussion of this matter.

54. *Supra*, note 9.

55. *Id.*, p. 42.

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 (although there is little real difference in this regard between the two systems).[56]

Section 504 now grants a prosecutor the power to prefer a bill of indictment against an accused regarding any charge founded on facts disclosed at the preliminary hearing, in addition to or in substititution for any charge on which that person was ordered to stand trial.

The *Schwerdt*[57] case has not been free of criticism.[58] 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 since this is a matter which may be determined by the accused himself? Yet, as one author has pointed out, "[i]t is difficult to find fault with [the learned judge's] reasoning."[59] As noted, the ambiguities of the law in this regard have in large measure been rectified and clarified by the enactment of the *Criminal Law Amendment Act, 1985*.

IV. Appeals

In our examination of 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 *Code*. The conclusion reached, based largely on the reasoning in *Schwerdt*, was that the common law had been altered so far as indictable proceedings were concerned. However, in the area of appeals the emphasis changes: "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 statute."[60]

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56. The only difference seems to 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 (*Criminal Code*, s. 505(4)). The only grand jury jurisdiction now remaining in Canada is in Nova Scotia (*Criminal Code*, s. 507(1)).

57. *Supra*, note 9. This, after all, is only a decision of court of first instance.

58. Kaufman, *supra*, note 1, p. 113.

59. Berner, *supra*, note 3, p. 13.

60. L.J. Ryan, ed., *Tremeear's Annotated Criminal Code*, 6th ed. (Toronto: Carswell, 1964), p. 1547, citing a dictum by Hall J. in *R.* v. *Joseph* (1900), 11 Que. K.B. 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 strictly complied with." This has a practical effect, as Berner, *supra*, note 3, p. 18, 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*.

What then have been 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 section 748 of the *Code*. Under paragraph (*b*), "the informant, the Attorney General or his agent ..." may appeal from an order dismissing an information or against sentence.[61] Therefore, this provision does confer on a private prosecutor the right to appeal against dismissal of the action or the sentence imposed.[62] As a matter of procedure, no reference to the sovereign needs to be made where an informant is appealing.[63]

The situation is quite different, however, when one is dealing with indictable offences. Statutory provisions stipulate that only the person convicted[64] or the Attorney General or counsel instructed by him[65] has standing in appeals to the court of appeal or the Supreme Court of Canada.[66] These provisions, by their terms, do not grant a private prosecutor the power to pursue an appeal. How can this apparent anomaly be explained? Perhaps by viewing this state of affairs as a compromise:

> [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.[67]

This rationalization in our view is likely to be small comfort to the unsuccessful prosecutor in proceedings on indictment, who, having a legitimate ground of appeal, learns that his interest ceases with the trial of the accused[68] and that the doors to the

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61. See Ryan, *id.*, p. 1550, and L.J. Ryan, ed., *Tremeear's 1971-1984 Criminal Annotations* (Toronto: Carswell, 1984), pp. 866-8. The same right is conferred on a private prosecutor in relation to appeals by way of stated case under section 762 of the *Code*.

62. Berner, *supra*, note 3, p. 17, considers the private prosecutor to have the right also to appeal against *conviction*. But this power is confined to the defendant under paragraph 748(*a*) of the *Code*. A private prosecutor (informant) may, under paragraph 748(*b*), appeal from an order dismissing an information or against the *sentence* passed upon the defendant.

63. *R.* v. *Allchin* (1971), 6 C.C.C. (2d) 332, [1972] 2 O.R. 580 (C.A.). This case concerned dismissal of an information.

64. *Criminal Code*, s. 603.

65. *Criminal Code*, s. 605.

66. *Criminal Code*, ss. 618-621.

67. Berner, *supra*, note 3, p. 18.

68. The protection of the accused is extended in any event by section 612 of the *Code*, granting an appeal court the summary power to terminate frivolous or vexatious appeals. This is largely nullified by subsection 610(3), whereby the appeal court has no power to award costs. Such costs are now regarded as available in summary conviction appeals: *R.* v. *Ouellette*, [1980] 1 S.C.R. 568; *R.* v. *Crosthwait*, [1980] 1 S.C.R. 1089.

appeal courts are closed to him. However, the law on this is clear: a private prosecutor has no standing in indictable appeals even though he possesses the ability to pursue an appeal from summary conviction proceedings.

It would also seem that so long as the Crown has not intervened, the private prosecutor as a litigant can seek judicial review or extraordinary remedies in summary conviction matters but has no such ability in relation to those indictable offences which he may not pursue.[69]

V. Miscellaneous Interventions 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.

The first is *intervention for the purpose of exercising control over the course of the prosecution at a public level*. In *R.* v. *Leonard*,[70] Kirby J. took the view that the provincial Attorney General had an inherent power to intervene and withdraw an information alleging theft laid by a private prosecutor. This discretion to *withdraw* is described as being "judicial" in nature, which normally means that judicial review of the activity is possible. However, the courts are most reluctant to interfere with an Attorney General's exercise of this discretion.[71] Such a withdrawal by an Attorney General has been found not to conflict with the provisions of the *Canadian Bill of Rights*.[72] The Crown can also intervene to *pursue* the prosecution 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."[73] This occurred in *Re Bradley and The Queen*,[74] a private prosecution arising out of a labour dispute where the charge was the summary conviction offence of intimidation under paragraph 381(1)(*a*) of the *Code*. The Ontario Court of Appeal upheld the provincial Attorney General's power (through his agent) to intervene and

69. In those indictable offences which the private prosecutor can pursue, the Crown is rendered a party for this purpose.

70. (1962), 37 C.R. 374 (Alta. S.C.). See also *Re Dick*, [1968] 4 C.R.N.S. 102 (Ont. S.C.).

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

72. S.C. 1960, c. 44; *R.* v. *Leonard*, *supra*, note 70, pp. 381-2. It is probably also consistent with the provisions of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, c. 11 (U.K.).

73. *Campbell* v. *Sumida*, *supra*, note 31, p. 207, *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 formed the opinion that although the private prosecution was abusive the proceedings nevertheless *should* be taken against the accused. It should be noted that *Campbell*'s case is no longer authoritative insofar as style of action is concerned: *Usick* v. *Radford*, *supra*, note 18, p. 192.

74. (1975), 9 O.R. (2d) 161 (C.A.).

proceed with the case even though the private prosecutor had advised the remand court that he wished to withdraw the charge. Arnup J.A. speaking for a unanimous court stated:

> The Attorney-General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. The role of the private prosecutor, permitted by statute in this country, is parallel to but not in substitution for the role of the Attorney-General, and where the two roles come into conflict, the role of the Crown's prosecutor is paramount, where in his opinion the interests of justice require that he intervene and take over the private prosecution.[75]

However, does the power in the Attorney General to intervene and withdraw an information apply to both summary conviction and indictable offences? *Leonard* was concerned with an indictable offence. This class of criminal offence is clearly susceptible to such intervention as a result of the meaning of the term "prosecutor" in section 2 of the *Code*[76] which applies to Parts XV and XVI of the *Code* governing the preliminary inquiry and trial procedure of indictable offences. Where the Attorney General does intervene, he, or his agent, becomes the prosecutor and the private prosecutor has no standing.

Part XXIV of the *Criminal Code*, dealing with summary conviction offences, previously had its own definition of "prosecutor" in subsection 720(1)[77] which made no specific mention of the power of intervention by the Attorney General. However, the definition of "prosecutor" was amended in 1985.[78] The amended text now provides that the term "prosecutor," for the purpose of summary conviction offences, includes the Attorney General or, where the Attorney General does not intervene, the informant, or counsel or an agent on behalf of either of them.[79] The amendments to the *Criminal Code* are a clear indication that Parliament did not intend, in minor cases, to strip the Attorney General of the capacity to control abusive prosecutorial practices — especially when he has a formal obligation otherwise to assure himself of the integrity of all prosecutions.

The second kind of intervention is *intervention in order to stay proceedings*. The power to enter a stay of proceedings,[80] which is vested in the Attorney General or

75. *Id.*, p. 169.

76. Section 2 of the *Code* states: "'prosecutor' means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings ..."

77. Subsection 720(1) of the *Code* prior to the proclamation of the *Criminal Law Amendment Act, 1985* provided: "'prosecutor' means an informant or the Attorney General or their respective counsel or agents; ..." In the amended definition: "'prosecutor' means the Attorney General or where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them; ..."

78. See the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 169(1).

79. Note also that summary conviction offences are subject to a stay of proceedings (*Criminal Code*, s. 731).

80. *Criminal Code*, ss. 508 (indictable offences) and 731 (summary conviction offences). This was known as *nolle prosequi* at common law. See *Beaudry*, *supra*, note 53. An Attorney General cannot intervene to stay proceedings by a private prosecutor commenced by preferring an indictment by consent of a judge: *Re Johnson and Inglis*, *supra*, note 48.

counsel instructed by him, is regarded as being of particular social value where abusive private prosecutions have been initiated.[81] 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. Nevertheless, the courts have been at pains to insure that the Attorney General remains accountable to the legislature for his actions.

The recent case of *Dowson* v. *The Queen*[82] established that the Attorney General cannot stay proceedings on an information which is before a justice, until the justice has decided whether or not to issue process. Although the Supreme Court of Canada held that the Attorney General had the clear right to stay proceedings *after* process was issued, to allow it *before* this would disturb a citizen's right to have the justice hear and consider the allegation and determine whether or not to act on it. The court, by this ruling, was seeking to reinforce the Attorney General's accountability to the legislature[83] by ensuring that the decision to intervene was not only deliberate but also open.

An Attorney General's power to intervene has a complication that is introduced by reason of the constitutional division of powers in the Canadian federal state. The provincial Attorney General may only intervene in relation to those matters ordinarily prosecuted by provincial authorities, while the federal Attorney General is restricted to prosecutions validly falling within the federal domain. Accordingly, only in those circumstances where the Attorney General of Canada has the power to initiate and validly proceed against an accused under a federal statute is it possible[84] for him to intervene.[85]

81. J.F. Archbold, *Criminal Pleading and Practice*, 30th ed., p. 111, cited in Ryan, *supra*, note 60, p. 843, contains the following observations:

> The usual occasion of granting a *nolle prosequi* [or a stay of proceedings] is either where in cases of misdemeanor a civil action is depending for the same cause ... or where any improper and 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 defendant ....

82. [1983] 2 S.C.R. 144. See also *Buchbinder* v. *The Queen*, [1983] 2 S.C.R. 159.

83. *Dowson*, *id.*, p. 155.

84. Berner, *supra*, note 3, p. 28, raises doubts as to the constitutional validity of this outside the territories mentioned. But see *R.* v. *Guenot, Kocsis and Lukacs* (1979), 51 C.C.C. (2d) 315 (Ont. C.A.); *R.* v. *Parrot* (1979), 27 O.R. (2d) 333 (Ont. C.A.); and *The Attorney General of Canada* v. *Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206.

85. Unless the matter takes place in the Northwest Territories or Yukon Territory. There is authority to the effect that a private prosecutor can revive a stayed prosecution on a different information: *R. ex rel. McNeil* v. *Sanucci*, [1975] 2 W.W.R. 203 (B.C. Prov. Ct.). But see *contra*, *R.* v. *McKay* (1979), 9 C.R. (3d) 378 (Sask. C.A.).

CHAPTER THREE

The Role of Private Prosecutions Today: The Policies at Stake

In Canada, the vast bulk of prosecutions[86] is initiated by the police and prosecuted by a public official, usually a Crown attorney.[87] Given this reality, it is valid to ask whether there is a role for the private prosecutor to play in the contemporary criminal justice system. In answering this question we find it necessary and important to observe, as did the Ouimet Committee which in 1969 reported on the state of corrections in Canada,[88] that an effective and fair criminal justice system requires the existence of discretion and should allow it at 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.
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> This means ... [t]he prosecution should have 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.[89]

Discretionary power of this nature is only relevant within the framework of a system of public prosecution.[90] Since public prosecutors do indeed possess many such discretionary powers, this fact, in a curious way, serves to strengthen the social justification for the retention or expansion of private prosecutions. For in a public prosecution system, it is only where a public prosecutor has failed to exercise his discretion to prosecute that a private prosecutor will feel the need to take action personally. If one accepts these postulates, can a case be made out for the removal of the power to prosecute privately?

Glanville Williams is of the view that "[t]he power of private prosecution is undoubtedly right and necessary in that it enables the citizen to bring even the police

86. Whether the alleged offence is criminal or quasi-criminal, federal or provincial.

87. See B.A. Grosman, "The Role of the Prosecutor in Canada" (1970), 18 *Am. J. Comp. L.* 498. In some cases the prosecutor is a police officer or other enforcement official.

88. *Report of the Canadian Committee on Corrections*, Roger Ouimet, Chairman (Ottawa: Information Canada, 1969).

89. *Id.*, pp. 16-7.

90. See G. Williams, "Discretion in Prosecuting," [1956] *Crim. L.R.* 222, on this subject generally.

or government officials before the criminal courts, where the government itself is unwilling to make the first move."[91] 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.[92]

One American commentator, convinced that a system of private prosecutions is a necessary adjunct to a public prosecutions system, contends:

> A system of private prosecution 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.[93]

Although the Ouimet Report deliberately minimizes the individual's interest in vindication of personal grievances as an element of punishment,[94] this interest nonetheless has a place in our criminal justice system.[95] It may be unwise for society to ignore this elemental facet of human personality, since individuals, frustrated by the law, may seek to accommodate themselves by unlawful means.[96] Clearly the harmed party has a strong and valid interest in the exacting of justice.[97] It is no answer to respond to this contention by saying that the victim has a remedy in the civil courts, because his or her personal injuries are not really measurable in monetary damages. Also, the accused will almost invariably be judgment-proof.[98]

The retributive justification for the retention of a system of private prosecutions is clearly open to a basic moral objection, one with which we fully agree: vengeance is not a *proper* goal for either individuals or the state. Indeed this was the very impetus

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91. G. Williams, "The Power to Prosecute," [1955] *Crim. L.R.* 596, p. 599. This quotation summarizes D. Hay's argument in "Controlling the English Prosecutor" (1983), 21 *Osgoode Hall L.J.* 165, p. 179.

92. Williams, *id.*, p. 675.

93. Comment, "Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction" (1955), 65 *Yale L.J.* 209, p. 227.

94. *Supra*, note 88, p. 15. It recognizes deterrence, rehabilitation and control as the only elements of punishment properly operating to protect society.

95. O.W. Holmes, *The Common Law* (1881, reprinted Boston: Little, Brown, 1963), pp. 39-42, considered vengeance (retribution) a proper objective of the criminal law, referring to Stephen for support.

96. M.R. Cohen, "Moral Aspects of the Criminal Law" (1940), 49 *Yale L.J.* 987, p. 1010.

97. *Supra*, note 93, p. 228.

98. In the same way the provision of crime-victim indemnification schemes cannot other than imperfectly compensate the victim for his injuries.

behind an abortive 1854 Bill in the English House of Commons which was 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.[99]

Given the nature of man and his urge to retaliate when victimized, it may be argued that it is better for the legal system to channel and ritualize such conduct rather than force him to respond at a primordial and socially destructive level.[100]

Arguments in support of a system which allows private prosecutions are reinforced when viewed in the Canadian context, from a perspective outside the *Criminal Code*. In the *Criminal Code*, the only offence that is recognized as being of an inherently private nature and hence susceptible to a private prosecution is that of defamatory libel.[101] That offence is concerned with protection of an interest in reputation, and thus is of a personal rather than public nature. However, over the past two decades, legislation has been enacted by both the federal and provincial authorities that are concerned to protect public interests, for example, in consumer protection and environmental quality.[102]

This legislation usually imposes duties the breach of which involves significant sanctions. Very often the "victim" is unaware that he has been victimized. In any event, offences under this kind of legislation are generally regarded as less significant by busy prosecutors who have a full calendar of "standard crimes" to cope with. As a result, public interest groups throughout Canada have altered their customary roles and now often act as informal watch-dogs in the regulated field. They or their members have been involved in private prosecutions under the legislation concerned. These individuals are not "victims" in the classic sense.[103] Rather than seeking vengeance or

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

100. S. Jacoby, in *Wild Justice: The Evolution of Revenge* (New York: Harper & Row, 1983), argues (on pp. 9-10) for the victim to be part of the social system of justice. Failure to meet this need may give rise to vigilantism:

> A victim wants to see an assailant punished not only for reasons of pragmatic deterrence but also as a means of repairing a damaged sense of civil order and personal identity ... a society that is unable to convince individuals of its ability to exact atonement for injury is a society that runs a constant risk of having its members revert to the wilder forms of justice.

101. *Criminal Code*, s. 265. The Commission has advocated the repeal of this section of the *Criminal Code* in *Defamatory Libel* [Working Paper 35] (Ottawa: Supply and Services, 1984).

102. The Commission has recently advocated further initiatives in this area: see *Crimes against the Environment* [Working Paper 44] (Ottawa: LRCC, 1985).

103. Any person may initiate a prosecution, not merely 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.

retribution, they are acting in the public interest as they see it.[104] This type of citizen action reinforces democratic values and public perceptions of justice, yet does so within a system that has public prosecutors as the linchpin of the prosecution process.[105]

Whatever may be the theoretical nature of prosecutions in Canada, we clearly *do* have a formal system of public prosecutors[106] many of whom are career appointees. In Canada, public prosecutors are appointed rather than elected officials as they are in the United States.

Systems based upon public prosecution, whether with elected or appointed prosecutors, are not without their critics. England, which has no shortage of such critics, has wrestled with the question of how best to structure its prosecution process. The Justice Report[107] of 1970 recommended the establishment of a centralized Department of Public Prosecutions and the retention of the power of the private citizen to initiate and proceed in the criminal process subject to the power of the Department of Public Prosecutions to take over the prosecution as it sees fit and this was adopted by legislation in 1979.[108] English objections to a centralized system of public prosecutions have been summarized as follows:

> 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 ....[109]

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 any degree to lessen the sense of the responsibility of the individual citizen actively to assist in the day-to-day enforcement of the law should be critically examined before they are accepted. Economy and even efficiency

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104. We do not propose to demonstrate, beyond the modest recommendations which we put forward in this document, how private prosecutions could be implemented more extensively, even within the present system. That is a topic which, if pursued, requires greater study. However, it is clear that financial factors would play a large part in such an extension, particularly where quasi-criminal offences are concerned. On this topic generally, see L.B. Hughes, *Private Enforcement of Federal Environmental Legislation* (1982), p. 42.

105. *Supra*, note 93, pp. 225-9.

106. Grosman, *supra*, note 87.

107. "The Prosecution Process in England and Wales," a Report by Justice: Criminal Justice Committee, [1970] *Crim. L.R.* 668, p. 681 (hereinafter referred to as the Justice Report).

108. *Prosecution of Offences Act 1979*, c. 31, s. 4 (U.K.).

109. Comment, *supra*, note 93, p. 234, note 130, quoting P. Howard, *The Conduct of Criminal Prosecutions in England* (unpublished paper) cited in R. Moley, *Politics and Criminal Prosecution* (1929), p. 201.

> 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, but upon the active support and the final judgment of our fellow citizens.[110]

Essentially, proponents contend that private prosecutions are valuable to the general enforcement effort. They operate as an informal review of discretionary powers. By contrast, opponents of private prosecutions are concerned that they may lead to prosecutions for personal gratification, private gain or malice. Also, the power to prosecute privately may conceivably give rise to blackmail situations, with the potential prosecutor demanding some advantage from the potential accused not to prosecute his case. In truth this latter objection is groundless since most jurisdictions, Canada among them, have criminal sanctions against such demands.[111]

From an administrative perspective, it is probably true to say that maximized economy and efficiency will result if prosecutions are left solely to public prosecutors, particularly if the administrative machinery is centralized.[112] However, it is to be doubted whether complete uniformity and centralized control is either possible or desirable within the Canadian context.

Our system of public prosecution attempts to separate, as nearly as possible, the police from the prosecution function. The arguments in favour of such separation of function are strong. However the benefits which this segregated system provides can be secured without removing from all persons *other than the public officials* rights to prosecute. A scheme could be structured so that the right to prosecute privately is retained without affecting those rights that are formally vested in investigators acting in a *public* capacity, whether it is as police officers or customs officials and so forth.[113]

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 an expertise necessary in the understanding of the complexity of modern society and contemporary laws.[114] This is a

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110. Sir Theobald Mathew, *The Office and Duties of the Director of Public Prosecutions* (London: The Athlone Press, 1950), p. 16.

111. See *Criminal Code*, s. 305, dealing with extortion.

112. This view was expressed by Lord Cameron, in defence of the Scottish practice, who saw three desirable results of a centralized system of public prosecutions: (1) the almost complete dissociation 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. In this regard see Lord Cameron, "Some Aspects of Scots Criminal Practice and Procedure," a presidential address to the Holdsworth Club, Faculty of Law, University of Birmingham (1971), p. 4. Bear in mind, though, that Scotland has since recognized the power to prosecute privately (see *infra*, note 218).

113. England is presently considering the implementation of just such a system: see the White Paper entitled *An Independent Prosecution Service for England and Wales*, Cmnd. 9074 (London: HMSO, 1983).

114. Justice Report, *supra*, note 107, p. 679.

very strong argument insofar as it bears on the removal of the investigating officer from the decision to prosecute. But does it have the same force in relation to intervention in the decision of the private prosecutor to prosecute? Some would argue that it does not, particularly where the decision of the prosecutor is *not* to proceed with the charge. Here we are necessarily also concerned with the wider role of the citizen in the criminal justice system and the need to satisfy him that his injury can be properly accommodated by it.[115]

The problem of abusive private prosecutions, particularly the malicious private prosecution adverted to previously, also requires consideration.[116] At the present time we cannot confidently state that potential accused persons possess the necessary protection against such abuse.[117] Possibly with the inclusion of an adequate set of costs provisions in the *Criminal Code* and appropriate provincial legislation, such residual objections as exist to the retention of private prosecutions would evaporate.[118]

Private prosecutions potentially can also be abused where there is public discussion or controversy concerning a matter and one of the persons involved proceeds to lay a criminal charge concerning it. This could, owing to the dampening effect of the *sub judice* rule which restrains public discussion of matters before the courts, stifle public debate at the most important moment and matters may be compounded by the fact that the charge may later be withdrawn by the prosecutor at the hearing. However, this potential abuse seems more theoretical than real and is rarely known to occur in practice. Here again, it is possible that with the introduction of an effective costs system, the abuse could readily be responded to by the courts.

If it were to become a reality, the expansion of the right to prosecute privately in Canada could only be accomplished at some expense, albeit small, of the rather vast discretionary power of the public prosecutor. Commentators such as Gittler[119] maintain that it would be a welcome check to prevent possible public prosecutorial charging bias against certain classes of victims.[120]

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115. An interesting case is *R. v. Metropolitan Police Commissioner, ex p. Blackburn*, [1973] Crim. L.R. 185 (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, pp. 136, 139. This was the same Mr. Blackburn who was then attempting to mandamus the commissioner to enforce the law against gaming houses.

116. See Williams, *supra*, note 91, p. 678. Note that the tort remedy of malicious prosecution should not be regarded as a complete protection since it is very difficult to succeed in such cases.

117. Present *Code* cost tariffs are inadequate and rarely resorted to.

118. Note that the Commission is presently engaged in a joint study with the Saskatchewan Law Reform Commission on the general subject of awarding costs in criminal cases. The particular topic of costs awards in private prosecutions will be one component of that study.

119. J. Gittler, "Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems" (1984), 11 *Perspective L.Rev.* 117-82.

120. See D.A. Schmeiser's Study Paper prepared for the Commission on *The Native Offender and the Law* (Ottawa: Information Canada, 1974).

It has been argued that where the victim seeks to initiate the process and carry the prosecution forward, allowing the overriding of negative prosecutorial charging decisions by permitting private citizens to have direct access to the courts would have a salutary effect on the victim's restitutive and retributive interests, or at least on his or her perceptions of those interests.

As noted, it has been contended that the widespread revival or expansion of private prosecutions would be neither practical nor socially desirable. According to this argument, the frequency of such cases would inevitably increase and the already overburdened criminal courts would be hard put to cope with this new influx.[121]

Finally, there remains the troublesome question, Whose interest should prevail, the citizen's or the state's, in the event of a conflict where the victim wishes to prosecute (or is prepared to have some individual other than the state prosecutor champion his cause)?

There are at least six possible models for restraining but allowing the private prosecution within a public prosecution system such as our own:[122]

(1) confine private prosecutions to those offences which interested parties are likely to want prosecuted but which public prosecutors are likely to be reluctant to prosecute;[123]

(2) combine private prosecution with some degree of public control by making notification or approval by the public prosecutor or the Attorney General a prerequisite;[124]

(3) make negative prosecutorial charging decisions subject to judicial review;[125]

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121. It is interesting that the Canadian experience does not seem to bear out this postulate. It should be remembered that in Canada few barriers exist to the actual *initiation* of a prosecution (that is, the laying of an information) regardless of whether the case is triable by summary conviction procedure or on indictment. The Attorney General's power of intervention and the inherent jurisdiction of the courts to control abuses of process serve to inhibit any tendence to drift toward proliferation of the private prosecution.

122. The first four of these models are described and discussed in Gittler, *supra*, note 119.

123. These include crimes among friends and neighbours, commercial frauds perpetrated on customers and clients, crimes of strict liability involving health and safety, and public torts. See A.S. Goldstein, "Defining the Role of the Victim in Criminal Prosecution" (1982), 52 *Miss. L.J.* 515, p. 559.

124. *Id.*, p. 560.

125. See: D.G. Gifford, "Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal" (1981), 49 *Geo. Wash. L.Rev.* 659, pp. 716-7; J. Vorenberg, "Decent Restraint of Prosecutorial Power" (1981), 94 *Harvard L.Rev.* 1521, p. 1568. Subsection 15(1) of the *Canadian Charter of Rights and Freedoms* may also give rise to such issues although it is arguable that the proper exercise of charging discretion is outside the scope of subsection 15(1) or is protected by section 1.

(4) establish a mechanism whereby an interested party could challenge a negative prosecutorial charging decision by directly petitioning a grand jury or the court to initiate a prosecution;[126]

(5) give the public prosecutor the power to intervene in proceedings once they have been commenced in order either to conduct the prosecution in the name of the state or to stay unmeritorious proceeding; and

(6) require the private prosecutor to obtain the consent of the court before allowing an indictment to be preferred.

Alternative (1) serves no practical purpose since the present system arrives, in practice, at very much the same conclusion. Alternative (2) leaves unresolved the genuine conflicts between victim and prosecutor as to whether a prosecution should be undertaken. Alternative (3) has a disadvantage in that the judiciary has been traditionally reluctant to review prosecutorial charging decisions. Alternative (4) has the advantage of bringing justly accused persons to trial but it allows for a form of second-guessing of prosecutorial decisions which is foreign to Canadian legal traditions. While these four reform options provide general guidance, considerable fine tuning would be necessary before a distinctive contribution to Canadian law could be made. Alternatives (5) and (6) are attributes of our system as presently constituted.

126. The grand jury is presently retained in Canada only by the province of Nova Scotia.

CHAPTER FOUR

Conclusions and Recommendations

While under Canadian law the private prosecutor is granted considerable power to pursue his case,[127] in practice it is a power that is very rarely exercised.[128] The frequency of the use of the power is not in our view an accurate measure of its value, which for reasons detailed previously we believe to be considerable. In summary conviction matters our law places few, if any, restrictions on the private prosecutor. However, our survey of the law, even as amended by the *Criminal Law Amendment Act, 1985*, reveals that insofar as indictable offences are concerned a few not inconsiderable anomalies still remain. Operationally these arise as a result of the mode of trial selected by the accused. Believing, as we do, that it is desirable to retain private prosecutions as a feature of our prosecution system, our burden then becomes one of devising appropriate means for ridding the system of these anomalies. At the same time we believe it important to make one perhaps implicit point abundantly clear: in making these proposals we are not in any significant way seeking to undermine the general supervisory role of the Attorney General in regard to criminal prosecutions. We say this having regard especially to the Attorney General's statutory duty to supervise all prosecutions and to intervene as necessary in order to conduct the prosecution or stay proceedings.

In our Working Paper 15, *Criminal Procedure: Control of the Process*, we recognized the importance of retaining private prosecutions, but in that Paper we tentatively recommended a restricted system that would have permitted unencumbered prosecutorial rights up to the charging process but not beyond.[129] This recommendation was premised on the public prosecutor having the final discretion in this regard, subject to judicial review.[130] Our thinking on this subject has evolved, having benefitted from further study, consultation and analysis. We are now of the view that more expanded rights should be conferred on private prosecutors.

127. His powers are greater in summary conviction offences than in indictable offences: *Schwerdt*, *supra*, note 9.

128. For example, in British Columbia our consultant was advised informally by spokesmen for the Department of the Attorney General that, although no statistics are kept on the matter, there would be no more than ten such cases a year in the province that were permitted to proceed to trial. It is the policy in that province for the Attorney General to intervene and enter a stay of proceedings unless the case is one that the Department would have prosecuted on the facts.

129. LRCC, *supra*, note 3, pp. 49-50.

130. *Id.*, p. 50.

For the reasons given in Chapter Three, we believe that private prosecutions are not only desirable but also necessary for the proper functioning of the Canadian prosecution process. Our weighing of costs and benefits leads us to conclude that there are measurable gains not only to the citizen but also to the system of state prosecution in providing for private prosecutions as an adjunct to a public prosecution system.

Society as a whole is the beneficiary where formal, positive citizen interaction with the justice system results in some additional control over official discretion.[131] Also, the form of retribution which is exacted by the citizen's resort to legal processes is clearly preferable to other unregulated forms of citizen self-help. Further, the burgeoning case-loads which our public prosecutors routinely shoulder are, in some small measure at least, assisted by a system which provides an alternative avenue of redress for those individuals who feel that their cases are not being properly attended to within the public prosecution system. Finally, it is our belief that this form of citizen/victim participation enhances basic democratic values while at the same time it promotes the general image of an effective system of administering justice within the Canadian state.

For these significant reasons we believe that the right to prosecute privately ought not only to be retained but also extended to those elements of the trial and appeal process where they are presently proscribed or restricted. This means at the initiatory stages of the process that the right to lay an information and to issue process in relation thereto ought to remain as it is, unexceptional and subject to the ordinary law. The anomalies and restrictions which exist in relation to the right to carry a charge forward to trial where the offence is an indictable one ought to be removed. We see no reason for differing procedures which depend upon the nature of the charge and upon whether or not the prosecutor enjoys a public or a private status. It is difficult to accept as necessary the *prior* consent of the Attorney General to the initiation of a prosecution, given that he has the power in all cases to intervene *after* charges have been laid in order to direct a stay of proceedings and that this power is exerciseable regardless of whether the proceedings are triable by summary conviction procedure or on indictment. Therefore, we believe that the requirement which, prior to the passage of the *Criminal Law Amendment Act, 1985*, obliged a private prosecutor to obtain the consent of the Attorney General before being able to carry his prosecution forward (where the offence is indictable) is undesirable and ought not to be revived. We take this position subject to one caveat concerning the general question of criminal prosecutions requiring the prior consent of the Attorney General. This is presently under study as one component of our work on the Powers of the Attorney General. We do not at this time wish to be seen as ruling out or precluding the possibility of empowering the Attorney General to screen charges by means of the device of consent in relation to certain *specific* substantive offences (such as advocating genocide). Our position on this general issue will be clarified in the forthcoming Working Paper.

131. See generally, Hay, *supra*, note 91, p. 186.

In a similar vein, we see no compelling justification for requiring, as we presently do, the prior consent of the court to the preferment of an indictment where there has been a committal for trial following a preliminary inquiry. Inappropriate cases may be met under our scheme with the intervention of the Attorney General or his agent after preferment or by the court's own inherent powers to control abuses of its process, and also through the court's statutory ability to refuse to issue process. We are not proposing to grant the private prosecutor the power to prefer an indictment directly where no preliminary inquiry has been held or where the accused has been discharged at a preliminary inquiry. The power to prefer an indictment directly is a prerogative of the Attorney General, one that is sparingly exercised and one which would be inappropriate as a general power exerciseable in the context of private prosecution.

The simple conclusion to which we have come in this Working Paper is that the private prosecutor ought, as nearly as possible, to enjoy the same rights as the public prosecutor in carrying his case forward. This proposition is not limited to the trial process alone, but in our view should be applied at the appeal stage as well. Practical inequalities exist which may be easily overcome by minor modifications to our law. The treatment of the private prosecutor under our law is an issue which perhaps does not fit neatly within the classic parameters of constitutionally protected equal rights. Nevertheless, we are of the view that the differential treatment which is presently countenanced in the procedural law which regulates appeals does result in the unequal status of certain individuals before the law and does confer unequal benefits of the law. The inequities which we perceive depend upon the nature of the prosecutor and the type of case which is to be pursued.

It should be noted that, presently, where the offence is indictable the Crown and the accused do not have identical rights of appeal. Under our law the Crown has considerably narrower rights of appeal than does the accused. The Crown may appeal against acquittal as of right where the ground of appeal is "a question of law alone," and against sentence, with leave of the court of appeal or a judge thereof, where the sentence is not fixed by law. We are not here advancing the suggestion that the Crown prosecutor's rights of appeal be generally extended. We are sensitive to the argument that the individual citizen should be protected, as far as possible, from facing a traumatic and protracted series of legal proceedings. We believe that there is substance in the argument that the granting of extremely broad powers of appeal to the Crown could result in possibly unjustifiable hardship for a defendant who had been acquitted in a previous criminal trial. Such a defendant would never know for sure whether the case was completely over until the rather lengthy appeal process had run its course. Instead, what we are recommending here is that the Crown prosecutor and the private prosecutor possess precisely the same rights of appeal. We see no basis for saying that in identical circumstances an individual should have no right to pursue an appeal whereas the Crown prosecutor should have an ability to proceed further and question an erroneous ruling of the trial court.

At the present time, appeals from summary trial conclusions *can*, as a result of the language of section 748 of the *Criminal Code*, be taken by a private prosecutor.

But no such power exists in relation to indictable proceedings. As discussed, there is an argument that this procedural arrangement is a reasonable compromise, that is: 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 Attorney General or counsel instructed by him being able to appeal the acquittal or sentence.[132]

We do not believe that the case based on compromise is a strong one. Since we believe in the desirability of retaining the right to prosecute privately, it seems to us both logical and proper that this right should be reinforced by the private prosecutor's being granted full status to pursue his case through the appeal stages in the absence of the Attorney General's intervention to carry the appeal forward.[133] This right of appeal could conceivably be linked to the introduction of appropriate changes to the *Criminal Code* concerning costs, but we wish to reserve our position on this aspect of the subject until we have completed our work on the specific area of costs.[134]

Section 621, which applies to appeals to the Supreme Court of Canada should also be amended in similar fashion so as to extend the rights the public prosecutor presently possesses to the private prosecutor in the absence of intervention by the Attorney General. While the changes that we propose result in relatively few direct amendments to the *Criminal Code*, their significance should not be underestimated.

Recommendations

1. The right to prosecute privately ought to be retained and extended to those elements of the trial and appeal process where they are presently proscribed or restricted.

2. As nearly as possible, the private prosecutor ought to enjoy the same rights as the public prosecutor in carrying his case forward. This proposition is not limited to the trial process, but extends to the appeal stage as well.

3. The right to lay an information and issue process in relation thereto ought to be unexceptional, subject as it presently is to the ordinary law which governs all cases.

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132. See *Criminal Code*, s. 605.

133. An intervention by the Attorney General in order to stay an appeal would, in some circumstances, at least amount to an abuse of process.

134. Cost awards 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.

4. The right to carry a charge forward to trial ought to be unexceptional and ought not to be affected by the private status of the prosecutor. Anomalous restrictions pertaining to indictable offences such as the obtaining of the consent of the court or of the Attorney General ought to be modified accordingly.

5. The right of the private prosecutor to appeal, whether acquittal or conviction, ought to be unexceptional and ought to be governed by the same rules as presently pertain to appeals generally. This recommendation includes appeals to the Supreme Court of Canada.

6. All of the foregoing recommendations are subject to the right of the Attorney General to intervene in any prosecution in order to carry the case forward, or stay the proceedings, or withdraw the charges.

7. The right of the Attorney General to prefer an indictment directly in the event of a discharge following a preliminary inquiry or in the absence of a preliminary inquiry ought to remain a prerogative enjoyed exclusively by the Attorney General and should not be available to a private prosecutor.

APPENDIX

An Historical and Comparative View of Private Prosecutions

1. Introduction: The Evolving Role of the Prosecutor in English Law

The primary reason for embarking on comparative and historical studies is that one can examine the responses of different societies to the same broad social phenomena. The value of this to the law reformer is clear: since it is virtually impossible to accomplish a controlled experiment in "the law," the only way to gain perspective on different approaches to the law and its institutions is by studying our own past and that of other legal systems.

The main question of interest to us in this comparative exercise is whether, assuming the formal availability of a private prosecution mechanism, there is, in practice or in effect, an ideological commitment to the state control of such prosecutions. In civil law countries such as France and Germany, criminal law is inquisitorial in the sense that the state has appointed itself as both investigator and judge. In a sense, there is no prosecutor because the state authority is strictly on a fact-finding mission.[135] In England, on the other hand, prosecution is part of the criminal procedure, and private prosecution is guaranteed both by tradition and, since 1979, by legislation.[136]

It can be argued, of course, that for practical purposes prosecution by private interests is not now a viable option even in common law jurisdictions because in general terms, victims of crime do not have sufficient resources to engage in private prosecution. This argument, though it has statistical force, misses a basic point: far from being committed to state intervention in criminal prosecution, England and other common law jurisdictions have traditionally maintained a conservative, non-interfering stance towards the individual's right of private prosecution.[137] As well, the common law history shows that England has always used its traditional techniques and devices

135. W.S. Holdsworth, *A History of English Law*, 5th ed. (1903, reprinted London: Sweet and Maxwell, 1966), Vol. 3, p. 622.

136. *Prosecution of Offences Act 1979*, c. 31, s. 4 (U.K.). See now, the *Prosecution of Offences Act 1985*, c. 23, s. 6(1) (U.K.).

137. One of the objectives of this Paper is to show that to the extent that the "right" of private prosecution exists it does so as a correlative to the limitation of legislative authority. Thus, as will be explained more fully elsewhere, although the *Prosecution of Offences Act 1979* appears to guarantee the private prosecution right, it actually limits it substantially.

in new ways in order to adapt to changing conditions. The significance of this historical pattern for Canada is clear: private prosecution not only goes back to the roots of the common law, but also it is an institution which, although it has fallen into relative disuse in recent times, may well have considerable potential and utility.

English law before the Norman Conquest was essentially adversarial, and disputes often wound up in physical battles.[138] As society developed, these early methods evolved into more civilized ones,[139] but the adversarial basis did not change. With the Conquest, whole new procedures came into existence, but what is significant is that the new techniques did not extinguish the old law, but were, as Holdsworth says, "... adapted to the old conception [of the law]."[140] Thus, although by the thirteenth century the normal trial procedure was presentment to the grand jury, indictment and trial by petty jury,[141] this newer procedure coexisted with the Anglo-Saxon "appeal" and summary procedure for criminals caught in the act. When a petty jury was called, it was made up of members of the local community. The legal rationale was that these citizens would be knowledgeable about the crime, and in fact, would describe what they had seen.[142] The jury members, in other words, were also the witnesses. This system required the victim, or a relative of the victim, to initiate the prosecution.

If the legal method of English law at that time was adversarial, then the end was compensation.[143] In other words, criminal acts were treated as tortious acts, requiring redress for the victim rather than punishment by the state. However, in 1106 and 1167 statutes were passed at the Assize of Clarendon and Northampton[144] which are now rightly regarded as the formal beginnings of the general machinery of criminal justice.[145] The legislation established trials by the Royal Justices for the serious crimes of theft, murder, robbery, forgery and arson, after presentment by local juries.

The trials were initiated by victims. Once a trial had gone to the King's Court, counsel were largely excluded.[146] Forensic argument and reasoning as well as evidentiary techniques were quite primitive and did not play an important role in court procedure.[147] The social problem at which the legislation was aimed was "certain

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138. J.F. Stephen, *A History of the Criminal Law of England* (1883, reprinted New York: Burt Franklin, 1964), Vol. 1, p. 60.

139. *Id.*, pp. 61-2.

140. Holdsworth, *supra*, note 135, p. 612.

141. *Id.*, p. 607.

142. J.H. Langbein, "The Origins of Public Prosecution at Common Law" (1973), 17 *Am. J. Leg. Hist.* 314.

143. J.M. Kaye, "The Making of English Criminal Law: (1) The Beginnings — A General Survey of Criminal Law and Jutice down to 1500," [1977] *Crim. L.R.* 5.

144. H.W.C. Davis, ed., *Stubb's Select Charters*, 9th ed. (1913), pp. 167, 178.

145. *Supra*, note 143, p. 5.

146. *Id.*, p. 10.

147. *Supra*, note 142, p. 317.

classes of offenders, notably thieves and robbers who, presumably having no money, were unable or unwilling to compensate'' their victims.[148] For the good of the state such offenders had to be punished. However, strikingly, in practice not all the above crimes did result in punishment. For example, although the relative of a homicide victim could ''appeal'' a crime, thus bringing it to a Royal trial, frequently such victims would be bought off by the perpetrator of the crime. Although the Crown was aware of this practice, it was usually accepted. In other words, the new machinery was allowed to produce the old result of compensation.[149] The only major exception to this was the crime of theft.[150]

The significance of these developments is clear. Rather than re-ordering legal procedure, the legislation was integrated into the existing system. The state's concern with criminal punishment was balanced by the individual's concern with compensation. The tension between these two interests produced a compromise.

This early legislation was followed by other, more minor statutory changes, but the next legislation which had a major impact on prosecution procedure was the so-called Marian statutes of 1554 to 1555.[151] These statutes are considered by some historians[152] to be the origin of the public prosecutor role in English law. The discussion of the legislation is drawn extensively from Professor Langbein's methodical study of this period.[153]

Langbein's concern is to show that the Marian statutes were not the result of the direct adoption of Continental practices, but were rather measures reflecting English common law tradition.[154] He argues that the second statute, which is the most relevant for our purposes, was to provide a public aspect to the prosecution process, but not to institute a civil law ''Inquisition.''[155] Specifically, the statute was to deal with cases where there were no aggrieved citizens surviving to prosecute — or where their evidence would have to be forced in order to secure a conviction.[156] As can be imagined, the medieval jury/witness system could create prosecutory ''gaps'' in complicated crimes. Langbein states: ''The public interest in law enforcement cannot allow such gaps, and the rest of the Marian committal statute was designed to close them.''[157]

148. *Supra*, note 143, p. 7.

149. *Id.*, p. 9.

150. *Ibid.*

151. Respectively: 1 & 2 Ph. & M., c. 13; and 2 & 3 Ph. & M., c. 10.

152. For example, see P.R. Glazebrook, ''The Making of the English Criminal Law: (3) The Reign of Mary Tudor,'' [1977] *Crim. L.R.* 582; and Langbein, *supra*, note 142, p. 318.

153. J.H. Langbein, *Prosecuting Crime in the Renaissance: England, France and Germany* (Cambridge, Mass.: Harvard University Press, 1974).

154. *Id.*, p. 22. On this point he seeks to prove Holdsworth wrong.

155. *Ibid.*

156. *Id.*, p. 35.

157. *Ibid.*

There were four objectives in the statute: (1) the justice of the peace was to take an active role in investigations; (2) he was to organize a case for the prosecution; (3) he was to act as the prosecutor if necessary; and (4) he was to aid the assize judge by giving him a survey of the prosecuting case. Looked at in retrospect, this legislation gave power to the justice of the peace which evolved into something quite like present-day police powers and, indeed, was not repealed until legislation was enacted giving the police broad powers in the nineteenth century. However, the important point is that the legislation which created the public prosecutor was, like the earlier legislation, a corrective measure designed to shore up the existing system. The legislative intent was not to overturn private prosecution, but to supplement it.

The social forces at work which affected the Marian statutes and produced a role something like a public prosecutor also produced specific initiatives to reinforce the official position. In the late eighteenth century and throughout the nineteenth century such authorities as Patrick Colquhon, the Select Committee of 1798, Jeremy Bentham and Edwin Chadwick all advocated a public prosecutor.[158] The concerns they had, as Radzinowicz describes, were many:

> Almost the whole onus of prosecution rested upon the victim: his was usually the main burden of securing detection and pursuit and the services of the local constable were likely to depend on what reward he could offer. Referring to this burden, a contemporary observed that "in a great proportion of instances — in, probably, by far the majority of instances — where the injury is not of an atrocious sort, the injured person conceals it, and withholds complaint."
>
> If the offender were caught, the victim had still to face the expense, the travelling and the loss of time involved in the cumbrous and protracted criminal procedure of the time, often with doubtful prospects of reimbursement, as well as the ordeal of giving evidence in one of the higher courts .... There is always a great gap between crime committed and crime detected and prosecuted. There can be little doubt that at this period it yawned very wide indeed.[159] [Footnotes omitted]

The legislation of 1879 creating the Director of Public Prosecutions[160] was also, like the earlier legislation, formulated as a corrective measure for specific concerns.

It is noteworthy that this legislation did not establish a general system of public prosecution, but rather was designed to act in cases which appeared to be of importance or difficulty or in which special circumstances, such as a person's refusal or failure to proceed with a prosecution, appeared to render the action of the Director of Public Prosecutions necessary to secure the due prosecution of an offender. As well, the Bill specifically stated there was to be no interference with private prosecution. The legislative history of the measure is complicated, but a good summary is provided by

158. L. Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (London: Stevens, 1968), Vol. 3, p. 254.

159. *Id.*, Vol. 4, p. 68.

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

Kurland and Waters.[161] On the one hand, the supporters of a public prosecution system were motivated by the concerns mentioned above, together with a fear of the possibility that individuals might use the criminal justice system for private vengeance (malicious prosecution). On the other hand, the opponents of public prosecution were concerned with rights of the individual: "The fault, if there is one at all, lies in the passion of the English people for personal freedom, and in their intolerance of personal restraint or interference for any purpose whatever."[162] As well, they had a cultural enmity (jealousy) towards Continental and American practices. The result was a compromise, a system, as Lord Cairns said, changed only to meet exceptional cases.[163] This Bill, like the earlier legislation, was essentially conservative. It was state intervention which refused to disturb the entrenched right, yet was aimed at correcting the problems associated with that right.

By the time that Canada enacted its *Criminal Code* in 1893, England clearly had a tradition of private prosecution. In this context, then, it might be asked, Does the *Criminal Code* demonstrate that Canadian society desires complete officialization of, or official control over, criminal procedure? The answer seems clearly to be "No." The *Criminal Code* is largely a statutory restatement of the traditional common law — and Canada remains largely a common law jurisdiction for criminal law purposes. However, this line of inquiry leads us to ask, Precisely what interests does the common law criminal system safeguard? Or, to put it differently, What is the relationship between the state and the primary actors (other than the offender) in Canadian criminal procedure? To consider this question, a closer examination of the differences between the common law and the civil law approaches to criminal procedure is necessary.

2. The Prosecutor in Civil Law Systems

(a) *General*

When a crime occurs, at least two sets of interests have been disturbed: the state's and the victim's. Both civil law and common law jurisdictions reserve a place for both sets of interests to be involved in the criminal process. The difference is that the civil law system is historically based on the state's interest, whereas the common law system is historically based on the interest of the victim of the criminal act.[164] In civil law jurisdictions, once the crime has been reported the judge (and/or jury) is involved in a rational process of inquiry. The "prosecutor" as a representative of the state, is more concerned with finding the truth than presenting the victim's view of the facts. The question of the victim's rights in this process is really quite peripheral. There is a role for him to play, but his interest is not fundamental to the teleology of the procedure.

161. P.B. Kurland and D.W.M. Waters, "Public Prosecutions in England, 1854-79: An Essay in English Legislative History," [1959] *Duke L.J.* 493.

162. Cited in *id.*, p. 562.

163. *Id.*, p. 558.

164. What comprises the victim's "interest" will be discussed below.

On the other hand, historically in the common law the victim had an essential role to play in the procedure — both initially and thereafter. The common law criminal trial still involves an argument between parties: in this way it is the same as a civil (tort) dispute. Civilian criminal procedure, it scarcely needs repeating, is an inquiry into the facts, not an argument. In order to highlight this difference, a brief history of French criminal procedure will be outlined. France serves as an example and is probably also the most influential civil law system.[165]

(b) *France*

Criminal law in France in the medieval period was based on the ordeal and trial by battle.[166] As in England, these methods were gradually felt to be unacceptable, but in France the legislative change occurred a century later than in England, in 1258.[167] By this time a Germanic "folk-judgment" procedure was widely used in France. This system, as Dawson points out,[168] was later to provide the kernel of the English jury system. "The opportunity thus existed for France to emulate England's jury system. However, rather than follow England's lead, the French royalty passed legislation which implicitly adopted the 'Roman-canonist' system of proof by individual witnesses."[169]

The actual measure was the *Ordinance Royale* of Louis IX which abolished the judicial duel in royal courts. The effect of this measure was to create a vacuum; if there were no duels, some other criminal procedure had to be used. The question of why the French system evolved as it did is complicated and peripheral to our concerns and consequently will not be dealt with here. However, if the precise reasons for the particular historical choices are difficult to ascertain, the main quality of the new procedure is not. The Roman-canonist system was more rational than dueling or drawing together six to twelve men to extract a confession.[170] The new system had

> [d]efinite ideas not only about who should conduct the criminal process, but about how he should go about it. For *instruktionsmaxime* is primarily concerned with the nature of judicial proof. In contradistinction to the nonrational proofs of ancient Germanic law, it represents the view that the object of criminal procedure is to permit a judgment to be made about the authorship of criminal acts, based upon a rational inquiry into the facts and circumstances.[171]

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165. See D.M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), pp. 222-3.

166. M. Ploscowe, "The Development of Present-Day Criminal Procedures in Europe and America" (1935), 48 *Harvard L.Rev.* 440.

167. *Supra*, note 153, p. 211.

168. J.P. Dawson, *A History of Lay Judges* (Cambridge, Mass.: Harvard University Press, 1960), p. 44.

169. *Ibid.*

170. *Supra*, note 153, p. 214.

171. *Id.*, p. 131. In this context Langbein also points out that the English emphasis on rationality is actually a recent development of criminal evidence which was sporadic into the eighteenth century. "The trial judge had been the sudden successor to the ordeals. 'Like the ordeals the jury also was inscrutable' ": T.F. Plucknett, *Edward First and Criminal Law* (New York: Cambridge University Press, 1960), p. 75, quoted in Langbein, *supra*, note 153, pp. 132-3.

These Roman-canonist concepts did not, of course, become accepted immediately. The period from the thirteenth century to the *Ordinance Royale* of 1539 is the time when the new French criminal procedure became consolidated. The innovations clearly did not immediately stop private initiation of prosecution. However, by the fourteenth century:

> A lengthy series of ... statutes isolated the public interest in criminal prosecution and assigned its superintendence to the *procureur.* He was authorized to invoke the criminal process when there was no private complainant; his motions instigated judicial action and propelled the procedure through subsequent stages.[172]

Thus, as in England, state intervention into criminal proceedings (although in England the concept is one of minimal intervention) came about partially because of failure to prosecute all crimes. However, in France the public prosecuting authority, although given great power, was not immediately able to enforce completely the doctrine of officialized procedure. Thus, even beyond the sixteenth century there was a version of criminal legislation which actually was a civil procedure. This was the " 'ordinary,' as opposed to the 'extraordinary' (inquisitorial) procedure."[173] The concept dated back to the late thirteenth century when judicial examination of witnesses was accepted, but complete official prosecution — "public instigation of charges and discovery and production of witnesses"[174] — was not. In this situation:

> The suspected person consented to judicial examination and to binding adjudication on a roughly civil standard of proof. In return he was allowed liberal defense, again of a civil standard, including the aid of counsel and immunity from torture.[175]

This kind of uneasy compromise between civil and criminal practices lasted until France gained the requisite judicial and political resources to maintain complete official prosecution. The procedural implications of the officialization will be detailed below, but the following point should again be emphasized. French criminal law history at this time was a process of consolidating officialized prosecution. The result of that process was the emphasis of the state's interests and the concomitant de-emphasis of the interests of other participants.

Another result of the growing acceptance of the Roman-canonist procedure was the diminished role of lay judges. At the time that the new system started being used in France, the lay judge had an established role, as in England. However, as the inquisitorial procedure gained acceptance, "especially its modes of investigation and proof,"[176] it became more and more complex, driving out the lay judge.[177] More

172. *Supra*, note 153, p. 217.

173. *Ibid.*

174. *Ibid.*

175. *Id.*, p. 218.

176. *Supra*, note 168, p. 68.

177. *Ibid.*

extensive and sophisticated techniques called for more complete records; and with more complete records came a requisite demand for skill — this in an age when the ability to read was rare enough. Of course, as Dawson points out, at that level of sophistication oral records became mistrusted: "Each element of the system reinforced the rest."[178] An illustration of the relative complexity of the French system at this time is provided by a comparison between two treason cases, one in France in 1504-6 and one in England in 1509. The prosecution of Maréchal de Gie yielded a report of over six hundred pages, whereas *Empson and Dudley's Case* comprises two sides of a printed page in the *State Trials* reports.[179]

French criminal procedure became codified in a series of statutes around 1539.[180] This legislation consolidated the Roman-canonist system and it remained extant until the late eighteenth century and the French Revolution. Accordingly, as the inquisitorial method took hold, it developed a bureaucracy which became more and more specialized and complex. The result of this process was a highly developed, very rational system. Harold Berman summarizes the French system and contrasts it with the English one as follows:

> [T]he two systems acquired many of the contrasting features that have continued to characterize them in the twentieth century. The French system came to rely heavily on written procedure, the English on oral procedure; the French relied on hundreds of highly trained professional judges, the English on lay jurors and lay justices and only a very few professional judges; the French on judicial interrogation of parties and witnesses under oath, the English on accusation and denial by the opposing parties with resolution by the jury. With regard to substantive law, French royal law was more systematic, more learned, more Roman, more codified while English royal law was more particularistic, more practical, more Germanic, more orientated to case law.[181]

The goal of the French system was to establish rational, even empirical proof. Even convincing the judge was in a sense secondary,[182] because the proof was to be objectively verifiable. What then was the process by which such proof was to be obtained? The process could be initiated *pro forma* by a private citizen, but after that it was in the hands of officials. There were very detailed rules drawn up regarding the weighing of evidence.[183] The most substantial proof was a corroborated confession or two eyewitnesses. Because the accused's rights were not an important issue, torture was frequently used to hasten the process of justice. Evidence was admitted to the court in the form of written dossiers. There were seven judges, who saw no witnesses but dealt only with the written evidence. The accused first saw the evidence in this

178. *Id.*, p. 60.

179. *Supra*, note 153, p. 221.

180. *Id.*, p. 210.

181. H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), p. 478.

182. K.H. Kunert, "Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure" (1966), 16 *Buffalo L.Rev.* 122, p. 144.

183. *Id.*, pp. 144-5.

written form at the trial. It was unlikely that witnesses would change their evidence after the accused's argument, not in the least owing to fines for perjury.[184] The system throughout was bureaucratic and secretive.

If the Roman-canonist system were in use in France today, the distinction between France and England would be very clear. In that situation, a French jurist would regard private prosecution as being totally alien to the inquisitorial procedure, a throw-back to a more barbaric age. However, French criminal legal procedure has changed radically since the late eighteenth century. Specifically, in 1789, the French Revolution occurred. One immediate and short-lived effect was a drastically altered criminal procedure: there was to be a public trial with jury, a counsel for the defence and the old system of legal proof was abolished:

> The value of evidence ceased to be fixed in advance, and all that was demanded of the jury was that its decision be based upon an inner conviction (*conviction intime*) reached as a result of evidence presented in open court.[185]

The implications of this change were, indeed, revolutionary. However, the changes were too drastic for the prevailing social conditions; they gave too much protection to the accused, and the system partially regressed to the criminal procedure of the *ancien regime*. The Napoleonic *Code d'instruction criminelle* was a compromise between the earlier system and the influence of the English system.[186] It established two stages: first, an investigation by a *juge d'instruction* with the accused represented by counsel;[187] second, if the first stage established the accused's likely guilt, in open jury trial.[188] The first or preliminary stage was the product of pre-revolutionary influence; the second was the product of English influence.

These changes to the old criminal procedure reforms were attempts to make this system less secretive and officialized. Yet, although a lay element was introduced at the last stage of the proceedings, it is clear that the pre-revolutionary emphasis on rationality even today has a powerful effect. As Berman suggested above, the characteristics of the system in the fourteenth century are still present in the twentieth century.

The procedure defined in the Napoleonic Code changed little until 1958, and the changes are not fundamental to this analysis. Two questions then can be asked. First, what role do private interests play in modern French criminal procedure, and second, what relationship does that role have to the historical development of the system? The answer to the first question is straightforward. The victim of a crime has three functions

184. Ploscowe, *supra*, note 166, p. 451.

185. *Id.*, p. 461.

186. *Id.*, p. 462.

187. The right to counsel is now available. See R. David, *English Law and French Law* (London: Stevens, 1980), p. 65.

188. Ploscowe, *supra*, note 166, p. 462.

in the system. First, he reports the crime. Second, he can join in the trial as a civil party. He can, in other words, sue for compensation during the criminal action. Third, if the public prosecutor (*le procureur de la République*) elects not to prosecute, then the victim can:

> ... notwithstanding the decision of non-prosecution, bring the matter before the examining magistrate or the trial court by means of a civil party complaint (*constitution de partie civile*). The bringing of the civil action triggers the public action. Thus it is clear that the state's attorney (*procureur*) is not completely in control of the public action in that he cannot extinguish it either by settlement or by refraining from prosecution.[189]

The second question can now be addressed: If French victims can initiate public action even though the public prosecutor has decided against it, how does this power relate to the tradition of the French criminal legal system? We have seen that France has a history of bureaucratic, officialized procedure. Although changes after the Revolution tempered that tradition, the element of officialization remains very strong. Where does the victim's interest fit in? Clearly, the protection of the victim's interest must be seen as an example of the humanizing reform that occurred after the Revolution. Private prosecution is not conducive to "rationality" in the criminal system and it certainly is not part of a state-organized bureaucracy. It exists rather as a counter to those forces, as a safeguard. It is a concession to the belief that the victim's rights need more recognition than the mere ability to report a crime or sue for damages. As Langbein points out, that recognition has achieved a significant status:

> If the public prosecutor does not initiate *l'action publique*, the *partie civile* may do it himself, ostensibly in order to provide the necessary basis for his parasitic damages claim. What in fact results is akin to private prosecution. The use of this procedure has grown enormously in the present century on account of what Americans would call a relaxation of standing requirements. Trade unions, policemen's associations, and numerous other juristic persons have been allowed to deem themselves "victims" of crimes committed against their members. Consequently, when the French prosecutor decides not to prosecute, he decides for himself and his office alone.[190]

The fact that the private prosecution interest has become part of a legal system so philosophically and historically removed from our own is striking and, it is suggested, instructive.

(c) *Germany*

Germany is a civil law jurisdiction with characteristics different from both France and England. Specifically, there is only very limited private prosecution in Germany, but the private interest is recognized in other ways. To understand the system, some background should be provided.

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189. R. Vovin, "The Role of the Prosecutor in French Criminal Trials" (1970), 18 *Am. J. Comp. L.* 489.

190. J.H. Langbein, *Comparative Criminal Procedure: Germany* (St. Paul, Minn.: West Publishing, 1977), p. 88, footnote.

Germany up to the 1840s had a strong inquisitorial criminal procedure in which the judge both investigated and adjudicated. In 1848 the system was reformed by separating the adjudicating and prosecuting roles, a separation that is still established today.[191] The prosecutor, much as the *juge d'instruction* does in the French preliminary examination, decides if there is enough evidence to go to trial. Once at trial, the judges, made up of lay members and professionals, handle most of the questions.[192] The prosecuting role was not given to the victim because it was felt that private prosecution would detract from "the accustomed thoroughness of criminal justice under the inquisitorial system."[193] The public prosecutor was envisaged as "the watchman of the law;"[194] he was not just to press criminal charges but to gather evidence for both sides.[195] The most significant guarantee that the prosecutor will pursue justice is the *Legalitätsprinzip* — the legality principle or, as Langbein translates it, compulsory prosecution: "[The prosecutor] is obligated, unless otherwise provided by law, to take action against any activities which may be prosecuted and which are punishable in a court of law, to the extent that sufficient factual particulars may be obtained."[196] The legality principle, in other words, forces the prosecutor to prosecute where there is sufficient evidence.

The problem with the legality principle is obvious. If all potential criminal cases were prosecuted, the criminal system would slow down and eventually falter from overuse. Thus, as one would expect, the German criminal procedure has certain exceptions to compulsory prosecution. However, these exceptions and the way in which "normal" compulsory prosecution cases are handled bring up again the question of protecting the private interest. To be specific: Are there devices to ensure that the prosecutor follows the rule of compulsory prosecution, where it is required? Moreover, if there are exceptions to compulsory prosecution, are there also safeguards preventing prosecutors from abusing their discretion? In the remainder of this section, the relevant German criminal procedure will be outlined to show what place the private interest has in that system.

There are three classes of offences in Germany: petty infractions, misdemeanours, and felonies and serious misdemeanours. All three have different procedures and have different prosecution requirements.

Petty infractions basically are comprised of traffic violations and economic and public regulatory activity.[197] Compulsory prosecution does not apply to petty infractions as the traffic police or other enforcement agency prosecutes the offence.

191. J.H. Langbein, "Controlling Prosecutorial Discretion in Germany" (1974), 41 *U. Chi. L.Rev.* 439, p. 442.

192. *Id.*, p. 447.

193. H.H. Jescheck, "The Discretionary Powers of the Prosecuting Attorney in West Germany" (1970), 18 *Am. J. Comp. L.* 508.

194. Savigny, quoted in Langbein, *supra*, note 191, p. 449.

195. *Ibid.*

196. *Strafprozessordnung*, ss. 151, 152 II, quoted in Jescheck, *supra*, note 193, p. 509.

197. *Supra*, note 191, p. 451. The code is the *1968 Gesetz über Ordnungswidrigkeiten*.

Misdemeanours under German law include larceny, embezzlement, fraud, extortion, receiving stolen goods, forgery, negligent homicide, abortion, and dangerous driving, among others.[198] The relevant rule here is the *Opportunitätsprinzip,* which is the principle of expediency or advisability: "[T]he public prosecutor may refrain from prosecuting with the consent of the court competent (to try the case), if the guilt of the actor would be regarded as minor (*gering*), and there is no public interest in prosecuting."[199] Although this procedure is available, the number of terminations is actually quite small.

> [P]rosecutors regard compulsory prosecution and restraint of discretion as overriding principles. They generally agree that they should be reluctant to exercise their discretionary power, and they abort proceedings only in really trivial cases.[200]

It should be noted that the prosecutor also has other choices about how to proceed with the prosecution. For example, he could deal with the accused in a manner appropriate to the accused's conduct after the crime.[201] Thus, if an accused donated a sum of money to a charity after committing a minor crime, it could result in non-prosecution. Or, after a crime, the prosecutor could issue a penal order with a fine, rather than have the case go to court.[202] The accused could, if he disagreed, require that the case be tried. Both these methods are only utilized with fairly minor crimes and fairly minor sanctions.

The most dangerous crimes are, of course, felonies and serious misdemeanours. The rule for felonies, such as murder, rape, robbery, perjury and arson is quite simple — they are prosecuted if there is sufficient evidence.[203] If prosecutors do not prosecute, having sufficient evidence, they can be charged with "favouritism," but such charges are quite rare.[204]

The point is made by Herrmann that the German prosecutor generally wants to put criminal proceedings before the judges, if there is need.[205] It is significant then for our purposes that, despite stressing compulsory prosecution for serious crimes, there is as well other machinery recognizing the private interest. There are three separate devices protecting this interest.

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198. J. Herrmann, "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany" (1974), 41 *U. Chi. L.Rev.* 468, p. 484.

199. EGStGB: Code of Criminal Procedure, s. 153, cited in Langbein, *supra*, note 191, pp. 458-9.

200. *Supra*, note 198, p. 484.

201. *Supra*, note 191, p. 460.

202. *Id.*, p. 456.

203. *Supra*, note 193, p. 509.

204. *Supra*, note 198, p. 476.

205. *Id.*, pp. 472-3.

Firstly, for certain misdemeanours private prosecution is possible. There are eight of these:

> trespass to domestic premises, insult, inflicting minor bodily injury, threatening to commit a crime upon another, unauthorized opening of a sealed letter or document, inflicting property damage, patent and copy right violations, and crimes prescribed by the unfair competition statute.[206]

The citizen can prosecute whether or not he has asked for public prosecution, but if the public prosecutor decides to prefer charges, that is, if it is in the public interest, then the public prosecutor takes over primary responsibility for the case.[207] It should be observed that, unlike France, Germany has kept the standing interest narrow. Along with these eight, there are other misdemeanours which cannot be prosecuted without a formal demand from the victim: "The offences consist mainly of intra-family trespasses (excluding the very serious ones such as incest), where criminal sanctions may do more harm than good; and minor injuries to property, person and dignity ...."[208]

The second remedy for citizens is administrative and judicial review, the *Klageerzwingungsverfahren*, which Langbein calls "a mandamus action for a judicial decree to require the prosecutor to prosecute."[209] Anyone can make a formal demand for the public prosecutor to prosecute. If he does not prosecute, he explains why to the complainant but the victim alone can bring the mandamus action. The State Supreme Court has original jurisdiction[210] and the remedy is not available in non-prosecution of misdemeanour cases because, theoretically, the decision not to prosecute has judicial consent.[211] However, as Langbein states, such consent is usually a formality.[212] The result is that only felonies and serious misdemeanours, those crimes requiring "compulsory" prosecution, are protected by mandamus. Peters is quoted as stating: "Successful *Klageerzwingungsverfahren* occur in practice with the most extreme rarity. Nevertheless, the possibility of a *Klageerzwingung* is of great importance, in that it imposes a flat rule against improper and illegal considerations."[213]

Part of the reason for this rarity of the mandamus action is because departmental complaint processes precede it. The third device protecting the private interest is that citizens may lodge a departmental complaint against the prosecutor for any crime, misdemeanour or felony. This remedy, the so-called *Dienstaufsichtsbeschwerde*, is not part of the Code of Criminal Procedure, but is derived from a principle of "German

206. *Supra*, note 191, pp. 461-2.

207. *Id.*, p. 462.

208. *Id.*, p. 463.

209. *Ibid.*

210. *Id.*, p. 464.

211. *Supra*, note 198.

212. *Supra*, note 191.

213. *Id.*, pp. 464-5.

administrative law that the citizen is entitled to file a complaint against a public employee's neglect of duty or abuse of power.''[214] The Prosecutor-General thus can rule on how a public prosecutor handled a case. It is suggested that because citizen complaints are not conducive to a successful prosecuting career, the departmental complaint is a very effective safeguard of private interests.

It can be seen that the German system has a strong respect for the rights of the victim. It is dangerous, of course, to draw lessons from a criminal legal system so philosophically removed from our own. But this much, perhaps, can be said: Germany, like France, recognizes the private interest in its criminal procedure, if only indirectly. This suggests that the private interest is one that transcends the ideologies of major legal systems.

3. The Common Law Jurisdictions Today

Having examined private prosecutions in two civil law jurisdictions, we now turn our attention to the situation in other common law locales. How have Australia, New Zealand, the United States and contemporary England, among others, approached this problem? Also of interest is the approach adopted in Scotland.

(a) *Scotland*

The Scottish system is quite unlike the English and Canadian.[215]

> 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 himself[216] when his own personal interests are directly affected, has not been formally abolished ... but that right has not been successfully invoked for over 60 years and today such applications are practically unknown.[217]

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214. *Id.*, p. 466.

215. See: the Justice Report, *supra*, note 107; Lord Cameron, *supra*, note 112; *Report of Working Party of the Public Prosecutions in Northern Ireland* (1971), Government of Northern Ireland, Appendix C; W.G. Normand, ''The Public Prosecutor in Scotland'' (1938), 54 *L.Q.R.* 345.

216. This is the minor exception referred to in the extract, although the *Report of the Working Party on Public Prosecutions in Northern Ireland*, *id.*, p. 56, Appendix C (III), did note 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 of the court is required if the breach is punishable by imprisonment without the option of a fine, unless the statute otherwise provides.

217. Lord Cameron, *supra*, note 112, pp. 3-4.

Whether or not the Scottish criminal justice system had a place for the private prosecutor was finally resolved in a dramatic application to the High Court for what was described as a "Bill for Criminal Letters" in 1982. This was the infamous *Glasgow Rape Case* where a young woman had been brutally attacked, disfigured and raped by several young men and the Lord Advocate had declined to prosecute them.[218] Her application to prosecute them privately was granted by the High Court and they were subsequently convicted.

It is this highly centralized system that removes investigative (police) functions entirely from the prosecution role that appealed to the framers of the Justice Report.[219]

(b) *New Zealand, Australia, and the United States*

In New Zealand, as in Canada, the private prosecutor role is recognized to a certain extent.[220] In New South Wales, Australia, on the other hand, the prosecutions in superior courts are conducted by Crown prosecutors[221] and Victoria has created a Directorate of Public Prosecutions.[222]

In the United States,[223] the private prosecutor has virtually no formal role to play in the criminal justice process at all. In that country, private prosecutions on the English model were rejected by the colonial settlers, particularly after the War of Independence[224] and at the state level county prosecutors were appointed, evolving into the district attorney system which today is largely an elective office. Prosecution at the federal level also developed along these lines until the Civil War when a process of centralization occurred.[225] All federal attorneys were placed under the supervision of the Attorney General who was now the head of the Justice Department.

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218. R. Harper and A. McWhinnie, *The Glasgow Rape Case* (London: Hutchinson, 1984). See Appendix.

219. *Advisory Committee on the Police in Northern Ireland 1969*, Cmnd. 535 (London: HMSO, 1969), para. 142, p. 34.

220. See section 37 of the *Summary Proceedings Act 1957* (N.Z.), and section 345 of the *Crimes Act, 1961* (N.Z.).

221. R.R. Kidston, "The Office of Crown Prosecutor (More Particularly in New South Wales)" (1958), 32 *Aust. L.J.* 148. However, other states in Australia have different systems. In Queensland, for example, private prosecution by leave of the court is possible. See R.F. Carter, *Criminal Law of Queensland*, 3rd ed. (Sydney: Butterworth, 1969), p. 652.

222. *Director of Public Prosecutions Act, 1982* (Aust.). See "Note" (1984), 58 *Aust. L.J.* 3-5.

223. See the *Administration of Criminal Justice in the United States* (Am. Bar Foundation, 1955), pp. 84-8; Comment, *supra*, note 93; B.A. Grosman, *The Prosecutor* (Toronto: University of Toronto Press, 1969), pp. 13-4; *Report on the Office of the Attorney-General* (National Association of Attorneys General, 1977), pp. 11-22.

224. Public prosecutions there originated in a Connecticut enactment of 1704 setting up Queen's Attornies to prosecute in the county courts. This served as a paradigm for other states and was supported by the French model in terms of influencing which of the alternatives to choose: *Administration of Criminal Justice in the United States*, *id.*, p. 85. See also: P.S. Hudson, "The Crime Victim and the Criminal Justice System: Time for a Change" (1984), 11 *Perspective L.Rev.* 23; and Gittler, *supra*, note 119. Recently some exceptions to the general exclusion have begun to appear: see Gittler, *id.*, p. 151, footnote 112.

225. *Ibid.*

Thus, the formal role of the private individual in the American criminal justice system has been largely confined to that of complainant. This has led to considerable criticism, particularly where the public prosecutor has refused to prosecute.[226]

(c) *Contemporary England*

As we have seen, private prosecution was clearly available in England up to the 1870s. Indeed, private prosecution as a right was not greatly influenced until 1908.[227] However, since that time there has been a steady erosion of that right, and it is fair to say now that it is more one of appearance rather than of substance.[228] There exists today three distinct limitations on private prosecution in England:

(1) The historical limitation of *nolle prosequi* by which "proceedings upon an indictment pending in any court may be stayed ... at any time after the bill of indictment is signed and before judgement."[229] This power has been available to the Attorney General since the sixteenth century.[230]

(2) There has been a growing number of statutes regarding various offences which require the consent respectively of the Attorney General, the Director of Public Prosecutions, or the official body dealing with the offence in question in order to launch a prosecution. For a list current to 1979 see the Royal Commission on Criminal Procedure, *Prosecutions by Private Individuals and Non-Police Agencies*, Appendix F.[231]

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226. Recent American commentators focus on the problem of prosecutorial discretion (plea bargaining, and so forth) and it is generally conceded that a definite problem, or potential for a problem, exists. Because of the historical background of the American system, private prosecution is not generally considered a viable solution, although in *supra*, note 93, it is pointed out that thirty states used private attorneys to assist the public prosecutor.

    As an example of the difficulty of that problem, John Langbein and Lloyd Weinreb engaged in a debate with Abraham Goldstein and Martin Marcus which ranged over the 1978-79 issues of the *Yale Law Journal* regarding the question of whether the Continental criminal procedure had anything to teach the United States. Both sets of authors agreed that a "persistent, deep dissatisfaction with criminal justice" in the United States had caused investigators to look abroad, but they had deep disagreements over the results. Langbein and Weinreb feel that Continental practices can be helpful as a comparison, *after* the differences are established ((1978), 87 *Yale L.J.* 1549, pp. 1568-9). Goldstein and Marcus concluded that the differences among the systems in Germany, France and the United States are not significant in practical terms because, while on the surface the Continental system is missing parts the American system has, actually other parts of the system "fill in" to make the two systems quite similar (*id.*, p. 1573). The two different conclusions stem from different analyses.

227. Hay, *supra*, note 91.

228. *Id.*, pp. 180-1. Hay argues that private prosecution may still have some "constitutional" significance in England. This view is based primarily on the large number of groups which support private prosecution.

229. J.F. Archbold, *Pleading, Evidence and Practice in Criminal Cases* (London: Sweet and Maxwell, 1969), para. 142.

230. *Supra*, note 165, p. 883.

231. Royal Commission on Criminal Procedure, *supra*, note 10.

(3) In 1908 a distinct change in legislation took place: "[O]nly in 1908 did it become possible for the Director of Public Prosecutions to assume a private prosecution and then drop it, with no recourse for the private prosecutor."[232]

This ability of the Director of Public Prosecutions to intervene in a proceeding to stop it, has been affirmed by case-law in *Gouriet* v. *Union of Post Office Workers*,[233] *Turner* v. *Director of Public Prosecutions*[234] and, most recently, *Raymond* v. *Attorney-General*[235] reflecting recent statutory developments:[236]

> [T]here may be what appear to the Director substantial reasons in the public interest for not pursuing a prosecution privately commenced .... The Director, in such a case, is called upon to make a value judgment. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at it cannot, in our opinion, be impugned. The safeguard against an unnecessary or gratuitous exercise of this power is that by section 2 of the Act [of 1979] the Director's duties are exercised "under the superintendence of the Attorney-General." That officer of the Crown is, in his turn, answerable to Parliament if it should appear that his or the Director's powers under the statute have in any case been abused.[237]

This case suggests that, unless the court feels that the Director's decision is manifestly dishonest or unreasonable, the decision is only reviewable by Parliament. In other words, for the most part, the courts are powerless to intervene.

In 1981, the Royal Commission on Criminal Procedure[238] reported that private prosecution in England was significant only in shoplifting and common assault cases.[239] Neither type of offence was numerically very large, and it concluded, in a different volume, that:

> Prosecutions by private citizens other than in these cases are very rare indeed and scarcely seem a sufficient base to justify the position of the great majority of our witnesses who argue in one way or another that the private prosecution is one of the fundamental rights of the citizen in this country and that it is the ultimate safeguard for the citizen against inaction on the part of the authorities.[240]

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232. Hay, *supra*, note 91, p. 179.

233. [1977] 1 All E.R. 696 (C.A.).

234. (1978), 68 Cr. App. R. 70.

235. (1982), 2 W.L.R. 849.

236. *Prosecution of Offences Act 1979*, c. 31, s. 4 (U.K.).

237. *Raymond* v. *Attorney-General*, *supra*, note 235, pp. 854-5, *per* Sir Sebag Shaw.

238. Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: the Law and Procedure*, Cmnd. 8092-1 (London: HMSO, 1981).

239. *Id.*, p. 61.

240. Royal Commission on Criminal Procedure, *Report*, Cmnd. 8092 (London: HMSO, 1981), p. 160. See also B.M. Dickens, "Control of Prosecutions in the United Kingdom" (1973), 22 *Int. & Comp. L.Q.* 1.

One of the main reasons for this limitation, along with the other factors already alluded to, is the cost of the proceedings for a private prosecutor.[241] The Commission recommended, therefore, that to have private prosecution "retained as an effective safeguard against improper inaction by the prosecuting authority,"[242] and to keep citizens from the risk of "malicious, vexatious, and utterly unreasonable prosecution,"[243] a new system was needed with different financial underwriting. This suggested new procedure is summed up in a 1983 government White Paper:[244]

> [P]rivate prosecutors should first apply to the Crown prosecutor to take up the case and, if the latter refused, be required to obtain the consent of a magistrate's court for the prosecution to proceed (which it would then do at public expense).[245]

In the same White Paper the English government refused to change the system regarding private prosecution, stating that it saw "no sufficient justification for imposing this restriction on the right of private prosecution."[246] The paper went on to say that there was no adequate reason for private prosecution to be funded by the public, although the 1981 Royal Commission *Report* had stated that the apparent right was actually severely restricted by financial necessity and statutory requirements. The result seems to be that private prosecution in England will remain a right, but a largely ineffectual one.[247]

Today in England, the framework of public prosecution is being transformed in a manner more significant than anything that has transpired in the past 700 years. Until recently the words of Sir James Fitzjames Stephens would have remained apt:

> 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.[248]

The forthcoming implementation of the *Prosecution of Offences Act 1985* will mean that a large part of the decision making on prosecutions will be transferred into the hands of legally qualified members of the Crown Prosecution Service which will be headed by the Director of Public Prosecutions under the ministerial responsibility of the

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241. Royal Commission on Criminal Procedure, *id.*, p. 161.

242. *Ibid.*

243. *Ibid.*

244. *Supra*, note 113.

245. *Id.*, para. 11.

246. *Ibid.* The system of public prosecution, as opposed to private prosecutions, is in the process of being dramatically altered as a result of the recent passage of the *Prosecution of Offences Act 1985*. For a complete discussion of "The New Prosecution Arrangements" see the articles contained in [1986] *Crim. L.R.* 1-44.

247. See A. Samuels, "Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals," [1986] *Crim. L.R.* 33, p. 43.

248. *Supra*, note 138, Vol. 1, p. 493.

Attorney General. Public prosecutions, therefore, will be profoundly affected by the new arrangements but private prosecutions will remain largely undisturbed by the new initiative.

Accordingly, it can be safely asserted that today in England (as is the case in Canada) there is an ideological commitment towards retention of private prosecution, subject to an overriding power, vested in the state, either through the Attorney General or Director of Public Prosecutions, to intervene and stop the process or take over the prosecution itself.

Rapports et documents de travail de la Commission de réforme du droit du Canada

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1. *La preuve* (19 déc. 1975)
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3. *Notre droit pénal* (25 mars 1976)
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9. *Procédure pénale — Première partie : amendements divers** (23 fév. 1978)
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LES POURSUITES PRIVÉES

Commission de réforme
du droit du Canada

Document de travail 52

LES POURSUITES PRIVÉES

1986

Avis

Ce document de travail présente l'opinion de la Commission à l'heure actuelle. Son opinion définitive sera exprimée dans le rapport qu'elle présentera au ministre de la Justice et au Parlement, après avoir pris connaissance des commentaires faits dans l'intervalle par le public.

Par conséquent, la Commission serait heureuse de recevoir tout commentaire à l'adresse suivante:

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CHAPITRE UN

Introduction

Essentiellement, un crime est un acte répréhensible si grave qu'il est considéré comme une atteinte non pas contre un seul individu, mais contre l'État lui-même[1]. Dans le contexte du système de justice pénale canadien, c'est le respect de ce principe fondamental qui est à l'origine de la charge de procureur de la Couronne ou du ministère public. En effet, s'agissant d'infractions contre l'État, il est normal qu'elles soient poursuivies au nom de l'État par des représentants de celui-ci. Ces fonctionnaires publics conduisent et surveillent la très grande majorité des poursuites criminelles au Canada. Quoique relativement peu nombreux, les cas qui échappent à cette règle générale n'en constituent pas moins une source de préoccupation pour les intervenants du processus d'administration de la justice au Canada. L'ampleur des difficultés que posent les droits et le statut des poursuivants privés dans la poursuite des infractions criminelles est beaucoup plus grande que l'on ne pourrait le croire au regard de la modeste importance statistique des poursuites privées.

Le poursuivant, qu'il s'agisse d'une autorité publique ou d'une personne privée, joue un rôle particulier dans tout système de justice pénale. Dans le présent document de travail, nous tenterons d'examiner et d'analyser les pouvoirs et les obligations du poursuivant privé au Canada, principalement en vue de déterminer s'il y a lieu de les conserver à ce stade de notre évolution sociale et juridique. Aussi, l'objet du présent document de travail est-il le rôle, réel et potentiel, du poursuivant privé au Canada.

Dans ce contexte, nous entendrons par «poursuivant privé» tout individu, groupement ou personne morale (autre qu'une autorité publique) qui n'agit pas dans le cadre d'une charge publique. Certes, en théorie, la plupart des poursuites sont «privées» au sens où elles sont conduites par divers fonctionnaires publics qui n'ont d'autres pouvoirs que ceux que la loi confère aux particuliers. Toutefois, il ne s'agit pas de poursuites privées au sens où nous l'entendons dans le présent document de travail[2].

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1. F. Kaufman, «The Role of the Private Prosecutor: A Critical Analysis of the Complainant's Position in Criminal Cases», (1960-1961) 7 *R. de droit de McGill* 102. L'auteur cite *Tremeear's Annotated Criminal Code of Canada*, 5e éd., 1944, p. 1.

2. Cf. P. Howard, *Criminal Justice in England: A Study in Law Administration*, New York, 1931. À la page 3, Howard fait référence à Maitland : [TRADUCTION] «Le professeur Maitland estimait qu'il était erroné de décrire le système anglais comme un système de poursuites *privées*. ‹C'est en Angleterre que l'on retrouve les véritables poursuites publiques, écrivait-il, en ce sens que toute personne peut engager des poursuites. À l'étranger, le système est fondé sur l'*étatisation* des poursuites, où l'engagement des procédures est un acte *officiel* appartenant à l'État›».

Sur la question des poursuites privées, la littérature est pour ainsi dire inexistante. Au Canada, on ne trouve que trois ouvrages d'importance à ce sujet[3]. De fait, les sources écrites sont d'une rareté singulière au sujet du statut des poursuivants en général, qu'il s'agisse du ministère public ou des poursuivants privés[4].

Pourtant, le poursuivant joue un rôle essentiel dans notre système de type accusatoire. Comme nous l'avions expliqué dans nos documents de travail intitulés *La communication de la preuve*[5] et *Les poursuites pénales : responsabilité politique ou judiciaire*[6], le procès pénal est conçu comme un litige opposant deux parties : le poursuivant (habituellement la Couronne) et l'accusé. C'est aux parties qu'il incombe de formuler les questions de droit et de fait qui constituent le litige, et de présenter les preuves pertinentes à l'égard de ces questions. Et en raison de l'attribution de la charge de la preuve en matière pénale, cette tâche revient principalement à la poursuite. Le juge du fond ne joue aucun rôle actif pour ce qui est de définir et de présenter la preuve. Son rôle consiste à veiller à ce que les règles de procédure soient respectées par les parties, et à statuer sur les questions qui lui sont soumises.

Il serait tout à fait conforme à l'esprit du système de type accusatoire que nous avons décrit ci-dessus de confier à la Couronne la responsabilité exclusive des décisions relatives à l'inculpation. Pourtant, la solution que présentent le droit et la pratique au Canada n'est pas aussi simple. En fait, la responsabilité des décisions relatives à l'inculpation est tellement morcelée qu'elle ne peut être décrite succinctement, ni être étudiée de façon rationnelle. La complexité du régime actuel s'explique en partie historiquement. Son maintien correspond peut-être à un réflexe de méfiance à l'idée de confier à un seul individu ou à une seule autorité les vastes pouvoirs que met en jeu le processus d'engagement des poursuites pénales. La raison en est que le contrôle de ce processus est d'une importance capitale. Si une personne est accusée de voies de fait et jugée pour ce crime, mais que la preuve révèle la commission d'un vol, elle doit être acquittée. Elle ne peut être jugée que pour le crime décrit dans les accusations portées contre elle (ou une infraction incluse). Les accusations, dont la responsabilité incombe au poursuivant, constituent la base sur laquelle seront tranchées toutes les questions soulevées dans le cadre des procédures. Il s'agit là d'un prolongement du principe de la légalité, suivant lequel une personne ne peut être poursuivie que pour une infraction

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3. Voir P. Burns, *Private Prosecutions*, 1973, étude non publiée réalisée pour le compte de la CRDC; Kaufman, *loc. cit. supra*, note 1; S.H. Berner, *Private Prosecution and Environmental Control Legislation: A Study*, Ministère de l'Environnement, septembre 1972. Voir aussi CRDC, *Les poursuites pénales : responsabilité politique ou judiciaire* [Document de travail 15], Ottawa, Information Canada, 1976; P. Burns, «Private Prosecutions in Canada: The Law and Proposal for Change», (1975) 21 *R. de droit de McGill* 269; P. Burns, «The Power to Prosecute», dans J. Atrens, P. Burns et J. Taylor (éds), *Criminal Procedure: Canadian Law and Practice*, Vancouver, Butterworths, 1981, chap. V, p. 8-34.

4. Pour une analyse instructive et détaillée du pouvoir de poursuite au Canada, voir P.C. Stenning, *Appearing for the Crown*, Cowansville, Brown Legal Publications, 1986. Depuis longtemps, l'ouvrage de J.L. Edwards, *The Law Officers of the Crown*, Londres, Sweet & Maxwell, 1964, est reconnu comme l'autorité dans ce domaine.

5. CRDC, *La communication de la preuve* [Document de travail 4], Ottawa, Information Canada, 1974.

6. CRDC, *op. cit. supra*, note 3; certains passages du présent chapitre sont tirés de ce document.

créée par un texte de loi ou par une autorité législative. Il s'ensuit qu'une personne ne peut être condamnée que pour une infraction précisée dans les accusations dont est saisi le tribunal.

Au Canada, le système des poursuites pénales reconnaît un rôle au citoyen privé en lui permettant de porter des accusations (ou dans la langue technique, de «faire une dénonciation») et en lui conférant le pouvoir de poursuivre certaines catégories d'infractions, encore que ce pouvoir soit limité et mal défini. Dans les pages qui suivent, nous examinerons la fonction des poursuites privées au sein de notre système, de même que les principes concurrents qui pourraient orienter une réforme éventuelle de ce domaine. Par ailleurs, afin d'être mieux en mesure de déterminer la nature précise de la réforme devenue nécessaire, nous avons consacré un soin considérable à l'étude des règles qui régissent actuellement les poursuites privées au Canada.

Comme on pourra facilement s'en rendre compte, nous croyons qu'il est avantageux pour notre système de justice pénale de comporter un régime complet de poursuites privées en matière pénale et quasi pénale. Dans tout système juridique, et en particulier dans celui dont l'objet est la répression des crimes, la participation active du citoyen prend une importance capitale. Pour favoriser cette participation, l'une des solutions possibles consiste à donner à ce dernier la possibilité de s'adresser lui-même aux tribunaux, surtout lorsqu'un fonctionnaire public a refusé de s'en charger.

Bien entendu, il se peut que, sur le plan des principes, certaines infractions se prêtent mal aux poursuites privées en raison de leur nature particulière. Toutefois, cette difficulté peut être réglée facilement de différentes façons : par exemple, les textes d'incrimination pourraient confier la responsabilité exclusive de leur poursuite à un fonctionnaire public (en l'occurrence le procureur général), ou encore en interdire la poursuite en l'absence du consentement d'une autorité désignée.

D'autre part, certains types d'infractions peuvent être plus susceptibles de donner lieu à l'engagement de poursuites privées par des citoyens ou des groupes. Parmi ces types d'infractions, les premières qui viennent à l'esprit sont les infractions liées à la qualité de l'environnement et à la protection du consommateur (encore que ces catégories ne soient pas l'objet principal du présent document). Dans ces deux domaines, on a pu voir des citoyens manifester activement leur sens civique. Des groupes importants s'emploient à promouvoir les valeurs qui sous-tendent la législation dans ces domaines. Or, pour des raisons que nous verrons plus loin, ce type de quasi-crime ou d'infraction à caractère réglementaire semble plus susceptible d'avoir un rang peu élevé dans l'ordre de priorité du ministère public ou du procureur de la Couronne. On ne devrait pas voir dans cette remarque l'intention de réduire l'importance que devraient avoir les poursuites privées dans le contexte de ce que l'on peut appeler les «crimes véritables». Néanmoins, il ne nous paraît pas déraisonnable de prédire que le nombre de poursuites privées sera considérablement plus élevé dans le cas des infractions à caractère réglementaire que dans celui des crimes véritables. Cela dit, l'objet principal du présent document reste les crimes véritables et les mécanismes de poursuite qui les concernent au sein du système de justice pénale.

Si nous en sommes venus à préconiser l'extension des droits des citoyens privés en matière de poursuite, c'est en raison de notre conception particulière du rôle optimal que devraient jouer la victime et le citoyen dans le processus de justice pénale. Ce faisant, nous sommes conscients de l'importance des frais et des embûches procédurales auxquels le poursuivant privé fera face lorsqu'il choisit d'engager lui-même des poursuites. En effet, l'existence de problèmes pratiques importants est indéniable. En premier lieu, on peut penser à la difficulté de réunir la preuve devant être présentée au tribunal. Vient ensuite l'éventuelle indifférence, voire l'hostilité des organismes administratifs qui détiennent des renseignements dont le poursuivant privé peut avoir besoin pour sa cause. Sans l'appui de la Couronne, il est possible que le poursuivant privé ne parvienne pas à obtenir les documents nécessaires. (D'après nos renseignements, la pratique courante veut que lorsque des procédures sont engagées par le poursuivant privé, les enquêteurs de la police transmettent leurs conclusions et leurs dossiers au bureau du procureur de la Couronne, plutôt que de remettre ces renseignements directement à l'intéressé.) Il appartient alors au procureur de la Couronne de déterminer quels renseignements seront divulgués au citoyen qui souhaite intenter des poursuites privées. Par conséquent, ce seront généralement les personnes les plus déterminées ou les plus lésées par la commission d'un crime qui tenteront de mettre elles-mêmes en marche les rouages du droit pénal. Compte tenu des mécanismes de protection actuels (dont nous ne cherchons pas à réduire la valeur) que comporte le pouvoir d'intervention de la Couronne, nous sommes d'avis que les poursuites privées ont un rôle pratique, justifié et réel à jouer dans notre processus de justice pénale, que ce rôle devrait être reconnu ouvertement et que ses aspects formels devraient être incorporés directement dans les règles de procédure pénale du *Code criminel*.

Nos conclusions reposent sur des bases solides. Nous avons examiné, d'un point de vue comparatif, la situation dans d'autres pays et d'autres sociétés. En outre, nous ne nous sommes pas limités aux systèmes juridiques inspirés du common law, mais nous avons également étudié la position du poursuivant dans les systèmes civilistes. Bien que le rôle attribué aux poursuites privées varie et se manifeste de différentes façons suivant les pays, le poids des données recueillies nous a amenés à conclure que le poursuivant privé a un rôle vital à jouer dans le système de justice pénale canadien. Nous sommes persuadés que le fruit de nos recherches historiques et comparatives peut contribuer de façon importante à éclairer le sujet. Aussi en avons-nous joint une partie en annexe du présent document de travail. De façon générale, nous avons conclu que le maintien et l'extension des droits relatifs aux poursuites privées au Canada seraient conformes aux valeurs que reflète l'évolution idéologique de notre droit pénal. Nous croyons également que cette position s'inscrit dans la ligne des principes fondamentaux qui devraient orienter tout système de justice pénale qui se veut efficace : l'économie, la responsabilité et la modération. En outre, les poursuites privées nous apparaissent comme une institution qui confère un caractère plus équitable et humain à l'administration de la justice.

Pour les raisons qui vont suivre, nous en sommes venus à la conclusion que, dans toute la mesure du possible, le poursuivant privé devrait jouir des mêmes droits que le ministère public pour mener sa cause devant les tribunaux, jusqu'à la décision définitive

d'un tribunal d'appel, le cas échéant. Il s'agit d'une proposition modeste mais essentielle puisqu'elle souligne l'importance que nous attachons à la participation du citoyen et de la victime au sein du système de justice pénale, et contribue à renforcer et à mettre en lumière l'intégrité des valeurs démocratiques fondamentales.

CHAPITRE DEUX

Le droit canadien actuel en matière de poursuites privées

La principale difficulté que pose l'examen des règles de droit régissant les poursuites privées au Canada est la rareté des sources au sujet des multiples questions importantes soulevées par cette institution[7].

Le droit pénal canadien s'inspire du droit britannique, tant pour ses règles de fond que pour sa procédure. Ainsi, il est énoncé au paragraphe 7(2) du *Code criminel*[8] que sauf dans la mesure où il a été modifié par le *Code* ou un autre texte de loi fédéral, le droit criminel d'Angleterre qui était en vigueur dans une province immédiatement avant le 1er avril 1955 (date à laquelle a eu lieu la dernière refonte globale du *Code criminel*), reste en vigueur. Dans ces conditions, la procédure anglaise traditionnelle reste en vigueur dans une large mesure au Canada, et [TRADUCTION] «les décisions qui intéressent la procédure et qui ont été rendues en application de l'ancien *Code* font toujours autorité, sauf dans la mesure où elles ont été écartées par les dispositions du nouveau *Code*[9]».

La question est donc de savoir si le droit pénal d'Angleterre relatif aux poursuites privées a été modifié, dans son application au Canada, par les dispositions du *Code* lui-même ou par la jurisprudence des trente dernières années. En Angleterre, la règle générale est fort simple : [TRADUCTION] «En droit anglais, il ne fait aucun doute qu'un poursuivant privé pouvait, en date du 19 novembre 1858, et peut encore aujourd'hui, en l'absence d'intervention de la Couronne, mener à travers toutes les étapes du processus pénal des poursuites relatives à toute infraction[10]». Compte tenu du fait que [TRADUCTION] «l'on ne trouve aucun texte de loi fédéral ou provincial qui sanctionnerait ou nierait directement et explicitement le droit de conduire des poursuites privées[11]», il

7. Berner, *op. cit. supra*, note 3, p. 29.

8. Toute référence au *Code criminel* renvoit à S.R.C. 1970, chap. C-34, modifié.

9. *R.* v. *Schwerdt*, (1957) 27 C.R. 35, p. 38, le juge Wilson (C S. C.-B.).

10. *Ibid.* Mais même en 1957, époque où le juge Wilson a fait cette affirmation, les poursuites ne pouvaient pas être menées «à travers toutes les étapes du processus pénal» dans le cas de toutes les infractions : voir Royal Commission on Criminal Procedure, *Prosecutions by Private Individuals and Non-Police Agencies* [Document de recherche 10], Londres, HMSO, 1980, annexe F.

11. Berner, *op. cit. supra*, note 3, p. 3. Il existe des exceptions bien précises : voir, par exemple, le paragraphe 40(2) de la *Loi sur la conservation de la faune*, L.R.M. 1970, c. W140, aux termes duquel les poursuites privées constituent la méthode de mise en application.

convient de se demander dans quelle mesure les règles du droit anglais s'appliquent au Canada. La réponse à cette question exige une analyse du droit dans le contexte du processus pénal ordinaire[12].

I. La dénonciation

Toute procédure pénale commence par le dépôt d'une «dénonciation»[13], conformément à l'article 455 du *Code*, dont voici un passage :

> Quiconque croit, pour des motifs raisonnables et probables, qu'une personne a commis un acte criminel, peut faire une dénonciation par écrit et sous serment devant un juge de paix ...[14]

Le juge de paix est tenu de recevoir la dénonciation[15], pour peu que toutes les exigences de forme aient été respectées. S'il refuse pour absence de juridiction, sa décision peut être portée devant une instance supérieure, puisqu'il s'agit d'une question de droit[16].

Il convient de signaler dès maintenant qu'au sens de l'article 2 du *Code*, le terme «poursuivant» désigne «le procureur général ou, *lorsque celui-ci n'intervient pas, la personne qui intente des procédures visées par la présente loi*, et comprend un avocat agissant pour le compte de l'un ou de l'autre» [C'est nous qui soulignons]. Dans le contexte de la Partie XXIV du *Code*, qui traite des infractions criminelles mineures punissables sur déclaration sommaire de culpabilité, le terme «dénonciateur» désigne toute «personne qui dépose une dénonciation». Au Canada, la grande majorité des dénonciations sont faites par des agents de police, à la demande d'un particulier ou par suite de la plainte formulée par celui-ci. Ce détail est important, puisqu'il n'est pas nécessaire que le dénonciateur ait été témoin des faits constituant l'infraction présumée. Il doit cependant avoir des «motifs raisonnables et probables» (c'est-à-dire fondés sur des renseignements fiables d'un point de vue objectif) de croire que l'infraction présumée a été commise par l'accusé. Une personne peut faire une dénonciation même si elle n'a pas été lésée dans ses intérêts matériels[17], et même si elle n'est pas la

12. Ce processus s'applique également, de façon générale, aux infractions provinciales et aux infractions prévues par les règlements.

13. Fait exception la mise en accusation en vertu des articles 505 et 507 du *Code*.

14. *Code criminel*, art. 455. Il en va de même des infractions punissables sur déclaration sommaire de culpabilité, en raison de l'article 723 du *Code*.

15. Berner, *op. cit. supra*, note 3, p. 4.

16. *R. v. Meehan (No. 2)*, (1902) 5 C.C.C. 312, 3 O.L.R. 567 (H.C.).

17. Berner, *op. cit. supra*, note 3, p. 4.

victime du crime. Elle n'est pas tenue d'agir pour le compte de la Couronne[18] et peut faire la dénonciation en son propre nom. Enfin, il n'est pas nécessaire que le document énonce que la dénonciation est faite «au nom de Sa Majesté la Reine[19]».

II. La comparution de l'accusé

Une fois la dénonciation déposée, l'accusé est tenu de comparaître devant un tribunal pour répondre aux accusations qu'elle contient. Le *Code criminel* dispose que le juge de paix doit entendre les allégations du dénonciateur et, s'il l'estime opportun ou nécessaire, les dépositions des témoins, avant de décerner un document en vue de contraindre l'accusé à comparaître. Il est habilité à délivrer (dans le cas d'une sommation ou d'un mandat d'arrestation) ou à confirmer un document à cet effet «lorsqu'il estime qu'on a démontré qu'il est justifié de le faire[20]».

L'exercice du pouvoir de décerner ou de confirmer un document visant à contraindre l'accusé à comparaître a été décrit comme [TRADUCTION] «relevant exclusivement de la discrétion [du magistrat]. Même si, en exerçant son pouvoir discrétionnaire, le ‹magistrat› rend une décision mal fondée en droit, le bref de *mandamus* n'est pas recevable[21]». En conséquence, le poursuivant n'est pas admis à s'adresser à une instance supérieure afin de *forcer* un juge de paix à délivrer un document pour contraindre l'accusé à comparaître[22].

Dans ces conditions, on peut facilement concevoir qu'un juge de paix refuse de décerner un tel document lorsque la dénonciation provient d'un poursuivant privé. Ce dernier a alors la possibilité de s'adresser à un autre juge de paix pour obtenir la

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18. Kaufman, *loc. cit. supra*, note 1, p. 102-113, a émis certaines réserves à cet égard, s'appuyant sur des décisions rendues antérieurement au Québec. Mais dans l'affaire *Mandelbaum* v. *Denstedt*, (1968) 5 C.R.N.S. 307, après avoir soigneusement analysé la jurisprudence, la Cour d'appel du Manitoba a conclu qu'une dénonciation pouvait être faite au nom du poursuivant, sans qu'il soit fait mention de la Couronne. Par contre, reste à savoir si, par suite de cette décision, les procédures peuvent être continuées au seul nom du poursuivant privé. Voir également *Usick* v. *Radford*, [1974] 1 W.W.R. 191 (C.A. Man.).

19. *Mandelbaum* v. *Denstedt*, *supra*, note 18, p. 313.

20. *Code criminel*, al. 455.3(1)*b*) et 455.4(1)*b*).

21. *Evans* v. *Pesce and Attorney General for Alberta*, (1969) 8 C.R.N.S. 201, p. 214, le juge Riley (C.S. Alb.).

22. Voir aussi *R.* v. *Doz*, (1968) 5 C.R.N.S. 86 (C.S. Alb.); *Re E.J. Parke*, (1899) 3 C.C.C. 122, 30 O.R. 498 (H.C.); *Broom* v. *Denison*, (1911) 20 O.W.R. 30, conf. 20 O.W.R. 244 (C.A.); *Blacklock* v. *Primrose*, [1924] 3 W.W.R. 189 (C.S. Alb.); *R.* v. *Jones, Ex parte Cohen*, [1970] 2 C.C.C. 374 (C.S. C.-B.).

délivrance du document (en utilisant la même dénonciation) ou de déposer une autre dénonciation sous serment devant un autre juge de paix[23].

III. Le procès

A. Les infractions punissables sur déclaration sommaire de culpabilité[24]

Toutes les infractions punissables sur déclaration sommaire de culpabilité[25] sont assujetties à la procédure établie dans la Partie XXIV du *Code*. Il est maintenant parfaitement clair, à la lecture de l'article 720, que [TRADUCTION] «rien dans la Partie XXIV ne prive le citoyen privé du droit fondamental, découlant du droit anglais, de mener des poursuites privées[26]». Pourtant, le droit n'a pas toujours été aussi limpide.

La raison en est qu'avant 1985, la définition du terme «poursuivant» figurant au paragraphe 720(1) du *Code*, incluait «un dénonciateur ou le procureur général ou leurs avocats ou agents respectifs»[27]. On considérait que l'emploi de la conjonction «ou» avait pour but d'embrasser la situation où le procureur général ou son représentant ne serait pas partie aux procédures[28]. À l'heure actuelle, l'article 720 prévoit que le mot

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23. Selon la décision rendue dans l'affaire *Barrick* v. *Parker*, (1963) 45 W.W.R. 697 (B.R. Sask.), la même dénonciation ne pourrait être présentée à un autre juge de paix. Pourtant, cette position n'a pas été retenue dans l'affaire ultérieure *R.* v. *Southwick, Ex parte Gilbert Steel Ltd.*, [1968] 1 C.C.C. 356, 2 C.R.N.S. 46 (C.A. Ont.), où il n'est fait aucune mention de la décision *Barrick*. À l'instar de Berner, *op. cit. supra*, note 3, p. 8, nous souscrivons à la position adoptée dans l'affaire *Southwick*, encore qu'il s'agisse d'un faux problème puisqu'une nouvelle dénonciation peut être faite par le poursuivant.

24. Kaufman, *loc. cit. supra*, note 1, p. 103-104; Berner, *op. cit. supra*, note 3, p. 8-10.

25. Sont incluses toutes les infractions provinciales, les infractions fédérales punissables sur déclaration sommaire de culpabilité, de même que tous les actes criminels qui peuvent, à la discrétion du poursuivant, être poursuivis suivant la procédure sommaire : voir *R.* v. *Seward*, (1966) 48 C.R. 220 (C.M. Yuk.); *R.* v. *Paulovich*, (1966) 49 C.R. 21 (C.S. Alb.). Si le poursuivant n'a pas fait connaître son choix au moment de l'interpellation, il est réputé avoir choisi la procédure sommaire : *R.* v. *Mitzell*, (1951) 14 C.R. 170 (C.S. C.-B.).

26. *Schwerdt*, *supra*, note 9, p. 40-41, le juge Wilson (C.S. C.-B.). Voir aussi *Re McMicken*, (1912) 3 W.W.R. 492 (C.A. Man.).

27. Kaufman, *loc. cit. supra*, note 1, p. 103-104, souligne l'existence d'une règle plus restrictive au Québec, puisque la législation provinciale érige en infraction le fait pour une personne qui n'est pas avocat de plaider devant un tribunal. Selon la définition de l'article 2 du *Code*, le terme «poursuivant» inclut le poursuivant privé. Cette définition s'applique aux procédures relatives aux actes criminels.

28. Voir, par exemple, l'affaire *R.* v. *McIlree*, [1950] 1 W.W.R. 894 (C.A. C.-B.), où l'on a refusé de prononcer l'ordonnance de prohibition qui avait été demandée parce que l'avis d'appel n'avait pas été signifié à la Couronne, mais seulement au poursuivant privé. Il importe de signaler que la Cour a jugé que la Couronne, par ses agissements, avait montré qu'elle ne se considérait pas comme «partie» aux procédures.

«poursuivant» désigne «le procureur général ou le dénonciateur lorsque le procureur général n'intervient pas, et comprend un avocat ou un mandataire agissant pour le compte de l'un ou de l'autre».

Aux termes du paragraphe 736(3), lorsque le défendeur nie sa culpabilité, la cour des poursuites sommaires doit recevoir la déposition des témoins à charge. En vertu de l'article 737, le «poursuivant» (au sens de la définition précitée) a le droit «de conduire personnellement sa cause, et ... peut interroger et contre-interroger les témoins personnellement ou par l'intermédiaire d'un avocat ou représentant». Or, comme le «poursuivant» inclut un «dénonciateur», il s'ensuit qu'une personne privée peut conduire personnellement sa cause en suivant la procédure sommaire, ou encore agir par l'entremise d'un avocat ou d'un représentant[29].

Quant à savoir si les poursuites peuvent être menées à terme au nom du poursuivant privé, la question est épineuse. Il est établi que la dénonciation peut être faite au nom du poursuivant privé. En revanche, la sommation et le mandat d'arrestation (qui marquent l'entrée en scène de l'État) sont toujours décernés au nom de la Couronne. Mais qu'en est-il des poursuites elles-mêmes? Certaines sources permettent d'affirmer qu'au Québec, à tout le moins, les poursuites relatives aux infractions punissables sur déclaration sommaire de culpabilité peuvent être conduites au nom du poursuivant privé[30]. Pour ce qui est des autres provinces, la question est controversée[31].

Dans l'affaire *R.* v. *Devereaux*[32], la Cour d'appel de l'Ontario a adopté la position suivante :

> [TRADUCTION]
> La distinction entre la dénonciation et la sommation est essentielle et devrait sauter aux yeux. La dénonciation est le moyen dont dispose le sujet pour porter à l'attention de la Souveraine l'infraction censément commise contre elle. D'autre part, la délivrance d'une

29. À moins que le procureur général ou son mandataire n'interviennent. Voir *R.* v. *Stoopnikoff*, (1966) 47 C.R. 341 (C.A. C.-B.); *R.* v. *Dzurich*, [1966] 2 C.C.C. 196 (C.A. Sask.); *R.* v. *Devereaux*, (1966) 48 C.R. 194 (C.A. Ont.); *MacIsaac* v. *Motor Coach Industries Ltd.*, (1982) 70 C.C.C. (2d) 226 (C.A. Man.). Voir aussi Berner, *op. cit. supra*, note 3, p. 13; l'auteur signale que selon certaines sources, le dénonciateur n'aurait pas qualité pour agir après avoir fait la dénonciation. Cependant, au regard de la jurisprudence précitée et de la formulation non équivoque de l'article 737 du *Code*, cette position n'est plus défendable.

30. *Gagnon* v. *Morin*, (1955) 116 C.C.C. 104 (C.S. Qué.).

31. *Beauvais* v. *The Queen*, [1956] R.C.S. 795, 24 C.R. 365. Cette décision ne semble faire autorité que sur un point : lorsque le magistrat a une juridiction absolue, un acte d'accusation formel n'est pas nécessaire même si l'infraction en cause est un acte criminel. Par ailleurs, le juge Taschereau semble avoir reconnu la règle voulant que les poursuites pénales doivent être intentées au nom de la Couronne. Cela signifierait que les infractions provinciales n'auraient pas à être désignées comme telles. Bien qu'elle ait paru reprendre cette position dans l'affaire *Campbell* v. *Sumida*, (1964) 45 C.R. 198, la Cour d'appel du Manitoba a décidé, dans *Usick* v. *Radford*, *supra*, note 18, que l'affaire *Campbell* ne faisait plus autorité. Dans l'affaire *Usick*, la Cour a jugé que la dénonciation faite sous serment par le poursuivant privé en son propre nom n'était pas invalide. Le juge de paix qui avait reçu la dénonciation avait délivré une sommation [TRADUCTION] «au nom de Sa Majesté». Fait à signaler, cette décision fait suite à un appel par exposé de cause formé devant la Cour d'appel du Manitoba au nom du poursuivant privé et du défendeur, sans qu'il soit fait mention de la Couronne.

32. *Supra*, note 29.

sommation est l'acte par lequel la Souveraine enjoint à l'accusé de comparaître devant le juge de paix. Les *«poursuites» commencent lorsque le juge de paix délivre la sommation adressée à l'accusé*. Dans cette optique, il est clair que le dépôt d'une dénonciation ne suppose aucune intervention de la part de la Souveraine, et que par conséquent, il n'est pas nécessaire que la dénonciation soit faite au nom de celle-ci. Il est également clair que par la délivrance d'une sommation en vertu du *Code criminel* ou de la *Loi sur les déclarations sommaires de culpabilité*, ... la Souveraine intervient et les procédures sont continuées en son nom[33]. [C'est nous qui soulignons]

Si cette conception du début des poursuites devait faire autorité, la mention du nom des parties dans l'intitulé de la cause n'aurait aucun intérêt puisqu'à toutes fins utiles, dans toutes les affaires pénales et quasi pénales, on retrouve des documents comme des sommations ou des mandats d'arrestation qui témoignent de l'intérêt de la Couronne dans les procédures[34]. Suivant cette position, toutes les procédures devraient en principe être continuées au nom de la Couronne même lorsque celle-ci ne se considère pas comme partie à l'affaire. En somme, l'usage voulant que la Couronne soit mentionnée dans l'intitulé de la cause, à titre de poursuivant ou de poursuivant conjoint, serait en grande partie attribuable à un surcroît de prudence[35].

Aux termes de l'article 734 du *Code*, lorsque le poursuivant ne comparaît pas au procès, la cour n'est pas compétente pour entendre l'affaire en son absence. Elle doit alors rejeter la dénonciation ou ajourner le procès aux conditions qu'elle juge opportunes.

B. Les actes criminels

C'est surtout à propos de la procédure relative aux actes criminels que l'on peut soutenir que des modifications ont été apportées au common law de façon à restreindre considérablement son applicabilité, sinon à le supplanter tout à fait. Sur ce point, la position du common law est relativement claire :

[TRADUCTION]
En droit anglais, il ne fait aucun doute qu'un poursuivant privé ... peut encore aujourd'hui, en l'absence d'intervention de la Couronne, mener à travers toutes les étapes du processus pénal des poursuites relatives à toute infraction ...[36]

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33. *Id.*, p. 197, le juge Kelly. Voir aussi *MacIsaac* v. *Motor Coach Industries Ltd.*, [1982] 4 W.W.R. 436 (C. Comté Man.), conf. *supra*, note 29.

34. En théorie, du moins, il est toujours possible pour l'accusé de comparaître volontairement pour répondre à la dénonciation sans qu'une sommation ou un mandat d'arrestation ne soit délivré.

35. Au regard de l'affaire *McIlree*, *supra*, note 28, on peut soutenir que, du moins en ce qui a trait aux infractions provinciales, la Couronne peut indiquer qu'elle ne se considère pas comme *partie* aux procédures, même si la sommation qui fait suite à la dénonciation du poursuivant privé a été délivrée au nom de la Couronne.

36. *R.* v. *Schwerdt*, *supra*, note 9, p. 38. Cette règle souffre cependant quelques exceptions : voir Royal Commission on Criminal Procedure, *supra*, note 10, annexe F.

Les dispositions du *Code* qui traitent de la procédure relative aux actes criminels diffèrent sous plusieurs rapports des règles en vigueur en Angleterre. Certaines d'entre elles semblent même contredire la théorie voulant qu'une personne privée puisse elle-même conduire sa cause. À l'heure actuelle, trois modes de procès sont possibles dans le cas des actes criminels : (1) procès par un juge et un jury[37]; (2) procès «expéditif» sans jury, par un juge au sens de la Partie XVI[38]; (3) procès sommaire par un juge de la Cour provinciale[39].

S'il s'agit d'un procès devant juge et jury ou d'un procès expéditif, une enquête préliminaire a généralement lieu[40]. En vertu des articles 496 et 504 à 507 du *Code*, modifiés par l'article 111 du chapitre 19 des statuts de 1985, lequel est entré en vigueur le 2 décembre 1985 [ci-après appelé également la *Loi de 1985 modifiant le droit pénal*], le ministère public ou le procureur de la Couronne peut déposer un acte d'accusation contre la personne qui choisit d'être jugée par un juge et un jury ou qui a été renvoyée pour subir son procès. Si l'enquête préliminaire n'a pas eu lieu ou si l'accusé a été libéré à l'issue de l'enquête préliminaire, l'acte d'accusation ne peut être présenté sans le consentement personnel écrit du procureur général ou du sous-procureur général, ou le consentement écrit d'un juge du tribunal. Un acte d'accusation formel n'est pas nécessaire si l'accusé est jugé sommairement[41].

Dans le cas de poursuites menées par un poursuivant autre que le procureur général, ou dans lesquelles le procureur général n'intervient pas, l'acte d'accusation ne peut en aucun cas être déposé à moins que le poursuivant privé obtienne au préalable l'ordonnance écrite d'un juge du tribunal.

Dans l'affaire *Schwerdt*[42], qui faisait sans doute autorité sur le statut des poursuivants privés au Canada avant l'entrée en vigueur de la *Loi de 1985 modifiant le droit pénal* (ci-après appelée Loi de 1985), le juge Wilson avait conclu que relativement

37. *Code criminel*, art. 427 et 484.

38. *Code criminel*, art. 484, 488 et 489.

39. *Code criminel*, art. 483, 484 et 487. La procédure applicable est celle que prévoit la Partie XVI.

40. En vertu de la Partie XV du *Code*. L'enquête préliminaire n'est pas nécessaire lorsqu'un acte d'accusation est présenté en vertu des articles 505 et 507 du *Code*.

41. *Beauvais* v. *The Queen*, *supra*, note 31. Si l'accusé est jugé suivant la procédure de la Partie XVI du *Code*, le poursuivant privé est en droit d'être présent en tout temps pendant le procès, et même si l'accusé se propose de plaider coupable, le juge ne peut entendre la cause en son absence. Le poursuivant privé est en droit de citer des témoins, tant à charge qu'à décharge : voir *Re McMicken*, *supra*, note 26.

42. *Supra*, note 9, p. 46.

aux différents modes de procès pour les actes criminels, les droits du poursuivant privé étaient les suivants :

(1) Dans le cas d'un procès sommaire tenu par un magistrat, le poursuivant privé peut être entendu de plein droit[43].

(2) L'enquête préliminaire peut être conduite par un poursuivant privé[44]. Cette conclusion peut être tirée de la définition du terme «poursuivant» utilisé dans la Partie XV du *Code*, qui traite de l'enquête préliminaire. Cette définition figure à l'article 2 du *Code* et, comme nous l'avons mentionné relativement aux infractions punissables sur déclaration sommaire de culpabilité, inclut un poursuivant privé.

(3) Dans le cas d'un procès «expéditif» devant un juge, le poursuivant privé ne peut être entendu à moins que le procureur général ou le greffier de la paix ne présente l'acte d'accusation, ou que le procureur général ne lui permette de présenter l'acte d'accusation[45]. Aux termes de l'article 496 du *Code*, en effet, lorsque l'accusé choisit un procès expéditif, l'acte d'accusation «. . . *doit* être présenté par le procureur général ou son représentant, ou par toute personne ayant le consentement écrit du procureur général et, dans la province de Colombie-Britannique, un tel acte d'accusation peut être présenté par le greffier de la paix». Il s'agit d'une disposition impérative et le poursuivant privé ne peut conduire sa cause personnellement que si le procureur général le permet. Il peut toujours essayer de convaincre le procureur général ou le greffier de la paix de présenter l'acte d'accusation, pour ensuite continuer lui-même les procédures. Mais si l'acte d'accusation n'est pas présenté, l'affaire en reste là[46]. [Bien qu'elle fût juste jusqu'à tout récemment, cette règle n'a plus cours. En effet, les modifications apportées aux articles 504 et 507 du *Code* ont eu pour effet de conférer au juge du tribunal, plutôt qu'au procureur général, le pouvoir de consentir à la présentation de l'acte d'accusation.]

(4) Dans le cas d'un procès devant un juge et un jury, le poursuivant privé peut être entendu avec la permission du tribunal ou du procureur général[47]. Cette conclusion, que le juge Wilson a tirée en 1957, est en grande partie attribuable à l'effet conjugué de la définition du terme «poursuivant», lequel figure dans un certain nombre de dispositions de la Partie XVII du *Code* (ce terme incluant le poursuivant privé en vertu de l'article 2 du *Code*), et du paragraphe 507(2), aux

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43. Voir l'affaire *Re McMicken*, *supra*, note 26. Nous avons déjà examiné les dispositions de la Partie XXIV du *Code* qui appuient cette conclusion en ce qui concerne les infractions punissables sur déclaration sommaire de culpabilité. Signalons que de nos jours, c'est un juge de la Cour provinciale et non plus un magistrat qui entend les procès sommaires.

44. *R.* v. *Schwerdt*, *supra*, note 9, p. 40; bien entendu, cette règle ne s'applique qu'en l'absence d'intervention de la part de la Couronne.

45. *Id.*, p. 46.

46. Berner, *op. cit. supra*, note 3, p. 13.

47. *R.* v. *Schwerdt*, *supra*, note 9, p. 46.

termes duquel «[u]n acte d'accusation prévu par le paragraphe (1) peut être présenté par le procureur général ou son représentant ou par toute personne avec le consentement écrit d'un juge de la cour[48] ou celui du procureur général ou, dans une province à laquelle le présent article s'applique, par ordonnance de la cour». Le juge Wilson a décidé que cette disposition, jointe à celles de l'ancien article 558 du *Code* de 1955 qui établissaient une distinction entre «le procureur général ou le conseil agissant de sa part[49]», fondait de façon concluante le droit du poursuivant privé de conduire un procès par jury. Le juge s'est dit d'avis qu'il fallait poser pour [TRADUCTION] «prémisse qu'une poursuite privée est légale à moins qu'elle ne soit interdite[50]», et que rien dans la Partie XVII n'empêchait les poursuites privées, ni de façon expresse, ni à titre de conséquence nécessaire[51]. [Dans ce cas encore, le droit a été modifié récemment par la Loi de 1985. Le *Code* énonce maintenant le droit du poursuivant privé de présenter un acte d'accusation dans le cas d'un procès par jury, à condition d'avoir obtenu une ordonnance écrite du tribunal. L'autre solution, qui consistait à obtenir le consentement du procureur général, est maintenant chose du passé.]

Le juge Wilson était également d'avis que [TRADUCTION] «si le tribunal peut permettre à un citoyen de présenter un acte d'accusation [en vertu du paragraphe 507(2) alors en vigueur], il doit également lui permettre de mener les poursuites qui en découlent, sans quoi la disposition n'aurait aucune utilité pratique[52]». On remarquera que dans les cas prévus à l'article 507 du *Code*, la présentation de l'acte d'accusation peut avoir lieu [TRADUCTION] «même lorsqu'il n'y a pas eu d'enquête préliminaire ou lorsque l'accusé a été libéré à l'issue de l'enquête[53]». Le droit actuel est toujours à cet effet.

Il convient de signaler que l'affaire *Schwerdt*[54] portait sur une question bien précise : un poursuivant privé peut-il conduire un procès sommaire ou une enquête préliminaire relativement à un acte criminel? Répondant par l'affirmative à cette question, le juge Wilson, dans sa décision, est allé au-delà des limites restreintes de la question et s'est lancé dans des commentaires détaillés (qu'il a lui-même reconnus

48. Le tribunal devrait permettre au poursuivant privé de présenter un acte d'accusation : a) si une enquête préliminaire a eu lieu, seulement lorsque cela est nécessaire pour empêcher un déni de justice, et b) s'il n'y a pas eu d'enquête préliminaire, seulement en cas d'urgence ou lorsqu'il existe d'autres raisons pressantes : *Re Johnson and Inglis*, (1980) 52 C.C.C. (2d) 385 (H.C. Ont.).

49. Cette disposition qui date de 1955 a été remplacée par l'article 578 du *Code*, où seul le terme «poursuivant» a été utilisé. Néanmoins, cette modification n'enlève rien de sa valeur au raisonnement du juge Wilson.

50. *R.* v. *Schwerdt*, *supra*, note 9, p. 41.

51. Certaines dispositions traitant du libelle diffamatoire reconnaissent expressément le rôle du poursuivant privé : voir les articles 566 et 656 du *Code*.

52. *R.* v. *Schwerdt*, *supra*, note 9, p. 41.

53. Kaufman, *loc. cit. supra*, note 1, p. 106-107. Pour une étude poussée quoiqu'un peu surannée de la question, voir *R.* v. *Beaudry*, [1967] 1 C.C.C. 272 (C.A. C.-B.).

54. *R.* v. *Schwerdt*, *supra*, note 9.

comme tels[55]). Il reste néanmoins le seul à avoir tenté, dans une décision judiciaire, une analyse complète des dispositions du *Code*, en vue de définir de façon rationnelle le rôle du poursuivant privé aux termes du *Code*. Rappelons par ailleurs que la quatrième conclusion du juge Wilson, concernant le droit du poursuivant privé de conduire un procès par jury, ne vaut qu'à l'égard des dispositions du *Code* s'appliquant aux provinces où le grand jury a été aboli (encore que les deux systèmes présentent peu de différences pratiques sous ce rapport)[56].

De nos jours, l'article 504 confère au poursuivant le pouvoir de présenter un acte d'accusation contre un accusé relativement à toute accusation reposant sur les faits révélés à l'enquête préliminaire, en plus ou en remplacement de toute accusation pour laquelle cette personne a été renvoyée pour subir son procès.

La décision rendue dans l'affaire *Schwerdt*[57] n'a pas été épargnée par la critique[58]. De fait, les conclusions tirées par le juge Wilson paraissent arbitraires les unes par rapport aux autres. Ainsi, pourquoi le droit du poursuivant privé de mener sa cause serait-il tributaire du *mode* de procès, puisque cette question dépend entièrement du choix de l'accusé? Cela dit, comme un auteur l'a fait remarquer, [TRADUCTION] «on peut difficilement trouver à redire au raisonnement du savant juge[59]». Quoi qu'il en soit, les ambiguïtés du droit sur ce plan ont été, dans une large mesure, éclaircies par l'adoption de la Loi de 1985.

IV. L'appel

Dans notre étude de la procédure relative au procès, nous avons tenté de voir si les droits que conférait le common law au poursuivant privé avaient été modifiés par le *Code criminel*. Nous en sommes venus à la conclusion, en nous appuyant en grande partie sur le raisonnement tenu dans l'affaire *Schwerdt*, que le common law avait été modifié en ce qui a trait à la procédure relative aux actes criminels. Pour ce qui est de l'appel, cependant, la situation est différente : [TRADUCTION] «Suivant un principe bien

55. *Id.*, p. 42.

56. La seule différence semble être que lorsque l'accusé a été libéré à l'issue de l'enquête préliminaire ou qu'aucune enquête préliminaire n'a eu lieu, l'acte d'accusation ne peut être présenté sans le consentement d'un juge ou du procureur général : *Code criminel*, par. 505(4). La Nouvelle-Écosse est la seule province où subsiste le grand jury : *Code criminel*, par. 507(1).

57. *Supra*, note 9. Rappelons que cette décision émane d'un tribunal de première instance.

58. Kaufman, *loc. cit. supra*, note 1, p. 113.

59. Berner, *op. cit. supra*, note 3, p. 13.

établi, le droit d'en appeler de la décision d'un tribunal quelconque n'existe jamais d'office, mais seulement lorsqu'il est conféré expressément par un texte de loi[60]».

La question est donc de savoir quels sont les droits d'appel conférés par le *Code*, et dans quelle mesure ils peuvent être exerçés par un poursuivant privé.

En matière d'infractions punissables sur déclaration sommaire de culpabilité, l'appel est régi par les dispositions de l'article 748 du *Code*. Aux termes de l'alinéa *b*), «le dénonciateur, le procureur général ou son agent ...» peut en appeler d'une sentence ou d'une ordonnance rejetant une dénonciation[61]. Cette disposition confère donc au poursuivant privé le droit d'en appeler de la décision rejetant les procédures ou de la sentence imposée[62]. Sur le plan de la procédure, l'appel interjeté par un dénonciateur n'exige aucune intervention de la Souveraine[63].

Par contre, la situation est sensiblement différente en ce qui concerne les actes criminels. La loi dispose que seuls la personne condamnée[64], le procureur général et l'avocat agissant pour le compte de ce dernier[65] peuvent se pourvoir devant la cour d'appel ou la Cour suprême du Canada[66]. Les dispositions en cause ne donnent pas au poursuivant privé le pouvoir de conduire un appel. Comment expliquer ce qui apparaît comme une anomalie flagrante? Peut-être en considérant cet état de choses comme un compromis :

> [TRADUCTION]
> [O]n peut y voir un compromis raisonnable entre, premièrement, l'intérêt qu'a un poursuivant privé à obtenir la condamnation de l'accusé, deuxièmement, l'intérêt qu'a l'accusé à échapper à un harcèlement injustifié et troisièmement, l'intérêt qu'a l'État,

60. L.J. Ryan (éd.), *Tremeear's Annotated Criminal Code*, 6e éd., Toronto, Carswell, 1964, p. 1547. L'ouvrage reproduit un commentaire du juge Hall dans l'affaire *R.* v. *Joseph*, (1900) 11 B.R. 211 : [TRADUCTION] «L'appel n'est pas un droit général, ni un droit de common law. Il s'agit d'un droit exceptionnel conféré par un texte de loi, pour l'exercice duquel les conditions imposées par la loi doivent être remplies ...». Comme l'explique Berner, *op. cit. supra*, note 3, p. 18, en pratique, l'effet de cette règle est le suivant :

> [TRADUCTION]
> [L]orsqu'il est nécessaire d'interpréter la loi, dans un cas [les procédures de première instance], l'on peut compter sur une sorte de présomption voulant que les poursuites privées soient possibles à moins d'avoir été exclues. Lorsqu'il s'agit des droits d'appel, en revanche, la présomption est inversée et l'on doit présumer que les droits d'appel n'existent pas à moins d'avoir été conférés expressément.

61. Voir Ryan, *op. cit. supra*, note 60, p. 1550, et L.J. Ryan (éd.), *Tremeear's 1971-1984 Criminal Annotations*, Toronto, Carswell, p. 866-868. Le même droit appartient au poursuivant privé relativement à l'appel par exposé de cause en vertu de l'article 762 du *Code*.

62. Selon Berner, *op. cit. supra*, note 3, p. 17, le poursuivant privé peut également interjeter appel d'une *déclaration de culpabilité*. En fait, ce pouvoir est réservé au défendeur en vertu de l'alinéa 748*a*) du *Code*, le poursuivant privé (dénonciateur) étant admis, en vertu de l'alinéa 748*b*), à en appeler de l'ordonnance rejetant la dénonciation ou de la *sentence* prononcée contre le défendeur.

63. *R.* v. *Allchin*, (1971) 6 C.C.C. (2d) 332, [1972] 2 O.R. 580 (C.A.); il s'agissait, en l'espèce, du rejet de la dénonciation.

64. *Code criminel*, art. 603.

65. *Code criminel*, art. 605.

66. *Code criminel*, art. 618-621.

représenté par le procureur général, à veiller à ce que justice soit faite. On répond aux revendications du poursuivant privé en lui permettant de faire en sorte que l'accusé soit jugé. On protège ce dernier, d'une part, en lui conférant un droit d'appel général en cas de condamnation, et d'autre part, en le soustrayant à la possibilité d'un appel interjeté par le poursuivant privé en cas d'acquittement. Enfin, les intérêts de l'État sont sauvegardés dans la mesure où le procureur général peut interjeter appel dans tous les cas, qu'il s'agisse de poursuites privées ou non[67].

À notre avis, cependant, ce raisonnement est un bien maigre réconfort pour le poursuivant qui est débouté des accusations criminelles qu'il a portées, et qui, même s'il dispose d'un motif d'appel légitime, apprend que sa capacité d'agir prend fin avec le procès[68], et que les portes des juridictions d'appel lui sont fermées. Quoi qu'il en soit, le droit est clair à cet égard : le poursuivant privé n'est pas admis à se pourvoir en appel dans le cas des actes criminels, alors que son appel est recevable dans le cas des infractions punissables sur déclaration sommaire de culpabilité.

Il semble également que tant et aussi longtemps que la Couronne n'intervient pas, le poursuivant privé puisse de lui-même se prévaloir des procédures de contrôle judiciaire et des recours extraordinaires dans le cas des infractions punissables sur déclaration sommaire de culpabilité, mais non dans le cas des actes criminels à l'égard desquels il n'est pas admis à diriger la procédure[69].

V. L'intervention de la Couronne

Comme nous l'avons déjà mentionné, le pouvoir du poursuivant privé de diriger des poursuites est soumis au pouvoir d'intervention de la Couronne. Cette intervention peut prendre deux formes.

La première est l'*intervention en vue d'exercer un contrôle au niveau public sur le déroulement des poursuites*. Dans l'affaire *R.* v. *Leonard*[70], le juge Kirby a émis l'opinion que le procureur général provincial avait le pouvoir d'intervenir de plein droit et de retirer une dénonciation déposée par un poursuivant privé et imputant un vol à l'accusé. Ce pouvoir discrétionnaire de *retirer* la dénonciation a été décrit comme de nature «judiciaire», ce qui, normalement, rend possible le contrôle judiciaire de son

67. Berner, *op. cit. supra*, note 3, p. 18.

68. Du reste, l'accusé est déjà protégé par l'article 610 du *Code*, qui confère à la Cour d'appel le pouvoir de mettre fin sommairement à tout appel futile ou vexatoire. L'effet de cette disposition est en grande partie neutralisé par le paragraphe 610(3), suivant lequel la Cour d'appel n'a aucun pouvoir quant à l'adjudication des dépens. À l'heure actuelle, il semble que les dépens puissent être adjugés dans le cas des appels relatifs aux infractions punissables sur déclaration sommaire de culpabilité : *R.* c. *Ouellette*, [1980] 1 R.C.S. 568; *R.* c. *Crosthwait*, [1980] 1 R.C.S. 1089.

69. Dans le cas des actes criminels où le poursuivant privé est effectivement admis à diriger les procédures, la Couronne devient partie à l'affaire à cette fin.

70. (1962) 37 C.R. 374 (C.S. Alb.); voir aussi *Re Dick*, [1968] 4 C.R.N.S. 102 (C.S. Ont.).

exercice. Cela dit, les tribunaux sont très réticents à s'immiscer dans cet aspect de l'activité du procureur général[71]. Par ailleurs, on a jugé que le retrait des accusations par le procureur général ne contrevenait pas aux dispositions de la *Déclaration canadienne des droits*[72]. La Couronne peut aussi intervenir pour *continuer* les poursuites puisqu'en common law, le principe qui sous-tend ces différentes formes d'intervention vise à [TRADUCTION] «empêcher le poursuivant privé, en cas de procédures abusives ou injustifiées contre un sujet de [la Couronne], de commettre une injustice[73]». C'est d'ailleurs ce qui s'est produit dans l'affaire *Re Bradley and The Queen*[74], où un conflit de travail avait donné lieu à des poursuites privées pour intimidation, infraction punissable sur déclaration sommaire de culpabilité prévue à l'alinéa 381(1)*a*) du *Code*. La Cour d'appel de l'Ontario a reconnu le pouvoir du procureur général provincial d'intervenir (par l'intermédiaire d'un mandataire) et de continuer les poursuites, bien que le poursuivant privé eût informé le tribunal saisi de l'affaire qu'il souhaitait retirer les accusations. Rendant jugement au nom de la Cour unanime, le juge Arnup a déclaré ce qui suit :

> [TRADUCTION]
> Le procureur général, de même que son mandataire, le procureur de la Couronne, représente la Souveraine dans la poursuite des crimes. Le rôle que la loi donne au poursuivant privé dans ce pays est parallèle au rôle du procureur général mais ne peut s'y substituer. Et lorsque les deux rôles entrent en conflit, le rôle du procureur de la Couronne doit prévaloir, lorsqu'à son avis les intérêts de la justice exigent qu'il intervienne et prenne à sa charge les poursuites privées[75].

Reste à savoir si le pouvoir du procureur général d'intervenir et de retirer une dénonciation s'applique aussi bien aux actes criminels qu'aux infractions punissables sur déclaration sommaire de culpabilité. Dans l'affaire *Leonard*, il s'agissait d'un acte criminel. Pour ce qui est de cette catégorie d'infractions, le pouvoir d'intervention est indiscutable en raison de la définition du terme «poursuivant» que donne l'article 2 du *Code*[76], définition qui s'applique aux Parties XV et XVI, lesquelles régissent la procédure de l'enquête préliminaire et du procès relativement aux actes criminels. Dès lors qu'il intervient, le procureur général, ou son représentant, assume la responsabilité des poursuites et le poursuivant privé n'y est plus partie.

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

72. S.C. 1960, chap. 44; *R.* v. *Leonard*, *supra*, note 70, p. 381-382. Tout porte à croire que ce pouvoir ne contrevient pas non plus à la *Charte canadienne des droits et libertés*, c'est-à-dire la Partie I de la *Loi constitutionnelle de 1982*.

73. *Campbell* v. *Sumida*, *supra*, note 31; voir les motifs du juge en chef Miller, p. 207. De toute façon, le procureur général pourrait toujours mettre fin aux procédures et engager de nouvelles poursuites s'il était d'avis que même si les poursuites privées étaient abusives, l'accusé *devrait* néanmoins être poursuivi. Précisons que l'affaire *Campbell* ne fait plus autorité en ce qui concerne l'intitulé de la cause : *Usick* v. *Radford*, *supra*, note 18, p. 192.

74. (1975) 9 O.R. (2d) 161 (C.A.).

75. *Id.*, p. 169.

76. L'article 2 du *Code* énonce ce qui suit : «‹poursuivant› désigne le procureur général ou, lorsque celui-ci n'intervient pas, la personne qui intente des procédures».

La Partie XXIV du *Code criminel*, qui traite des infractions punissables sur déclaration sommaire de culpabilité, comportait auparavant une définition spécifique du terme «poursuivant», au paragraphe 720(1)[77], où il n'était fait aucune mention explicite du pouvoir d'intervention du procureur général. Cette définition a toutefois été modifiée en 1985[78]. Désormais, le terme «poursuivant» s'entend, en matière d'infractions punissables sur déclaration sommaire de culpabilité, du procureur général ou du dénonciateur lorsque le procureur général n'intervient pas, et comprend un avocat ou un mandataire agissant pour le compte de l'un ou de l'autre[79]. Les modifications apportées au *Code criminel* montrent clairement que le législateur n'a pas voulu, dans le cas des infractions mineures, priver le procureur général du pouvoir de prévenir les abus en matière de poursuites, d'autant qu'il a lui-même l'obligation formelle de veiller à l'intégrité de toutes les poursuites.

La seconde forme est l'*intervention en vue d'arrêter les procédures*. Le pouvoir d'ordonner la suspension des procédures[80], conféré au procureur général ou au procureur mandaté par lui à cette fin, présente un intérêt social particulier pour le cas où des poursuites privées abusives auraient été engagées[81]. Ainsi, lorsqu'il le juge opportun, le procureur général peut ordonner la suspension des procédures afin d'empêcher le poursuivant privé de continuer les poursuites. Toutefois, les tribunaux se sont fait un point d'honneur de veiller à ce que le procureur général réponde devant la législature de l'exercice de ce pouvoir.

La décision rendue récemment dans l'affaire *Dowson* c. *La Reine*[82] a bien établi que le procureur général ne peut ordonner l'arrêt des procédures relatives à une dénonciation se trouvant devant un juge de paix jusqu'à ce que ce dernier ait décidé

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77. Avant l'entrée en vigueur de la *Loi de 1985 modifiant le droit pénal*, le paragraphe 720(1) du *Code* prévoyait ce qui suit : «‹poursuivant› signifie un dénonciateur ou le procureur général ou leurs avocats ou agents respectifs».

    Suivant la définition modifiée, «‹poursuivant› signifie le procureur général ou le dénonciateur lorsque le procureur général n'intervient pas, et comprend un avocat ou un mandataire agissant pour le compte de l'un ou de l'autre».

78. Voir la *Loi de 1985 modifiant le droit pénal*, S.C. 1985, chap. 19, par. 169(1).

79. Signalons que l'arrêt des procédures est également possible dans le cas des infractions punissables sur déclaration sommaire de culpabilité : *Code criminel*, art. 731, qui rend applicable l'article 508.

80. *Code criminel*, art. 508 (actes criminels) et 731 (infractions punissables sur déclaration sommaire de culpabilité). En common law, ce type d'intervention portait le nom de *nolle prosequi*. Voir l'affaire *Beaudry*, *supra*, note 53. Cependant, le procureur général ne peut intervenir pour mettre fin à des poursuites privées ayant commencé par la présentation de l'acte d'accusation avec la permission d'un juge : *Re Johnson and Inglis*, *supra*, note 48.

81. Dans J.F. Archbold, *Criminal Pleading and Practice*, 30e éd., p. 111, cité dans Ryan, *op. cit. supra*, note 60, p. 843, on trouve les remarques suivantes :

    > [TRADUCTION]
    > Les principaux cas d'application du *nolle prosequi* [c'est-à-dire l'arrêt des procédures] sont ceux où il s'agit d'un délit mineur qui fait également l'objet d'une action civile ... ceux où des tentatives inopportunes et vexatoires sont faites pour opprimer le défenseur, comme la présentation répétée d'actes d'accusation irréguliers relativement à la même infraction ... ou encore ceux où il est clair que l'acte d'accusation ne peut être soutenu contre le défendeur ...

82. [1983] 2 R.C.S. 144; voir aussi *Buchbinder* c. *La Reine*, [1983] 2 R.C.S. 159.

s'il y a lieu d'intenter des poursuites. Tout en reconnaissant qu'*après* ce moment, le procureur général avait le pouvoir manifeste de suspendre les procédures, la Cour suprême du Canada a jugé qu'*avant* l'engagement des poursuites, l'exercice de ce pouvoir porterait atteinte au droit du citoyen de soumettre sa dénonciation à un juge de paix pour que celui-ci «entende et examine» les allégations et décide s'il y a lieu ou non d'y donner suite. En rendant cette décision, la Cour a voulu renforcer l'obligation du procureur général de rendre compte à la législature de l'exercice de ce pouvoir[83], en faisant en sorte que la décision d'intervenir soit non seulement bien réfléchie, mais aussi ouverte.

Le pouvoir d'intervention des procureurs généraux pose certaines difficultés en raison du partage constitutionnel des pouvoirs au sein d'un État fédératif comme le Canada. Le procureur général provincial ne peut intervenir que dans les affaires qui relèvent habituellement du pouvoir de poursuite provincial, tandis que le procureur général fédéral doit limiter ses interventions aux poursuites qui tombent dans le champ de compétence du fédéral. Par conséquent, ce n'est que dans les cas où le procureur général du Canada est habilité à engager et à conduire validement des poursuites contre un accusé en vertu d'une loi fédérale qu'il lui est possible[84] d'intervenir[85].

83. *Dowson, id.*, p. 155.

84. Berner, *op. cit. supra*, note 3, p. 28, met en doute la validité constitutionnelle de cette proposition en dehors des territoires mentionnés. Voir cependant *R.* v. *Guenot, Kocsis and Lukacs*, (1979) 51 C.C.C. (2d) 315 (C.A. Ont.); *R.* v. *Parrot*, (1979) 27 O.R. (2d) 333 (C.A.); et *Le procureur général du Canada* c. *Les Transports Nationaux du Canada*, [1983] 2 R.C.S. 206.

85. La situation est différente si l'affaire survient au Yukon ou dans les territoires du Nord-Ouest. Il semble que le poursuivant privé puisse reprendre des procédures ayant été suspendues en faisant une nouvelle dénonciation : *R. ex rel. McNeil* v. *Sanucci*, [1975] 2 W.W.R. 203 (C. Prov. C.-B.). Voir *contra*, *R.* v. *McKay*, (1979) 9 C.R. (3d) 378 (C.A. Sask.).

CHAPITRE TROIS

Le rôle actuel des poursuites privées : Les principes en jeu

Au Canada, la grande majorité des poursuites[86] sont engagées par la police, puis dirigées par un fonctionnaire public, habituellement un procureur de la Couronne[87]. Dans ces conditions, il convient de se demander si le poursuivant privé a toujours un rôle à jouer dans le système de justice pénale contemporain. Pour répondre à cette question, il nous paraît nécessaire et important de souligner, à l'instar du Comité Ouimet qui, en 1969, publiait son rapport sur l'état du système correctionnel au Canada[88], que l'efficacité et l'équité, dans le système de justice pénale, supposent un certain discernement à toutes les étapes du processus de justice pénale :

> Pour faire passer dans la pratique la proposition du Comité à l'effet que l'application de la loi pénale limite le plus possible le tort causé au délinquant, on devrait agir avec discernement dans les cas impliquant des personnes qui sont techniquement coupables d'une infraction mais où intenter des poursuites ne produirait rien de bon. En cas de poursuites, la façon d'appliquer la loi devrait se faire avec discernement.
>
> Cela signifie que ... la poursuite devrait aussi posséder les pouvoirs discrétionnaires voulus pour décider de l'opportunité d'accueillir la plainte ou de continuer les procédures et décider si la justice serait satisfaite d'une condamnation obtenue à la suite d'une accusation moins grave[89].

Les pouvoirs discrétionnaires de cette nature ne deviennent nécessaires que dans le cadre d'un système de poursuites publiques[90]. Paradoxalement, le fait que le ministère public soit investi d'un bon nombre de pouvoirs de cette nature contribue à justifier encore davantage le maintien, voire l'extension du rôle des poursuites privées. En effet, dans un système de poursuites publiques, ce n'est que lorsque le ministère public se sera abstenu d'exercer son pouvoir discrétionnaire de poursuivre que le poursuivant privé sentira le besoin d'agir personnellement. Une fois ces postulats posés, peut-on justifier l'abolition du pouvoir de poursuite des citoyens privés?

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86. Sont incluses les poursuites relatives aux infractions pénales et quasi pénales, fédérales et provinciales.

87. Voir B.A. Grosman, «The Role of the Prosecutor in Canada», (1970) 18 *Am. J. Comp. L.* 498. Dans certains cas, le poursuivant est un policier ou un autre fonctionnaire chargé de l'application de la loi.

88. *Rapport du Comité canadien de la réforme pénale et correctionnelle*, Ottawa, Imprimeur de la Reine, 1969.

89. *Id.*, p. 17.

90. Sur ce sujet, en général, voir G. Williams, «Discretion in Prosecuting», [1956] *Crim. L.R.* 222.

Glanville Williams estime pour sa part que [TRADUCTION] «le pouvoir de poursuite du citoyen privé est sans aucun doute bien fondé et nécessaire en ce qu'il permet au citoyen, en cas d'inaction du ministère public, d'amener les fonctionnaires publics et la police à agir devant les juridictions pénales[91]». Cela dit, il existe un argument encore plus fondamental en faveur du maintien des poursuites privées :

> [TRADUCTION]
> Normalement, un citoyen n'intentera des poursuites privées que lorsqu'il est gravement lésé dans ses intérêts ou profondément heurté dans ses émotions, et encore, rien n'est moins sûr. Même à l'époque reculée où les passions étaient plus fortes, et où l'esprit vindicatif n'était pas considéré comme un signe de barbarie, on sentait le besoin de contenir la soif de vengeance au moyen d'un système régulier de présentation des accusations devant la dizaine et le grand jury[92].

Convaincu qu'un système de poursuites privées est le pendant nécessaire du système de poursuites publiques, un auteur américain a soutenu ce qui suit :

> [TRADUCTION]
> Le système de poursuites privées peut se justifier tant au regard de l'intérêt qu'a la société dans une meilleure application de la loi que du point de vue de l'intérêt qu'a le particulier à se venger des atteintes qui lui sont portées. La pleine participation du citoyen, à titre de poursuivant privé, est nécessaire pour enrayer la menace grave que posent pour la société la carence et les actes inconsidérés [du ministère public][93].

Bien que dans son rapport, le Comité Ouimet ait délibérément choisi de minimiser le désir de vengeance personnelle à titre de composante de la punition[94], cette considération a néanmoins sa place dans notre système de justice pénale[95]. Il serait sans doute peu réaliste pour la société de ne pas tenir compte de cet élément fondamental de la nature humaine car le citoyen, déçu par la loi, pourrait bien chercher à se faire justice lui-même par des moyens illégaux[96]. De toute évidence, la partie lésée est fondée à requérir l'intervention vigoureuse de la justice[97]. Et à cet égard, on ne peut se contenter de répondre à la victime qu'elle peut toujours s'adresser aux tribunaux civils, parce que le préjudice personnel qu'elle a subi n'est pas vraiment mesurable en

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91. G. Williams, «The Power to Prosecute», [1955] *Crim. L.R.* 596, p. 599. Cette citation résume la position de D. Hay dans «Controlling the English Prosecutor», (1983) 21 *Osgoode Hall L.J.* 165, p. 179.

92. *Id.*, p. 675.

93. Commentaires, «Private Prosecution: A Remedy for District Attorney's Unwarranted Inaction», (1955) 65 *Yale L.J.* 209, p. 227.

94. *Op. cit. supra*, note 88, p. 15. Suivant le rapport, la dissuasion, la réhabilitation et le contrôle seraient les seuls éléments de la punition qui servent véritablement à protéger la société.

95. Se réclamant de Stephen, O.W. Holmes, *The Common Law*, 1881, réimpression Boston, Little, Brown, 1963, p. 39-42, soutient que la vengeance (la rétribution) figure légitimement parmi les objectifs du droit pénal.

96. M.R. Cohen, «Moral Principles of the Criminal Law», (1940) 49 *Yale L.J.* 987, p. 1010.

97. *Loc. cit. supra*, note 93, p. 228.

espèces. Par ailleurs, le plus souvent, le jugement ne pourra être exécuté contre l'accusé[98].

Le fait d'invoquer l'aspect rétributif de la punition pour justifier le maintien du système des poursuites privées soulève manifestement une objection morale à laquelle nous souscrivons parfaitement : la vengeance n'est pas une motivation *convenable* ni pour le citoyen, ni pour l'État. Du reste, ce sentiment était à la base même d'un projet de loi présenté à la Chambre des communes d'Angleterre en 1854 et resté lettre morte, qui avait pour but d'abolir les poursuites privées :

> [TRADUCTION]
> L'objectif du présent projet de loi est de soustraire à l'animosité, au harcèlement et à la vengeance personnelle ce qui n'aurait jamais dû être laissé à des considérations aussi arbitraires, et de voir à ce que la justice soit administrée de façon convenable[99].

Compte tenu de la nature de l'être humain et de son besoin de se venger lorsqu'il est lésé, il paraît sans doute préférable pour le système juridique de sanctionner et de canaliser ce besoin plutôt que de contraindre le citoyen à réagir par des moyens primaires et antisociaux[100].

Les arguments qui militent en faveur du système permettant les poursuites privées prennent encore plus de poids lorsqu'ils sont examinés dans le contexte canadien, d'un point de vue extérieur au *Code criminel*. En effet, le libelle diffamatoire[101] est la seule infraction prévue au *Code* dont le législateur ait reconnu le caractère essentiellement privé et particulièrement propice aux poursuites privées. Le texte d'incrimination vise à protéger l'intérêt qu'a une personne à défendre sa réputation, ce qui lui confère une nature beaucoup plus privée que publique. Cependant, au cours des deux dernières décennies, les législateurs fédéral et provinciaux ont adopté des textes de loi visant à protéger l'intérêt public, en matière de protection du consommateur et de qualité de l'environnement par exemple[102].

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98. De même, l'établissement de mécanismes destinés à indemniser la victime d'un crime ne constitue jamais qu'une réparation imparfaite du préjudice subi par elle.

99. J.G. Phillimore, M.P., (1854) 130 *Parl. Deb., 3rd Series* 666.

100. Dans *Wild Justice: The Evolution of Revenge*, New York, Harper & Row, 1983, p. 9-10, S. Jacoby préconise la participation de la victime au système de justice sociale, sous peine de voir surgir chez les citoyens le désir de prendre en main l'application de la justice :

> [TRADUCTION]
> Si la victime souhaite voir son agresseur puni, ce n'est pas seulement pour des raisons pratiques de dissuasion, mais aussi pour obtenir réparation de l'atteinte portée à son sens de l'ordre social et de l'identité personnelle ... La société qui ne parvient pas à convaincre ses membres de sa capacité d'obtenir réparation des préjudices qui leur sont causés s'expose au risque constant de voir ses membres recourir à des moyens violents pour se faire justice.

101. *Code criminel* art. 265. Dans le document de travail 35, intitulé *Le libelle diffamatoire*, Ottawa, Approvisionnements et Services, 1984, la Commission a recommandé l'abrogation de cette disposition du *Code*.

102. La Commission a récemment recommandé d'autres initiatives dans ce domaine : voir le document de travail 44, intitulé *Les crimes contre l'environnement*, Ottawa, CRDC, 1985.

De façon générale, ces textes de loi imposent des obligations dont l'inexécution entraîne des sanctions importantes. Le plus souvent, la «victime» n'est pas consciente du préjudice qui lui est causé. Quoi qu'il en soit, les infractions prévues par ce type de législation sont généralement perçues comme moins importantes par les procureurs déjà aux prises avec une lourde charge de travail constituée de «crimes véritables». C'est pour cette raison que partout dans le pays, les groupes d'intérêt public ont intensifié leur rôle traditionnel et se sont faits en quelque sorte les défenseurs des domaines réglementés. Leurs membres ont engagé des poursuites privées, soit à titre individuel, soit au nom du groupe. Ces personnes ne sont pas des «victimes» au sens traditionnel du terme[103]. Elles ne sont pas motivées par un désir de vengeance ou de rétribution, mais plutôt par leur conception de l'intérêt public[104]. L'action de ces citoyens contribue à renforcer les valeurs démocratiques et la perception publique de la justice, encore qu'elle s'accomplisse dans le cadre d'un système où le ministère public est le pivot du processus de poursuite[105].

Quel que soit le fondement théorique des poursuites au Canada, il est clair que notre système repose sur l'action des poursuivants publics[106], dont un bon nombre détiennent leur charge à titre permanent. Au Canada, en effet, les poursuivants publics sont nommés et non élus comme le sont les procureurs aux États-Unis.

Les systèmes reposant sur les poursuites publiques, que les poursuivants soient nommés ou élus, ont aussi leurs détracteurs. En Angleterre, notamment, où les critiques ont été particulièrement nombreuses, on s'est donné beaucoup de mal pour déterminer quelle était la meilleure façon d'organiser le processus des poursuites. Les auteurs du *Justice Report*[107] de 1970 ont recommandé l'institution d'un ministère central des poursuites publiques et le maintien du pouvoir du citoyen privé de mettre en mouvement le processus pénal, sous réserve de la prérogative du ministère des poursuites publiques de prendre en main les poursuites lorsqu'il le juge opportun. En 1979, ces recommandations ont reçu la sanction du législateur[108]. Les critiques formulées par les

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103. Des poursuites peuvent être engagées non seulement par la victime, mais par toute personne : *Duchesne* v. *Finch*, (1912) 23 Cox C.C. 170; *Young* v. *Peck*, (1913) 77 J.P. 49. Il importe peu que le délinquant ait indemnisé la victime : *Smith* v. *Dear*, (1903) 20 Cox C.C. 458.

104. Il n'est pas dans notre intention de chercher à démontrer, au-delà des recommandations modestes que nous formulons dans le présent document, comment promouvoir l'engagement de poursuites privées, même au sein du système actuel. Si elle était abordée, cette question exigerait des études plus poussées. Cela dit, il est clair que les considérations financières joueraient un rôle important dans un tel projet, en particulier pour ce qui concerne les infractions quasi pénales. À ce sujet, voir de façon générale L.B. Hughes, *Private Enforcement of Federal Environmental Legislation*, 1982, p. 42.

105. *Loc. cit. supra*, note 93, p. 225-229.

106. *Loc. cit. supra*, note 87.

107. «The Prosecution Process in England and Wales», [1970] *Crim. L.R.* 668, p. 681 (ci-après appelé *Justice Report*).

108. *Prosecution of Offences Act 1979*, chap. 31, art. 4 (R.-U.).

Anglais à l'égard du système centralisé de poursuites publiques ont été résumées de la façon suivante :

> [TRADUCTION]
> Les détracteurs de la réforme en cause [les poursuites publiques] arguent de l'expérience d'autres pays où, soutiennent-ils, le contrôle des rouages de l'administration de la justice pénale est tombé nécessairement entre les mains des partis politiques et a été mis à la disposition d'une foule de politiciens sans scrupules qui s'en sont servi afin de promouvoir des intérêts privés ou partisans. Le système des poursuites privées était infiniment préférable ... à une forme de mise en application du droit pénal qui met la liberté des citoyens à la merci du caprice ou de la malveillance des dirigeants de partis ...[109]

Un ancien directeur des poursuites publiques, qui favorisait le maintien des poursuites privées, a lui-même émis la même idée générale :

> [TRADUCTION]
> On fait parfois valoir qu'il serait avantageux d'étendre le champ de compétence de [son] ministère, et au cours des dernières années, la tendance a été d'ajouter aux responsabilités du directeur, tant en pratique que dans les textes de loi ... Lorsqu'il s'agit de l'administration du droit pénal, il convient d'examiner d'un point de vue critique, avant de l'accepter, toute proposition qui aurait plus ou moins pour effet de réduire, chez le citoyen, le sentiment de son devoir de participer activement à la mise en application quotidienne de la loi. L'économie et même l'efficacité ne sont pas nécessairement des motifs suffisants pour instaurer des changements susceptibles de saper les bases sur lesquelles notre système de justice pénale a été édifié ... L'histoire du droit pénal enseigne que nous avons garanti et préservé notre liberté et notre sécurité individuelles en développant un système dans lequel celles-ci dépendent, en dernière analyse, non pas du pouvoir exécutif, si bien intentionné soit-il, et non pas du pouvoir judiciaire, si grande soit sa sagesse, mais plutôt de l'appui actif et du jugement en dernier recours de nos concitoyens[110].

Essentiellement, les défenseurs des poursuites privées soutiennent que celles-ci sont une aide précieuse au processus général de mise en application de la loi. Elles tiennent lieu de mécanisme de contrôle informel de l'exercice des pouvoirs discrétionnaires. Par contre, les détracteurs des poursuites privées craignent que celles-ci n'en viennent à être intentées par malveillance, en vue d'un profit privé ou afin d'assouvir une vengeance personnelle. En outre, en sanctionnant les poursuites privées, on se trouverait à ouvrir la voie au chantage, une personne pouvant exiger un avantage sous la menace de poursuites. À la vérité, cependant, cette dernière objection est sans fondement puisque dans la plupart des pays, y compris le Canada, de tels agissements constituent un crime[111].

D'un point de vue administratif, il est sans doute vrai de dire que le fait de confier au ministère public un pouvoir exclusif en matière de poursuites augmenterait l'économie et l'efficacité du système, surtout si l'administration de celui-ci est

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109. *Loc. cit. supra*, note 93, p. 234, note 130, citant P. Howard, *The Conduct of Criminal Prosecutions in England*, non publié, cité dans R. Moley, *Politics and Criminal Prosecution*, 1929, p. 201.

110. Sir Theobald Mathew, *The Office and Duties of the Director of Public Prosecutions*, Londres, The Athlone Press, 1950, p. 16.

111. Voir l'article 305 du *Code criminel*, qui traite de l'extorsion.

centralisée[112]. Cela dit, il n'est pas sûr que l'uniformité complète et le contrôle centralisé soient possibles, ni même souhaitables au Canada.

Dans notre système de poursuites publiques, on tente de séparer le plus nettement possible les fonctions policières des fonctions liées aux poursuites proprement dites. Cette séparation des fonctions s'appuie sur des arguments solides. Les avantages qu'elle comporte pourraient néanmoins être conservés sans qu'il soit nécessaire d'enlever à tous les citoyens, *à l'exception des fonctionnaires*, le droit d'intenter des poursuites. Un mécanisme pourrait être établi de façon à retenir le droit d'intenter des poursuites privées, sans pour autant nuire aux droits dont sont formellement investis les enquêteurs qui agissent dans le cadre d'une charge *publique*, qu'ils soient par exemple agents de police, agents de douanes[113].

À l'appui du système reposant sur des poursuivants publics professionnels, on peut également soutenir qu'en raison de son statut de fonctionnaire indépendant et de sa formation professionnelle, le poursuivant est en mesure de faire preuve d'objectivité dans ses fonctions et dispose des connaissances nécessaires pour comprendre la complexité de la société moderne et des lois contemporaines[114]. Cet argument a beaucoup de poids lorsqu'il s'agit de justifier que le fonctionnaire chargé de l'enquête ne participe pas à la décision d'intenter des poursuites. Mais peut-on en dire autant lorsqu'il s'agit d'intervenir dans la décision du citoyen qui souhaite intenter des poursuites privées? D'aucuns soutiennent que cet argument n'a plus la même force, surtout lorsque le poursuivant public choisit de *ne pas* donner suite aux accusations portées. Dans cette optique, il importe de tenir compte également du rôle plus large que peut jouer le citoyen dans le système de justice pénale, ainsi que de la nécessité de convaincre le citoyen que le système peut répondre efficacement au préjudice qu'il a subi[115].

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112. Cette opinion a été exprimée, à la défense de la procédure écossaise, par lord Cameron qui voyait trois avantages au système centralisé des poursuites publiques : (1) l'impossibilité presque totale pour la police d'intervenir dans la décision de poursuivre; (2) un certain degré d'uniformité sur le plan de la pratique dans tout le pays; (3) le contrôle centralisé de la prise de décisions quant au tribunal devant lequel seront engagées les poursuites. À cet égard voir Lord Cameron, «Some Aspects of Scots Criminal Practice and Procedure», Holdsworth Club, Faculty of Law, University of Birmingham, 1971, p. 4. Signalons cependant que depuis, l'Écosse a reconnu le pouvoir d'engager des poursuites privées : voir *infra*, note 218.

113. L'Angleterre envisage actuellement la mise en œuvre d'un tel système : voir le livre blanc intitulé *An Independent Prosecution Service for England and Wales*, Cmnd. 9074, Londres, HMSO, 1983.

114. *Justice Report*, *op. cit. supra*, note 107, p. 679.

115. À cet égard, l'affaire *R.* v. *Metropolitan Police Commissioner, ex p. Blackburn*, [1973] Crim. L. R. 185 (C.A.) est intéressante. En l'espèce, l'appelant avait tenté en vain de demander la délivrance d'une ordonnance de *mandamus* contre le commissaire de police intimé, pour le forcer à mettre en application la législation anglaise relative à la pornographie. La Cour d'appel a jugé que dans l'accomplissement de ses fonctions, la police était investie de pouvoirs discrétionnaires, dans l'exercice desquels les tribunaux ne devaient pas s'immiscer. Les tribunaux n'interviendront que s'il est établi que la police *ne s'acquitte pas* de ses devoirs : *R.* v. *Metropolitan Police Commissioner, ex p. Blackburn*, [1968] 2 Q.B. 118, p. 136 et 139. Dans ce cas, il s'agit encore de la même personne qui tentait d'obtenir la délivrance d'une ordonnance de *mandamus* pour forcer le commissaire à mettre en application la législation relative aux maisons de jeu.

Il doit aussi être tenu compte du problème des poursuites privées abusives, surtout lorsqu'elles sont motivées par la malveillance[116]. À l'heure actuelle, on ne peut affirmer que l'accusé éventuel jouit d'une protection suffisante contre de tels abus[117]. Peut-être ces objections au maintien des poursuites privées pourraient-elles être réglées par l'inclusion, dans le *Code criminel* et dans la législation provinciale applicable, de dispositions régissant de façon adéquate l'adjudication des dépens[118].

Les poursuites privées peuvent également prêter aux abus lorsqu'une question fait l'objet d'une controverse ou d'un débat public et que l'une des personnes intéressées prend l'initiative de porter des accusations criminelles à cet égard. Étant donné la règle *sub-judice*, suivant laquelle les affaires pendantes devant les tribunaux ne devraient pas être discutées publiquement, le débat public pourrait être étouffé au moment où son importance est la plus grande. Les choses peuvent se compliquer encore davantage si les accusations sont ensuite retirées par le poursuivant au moment du procès. Pourtant, ce risque d'abus semble plus théorique que réel, et le cas est rare en pratique. Au demeurant, l'introduction d'un mécanisme efficace d'adjudication des dépens permettrait sans doute aux tribunaux d'éliminer ce problème.

Si elle avait lieu, l'extension de la portée du droit d'intenter des poursuites privées au Canada ne pourrait se faire qu'au moyen d'un empiétement, fût-il de peu d'importance, sur les pouvoirs discrétionnaires relativement vastes du ministère public. Certains auteurs, tel Gittler[119], y voient un frein utile contre l'éventuel parti pris du ministère public à l'égard de certaines catégories de victimes, dans l'exercice du pouvoir de poursuite[120].

On a fait valoir que lorsque la victime cherche à mettre elle-même le processus en mouvement et à assumer les poursuites, le fait de lui permettre de passer outre à l'inaction du ministère public et d'avoir accès directement aux tribunaux aurait un effet salutaire pour la victime, sur les plans de la restitution et de la rétribution, du moins au regard de la façon dont la victime peut concevoir ces valeurs.

Comme nous l'avons déjà signalé, d'aucuns soutiennent que la généralisation ou l'extension des poursuites privées seraient difficiles en pratique et peu souhaitables sur le plan social. Suivant cette position, le nombre de poursuites privées augmenterait

116. Voir Williams, *loc. cit. supra*, note 91, p. 678. Signalons que le recours de nature délictuelle pour poursuites abusives ne devrait pas être considéré comme une protection complète puisqu'il est très difficile d'obtenir gain de cause dans de telles circonstances.

117. Le tarif actuel du *Code* est insuffisant et rarement utilisé.

118. Mentionnons que la Commission participe actuellement à une étude conjointe avec la Saskatchewan Law Reform Commission sur le thème général de l'adjudication des dépens en matière pénale. La question particulière de l'adjudication des dépens dans le cas des poursuites privées sera examinée dans le cadre de cette étude.

119. J. Gittler, «Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems», (1984) 11 *Perspective L.Rev.* 117-182.

120. Voir l'étude de D.A. Schmeiser préparée pour la Commission et intitulée *La délinquance chez les autochtones et la loi*, Ottawa, Information Canada, 1974.

inévitablement et les tribunaux déjà engorgés auraient du mal à assumer cette surcharge[121].

Enfin, reste la question délicate de savoir s'il y a lieu d'accorder la préséance à l'intérêt du citoyen ou à celui de l'État, dans le cas d'un conflit où la victime souhaiterait intenter elle-même des poursuites (ou serait prête à en confier la responsabilité à quelqu'un d'autre qu'au ministère public).

Dans le cadre d'un système de poursuites publiques comme le nôtre, il existe au moins six façons possibles de restreindre la portée des poursuites privées sans les abolir tout à fait[122] :

(1) limiter la possibilité d'intenter des poursuites privées aux infractions que les personnes intéressées sont susceptibles de vouloir poursuivre, mais à l'égard desquelles le ministère public sera peu enclin à engager des procédures[123];

(2) assujettir les poursuites privées à un certain contrôle public en faisant aux poursuivants privés l'obligation d'aviser le poursuivant public ou le procureur général, ou d'obtenir leur consentement[124];

(3) soumettre à un contrôle judiciaire la décision du ministère public de ne pas engager de poursuites[125];

(4) établir un mécanisme grâce auquel une partie intéressée pourrait contester la décision du ministère public de ne pas intenter de poursuites, en demandant directement à un grand jury ou au tribunal d'engager des procédures[126];

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121. Assez curieusement, l'expérience passée au Canada ne semble pas étayer ce postulat. Il faut préciser qu'au Canada, il existe peu d'obstacles à *l'engagement* proprement dit de procédures (c'est-à-dire le dépôt d'une dénonciation), que l'infraction en cause soit un acte criminel ou une infraction punissable sur déclaration sommaire de culpabilité. La prérogative d'intervention du procureur général et le pouvoir des tribunaux d'intervenir d'office pour réprimer les abus de procédure permettent de contenir toute tendance à la prolifération des poursuites privées.

122. Les quatre premières solutions sont décrites et examinées dans Gittler, *loc. cit. supra*, note 119.

123. Parmi ces crimes, on compte les disputes entre amis et voisins, les fraudes commerciales perpétrées contre des clients, les crimes de responsabilité stricte mettant en jeu la santé et la sécurité, de même que les délits contre l'ordre public. Voir A.S. Goldstein, «Defining the Role of the Victim in Criminal Prosecution», (1982) 52 *Miss. L.J.* 515, p. 559.

124. *Id.*, p. 560.

125. Voir D.G. Gifford, «Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal», (1981) 49 *Geo. Wash. L.Rev.* 659, p. 716-717, et J. Vorenberg, «Decent Restraint of Prosecutorial Power», (1981) 94 *Harvard L.Rev.* 1521, p. 1568. On pourrait s'autoriser du paragraphe 15(1) de la *Charte canadienne des droits et libertés* pour soutenir cette position. Cela dit, on pourrait objecter que l'exercice raisonnable du pouvoir discrétionnaire de porter des accusations échappe à l'application du paragraphe 15(1) et est protégé par l'article 1.

126. De nos jours, au Canada, le grand jury n'existe plus que dans la province de la Nouvelle-Écosse.

(5) donner au ministère public le pouvoir d'intervenir lorsque des procédures ont été engagées, soit pour prendre les poursuites en main au nom de l'État, soit pour mettre fin à des procédures vexatoires;

(6) exiger du poursuivant privé qu'il obtienne le consentement du tribunal avant qu'un acte d'accusation puisse être présenté.

La première solution n'a que peu d'intérêt puisqu'en pratique, le système actuel se traduit par un résultat très semblable. La deuxième possibilité n'apporte aucune solution au conflit qui oppose la victime et le poursuivant pour ce qui est de savoir si des poursuites devraient être intentées. La troisième possibilité est difficilement praticable puisque les tribunaux ont toujours hésité à s'immiscer dans l'exercice du pouvoir discrétionnaire d'engager des poursuites. La quatrième solution présente l'avantage de soumettre l'accusé à un processus de mise en accusation équitable mais introduit, dans les décisions relatives à l'engagement des poursuites, une forme d'incertitude qui cadre mal avec les traditions du droit canadien. Bien qu'elles présentent un certain intérêt sur le plan des orientations générales de la réforme, les quatre premières possibilités devraient être perfectionnées de façon appréciable avant de pouvoir apporter une contribution sensible au droit canadien. Quant aux cinquième et sixième solutions, elles caractérisent déjà notre système dans sa forme actuelle.