NOTES

The Prosecutor as a Minister of Justice: a Critical Appraisal

Introduction

Neither a pragmatist, nor an idealist will find much comfort in an analysis of the process glibly referred to as the administration of justice; for it is through analysis that the dissonance between the concept and the realty, the myth and the truth, becomes manifest. The divergence exists not because of lack of revelation, but rather because the very idea of efficient administration in the eyes of the Administrators requires that the ideal be mitigated and compromised within certain fundamental norms to become the expedient.

When, as in the field of the administration of criminal justice, conflict exists between co-existent norms of equivalent strength the compromise of principle becomes greater, there being less polarization toward either norm.

In concrete terms, two operationally oriented norms, which Packer has termed "crime control" and "due process", dominate the administration of the criminal law.[1] The first, tainted with an authoritarian connotation, values the preservation of order as a paramount objective: the manner of achieving that end is necessarily secondary. The latter view holds that the end attained must justify the means used and that a fair trial of an accused is more important than the conviction of the guilty.

Those charged with the day-to-day administration of the system would probably claim that the two values are not inimical, but the practice and the history tend to show that due process receives more lip-service than real respect.

The present paper is an inquiry into one small area of the administration of criminal justice — the prosecutor.[2] It is an at-

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[1] Packer, H.L., *Two Models of the Criminal Process,* (1964-65), 113 U. of Pa. L. Rev. 1.

[2] For a complete outline for a comprehensive investigation far beyond the scope of this paper, see: *The Administration of Criminal Justice in the United States — Plan for a Survey to be Conducted under the Auspices of the American Bar Foundation,* American Bar Foundation, (Chicago, 1955).

tempt to reveal what compromises have been accepted, what sacrifices have been made, and what has been ultimately achieved.

The Conceptual Framework

Lord Wright, a jurist of eminence, has written categorically:

> I am most firmly convinced by all my experience and study of and reflection upon law that its primary purpose is the quest of justice.[3]

"Justice", it is taken to mean, is merely a state in which no man's rights are adversely affected unless and until the courts, in applying the proper positive law to the relevant facts in issue, determine that they should be.

It follows that "justice" is the result, in part, of fact finding and that no "justice" may be had where the court is not seized of all the relevant facts upon which it may properly adjudicate.

The rules attending a criminal prosecution are supposedly sophisticated procedures devised to ensure that only those guilty in the eyes of the law will be convicted. The issue then becomes, are these procedures compatible with what Lord Wright saw as their purposes; or was he myopic in his reflection and misinformed in his study, even perhaps, forced to tell an embarrassed lie?

The role and function of the prosecution at a criminal trial, as expressed in general theory at least, is not really subject to dispute. The classic statement of Riddle, J.A., in *R.* v. *Chamandy*[4] would seem to sum up the Canadian position:

> It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.[5]

With specific reference to the prosecution, Taschereau, C.J., (dissenting on other matters) statos what appears to be the accepted position in *Boucher* v. *The Queen*:[6]

> La situation qu'occupe l'avocat de la Couronne n'est pas celle de l'avocat en matière civile. Ses fonctions sont quasi-judiciaires. Il ne doit pas tant chercher à obtenir un verdict de culpabilité qu'à assister le juge et le jury pour que la justice la plus complète soit rendue. La modération et l'impar-

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[3] Lord Wright, "Natural Law and International Law" in *Interpretations of Modern Legal Philosophies*, (New York, 1947), at p. 794.

[4] (1934), 61 C.C.C. 224.

[5] *Ibid.*, at p. 227.

[6] [1955] S.C.R. 16.

> tialité doivent toujours être les caractéristiques de sa conduite devant le tribunal.[7]

The prosecutor is therefore, as it seems, a non-partisan fact-presenter. He is part of the court and has been regarded as a Minister of Justice rather than counsel representing any special interest.[8] The American position is substantially the same:

> The United States Attorney is the representative... of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[9]

From these statements it must be concluded that the officially determined norms as stated would demand that the criminal trial from the prosecution's standpoint be an unending, uncompromising search for truth; its purpose being as much the acquittal of the innocent as it is the conviction of the guilty.[10] It remains now to determine how much of this is sophistic rhetoric; where and to what extent the gap exists between espoused principle and the actual, condoned operation of the criminal process.

The Accusatorial System

Fundamental to the Anglo-American trial process is the Adversary system. It has been heralded as a glorious rejection of the practices of the notorious Star Chamber by its supporters.[11] It has been equally criticized as having its origin in and merely being an extension of out-of-court brawls.[12]

The system is based on two major premises; that society must prove its charge against the accused, and not the accused, his innocence; that through argument and counter argument, examination and cross-examination will truth emerge. In Hegelian terms, the clash of thesis and antithesis yields the synthesis, discovered by the objective Trier. The system, of necessity, presupposes that *all* relevant considerations will be *objectively* and dispassionately analysed. The idea of "adversaries" in the criminal trial is, at least in theory, repudiated. As Rand, J., in *Boucher* v. *The Queen*[13] has put it:

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[7] *Ibid.*, at p. 21.

[8] *Regina* v. *Puddick*, (1885), 4 F. & F. 497, at p. 498; 176 E.R. 662, at p. 662-663.

[9] *Berger* v. *U.S.*, (1939), 295 U.S. 78, at p. 88.

[10] Per Palmieri, J., *Application of Thomas Kapatos*, (1962), 208 Fed. Supp. 883, at p. 888.

[11] Honsberger, J., "The Power of Arrest and the Duties and Rights of Citizens and Police" in *Law Society of Upper Canada: Special Lectures on Arrest*, (Toronto, 1963), 1, at p. 7.

[12] Frank, Jerome, *Courts on Trial*, (Princeton, 1950), p. 80.

[13] *Supra*, n. 6.

> (T)he purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented ...The role of the prosecution excludes any notion of winning or losing.[14]

A realistic appraisal of what actually transpires at trial affords a rather different picture. Judge Botein has written:

> During the trial the accused is opposed by a prosecutor who is obliged by oath and impelled by persuasion or ambition or vanity or adversary ardour to use all the skill and resources at his disposal to convict. When a criminal case reaches the point of trial, the prosecutor is then the advocate for the community seeking to bring the criminal to justice, with all the psychological spur and stimulus of an attorney in an adversary proceeding.[15]

One need not develop a cynic's view of human nature to understand the phenomenon that Botein has described. Apart from the "crime control" mentality that Packer has suggested dominates those who are charged with the enforcement of the criminal justice system, there remains the obvious fact that prosecutors are merely lawyers who have been appointed to a special position. Their training and technique is fundamentally the same as other attorneys. Not that Swift was correct when he defined lawyers as "a society of men... bred up from their youth in the art of proving by words, multiplied for the purpose, in a jargon of their own, that no other mortal can understand, that white is black, and black is white, according as they are paid"; but it is not unreasonable to expect that the skilled prosecutor will use the same techniques in cross-examination as will the skilled defence counsel. For example, examine one bit of advice which is the keystone of a successful cross-examination. When a witness has been caught in an inconsistency during cross-examination, the normal immediate response would be to request an explanation. This urge should be suppressed. The witness is left dangling; his credibility demolished in the eyes of the jury. If on redirect examination, the witness does explain the apparent inconsistency, it will be at the guidance of counsel who calls him. It will therefore have a diminished significance for the jury.

Essentially, these tactics have as their object, preventing the trial judge or jury "from correctly evaluating the trustworthiness of witnesses and shutting out evidence the trial court ought to receive, in order to approximate the truth".[16] Frank has compared

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[14] *Ibid.*, at p. 23.
[15] Botein & Gordon, *The Trial of the Future*, (New York, 1963), p. 71.
[16] Frank, *op. cit.*, p. 85.

our present trial method to "the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation".[17] Thus the "fight system", or "sporting event", as the adversary system has been characterized, does not appear entirely compatible with its alleged objective, the quest for truth.

Plea-Bargaining

Not all accused choose to allow themselves to become the prize of the courtroom contest; instead they opt for another game, where rules are much less formal — a game the accused plays with a definite handicap. Again theory and fact are at loggerheads. Rives, J., has stated, "Justice and liberty are not the subjects of bargaining and barter".[18] Yet as Newman [19] and Packer [20] point out, the widespread reliance on guilty plea "bargaining" is essential to the operation of our present system of criminal prosecutions. As the term would imply, plea negotiation involves an exchange between the Crown and the defendant of benefits and concessions. In return for a plea of guilty, the defendant is promised less severe treatment than he would be subjected to if convicted of the maximum offence and given the most severe sentence. At the same time he waives his right to stand trial under the protection of the existing procedural safeguards, and thereby loses his chance for an outright acquittal. It is this area where a preponderance of power and inherent administrative biases work to circumvent and negative what Viscount Sankey proudly referred to as the whole policy of English Law, that is "to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues".[21]

Despite the primary burden of proof upon the Crown to prove all the elements of the charge against the accused beyond a reasonable doubt, there would seem to be a tendency of police and prosecution to institute proceedings on the basis of indices evidencing more only probable guilt. The accused, too often unrepresented by counsel, unaware of the higher degree of proof required by a court to convict, by entering into the bargaining process may be sacrificing liberty to which the law entitles him. Fear of a harsh

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[17] *Id.*

[18] *Shelton* v. *U.S.*, (1957), 242 F. 2d 101, at p. 113.

[19] See Newton, D.J., *Conviction, The Determination of Guilt or Innocence without Trial*, (Boston, 1966).

[20] See Packer, *op. cit.*

[21] *Maxwell* v. *D.P.P.*, [1935] A.C. 309, at p. 323.

sentence or damaging publicity, intimidation ranging from the subtle to the blatant, and ignorance of the rules which would exclude inadmissible evidence may be sufficient to convince the innocent defendant to plead guilty.[22] Thus, the quest for truth and the words of the late Mr. Justice Frankfurter that, "this history of liberty has largely been the history of the observance of procedural safeguards," have been lost and forgotten in the scramble that is the hallmark of assembly-line justice.

The Conduct of the Prosecution: Disclosure

> I do not agree that the state may be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that it would not be admissable at trial. The state's obligation is not to convict, but to see that, as far as possible, truth emerges. This is also the ultimate statement of the responsibility to provide a fair trial... No respectable interest of the State can be advanced by its concealment of information which is material, generously conceived, to the case including all possible defences... A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence... which may exonerate the defendant or be of material importance to the defense — regardless of whether it relates to testimony which the State has caused to be given at the trial — the State is obliged to bring it to the attention of the court and the defense.[23]

In this long statement Mr. Justice Fortas is unequivocal in requiring complete disclosure as an essential to any conception of a fair trial.

Canon 1(2) of the Canadian Bar Association's statement of Legal Ethics requires that

> When engaged as a public prosecutor, his [the lawyer's] primary duty is not to convict but to see that justice is done: to that end, he should withhold no facts tonding to prove either the guilt or innocence of the accused.[24]

As Orkin[25] points out, Canon 5 of the American Bar Association is an even more explicit admonition: "The suppression of facts or the security of witnesses capable of establishing the innocence of the accused is highly reprehensible."

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[22] See *The President's Commission on Law Enforcement. The Courts and the Administration of Justice,* (Washington, 1967), U.S. Gov. Printing Off.

[23] *Giles* v. *Maryland,* (1967), 87 S.Ct. 793, at p. 809.

[24] See the Honourable Mr. Justice Schroeder, "Some Ethical Problems in Criminal Law" in *Law Society of Upper Canada: Special Lectures on Arrest,* (Toronto, 1963), 87; at p. 112.

[25] Orkin, M. M., *Legal Ethics,* (Toronto, 1957), p. 118.

However high sounding pronouncements are hardly satisfactory surrogates for a positive requirement for a comprehensive disclosure. The extent to which the positive law complies with its ethical norms will be the present object of consideration.

The Calling of Witnesses

At common law, the entire task of producing evidence and witnesses was borne by the prosecution alone.[26] With the development of considerations which afforded protection to the defendant, the trial took on a more adversarial character and the prosecutor was allowed greater selectivity in presenting his case.

The tendency of the jurisprudence in the matter of disclosure through the calling of witnesses has been to give the prosecutor discretion; although admittedly, a discretion slightly qualified by abstruse, general rules regarding fair play and justice.

The extent of the duty on the prosecutor to call witnesses whose testimony could shed light on the case is not entirely clear. Devlin claims that in England the prosecutor is *expected* to call all "obvious" witnesses, that is, those who have some knowledge of the events under consideration, whether they fully support the prosecution's case or not. But he states, "there is no formal rule of practice to that effect".[27] The jurisprudence is not completely consistent.

In *Seneviratne* v. *R.*,[28] Lord Roche, speaking for the Judicial Committee of the Privy Council, tended to equivocate as to the extent of the required disclosure through the calling of witness:

> Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, *speaking generally*, approve of an idea that a prosecution *must* call witnesses irrespective of considerations of number and reliability, or that a prosecution ought to discharge the functions both of prosecution and defense... *Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.* (emphasis added)[29]

In essence, it appears that the prosecutor *must* call all material witnesses but it appears to be within his discretion to determine

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[26] Wigmore, vol. 6, para. 847.
[27] See Lord Devlin, *The Criminal Prosecution in England,* (New Haven, 1958).
[28] [1936] 3 All E.R. 36 (P.C.).
[29] *Ibid.*, at pp. 48-49.

what is material; nevertheless, it is a discretion subject to scrutiny by the court.

This judgment did not meet with complete approval in what is the leading Canadian case on the subject, *Lemay* v. *The King*.[30] The issue was whether the Crown was obliged to call eyewitnesses, one of whom was a paid informant of the R.C.M.P., in a prosecution for trafficking under the *Opium and Narcotic Drug Act*.[31]

Kerwin, J., was not prepared to accept completely the holding in the *Seneviratne* case, but rather adopted the rule expressed in the later judgment of the Judicial Committee in *Adel Muhammed El Dabbah* v. *A.-G. for Palestine*.[32]

It was held that no *rule of law* exists which requires the Crown to call to the witness stand alleged eyewitnesses to the transaction on which the charge is founded, or who are alleged to be able to give relevant and material evidence on the guilt or innocence of the accused. The *Palestine* case was quoted to the effect that:

> (T)he prosecution has a discretion as to what witnesses should be called for the prosecution, and the *court will not interfere with the exercise of that unless, perhaps,* it can be shown that the prosecutor has been influenced by some oblique motive.[33] (emphasis added)

In *Rex* v. *Sing*,[34] the issue, in part, was whether in a criminal prosecution, the Crown counsel is bound to call the witnessess whose names are on the back of the indictment. In the British Columbia Court of Appeal, MacDonald, J., cited with approval the opinion expressed in the case of *Regina* v. *Cassidy*,[35] that the prosecutor should always be allowed to take his own course in such circumstances, without compulsion to call the witness if he did not think it fit to do so.

It is obscure how the ends of justice and truth are best served by sanctifying such administrative discretion, apparently for its own sake, especially in the light of the vast disparity in investigation techniques and resources between the Crown and the accused. The burden of having to prove an *"oblique motive"* for concealment before the Crown can *"perhaps"* be compelled to call a witness would seem to afford little solace to the individual accused whose liberty hangs in the balance.

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30 (1951), 102 C.C.C. 1.
31 19-20 Geo. V, S.C. 1929, c. 49; now R.S.C. 1952, c. 201.
32 [1944] A.C. 156.
33 *Ibid.*, at p. 168.
34 [1936] 1 D.L.R. 36.
35 (1858), 1 F. & F. 79; 175 E.R. 634.

It is likewise to be noted that there exists no rule that entitles the accused to information of who will testify against him at his trial. In *Rex* v. *Bohozuk*,[36] where the issue was the right to such a disclosure, Mackay, J., stated:

> After reviewing the authorities... I am of the opinion that there is no rule directing that the names of witnesses which the Crown may call, should be given to the accused or the counsel for the defence... I am further of opinion that the Crown is under no obligation to divulge the names of such witnesses. The matter is discretionary... In the opinion of the Court, *it is neither necessary nor desirable that such names be made available to the defence.* (Emphasized) [37]

The learned judge did not elaborate on why the Court should find disclosure of this sort undesirable. He did, however, state that it was the interests of the "proper administration of justice" that must be and remain paramount over the interests of the accused.[38] In apparently finding the two interests inimical, his Lordship, it seems, was not prepared to endorse the fundamental premise of our criminal law that the accused is clothed with the presumption of innocence until the Crown proves him guilty. The only rationale for the judgment would appear to be that the disclosure of the names of Crown witnessess, would, by in some way benefitting the defence, weaken its chance of securing a conviction and thereby hamper the efficacious administration of justice.

In the case of *Rex* v. *Cunningham*,[39] there is an *obiter dictum* to the effect that a positive duty to disclose the names of Crown witnesses does exist. In that case Richards, C.J., concluded:

> It is a duty on the part of the presiding judge to see that an accused has a fair trial — that justice is done; and *that means that he should have the knowledge of the witnesses who are to be called against him* and the general character of the evidence they are to give. It is the function of the Crown to provide the information, but the trial judge has a duty to see that it is done. (Emphasis added) [40]

In the instant case, obviously no conflict between "justice" and disclosure was feared or found. The case, however, stands isolated. It is not without interest to note that both the *Bohozuk* and *Cunningham* cases are antidated by the decision in *Rex* v. *M'Clain*.[41] It was therein held that:

> As a measure of fairness and justice, the Crown ought to furnish the accused in some form with the names of the witnesses intended to be called

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[36] (1947), 87 C.C.C. 125.
[37] *Ibid.*, at p. 126.
[38] *Ibid.*, at p. 127.
[39] (1952), 30 M.P.R. 34.
[40] *Ibid.*, at p. 43.
[41] (1914-15), 23 C.C.C. 488.

> in chief support of the Crown's case... But there is no law laying down any definite rule in this manner, which must be left to the presiding judge to deal with in such a way as to give all necessary protection to the accused and to give him a fair opportunity to defend himself against the charge.[42]

The *M'Clain* case was cited in *R.* v. *Bohozuk* as an authority referred to. Yet the learned judge there found that the protection offered by disclosure would not only be "unnecessary" protection for the accused but as well "undesirable" protection.

However, in *Regina* v. *Torrens*,[43] it was held that the Crown ought to make known to the accused "at a reasonably early time, the names of any witness which it did not examine at preliminary inquiry who it proposed to call at trial".

The accused is therefore at the mercy of the whims of the trial judge and prosecutor. If he is so fortunate to have the means to appeal his case, his only remedy is to prove that within the meaning of sec. 592(1) (a) (iii) of the *Criminal Code*, a miscarriage of justice occurred. The possibility of such proof, in the absence of a positive duty of disclosure, can hardly be the subject of anything more than fanciful speculation.

It appears quite evident from the foregoing, that Canadian criminal procedure favours in general a sporting theory as the means of effectuating a finding based on truth. The rules it has developed, however, seem to indicate that the outcome of the game is in a large matter determined by the skill of the opponents.

There does exist in favour of the accused, a duty on the Crown to disclose the general nature of the evidence that it intends to produce at trial.[44] Left in the abstract, however, this statement is quite misleading, as it indicates nothing of the scope of the duty. The word "disclose" is equally inappropriate as, in fact, the vast majority of this evidence will only come under scrutiny before trial by the persistent probing of the defence attorney. The depth of the probing is in turn limited by the procedural facilities available and the discretionary power of the prosecution.

As has been indicated above, the decision of which witnesses to call is one entirely within the discretion of the prosecutor. As well, as G. Arthur Martin points out, there is no case which directly imposes any duty on the part of the Crown counsel to disclose or adduce any more evidence at preliminary inquiry than is necessary

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[42] *Ibid.*, at p. 495.
[43] [1963] 1 C.C.C. 383.
[44] See *Rex* v. *Bohozuk*, *supra*, n. 36.

to demonstrate a *prima facie* case against the accused.[45] Balancing this discretion is the requirement that the prosecutor must not withhold any evidence favourable to the accused.

What then of witnesses not called by the Crown who have material information relevant to the case? It was stated in the *Palestine* case that:

> It is consistent with the discretion of counsel for the prosecution, which is thus recognized, that it should be the general practice of prosecuting counsels, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defense, and this practice has probably become even more general in recent years, and rightly so, but it remains a matter for the discretion of the prosecutor.[46]

In *Rex* v. *Tilford*,[47] it was held that the Crown is not obliged to call all the witnesses whose names appear enclosed on the back of the indictment; they must, however, be present in court so that the defence may call them if it wishes. By compelling the defence to call these witnesses as their own, this practice may tend to hinder the revelation of the truth by subjecting the defense to the restrictions and prohibitions concerning leading questions and impeaching credibility.

When the witness' name is not on the back of the indictment, the problem becomes more complicated. It has been suggested that it would be a "grave dereliction of duty" not to notify the defence of any material witness who is not called at preliminary hearing or whose name is not on the indictment.[48]

If the Crown should decide to call such a witness without notice, it has been held in *Rex* v. *Gallant* [49] that such evidence is admissable but that the accused can ask for postponement to analyze the new evidence, if prejudiced by the surprise. How effective such a remedy would be in the midst of a trial is left to the opinion of the reader.

In the instance where a material witness is not called, but present at trial, the onus of calling him definitely appears to rest with the defence. In *Rex* v. *Mandryk*,[50] where an accessory to the crime charged was not called by the Crown, the cases which suggested a duty upon the prosecutor to present to the jury evidence of all those present at the occurrence of the event alleged to constitute a crime, even if they are likely to give different accounts of what

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[45] Martin, G.A., "Preliminary Hearings" in *Law Society of Upper Canada: Special Lectures on Evidence*, (Toronto, 1955), 1, at p. 2.

[46] [1944] A.C. 156, at p. 169.

[47] [1936] O.R. 35.

[48] Martin, G.A., *Problems in Litigation*, (1953), 31 Can. Bar Rev. 501, at p. 510.

[49] (1945), 83 C.C.C. 48.

[50] (1934), 72 C.C.C. 84.

took place, were distinguished or disregarded. It was held that the trial does not necessarily become a mistrial because some witness was not called. The governing factor in the decision appears to be that the defence was fully aware of the accessory's presence. The rules of the "game" are strict; the penalty for not wishing to fully participate, indeed severe.

Discovery

It now remains to be seen to what extent provisions for "discovery" introduce an element of equality to offset the imbalance in the relative strength of one side over the other.

It is to be noted that disclosure and discovery are in form very different procedures. The former is a positive duty upon the Crown to act of its own volition without any pressure or request from the defence to make available to the accused *all the evidence* which might tend to establish his guilt or innocence and *to call all witnesses* who can shed any light on the case. Discovery, however, is less an obligation of the Crown and more a right of the accused to demand access to evidence before the trial. As it is more in keeping with the adversary nature of the proceeding, it tends to be favoured as a form of protection for the accused over the concept of disclosure.

It would appear to be axiomatic that for the conduct of a fair trial, it is prerequisite that the accused will from the outset be fully made aware of the charges laid against him and of the issues which are to be determined, and that he should not be required to present his case to a court while being denied access to all reasonable and relevant information. If this realization has been accepted it may be said that criminal procedure has advanced immeasurably since Lord Kenyon, C.J., in *Rex* v. *Holland,*[51] stated that a pre-trial examination of evidence by the accused would "subvert the whole system of criminal law".[52]

There presently exists in Canada no comprehensive "discovery" facilities; the rights of the accused being both defined and limited by statute and case law.

The preliminary inquiry is the closest approximation to an examination on discovery that Canadian criminal procedure has

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[51] (1790-1792), 4 Durn. & E. 691 (K.B.). But note: ninety years later in *Rex* v. *Harris,* (1882), C.C.C. Sess. Pap. xcv, 525, it was stated that "modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him".

[52] *Ibid.,* at p. 692.

developed.[53] It is to be noted that it is of value only insofar as the accused is represented by astute counsel at that time. Personal observation leads this author to believe that this is not the case in a great number of instances.

The effective use of cross-examination is the most important tool the defence has of compelling disclosure of the Crown's case to any stage beyond mere *prima facie* proof. Considering the fact that the Crown need not confine the evidence adduced at trial to that revealed at the preliminary inquiry, failure to do so may have drastic consequences for the accused.

For example, in *Rex* v. *Grigoreshenko* and *Stupka*,[54] it was held that:

> To be prepared to rebut any additional evidence which might be elicited from the Crown witnesses at the trial, counsel should have cross-examined them at the preliminary inquiry in order to obtain the fullest disclosure and so provide against any possible surprise. If there were any omissions in this respect, the responsibility therefore must rest upon the prisoners and their counsel.[55]

Moreover, the accused may call witnesses which the Crown has not, in order to get a more complete picture of the evidence against him. This was the technique in *R.* v. *Mishko*.[56] In that case, the defence counsel, through cross-examination of one Crown witness was able to elicit the names of six other witnesses to the alleged crime. When the Crown objected to his calling of these witnesses as his own, Mr. Justice Hogg held that the defense was entirely within its rights to do so even though it was tantamount to conducting an examination on discovery.

A limited statutory right of "discovery" of a type is to be found in Section 512 of the *Criminal Code*:

> An accused is entitled, after he has been committed for trial or at his trial,
> a) to inspect without charge the indictment, his own statoment, the evidence and the exhibits, if any; and
> b) to receive, upon payment of a reasonable fee not to exceed ton cents per folio of one hundred words, a copy
> (i) of the evidence
> (ii) of his own statement, if any, and
> (iii) of the indictment,
> but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them

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[53] See Martin, G.A., "Preliminary Hearings", *loc. cit., supra*, n. 45.
[54] (1946), 85 C.C.C. 129.
[55] *Ibid.*, at p. 132.
[56] (1946), 85 C.C.C. 410.

> before the trial is not attributable to a lack of diligence on the part of the accused.

Supplementing section 512 is section 514 which allows for the release of any exhibit "for the purpose of a scientific or other test or examination".[57]

The majority of the jurisprudence surrounding section 512 has been on the question of what constitutes "evidence" within the meaning of paragraph (a) and specifically whether out-of-court statements by potential witnesses may be examined by the defence.

The Judicial Committee of the Privy Council held in *Mahadeo* v. *The King*,[58] the leading Commonwealth case on the subject, that the defence may request and should be granted statements of a witness, charged as an accomplice, for the purpose of cross-examination.

With the enactment of Section 512, Canadian cases appear to have disregarded or at least confined within narrow limits the scope of the holding in *Mahadeo*, relying more on interpretation of the statute.

In *R.* v. *Finland*,[59] this attitude was expressed by Wilson, J., who stated:

> The *Criminal Code* is the governing authority and insofar as its provisions conflict with the common law in substance and procedure, it must govern.[60]

It was therein held that the accused had no right to examine statements signed by possible witnesses taken before the preliminary hearing, during the course of the Crown's investigation. The learned judge added:

> In this case, if there are written signed statements of witnesses who are to be called, *the prosecutor might well, although it is for him to decide, reveal them to the defense before trial in order to help counsel for the accused decide on his defense.* (Emphasis added)[61]

Similarly, in *R.* v. *Silvester* and *Trapp*,[62] Verchères, J., stated that:

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[57] The latter is unquestionably a valuable provision in the light of modern scientific detection methods. For an extreme example of possible abuses where no such statutory safeguard exists see: *People* v. *Miller*, 148 N.E. 2d 455; *Miller* v. *Pate*, (1967), 87 S.Ct. 785.

[58] [1936] 2 All E.R. 813.

[59] (1960), 125 C.C.C. 186. See also *R.* v. *Bryant*, (1946), 31 Cr. App. R. 146, where it was held that the prosecutor need not disclose to the *defense* statements from interviews of witnesses not called at the trial. The duty goes no farther than to make available witnesses known to be able to give "material" evidence.

[60] *Ibid.*, at p. 188.

[61] *Ibid.*, at p. 190.

[62] (1960), 125 C.C.C. 190.

> (T)he asserted proposition that the accused has a right to have produced to him before the trial all statements taken from witnesses during the course of the investigation seems untenable.[63]

The rationale for these decisions appears to be that such statements are not "evidence" within the meaning of section 512 *Cr. Code.*

In *Regina* v. *Lantos*,[64] "evidence" was held to mean "testimony given at a judicial hearing relating to the subject matter of the charge against the accused".[65] It was not intended to embrace statements taken from prospective witnesses.

With respect, it is submitted that such a narrow interpretation of the word is both unwarranted and undesirable. "Evidence" is defined by *Bouvier's Law Dictionary,* 1946, as follow:

> That which tends to prove or disprove any matter in question or to influence the belief respecting to it.

"Evidence" as defined in Phipson is:

> (T)he means apart from argument and inference, whereby a court is informed as to the issues of fact ascertained by the pleading [in criminal cases, the charge]; secondly, the subject matter of such means.[66]

Such documents as signed statements, if properly introduced before the court, cannot logically be excluded from falling within the above definitions.

As a matter of interpretation, section 512 is a provision which acts as a safeguard to the rights of the accused. It should therefore be construed in a wide sense in line with what Viscount Sankey said was the whole policy of the English Law — that every rule in the prisoner's favour be observed so that the jury may fairly try the true issue (cited *supra*). To deny access to the fruits of the Crown's investigation is to disregard and negative the supposition that the criminal trial is the search for truth. Mr. Justice Brennan of the United States Supreme Court has asked rhetorically:

> Is not such denial blind to the superlatively important public interest in the acquittal of the innocent? To shackle counsel so that he cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seems seriously to imperil the bedrock presumption of innocence.[67]

Section 10(1) of the *Canada Evidence Act,* R.S.C. 1952, c. 307,[68] which grants to the judge the discretion to order the production

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[63] *Ibid.*, at p. 163.

[64] [1964] 2 C.C.C. 52.

[65] *Ibid.*, at p. 165.

[66] *Phipson on Evidence,* 10th ed., p. 2.

[67] Brennan, W.J. Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth,* (1963), Wash. U.L.Q. 287.

[68] Considered *inter alia* in: *Regina* v. *Weigett,* (1961), 128 C.C.C. 217 and *Regina* v. *Torrens,* [1963] 1 C.C.C. 383.

of such statements, during the trial, for whatever use he sees fit should not have any application in limiting the accused's personal rights under section 512 of the *Criminal Code*.

Forensic Conduct

"The right of an accused to have his guilt or innocence decided on sworn evidence alone", is in the words of *Maxwell* v. *D.P.P.* "one of the most deeply rooted and jealously guarded principles of our criminal law".[69] The issues must be decided on fact and reason, independent of extraneous considerations, facts not in the record, and emotional appeals. It is an elementary proposition that the Crown counsel must behave in an absolutely impartial manner and conduct his prosecution without feeling or animus, as he has no interest other than seeing justice done. Such imperatives, however, although honestly expressed, tend to disregard human nature. The individual does not exist in a vacuum; his behavior is conditioned by the environment and circumstances in which he participates.

The trial is by its very nature a battle. To the individual accused it is a matter of liberty; to the Crown it is a holy war to protect the integrity of its rule. In the heat of such a contest, principles of fair play are easily cast aside if the achievement of the desired end is seen as jeopardized. As a result, the substantive issues become obfuscated by passion and the truth becomes harder to find.

It is difficult to define beyond generalities, except by example, exactly what amounts to forensic misconduct that causes a miscarriage of justice. One extreme American *cause célèbre* may be useful in illustrating this difficulty.

In *State* v. *Beal*,[70] in his summation to the jury, the prosecutor knelt before the widow of the deceased, grasped his bullet-riddled clothing and characterized the defendants, on trial for murder, as

> (D)evils with hoofs and horns who threw away their pitchforks, foreign communists, fiends incarnate, who came sweeping like a cyclone, like a tornado to sink their fangs into the heart and life-blood of my community... Do you believe in the flag, do you believe in good roads... Men, do your duty and in the name of God and Justice render a verdict that will be emblazoned across the sky of America as an eternal sign that justice has been done![71]

It was held in appeal that the trial judge's admonition to the prosecutor for such behavior was sufficient to remedy any preju-

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[69] *Boucher* v. *The Queen*, [1955] S.C.R. 16, at p. 28.

[70] (1930), 154 S.E. 604.

[71] Cited in (1930-31), 44 Harv. L. Rev. 1118, at p. 1123, n. 29.

dice that might have been caused to the defendants, (who were found guilty).

By comparison, in *Boucher* v. *The Queen*, the prosecutor had expressed an opinion that the accused was guilty of a vicious murder and had added:

> Et si vous rapportez un verdict de coupable, pour une fois ça me ferait presque plaisir de demander la peine de mort contre lui.

Mr. Justice Cartwright, in allowing the appeal, held:

> The making of such a statement to the jury was clearly unlawful and its damaging effect would, in my view, be even greater than the admission of illegal evidence or a statement by Crown counsel to the jury either in his opening address or his closing address of facts as to which there was no evidence.[72]

As a general rule then, expressions of personal opinions of guilt, inflammatory, acrimonious or vindictive language and prejudicial references to race, nationality, and religion are unquestionably forbidden by the concept of a non-partisan prosecution whose immediate and ultimate objective is truth, not conviction. How much attention will be paid to such prohibitions, in practice, will depend on the individual prosecutor; his administrative biases necessarily tempering his conception of the nature of his office.

Conclusion

A drastic, comprehensive re-evaluation of the administration of criminal justice, with specific reference to the prosecutor's office, is of the utmost priority. Vague moral imperatives given judicial lip-service can never be sufficient for an accused when the stakes of the game are so high. Scattered *dicta* embracing philosophical conceptions of "justice" are entirely unsatisfactory substitutes for positive texts of law.

Undue reverence paid in the name of efficiency to historical institutions has caused us to lose sight of what must be the paramount objective of a free society. Prosecutional discretion, subject to subtle abuses, and preserved for its own sake is incompatable with the search for ultimate truth. The fundamental question is whether the individual can afford to rely on the good intentions of an administration, whose size, powers and facilities reduce his own ability for self-protection to virtual impotence. Is it not contrary to all conceptions of a fair trial to leave to the prosecutor the determination of what evidence is material or exculpatory, or of

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[72] [1955] S.C.R. 16, at p. 31. See also *Pursey* v. *The Queen*, (1957), 116 C.C.C. 82.

which witnesses should be called? Does it not seem reasonable that the products of the massive investigatory resources of the Crown, its manpower, technological capabilities, and hardly least of all, its treasury, be made accessible to the accused to enable him to prepare the best possible defense?

The potential sacrifice of efficiency is no rebuttal. If the validity of the proposition that "it is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited",[73] is accepted, then there can be no justification for the toleration of a system which might allow the innocent to become the sacrificial lambs of expediency.

One would need to be very naive indeed to believe that any system can be so perfected to warrant against the occasional conviction of the innocent. However, one would be equally naive to complacently accept the premise that the present system is the best way of minimizing this possibility.

Howard SHAPRAY *

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[73] *Maxwell* v. *D.P.P.*, *supra*, n. 21.

* Articles Editor, McGill Law Journal.