PROSECUTING PRACTICES AND THE ADMINISTRATION OF CRIMINAL JUSTICE IN CANADA

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A B S T R A C T

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The writer inquired into the practices of Crown Attorneys in Eastern Canada. He found that considerable and important differences exist between what many a Crown Attorney does and that which legal literature and judicial decisions say he should do. In the study which follows, those practices are described and analysed. The writer's conclusion is that many of the practices are inconsistent with the concept of 'due process' and the principles of the relationship between the individual and the State, which that concept epitomizes.

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INTRODUCTION

The writer inquired into the practices of Crown Attorneys in Eastern Canada. He found that considerable and important differences exist between what many a Crown Attorney does and that which legal literature and judicial decisions say he should do. In the study which follows those practices are described and analysed. The writer's conclusion is that many of the practices are inconsistent with the concept of 'due process' and the principles of the relationship between the individual and the state, which that concept epitomizes.

Very little is known about the powers exercised by Crown Attorneys and the factors that influence their exercise of discretion. In the past there have been public pronouncements by senior Crown authorities describing the quasi-judicial role of the Crown Attorney, his responsibilities and his duties. Legislative provisions which define the powers, duties and functions of the Crown Attorney are significantly absent. Judicial pronouncements are, by their nature, infrequent, restricted in scope and, for the most part, directed to the Crown Attorney's forensic behaviour. Legal writings developed from case-law and legislative materials, while valuable and stimulating in many respects, reveal little

of the undercurrent of the processes, informal practices and day to day decisions. For this reason, the writer formed the opinion that a contribution to the knowledge and understanding of prosecutorial processes could be made by a study of the prosecutors themselves. This research focuses on persons and their actions in their working environment. The legislative and judicial perspective is presented first and is followed by the empirical data.

The Legislative and Judicial Perspective

PART I - THE JURISDICTION OF THE CROWN ATTORNEY

A. Territorial Jurisdiction

In the Province of Ontario, the *Crown Attorneys Act*[1] provides that the Lieutenant Governor in Council may appoint a Crown Attorney 'for each county and for each provisional judicial district'. The oath of office makes reference to a specific county or district, the implication being that the Crown Attorney's jurisdiction in Ontario is restricted to the County or District to which he is appointed. The New Brunswick *Crown Prosecutors Act*[2] offers no clear guideline except for the fact that a Crown prosecutor performs the duties previously performed by a clerk of the peace.[3]

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[1] *Crown Attorneys Act*, 1960 R.S.O. Cap. 82.

[2] Assented to June 10, 1966. Sections 1,2,3,4 proclaimed in force January 4, 1967.

[3] *Crown Prosecutors Act*, 1952 R.S.N.B. Cap. 30. Crown Prosecutors are a recent addition to the administration of justice in New Brunswick, and currently perform those prosecutorial duties which had been the prerogative of the local clerks of the peace. Prior to January 1, 1967, clerks of the peace conducted all prosecutions of indictable offences under the Criminal Code. In many cases, the same clerk conducted summary prosecutions by special appointment by the Attorney-General -- *The Clerks of the Peace Act*, 1952, R.S.N.B., Cap. 30. The clerk of the peace was to "attend and assist", when requested to do so by a magistrate, in any proceeding where a person was charged with an indictable offence punishable by imprisonment for a period of two years or more; *An Act to Amend the Clerks of the Peace Act*, 1958 R.S.N.B., Cap. 26, assented to April 18, 1958. *The Clerks of the Peace Act*, as amended, was repealed and replaced by the *Crown Prosecutors Act*, assented to June 10, 1966.

The latter was appointed to exercise his functions in a particular county and a similar jurisdictional restriction would, therefore, appear to apply equally to the Crown Attorney. The Nova Scotia *Prosecuting Officers Act*[1] provides a similar restriction dealing with the appointment of 'County' prosecuting officers.

A specific statement of the territorial jurisdiction of the Crown Attorney is found in the *Crown Attorneys Act*[2] of Manitoba.

> 'Section 2(2): A Crown Attorney ... may be appointed for any one or more judicial districts, or any division of a judicial district, and his duties restricted to the area for which he is appointed; or he may be appointed for the province at large, in which case his duties shall extend thereto.'

Although an absence of statutory provisions regulating the territorial jurisdiction of the Crown Attorney is characteristic of the remaining provinces, the county seems the standard local unit which delimits the territorial jurisdiction of the Crown Attorney.

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[1] *Prosecuting Officers Act*, 1960 Acts of Nova Scotia, Cap. 12, Section 4.

[2] *Crown Attorneys Act*, 1954 R.S.M., Cap. 56, Section 2(2).

B. The Jurisdiction of the Private Prosecutor:

Section 2(33) of the Criminal Code provides that "prosecutor" means the Attorney-General or, where the Attorney General does not intervene, means the person who institutes proceedings to which the Code applies, and includes counsel acting on behalf of either of them.[1]

This raises the interesting question of the locus standi of a private prosecutor before the criminal courts. It had earlier been held that the informant at whose instance an indictment has been preferred has no locus standi to appear by counsel and take part in

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[1]Part XVIII (Speedy Trials of Indictable Offences) of the Criminal Code, R.S.C. 1906 Cap. 146 as amended. Section 823 has since been repealed by 1953-54 S.C. Cap. 51. S.823 provided: "In this Part, unless the context otherwise requires:

(b): 'prosecuting officers' includes: in the province of Ontario, the County Crown Attorney, in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the province of Manitoba, any Crown Attorney, the prothonotary of the Court of King's Bench, and any deputy prothonotary thereof, any deputy clerk of the peace, and the deputy clerk of the Crown and pleas for any district in the said province, and in the provinces of Saskatchewan and Alberta, any local registry clerk, or deputy clerk of the Superior Court of Criminal jurisdiction of the province, or any clerk or acting clerk of a district court, or any person conducting under proper authority the Crown business of the court."

This provision is no longer to be found in the present Code.

the trial, without the consent of the Crown.[1] This approach is consistent with observations made by the Quebec Court of Appeal in the case of *Gaboury v. Gagné*[2] where Mr. Justice Howard said:

> "The respondent, the alleged victim of the assault, laid the information and complaint in both cases, and with that his function as prosecutor should have ended and his name should have disappeared from the record from that time on except as a witness."[3]

All criminal prosecutions must be commenced in the name of the Crown but the prosecutorial function is not thereby limited to law officers of the Crown.[4] Mr. Justice Wilson outlined three situations which arise in the private prosecution of indictable offences;[5]

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[1] *R v. Gilmore*, 7 C.C.C. 219; See, e.g., *R v. Clark*, 9 C.C.C. 125; *R v. Berthiaume*, 37 C.C.C. 114; *R v. Fraser*, 19 D.L.R. 470,473; *R v. Patterson*, 36 U.C.Q.B. 129. It should be noted that the majority of these cases dealt with speedy trials of indictable offences under Part XVIII of the old Code. 1935 R.S.C., Cap. 146. The Court in *Maynard v. Lapointe*, 1951 Que. S.C. 113 held that prosecutions for indictable offences, after the preliminary inquiry, must be styled in the name of the Queen.

[2] *Gaboury v. Gagné*, (1930) 48 Que. K.B. 353. accord: *Woo Tuck v. Scallen*, (1929) 46 Que. K.B. 347, 51 C.C.C. 365; and *Maynard v. Lapointe*, (1951) Que. S.C. 113.

[3] ibid. at p. 355.

[4] For an interesting analysis of the question, see: Kaufman, Fred, *The Role of the Private Prosecutor*, (1960-61) 7 McGill L.J. 102. Relevant provisions of the Criminal Code (1953-54) S.C. Cap. 51 and amendments are Sections 692, 709, 451(h), 453(1)(a), 454(4), 478(1), 489, 480, 584, 490, 471. (hereinafter cited Code).

[5] *R v. Schwerdt*, (1957) 23 W.W.R. 374, 119 C.C.C. 81 (B.C.S.C.)

> " .... insofar as private prosecutions are concerned ... there are three different situations created by the Code in respect of the trial of the same offence: (1) On summary trial before a magistrate, the private prosecutor is heard as of right. (2) On ... 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. (3) On trial by judge and jury he may be heard by leave of the Court, or the Attorney General."[1]

In summary conviction offences[2] the informant or his counsel may conduct the prosecutorial proceedings.[3] The private prose-

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[1]ibid., at p. 46. This view is questioned by both Lagarde, *Supplement au nouveau code criminel annoté* 1958 89 ff. and Kaufman, op. cit., the latter at p. 113 suggests "that the indications found in the Code favour the theory that, in the case of indictable offense(s), the common law has been 'altered, varied, modified and affected' by statute law to the extent that a private prosecutor is deprived of any standing at *trial*, save in the case of defamatory libel." (emphasis added). The function of the private prosecutor under the former Code was considered in *R v. McIbnee*, (1950) 1 W.W.R. 894, 9 C.R. 447, 97 C.C.C. 89 (B.C.); *R v. Whiteford*, (1947) 1 W.W.R. 903, 4 C.R. 318, 89 C.C.C. 74 (.B.C.); *R v. Boulding*, (1920) 3 W.W.R. 52, 13 Sask. L.R. 383, 33 C.C.C. 227, 53 D.L.R. 657 (C.A.); *R v. Knowles et al*, (1913) 5 W.W.R. 20, 25 W.L.R. 302, 6 Alta. L.R. 221, 22 C.C.C. 66; 13 D.L.R. 773.

[2]Summary offences are to be distinguished from a summary trial of an indictable offence.

[3]In Ontario, however, the Crown Attorney may assume the conduct of any case where, in the interest of the accused, justice demands his interposition. Kaufman, op.cit., points out at p. 103 that although the informant may conduct the proceedings, it is questionable whether he can terminate them once they have been initiated. For a discussion of the problem see *Martin's Criminal Code*, (1955), 1053 ff, and *R v. Leonard*, (1962) 38 W.W.R. 300 (Alta.). In Quebec, prosecutions for summary offences are normally conducted in the name and at the instance of the informant: *Gagnon v. Morin*, (1956) 116 C.C.C. 104. In Ontario, the Crown Attorney normally conducts prosecutions in both summary and indictable offences. Note also: *Regina v. Devereaux*, 1966 4 C.C.C. 147 disapproving of: *Campbell v. Sumida*, 1965 3 C.C.C. 29, 49 D.L.R. (2d.) 263, 45 C.R. 198, 50 W.W.R. 16 (Man. C.A.)

cutor has a locus standi at the preliminary inquiry in all cases in which the Attorney General has not intervened.[1]

C. Jurisdiction Before the Courts

In those provinces which are without a Crown Attorney's Act the Crown Attorney appears before the courts as agent of the Attorney-General. As such, he may conduct proceedings before those courts where the Attorney-General himself has a locus standi. The situation is more clearly defined in the provinces of Manitoba,[2] Ontario[3] and Nova Scotia[4]

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[1]Code, Part XV, sections 451(h), 453(1)(a) and 454(4). Note particularly Code S. 2(33). Kaufman, op.cit., suggests at p. 105: "the Attorney General will not intervene unless the charge is of sufficient gravity to warrant the appearance of a Crown Attorney." This procedure may apply in Quebec alone. Legislation in the other provinces does not indicate the procedure followed by the Attorney General or his agent.

[2]Section 6 of the *Crown Attorneys Act* 1954 R.S.M. Cap. 56 provides that every Crown Attorney attends to all criminal business at the sittings of Her Majesty's Court of Queen's Bench and of the County Court Judge's Criminal Courts and performs similar duties in the inferior courts of the province.

[3]Section 14 of the *Crown Attorneys Act* 1960 R.S.O. Cap. 82: the Crown Attorney conducts preliminary hearings and prosecutions of indictable offences before the Supreme Court, the Court of general sessions of the peace, the county or district court, judges' criminal court and before magistrates in summary trials of indictable offences under the Criminal Code of Canada. Where in his opinion the public interest so requires, he may also conduct proceedings in respect of any offence punishable on summary conviction.

[4]Section 4 of the *Prosecuting Officers Act*, 1960 Acts of Nova Scotia, Cap. 12. The Attorney General appoints for each county a Crown Attorney to exercise this authority on behalf of the Crown.

where the Crown Attorney is statutorily empowered to appear at all levels.

An appeal may be lodged against an acquittal in indictable offences on any ground that involves a question of law alone. An appeal may also be lodged, with leave of the court of appeal or of a judge thereof, against the sentence imposed by the trial court in proceedings by indictment.[1] An appeal is instituted by notice of appeal signed by an agent of the Attorney-General. The agent who appears at the hearing of the appeal, must be directed by the Attorney-General to launch the appeal.[2] On summary convictions, the Attorney-General or his agent[3] may appeal from an order dismissing an information, or against the sentence.[4]

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[1]Unless that sentence is one fixed by law, see for example, the *Narcotic Control Act*, (1960-61) S.C. Cap. 35, S., 5.

[2]Code, S.584, *R v. Lemay* (No. 2) 1 W.W.R. 843, (N.S.), 12 C.R. 81, 100 C.C.C. 365 (B.C.C.A.), affirmed (1952) 1 S.C.R. 232, 14 C.R. 89, 102 C.C.C. 1.

[3]In *Regina v. MacKenzie*, (1966) 47 C.R. 68, "A notice of appeal from the dismissal of a summary conviction charge was signed by counsel as 'Counsel for the Attorney-General of Canada.' On his authority being challenged, the appeal was dismissed on the ground that the evidence showed that, at the time of the launching of the appeal, there was not in existence a communication under the Attorney-General's hand authorizing counsel to appeal." Reliance was placed upon the cases of *Regina v. Yastrub*, (1961) 37 C.R. 185, 37 W.W.R. 463, 132 C.C.C. 315, and *Regina v. Cannon*, 39 C.R. 376 [1963] 3 C.C.C. 79. The Crown appealed to the Court of Appeal and the appeal was allowed on the authority of *Regina v. Swantek*, 44 C.R. 257, 49 W.W.R. 122, [1965] 1 C.C.C. 242. Where the court approved that "the mere acting in a public capacity is sufficient prima facie proof of [the] appointment ...." per Lord Coleridge in *Regina v. Roberts*, (1878) 38 L.T. 690, 14. Cox C.C. 101, 103.

[4]Section 14(g) of the Ontario *Crown Attorneys Act*, 1960 R.S.O. Cap. 82 provides that, where in the opinion of the Crown Attorney the public interest so requires, he shall 'conduct appeals to the county or district court for offences punishable on summary conviction'.

PART II - PROCEDURAL DUTIES OF THE CROWN ATTORNEY

A. The Institution of Prosecutions

The Crown Attorney first participates in the prosecutorial process after the proceedings have been commenced by the laying of an information or complaint.[1] Legislative provisions in Ontario suggest that the Crown Attorney's participation in the prosecutorial process begins with his duty to examine informations and to conduct preliminary hearings of indictable offences.[2] One exception to the general rule is the duty of a prosecutor, upon written request, to 'cause prosecutions for offences against any Act of the legislature to be instituted on behalf of any (provincial) governmental department or agency'.[3]

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[1]Section 439 of the Criminal Code provides that "any one" may lay an information. A Crown Attorney seems to be embraced by the term "any one". See, for example: *Re Anthony* (1932) 5 M.P.R. 498, 59 C.C.C. 158 (N.S.C.A.)

[2]*Crown Attorneys Act*, 1960 R.S.O., Cap. 82, S.14(a).

[3]ibid. S. 14(f). "He does not in practice institute criminal proceedings on his own initiative. Although there is power to do so, it is one which is sparingly used and only in exceptional circumstances. All criminal proceedings are commenced by information or complaint sworn by an individual whether private citizen or law enforcement officer, before a justice of the peace." Bull, *The Career Prosecutor in Canada*, 53 J. Crim. L., Criminology and P.S. 89, 94 (1962) (hereinafter cited as "Bull").

In Nova Scotia, the *Prosecuting Officers Act*[1] empowers the Crown Attorney to "take charge of and conduct the prosecution of criminals," suggesting that this is done only once an information has been laid. In contrast, the Manitoba Statute provides that the Crown Attorney shall "institute and conduct on the part of the Crown, prosecutions for criminal and penal offences".[2]

In Newfoundland,[3] British Columbia,[4] Manitoba,[5] Saskatchewan,[6] and Alberta,[7] the Attorney-General's powers and functions are defined in terms of those exercised by the Attorney-General in England. In England, the Attorney-General has "overall authority for the initiation of criminal proceedings"[8] as well as the power to lay ex officio criminal informations that are triable outside the normal process of jury trial.[9] In addition, the Attorney General in

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[1] *Prosecuting Officers Act*, 1960, Acts of Nova Scotia, Cap. 12 S. 4

[2] *Crown Attorneys Act*, 1954 R.S.M. Cap. 56, S.6(1)(a)

[3] *Department of Justice Act*, 1966, S.N., No. 35

[4] *Attorney-Generals Act*, 1960, R.S.B.C., Cap. 21

[5] *Attorney-Generals Act*, 1964, R.S.M., Cap. 13

[6] *Attorney-Generals Act*, 1965, R.S.S., Cap. 24

[7] *Attorney-Generals Act*, 1955, R.S.A., Cap. 19

[8] Edwards, J.LI.J, *Law Officers of the Crown*, (1964), 7. (hereinafter cited as "Edwards")

[9] Edwards suggests ibid. at p. 266 that ex officio informations presumably are confined to the restricted circumstances outlined in Blackstone's *Commentaries*, namely, "to such enormous misdemeanours as peculiarly tend to disturb or endanger the Queen's government."

England has the power "to control the prosecution of cases under a proliferation of statutory provisions that restrict criminal proceedings to those cases in which the consent of one or other of the Law Officers (Attorney-General or Solicitor-General of England) has first been given."[1]

The Attorneys-General of Newfoundland, British Columbia, Manitoba, Saskatchewan and Alberta therefore possess the identical powers exercised by the Attorney-General and Solicitor-General in England. The Crown Attorneys in those provinces, exercising these powers as agents of their respective Attorneys-General, would thereby have considerable authority over the initiation of prosecutions.

A prosecutor may prefer, before a grand jury,[2] a bill of indictment against any person who has been committed for trial.[3] He may prefer that indictment in respect of the charge on which that person was committed for trial, or any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry.[4]

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[1]Edwards, op.cit., p. 7.

[2]Code, S. 489. In provinces where the grand jury does not exist, New Brunswick, Quebec, Manitoba, Saskatchewan, Alberta, British Columbia and in the Yukon and Northwest Territories, it is sufficient if the trial of an accused is commenced by an indictment in writing setting forthe the offence with which he is charged.

[3]Under Part XVII of the Criminal Code.

[4]Code, S. 486.

B. Stay of Proceedings

> "The Attorney-General or counsel instructed by him for the purpose may, at any time after an indictment has been found and before judgment, direct the clerk of the court to make an entry on the record that the proceedings on the indictment shall be stayed accordingly and any recognizance relating to the proceedings is vacated."[1]

The decision to enter a stay of proceedings is within the sole discretion of the Attorney-General or his agents.[2] The procedure is limited to cases heard on a bill of indictment, and then only after the indictment has been signed or found.[3] The entry of a nolle prosequi or stay of proceedings

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[1]Code, S. 490. "This section provides a procedure which is substantially the same as that known to the common law as the entry of a nolle prosequi and may be considered as having superseded the older procedure." --- Tremeear's *Annotated Criminal Code* 6th ed. 843.

[2]*R v. Cooke, R v. Cooke, Dingman and Whitton,* [1948] 1 W.W.R. 849, 5 C.R. 430, 91 C.C.C. 310 (Alta.) This is true, even when the prosecution is instituted by a private prosecutor: *R v. Blackley,* (1904) 13 Que. K.B. 472, 8 C.C.C. 405 (where the prosecution entered a nolle prosequi) *R v. Edwards* [1919] *2 W.W.R* 600, 31 C.C.C. 330 (Alta.) (where the prosecution entered a stay of proceedings.)

[3]See, e.g., *R v. Dunn,* (1843) 1 C & K 730; *R v. Wylie, Howe and McGuire* (1919) 83 J.P. 295, and *R v. London County Quarter Sessions Chairman, ex p. Downes* [1954] I Q.B.1, 6. See also: (1956) Crim. L.R. pp. 725-726 and Edwards, op.cit., at pp. 236-37 " ... summary prosecutions cannot be stopped by resort to this procedure where a charge is brought before a magistrate's court for summary disposal, the leave of the court being an essential prerequisite to a withdrawal of the charge." In provinces where there is no provision for a grand jury, a similar power exists after the preferring of a formal charge in lieu of an indictment. See, e.g., *R v. Edwards*, [1919] 31 C.C.C. 330. In Ontario, Section 8(b) of the *Crown Attorneys Act* (until amended 1926) conferred upon the Crown Attorney the duty to institute and conduct prosecutions for crimes "in the same manner as Law Officers of the Crown and with like rights and privileges, except as to the right of entering a nolle prosequi." Significantly, in 1926 when this act was amended, this exception was not included in the Act that consolidated and amended the *Crown Attorneys Act,* 1926 Statutes of Ontario, 16 Geo. V Cap. 32: nor is it to be found in the present *Crown Attorneys Act,* 1960 R.S.O., Cap. 82. The legislation of other provinces makes no provision for the entry of a nolle prosequi.

does not constitute an acquittal and is no bar to subsequent prosecution for the same offence.[1]

C. Investigation

Unlike the situation in many District Attorney offices in the United States,[2] the offices of the Crown Attorney in Canada do not employ investigatory staff.[3] Although without staff facilities attached to the offices, there is some statutory authority which suggests that the Crown Attorney himself may participate in directing an investigation to be made by police authorities. The Manitoba *Crown Attorneys Act*[4] speaks, not only of the Crown Attorney's duty to prosecute breaches of the criminal law, but also of his obligation to assume, perform and discharge all duties in connection with the enforcement of the criminal law.[5] Similarly, in Ontario, the *Crown Attorneys Act*[6]

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[1]*Regina v. Beaudry* [1967] 1 C.C.C. 272 (B.C.C.A.) *R v Blackley*, (1904) 13 Que. K.B. 472, 8 C.C.C. 405; See e.g., *R v. Spence*, (1919) 45 O.L.R. 391, 31 C.C.C. 365, *Goddard v. Smith*, (1705) 6 Mod. 261, 87 E.R. 1008.

[2]See: Baker, N.F., and DeLong, E.H., *The Prosecuting Attorney - Powers and Duties in Criminal Prosecution*, 24, J. of C.L. and Criminology, 1025, 1049-55 (1933-34).

[3]Bull, op.cit., at p. 94 points out that the Canadian Crown Attorney takes no direct part in the investigation of crime: "The Crown Attorney is not a law enforcement officer; that is a policeman's function."

[4]The *Crown Attorneys Act*, 1954 R.S.M., Cap. 56.

[5]Ibid., S. 6(j)

[6]*Crown Attorneys Act*, 1960 R.S.O., Cap. 82.

prescribes that the Crown Attorney examine informations ... ... and "where necessary, cause such charges to be further investigated."[1]

PART III - CROWN DISCLOSURE

A. Documents

An accused is entitled, after he has been committed for trial or at his trial, to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any, and to receive a copy of the evidence, of his own statement, if any, and of the indictment.[2] Furthermore, a judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction may order the release of any exhibit for the purpose of a scientific or other test or

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[1]ibid., S.14(a). In Ontario Section 8(1) of the *Administration of Justice Expenses Act*, 1960 R.S.O., Cap. 6, provides that: "Where, in the opinion of the Crown Attorney, special services not covered by the ordinary tariff are necessary for the detection of crime or the capture of a person who is believed to have committed a crime of a serious character, he may authorize and direct any constable or other person to perform such service." It is important, however, to read this section in the light of the words, 'special services'.

[2]Code S. 512. The Code also provides that 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 before the trial is not attributable to lack of diligence on the part of the accused."

examination.[1] The prosecution or the defence may request an order by summary application on three days' notice.[2] There is no specific code provision permitting the defence to inspect written statements made to the police by prosecution witnesses prior to trial.[3] In *Regina v. Silvester and Trapp*[4] defence counsel applied for production prior to trial of all statements taken from witnesses, by the police, during the course of their investigation. The application was refused on the ground that the defence is only entitled,

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[1]Code S. 514. In the United States, under the new Federal Rules of Criminal Procedure, Rule 16, reproduced in(1966) 35 Fordham Law R. 335, subsection (a) empowers the court to grant the defendant discovery of his own admissions, confessions, or testimony before a grand jury. The disclosure of other materials, documents, tests and reports are also subject to discovery by the defence if the defence agrees to mutual disclosure.

In England, the relevant legislation is *The Administration of Justice Miscellaneous Provisions Act*, 1933, 23 and 24. Geo. V, Cap. 36 schedules 1-3; and *The Magistrates' Courts Act*, 1952, 15 and 16 Geo. VI and 1 Eliz. II, Cap. 55.

[2]Code, S. 514(1).

[3]See Section 10(1) of *The Canada Evidence Act*, 1952, R.S.C. Cap. 307. It provides as follows: "Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purpose of the trial as he thinks fit." In *R v. Lepine*, (1962) 39 W.W.R. 253, 38 C.R. 145 (Sask.) production was ordered of a memorandum prepared by a police officer and referred to by him just prior to trial.

[4]*Regina v. Silvester and Trapp*, (1959) 29 W.W.R. 361, 31 C.R. 190 (B.C.)

as of right, to those documents referred to in Section 512 of the Criminal Code. There is no duty, said Mr. Justice Verchère, upon the police, to open their files to an accused and furnish him with all the various statements in writing taken by them from proposed witnesses during the course of their investigation.[1]

In *Regina v. Finland*,[2] Mr. Justice Wilson, suggests that there is no duty upon the prosecution to produce for inspection, before trial, statements of Crown witnesses. Any defence demand for their production should be made to the trial Judge, at trial, and not before. At the same time he goes on to suggest that a prosecutor has considerable discretion and if in doubt, should exercise it in favour of the accused by revealing to the defence both signed and unsigned statements. He quotes with approval "what I have always understood to be the law" the remarks of W.B. Common, Q.C., then Director of Public Prosecutions for Ontario:[3]

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[1]ibid., at p. 363.

[2]In *Regina v. Finland*, 31 C.R. 364 the Court held that the Criminal Code did not require the production for inspection before trial by the accused or his counsel of written statements of Crown witnesses obtained by the police. The Court also ruled that both *Rex v. Mahadeo*, 1936 3 W.W.R. 443 1936 2 All E.R. 813, 3 Abr. Con. (2d) 244 and *Rex v. Clarke*, (1930) 22 Cr. App. R.58 were authority for the proposition that statements must be produced, if required, at the trial and not before.

[3]ibid. at p. 367, (as reported in 1955, *Special Lectures of the Law Society of Upper Canada* at p. 3). In *Regina v. Lantos*, 1964 2 C.C.C. 52 the B.C. Court of Appeal ruled that statements of prospective Crown witnesses do not constitute "evidence" which an accused is entitled to inspect under Code, S.512(a). Before trial, the production of statements of Crown witnesses for inspection by the accused is a matter within the discretion of the Crown prosecutor.

" ... in all criminal cases there is complete disclosure by the prosecution of its case to the defence. To use a colloquialism, there are no 'fast ones' pulled by the Crown. The defence does not have to disclose its case to the Crown. We do not ask it for a complete and full disclosure of the case. If there are statements by witnesses, statements of accused, ... they know exactly what our case is, and there is nothing hidden or kept back or suppressed so that the accused person is taken by surprise at a trial by springing a surprise witness on him. In other words, I again emphasize the fact that every safeguard is provided by the Crown to ensure that an accused person, not only in capital cases but in every case receives and is assured of a fair and legal trial."[1]

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[1]This view would appear to be consistent with Lord Devlin's account of disclosure at preliminary inquiry in England. He writes: " ... the prosecution can be compelled to make a complete disclosure of the whole case ... Would not the advocate for the prosecution, as practically minded as his colleague for the defence, want to retain at least as much as he could of the element of surprise? Would it not be his object to disclose only as much of his evidence as was necessary to secure a committal and try to keep some cards up his sleeve? The answer is that he is not permitted to do that. He is not obliged at the trial to confine his case only to the material which he put before the magistrate because he may obtain other material afterward. But if he does so, he must disclose it by serving on the defence a notice setting out in the form of a statement by the witness the additional evidence he proposes to call. In this way, the defence gets to know the whole of the material that will be put against them." *contra:* see Louisell, "*Criminal Discovery: Dilemna Real or Apparent*" 49 Calif. L. Rev. 56 (1961) at p. 66. Compare two of the earlier cases on the subject: *Reg v. Connor,* (1845) 1 Cox C.C. 233; and *Reg v. Flannagan,* (1884) 15 Cox C.C. 403. Where evidence is to be produced for the first time at the trial the disclosure of such evidence by the Crown Attorney would be in the interests of justice. *Richard v. R.* (no. 1) (1959) 43 M.P.R. 229 (N.B.C.A.) applying *R v. Cunningham,* (1952) 15 C.R. 167, 30 M.P.R. 34. *R v. Finland,* 31 C.R. 364, *R v. Bohozuk,* (1947) 87 C.C.C. 125 and *R v. Bryant; R v. Dickson* (1946) 31 Cr. App. R. 146. This was done in the case of *R v. Towers* (1962) 40 W.W.R. 75 (Sask.) A Judge may order the production of a statement by a Crown witness if he believes it in the interests of justice that defence counsel should have the statement for the purpose of cross-examination: See, e.g., *R v. Weigelt,* (1960) 32 W.W.R. 449 (Alta. C.A.) *R v. McNeil,* (1960) 31 W.W.R. 232 (Sask.); *R v. Hall,* (1958) 43 Cr. App. R. 29.

For an appreciation of the development of the American

B. Witnesses

It is the practice in England and in a number of Canadian provinces, to endorse, on the back of the indictment, the names of these witnesses the Crown intends to call. The question arises as to what obligation there is upon the Crown to call these witnesses and what recourse, if any, is open to the defence if one or more of the witnesses whose names appear on the indictment are not called. In the case of *Seneviratne v. The King* the Court said:

> "Their Lordships cannot ... approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds, almost automatically, to discredit them by cross-examination. Witnesses essential to the unfolding of the narratives on which the prosecution is based must, of course, be called by the prosecution,

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case law see: *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957), *Napue v. Illinois*, 360 U.S. 264 (1959); *United States ex rel. Montgomery v. Rjagen*, 86 F. Supp. 382 (N.D.Ill.)(1949); *United States ex rel. Almeida v. Baldi*, 195 F.2d. 815 (3d.Cir.1952) *United States ex rel. Thompson v. Pye*, 221 F.2d. 763 (3d. Cir. 1955); *United States v. Consolidated Laundries Corp.*, 291 F.2d. 563 (2d. Cir. 1961); *Kyle v. United States*, 297 F.2d. 507 (2d. Cir. 1961); *Brady v. Maryland*, 373 U.S. 83 (1963) where the majority ruled at p. 87, "We now hold that the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also the recent cases of *Miller v. Pate*, 87 S.Ct. 785 (1967); *Giles v. The State of Maryland*, 87 S.Ct. 793 (1967).

whether in the result the effect of their testimony is for or against the case for the prosecution."[1]

Both in England and in Canada, the prosecution is bound to call all material witnesses even though their testimony may be inconsistent. The prosecutor, however, exercises an absolute discretion in determining what witnesses are material. The Crown Attorney is not bound to call witnesses merely because their names appear on the back of the indictment. Furthermore, the court will not interfere with the exercise of the Crown Attorney's discretion in this regard unless it is demonstrated "that the prosecutor has been influenced by some oblique motive."[2]

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[1] *Seneviratne v. The King*, (1936) 3 All. E.R. 36 at 49. For earlier cases on the subject see; *Reg v. Stiginani*, (1867) 10 Cox C.C. 552; *Reg v. Greenslade*, (1870) 11 Cox C.C. 412; *R v. McClain*, (1915) 23 D.L.R. 312; 23 C.C.C. 488; 8 A.L.R. 73. accord: *Muhammed El Dabbah v. Attorney General for Palestine*, [1944] A.C. 156; *R v. Woodhead*, (1847) 2 C.&.R. 520; *R v. Cassidy*, (1858) 1 F and F. 79. See too, the recent case of *Dallison v. Caffery*, [1964] 2 All E.R. 610 at 618 where Lord Denning suggests that if prosecuting counsel is aware of a credible witness "who can speak to material facts, which tend to show the prisoner to be innocent, he must either call the witness himself or make his statement available to the defence."

[2] *Muhammed El Dabbah v. Attorney-General for Palestine*, [1944] A.C. 156, 167. See: *Lemay v. The King*, [1952] 1.S.C.R. 232, *Agostino v. The King*, [1952] 1 S.C.R. 254, and *R v. Byrne*, (1953) 16 C.R. 133 where the defence alleged, on appeal, that the trial judge had erred in holding that the Crown was not obliged to call a witness who had given evidence at the preliminary hearing. Mr. Justice Bird, speaking for the Court said, (at p. 135) "There was no suggestion that the decision of Crown counsel to refrain from calling the witness was influenced by any oblique motive. Therefore, in the circumstances, I consider that Crown counsel has a discretion as to whether or not the witness in question should be called. Having decided to the contrary, his duty went no farther than to make the witness available to the defence, which was done, but defence counsel did not choose to call him."

PART IV - DISCRETION OF THE CROWN ATTORNEY

A. Discretion to Initiate Prosecutions

The Provincial legislation refers, almost exclusively, to the prosecuting officer's duty to conduct criminal prosecutions. The exception to this is the Manitoba *Crown Attorneys Act*[1] which provides that every Crown Attorney shall "institute and conduct", on the part of the Crown, prosecutions for criminal and penal offences. Section 439 of the Criminal Code provides that "anyone" may lay an information, and would seem to include the Crown Attorney. The Crown Attorney may indirectly exercise control over the initiation of prosecutions. He may advise persons, including the police, who wish to lay charges as to whether a criminal offence is disclosed by the facts, whether a prima facie case is made out and whether a prosecution is justified. This duty may be implied from the general legislative provisions.[2]

The Crown Attorney exercises his discretion over the initiation of habitual criminal proceedings.[3] Certain proced-

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[1] *Crown Attorneys Act*, 1954 R.S.M., Cap. 56, Section 6(a).

[2] Manitoba *Crown Attorneys Act*, ibid. S. 6 (1)(c) and the Ontario *Crown Attorneys Act*, supra S. 14(a). Section 14(f) of the Ontario Act also provides that the Crown Attorney shall, when requested in writing cause prosecutions for offences against any Act of the Legislature to be instituted on behalf of any governmental department.

[3] Code, S. 660.

ural requisites must be met by the Crown.[1] Individual local Crown Attorneys or Assistant Crown Attorneys exercise complete discretion when deciding whether or not to institute a habitual criminal prosecution. This leads to a variety of standards for initiating proceedings. Some Crown Attorneys never consider using the provisions[2] and others find the proceedings useful and institute them often.[3]

The prosecutor may prefer, before a court constituted with a grand jury, a bill of indictment against any person who has been commited for trial.[4] He may prefer an indictment in respect of the charge on which that person was committed for trial, or in respect of any charge founded on the facts disclosed by the evidence presented at the preliminary inquiry.

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[1]Among other requirements, the Attorney General of the province in which the accused is to be tried must consent, and seven clear days' notice must be given the accused by the "prosecutor". (Code S.662(1)). In *Re Mark*, [1964] 2 C.C.C. 398, 43 C.R. 39 (B.C.S.C.) the Prosecutor for the Municipality of Burnaby made the application. The Court ruled that the "prosecutor" who institutes and gives notice under Section 662(1) is "the person who institutes proceedings to which this Act applies" (Code, S.2(33)). For this reason it made no difference that the applicant was not the same prosecutor who initiated the indictment for the primary offence. (see: Code, S.660(1)) accord: *Regina v. Swontek*, (1965) 44 C.R. 257.

[2]In the Province of Quebec there have been only three convictions under the habitual criminal provisions of the Code.

[3]British Columbia: See also: Grosman, B.A., *The Treatment of the Habitual Criminal in Canada*, 9 C.L.Q. 95 (1966).

[4]Code, S. 486.

A similar discretion[1] is conferred upon the Attorney-General.[2] In a number of provinces the grand jury does not exist,[3] and the trial of an accused may be commenced by written indictment preferred by the Attorney-General or his agent.[4]

B. Discretion as to Mode of Procedure

Certain offences are, by the enactment creating them, made triable either on indictment or on summary conviction. With few exceptions, theppunishment is more severe when the procedure is by way of indictment. The accused cannot choose

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[1]That Section 486 confers a discretion is borne out by the cases of *R v. Faulkner* (1911) 18 W.L.R. 634, 16 B.C.R. 229; 19 C.C.C. 47 (C.A.) and *Gagnon v. R* , (1911) 23 Que. K.B. 390, 24 C.C.C. 51 (C.A.) which also suggest that the bill of indictment need not contain a statement that counsel presenting it is the representative of the Attorney-General.

[2]Code, S. 487. But note that a committal is not an essential condition under S. 487 and the Attorney-General is untrammelled in his discretion to prefer a bill of indictment for any charge. See, e.g., *R v. Court*, 19 M.P.R. 436, 4 C.R. 183, 88 C.C.C. 27, [1947] 3 D.L.R. 223 (P.E.I.); *Regina v. Beaudry*, (1967) 50 C.R.I. accord: *R v. Duff*, (1909) 2 Sask. L.R. 388, 15 C.C.C. 454 (C.A.). In *re Criminal Code*, (1910) 43 S.C.R. 434, 16 C.C.C. 459; *R v. Nyczyk*, [1919] 2 W.W.R. 661, 30 Man. R. 17, 31 C.C.C. 240 (C.A.); *R v. Simpson and Simmons*, [1943] 2 W.W.R. 426, 59 B.C.R. 132, 79 C.C.C. 344, [1943] 3 D.L.R. 355 (C.A.) and 80 C.C.C. 78, [1942] 3 D.L.R. 367 (Can.) refusing leave to appeal.

[3]New Brunswick, Quebec, Manitoba, Saskatchewan, Alberta and British Columbia.

[4]Code, S. 489.

the mode of trial, and the great weight of authority suggests that this is a matter within the sole discretion of the prosecution.[1]

C. Discretion to Compromise Cases[2]

On a plea of guilty, the judge or magistrate should be satisfied that the accused understands the nature of the charge and the meaning of his plea.[3] A plea of guilty is the equivalent of an admission, by the accused, that the Crown could, if necessary, establish his guilt.[4] Consequently, when it appears that the plea may have been involuntary, it

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[1]See, e.g., *Rex v. West*, (1915) 25 C.C.C. 145 (Ont.C.A.); *Rex v. Solomon*, (1918) 34 C.C.C. 171 (N.S.) *Rex v. McNabb*, (1919), 32 C.C.C. 166 (Alta.); *Ex p. Denis*, (1927) 49 C.C.C. 8 (Man.) where the suggestion is made that the discretion may lie partly with the magistrate; *Regina v. Paulovitch*, (1966-67) 49 C.R.21.

For an interesting American analysis see Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 Mich. L. Rev. 403 (1931); Dession, *From Indictment to Information - Implications of the Shift*, 42 Yale L.J. 163 (1932).

[2]A discretion to reduce the charge or to promise lighter sentence in return for a guilty plea.

[3]*R v. Haines*, (1960) 127 C.C.C. 125 (B.C.) This may require taking evidence; see, e.g., *R v. Johnson and Creanga*, [1945] 3 W.W.R. 201, 62 B.C.R. 199, 85 C.C.C. 56, [1945] 4 D.L.R. 75; *R v Hand*, [1946] 1 W.W.R. 421, 1 C.R. 181, 62 B.C.R.359, 85 C.C.C. 388, [1946] 3 D.L.R. 128; *R v. Milina*, [1946] 2 W.W.R. 584, 2 C.R. 179, 86 C.C.C. 374; *R v. Belton*, [1947] 2 W.W.R. 241, 89 C.C.C. 356; *R v. Gordon*, [1947] 1 W.W.R. 468, 3 C.R. 26, 88 C.C.C. 413; *R v. Karas*, (1961) 131 C.C.C. 414. It is not, however, obligatory to hear evidence: *R v. Maynard*, (1946) 2 C.R. 81 (Que. C.A.).

[4]*R v. Grant*, 57 N.S.R. 325, 42 C.C.C. 344 [1924] 3 D.L.R. 985 (Sub nom. *R v. Rosp*, (C.A.) See also: *R v. Inglis*, (1917) 23 Argus L.R. (Austr.) 378.

may be set aside. This will occur when the plea is induced by a person in authority who may have held out a promise of favour or advantage.[1] In *Rex v. Stone*[2] the Crown promised the accused that a minimum fine would be imposed in return for a guilty plea and the disclosure of certain information. The accused's information, however, was subsequently deemed valueless, and the maximum fine was imposed. The accused appealed and the conviction was quashed. On appeal by the Crown to the Nova Scotia Supreme Court, it was held that the accused was rightly allowed to appeal from her conviction following her plea of guilty.[3]

In *Weiner v. The Queen*[4] the accused pleaded guilty to

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[1]*Guerin v. R*, (1933) 55 Que. K.B. 84, 60 C.C.C. 350 (C.A.) per Walsh, J. referring to R *v. Brown*, (1848) 17 L.J.M.C. 145, and *R v. Dawson*, (1924) 18 Cr. App. R. 111.

[2]*Rex v. Stone*, (1932) 58 C.C.C. 262 (N.S.C.A.)

[3]After the conclusion of the evidence and after the accused has been declared guilty it is "quite proper for the magistrate to permit either the Crown or the accused or both to give evidence not only respecting the character, good or ill, of the accused but also of any other relevant circumstances or conditions with the view of enabling the magistrate to form an opinion as to what would be a suitable and proper sentence to impose" - *Rex v. Pinder*, (sub nom. Penders) 40 C.C.C. 272, 277. See also: Archbold's *Criminal Practice*, 25th ed., 218-219; *Rex v. Bonnevie*, (1906), 10 C.C.C. 376; *R v. Piluk*, (1933), 60 C.C.C. 92; *R v. Markoff*, (1937) 67 C.C.C. 308; *R v. Campbell*, (1911), 6 Cr. App. R. 131. The practice in England resembles that in Canada and is set forth in *Rex v. Campbell*, (1911) 27 Times L.R. 256 by Lord Alverstone, C.J.

[4]*Weiner v. The Queen*, (1962) Que. Q.B. 356.

two counts of possession under Section 296 of the Criminal Code. Certain representations had been made by an unspecified "person in authority" promising a suspended sentence in return for the guilty plea. The accused was sentenced to a term in prison. On appeal, the court held that "dans l'intérêt de la justice, l'accusé doit être autorisé à retirer son aveu pour lui substituer une dénégation de culpabilité."[1]

In the recent case of *R v. Barry Allan Marks*,[2] the accused, in return for his willingness to testify for the Crown in another trial, was promised certain inducements by the Crown.[3] The Crown carried out its part of the agreement. However, when Marks testified in the other case, he divulged the substance of his arrangement with the Crown in open court, thereby seriously reducing the value of his testimony in that case. Consequently, the Crown appealed Marks' sentence. In dismissing the appeal Mr. Justice Roger Brossard delivering the unanimous decision of the Court gave effect to the prior

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[1]ibid. at p. 357. In *Courtois v. The Queen*, (1962) Que. Q.B. 364 in identical circumstances the court ordered a new trial on the authority of unspecified "cas classiques reconnus par la jurisprudence." (ibid., p. 364).

[2]*R v. Barry Allan Marks*, Unreported judgment, Quebec Court of Queen's Bench, Appeal Side, No. 2449, March 20, 1967.

[3]These were promises regarding length of sentence and the timing of parole.

agreement between the Crown and the accused.[1]

D. Discretion With Regard to Bail

The primary consideration for granting bail is the probability of the accused appearing for trial.[2] Though this is the determining question, other factors may be

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[1]The Court noted that the Crown Attorney had advised the Court of the accused's co-operation since the inscription in appeal. Mr. Justice Brossard added that the police had benefited from Marks' information and his co-operation with the Crown was indicative of probable rehabilitation and the trial judge had not considered this point.

With regard to the American practice, Dession points out that "the great majority of convictions in both federal and State courts are based on pleas of guilty, most of which result from compromises involving waiver of felony or some other reduction in the charge or a recommendation for suspension of sentence." - Dession, op.cit., p. 374. See also: *(Report on Prosecution), United States National Commission on Law Observance and Enforcement,* (1931). 95 et seq.; Miller, *The Compromise of Criminal Cases,* So. Calif. L. Rev. 1 (1925); Newman, *Pleading Guilty for Considerationℓ A Study of Bargain Justice,* 46 J. Crim. L. and Criminology, 780 (1956); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas,* 112 U. Pa. L. Rev. 865, 893 (1964); Weintraub and Tough, *Lesser Pleas Considered,* 32 J. Crim. L. and Criminology, 506 (1942); Littleton, *Acceptance of Lesser Pleas - A Matter of Honest Discretion,* 14 The Panel 1 (No. 3., 1936); Mills, *The Prosecutor: Charging and Bargaining,* U. of Ill. L.F. 511 (1966); Arnold, *Law Enforcement: An Attempt at Social Dissection,* 42 Yale L. J. 1 (1932). However, in *People v. Elksnis,* 23 App. Div. 2d. 722, 258 N.Y.S. 2d. 351 the court ruled that any guilty plea promised upon a bargain with a judge is necessarily involuntary and void. The American courts usually have not distinguished between promises made by judges and those made by prosecutors: *Shelton v. U.S.,* 356 U.S. 26 (1958).

[2]See, e.g., *R v. Samuelson and Peyton,* 33 M.P.R. 116, 17 C.R. 395, 109 C.C.C. 253 (Nfld.) per Winter, J.; *R v. Rose,* (1898) L.J.Q.B. C.J., *McIntyre v. Recorder's Court,* (1947) R.L. 357 (Que.); *R v. Henderson,* (1963) 45 W.W.R. 55 (Alta.) *Re Robinson,* (1854) 23 L.J.Q.B. 286, *R v. Scaife,* (1841) 9 Dowl. 553, 10 L.J.M.C. 144.

considered in connection with this one inquiry.[1] The decision whether bail will be granted rests with the Court,[2] and the matter of the sufficiency of the bail and the sureties is for the judge. It should not be left either to the justices who take the recognizance nor tbethe Crown Attorney.[3] However, section 14(j) of the Ontario *Crown*

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[1] *R v. Lepicki*, [1925] 2 W.W.R. 726, 44 C.C.C. 263 [1925] 4 D.L.R. 170 (Man.). Factors include: the likelihood of the accused repeating the offence while on bail: *R v. Phillips*, (1947), 32 Cr. Appl. R. 47, applied in *R v. Vickers and Fletcher*, [1949] 1 W.W.R. 431, 93 C.C.C. 342 (B.C.) accused's long record including escapes: *R v. Edgecombe*, [1949] 2 W.W.R. 584 (B.C.) danger to the public: In *re N.* (1945), 19 M.P.R. 149 (P.E.I.); *R v. Russell*, [1919] 3 W.W.R. 306, 32 C.C.C. 66, 48 D.L.R. 603, 50 D.L.R. 629 (Man.). In *R v. Fortier*, (1902) 13 Que. K.B. 251, 23 C.L.T. 115, 6 C.C.C. 191, the Court said: "... it is proper to consider the nature of the offence charged and its punishment, the strength of the evidence against the accused, his character, his means and his standing." accord: *R v. Gottfriedson*, (1906) 10 C.C.C. 239 (B.C.) Ex *parte Huot*, (1882) 8 Q.L.R. 28, 5 L.N. 160 (C.A.); *R v. Dillenge*, [1923] 1 W.W.R. 448, 39 C.C.C. 168 (Sask.) *R v. Higgins*, (1835) 4 O.S. 83 (C.A.) *R v. Jones and Skinner*, (1835) 4 O.S. 18, *R v. Spicer*, (1901) 5 C.C.C. 229 (N.S.).

[2] Devlin, op.cit., states at p. 91: "The granting of bail, except in cases of murder and treason is thus discretionary." Furthermore, Code, Section 463(3) provides as follows: "The judge or magistrate may, upon production of any material that he considers necessary upon the application, order that the accused be admitted to bail." applied in: *R v. Russell*, [1919] 3 W.W.R. 306, 32 CCC.C. 66, 48 D.L.R. 603, 50 D.L.R. 629.

[3] *R v. Greig*, (1914) 30 W.L.R. 285, 23 C.C.C. 352 (Sask.).

Attorneys Act, provides that every Crown Attorney shall

> "where a prisoner is in custody charged with or convicted of an offence and an application is made for bail, inquire into the facts and circumstances and satisfy himself as to the sufficiency of the surety or sureties offered, and examine and approve of the bail bonds where bail is ordered."

With the exception of this provision, there is no further legislation specifically relating to the duties of the Crown Attorney at bail hearings.[1]

E. Discretion to Dismiss Proceedings

The terms "stay of proceedings" and "charge withdrawal" are not synonymous. When a charge has been withdrawn there is no charge remaining on the record, and to continue the prosecution a new charge must be laid. Therefore, the withdrawal of a charge ends the proceedings. However, when a stay is entered the Crown may, at a future date, continue the proceedings without laying any charge. Entering a stay of proceedings merely suspends the charge or charges.[2]

The Attorney-General, or counsel instructed by him, may direct a stay of proceedings.[3] All proceedings on the indict-

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[1] *Crown Attorneys Act*, (1960) R.S.O. Cap. 82. It is noted in Tremeear at p. 788 that "in practice, however, the usual order for bail directs the release of the accused upon his entering into a recognizance with sufficient sureties 'to the satisfaction of the agent of the Attorney-General'."

[2] *R v. Leonard, ex p. Graham*, [1962] 133 C.C.C. 230, 37 C.R. 374.

[3] Code, S. 490. This applies to proceedings by way of indictment. See Tremeear, op.cit., p. 13 footnote 1. The suggestion is that this procedure has superseded the older procedure of nolle prosequi.

ment are stayed accordingly and any recognizance relating to the proceedings is vacated. The stay may be directed at any time after an indictment has been found and before judgment.[1] It does not constitute an acquittal, and is no bar to a fresh prosecution for the same offence.[2] The exercise of discretion to stay proceedings may be summarized as follows:

> "The question of entering a stay of proceedings ... is something entirely and solely within the power conferred by Parliament in and through the Criminal Code on the Attorney-General, and by him to be delegated to Crown counsel in appropriate cases. It lies entirely outside the ambit of the authority of the court, and when entering a stay while a criminal court is sitting, Crown counsel does not address the court .... but the clerk of the court. The court has no part in any stay, and it is for the Attorney-General ... to determine the course of action ... in regard to the future disposition of the stayed charge."[3]

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[1] *R v. Edwards*, [1919] 2 W.W.R. 600, 31 C.C.C. 330 (Alta.)

[2] see, e.g., *R v. Blackley*, (1904) 13 Que. K.B. 472, 8 C.C.C. 405; *R v. Spence*, (1919) 450 L.R. 391, 31 C.C.C. 365; *Goddard v. Smith*, (1705) 6 Mod. 261, 87 E.R. 1008.

[3] *R v. Cooke; R v. Cooke, Dingman and Whitton*, [1948] 1 W.W.R. 849, 5 C.R. 430, 91 C.C.C. 310 (Alta.) per Boyd McBride, J. The courts are most reluctant to interfere with the exercise of the Attorney General's discretion, even where the informant desires the continuance of the proceedings: *R v. Leonard*, (1962) 38 W.W.R. 300 (Alta.) The American position is summarized in Dession, op. cit., at p. 374. See also: Note, *Prosecutor's Discretion*, (1954-55) 103 Univ. of Pa. L. Rev. 1057 at pp. 1066-1072 and the recent case of *Klopfer v. State of North Carolina*, 87 S. Ct. 988 (1967). In England, the Attorney-General is empowered to terminate any case tried on a bill of indictment by entering a nolle prosequi only after the indictment has been signed or found. See, e.g., *R v. Dunn*, (1843) 1 C. & K. 730; *R v. Wylie, Howe and McGuire*, (1919) 83 J.P. 295; and *R v. London County Quarter Sessions Char ex parte Downes*, [1954] 1 Q.B. 1 at p. 6; *R v. Colling*, (1847), 9 L.T.O.S. 180; *R v. Allen*, (1862), 1 B. & S. 850; *Jones v. Clay*, (1798), 1 Bos. and P. 191.

In the recent case of *Regina v. Beaudry*,[1] Crown Counsel directed the Clerk of the Court to enter a stay of proceedings after the accused had testified in his murder trial and the Judge had directed the jury to return a verdict of acquittal. The trial Judge received the jury's verdict of acquittal notwithstanding the stay. The British Columbia Court of Appeal ruled that once the Crown Attorney had entered the stay (on the instructions of the Attorney-General) it was beyond the trial Judge's authority to accept the jury's verdict. Consequently the acquittal was a nullity. Accordingly when the Crown immediately laid a charge of assault, causing bodily harm against the accused, arising out of the same fact situation, the Court ruled that the accused was not put in double jeopardy. Mr. Justice Bull confirmed the sole discretion of the Attorney-General in this regard when he said,

> "The entry of a stay is a statutory administrative discretion given to the Attorney-General and, if exercised, his direction is to the Clerk of the Court as such and is outside any control of the Judge."[2]

Mr. Justice Bull indicated that he was not convinced of the "propriety or fairness" of the procedure taken by the Crown.[3]

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[1] *Regina v. Beaudry*, [1967] 1 C.C.C., 272.

[2] ibid. at 275.

[3] ibid. at 276.

PART V -FORENSIC BEHAVIOUR

Crown counsel, in a criminal case, should act in a quasi-judicial capacity and should regard himself as an officer of the Court and not as ordinary counsel to an action. He should conduct the prosecution in a manner which assists the Court and fairly places the case before the jury and nothing more.[1] Crown counsel should avoid inflammatory addresses to the jury, or appeals to emotion, and should not advance arguments unwarranted by the evidence.[2] In *Boucher*

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[1]Taschereau's Criminal Statute Law (1888) 841; see also: *R v. Murray and Mahoney*, (1917) 1 W.W.R. 404, 10, Alta. L.R. 275, 27 C.C.C. 247, 33 D.L.R. 702 (C.A.) Sargeant Talfourd, in *Dickinsons's Quarter Sessions*, says at p. 495 ".... [Crown Counsel] should refrain from indulging in invective, and from appealing tothe prejudices or passions of the jury; for it is neither in good taste nor right feeling to struggle for a conviction as an advocate in a civil cause contends for a verdict." --- quoted in Taschereau, op. cit., at p. 840.

[2]See, e.g., *R v. Seabrooke*, (1832) O.R. 575, 58 C.C.C. 323, 1932 4 D.L.R. 116 (C.A.); *R v. American News Co.*, (1957) O.R. 145, 25 C.R. 374, 118 C.C.C. 152 (C.A.); *R v. McDonald* (No. 1), 27 C.R. 333 (1958) O.R. 413 (C.A.); *Tremblay v. R*, (1963) 40 C.R. 303 (Que. C.A.) where on appeal on a conviction of rape, a new trial was ordered partly on the ground that Crown counsel used inflammatory language. When addressing the jury concerning the noises allegedly made by the accused the Crown Attorney expressed himself as follows: "On parlait ... des 'grognements' d'un animal. Imaginez la scène: imaginez comment grogue un homme qui a dépassé les limites, - si c'est la vérité, - qui a dépassé les limites de la décence, les limites de la retenue. Et J'irai plus, messieurs: grognements d'un animal, je me demande si l'expression est juste parce qu'il est des actes que les animaux euxmêmes ne font pas, et qui - si elle a dit la vérité sous serment, - ont été faits par Tremblay l'accusé. Il est des choses que l'animal. N'est pas même assez méchant, mauvais ou vicieux pour faire, parce qu'il n'a pas l' intelligence."

See also: *McFarland v. United States*, 150 F.2d. 593 (D.C. Cir. 1945) (in rape case prosecutor kept victim's blood stained clothing on display); *Simmons v. State*, 14 Ala. App. 103, 71 So. 979 (1916) (remark calculated to arouse racial prejudice); *Thomas v. State*, 107 Ark. 469, 155 S.W. 1913). (remark cal-

v. The Queen,[1] Crown counsel expressed his personal belief in the guilt of the accused and went on to say (translated from the French):

> "Every day we see more and more crimes than ever, thefts, and many another thing. At least one who commits armed robbery does not make his victim suffer as Boucher made Jabour suffer. It is a revolting crime for a man with all the strength of his age, of an athlete against an old man of seventy-seven, who is not capable of defending himself. I have little respect for those who steal when they have at least given their victim a chance to defend himself, but I have no sympathy for these dastards who strike men ... in a cowardly manner with blows of an axe. ..... And if you bring in a verdict of guilty, for once it will be almost a pleasure for me to ask the death penalty for him."

The Supreme Court of Canada quashed the conviction and ordered a new trial. In the words of Chief Justice Kerwin:

> "It is the duty of Crown counsel to bring before the court the material witnesses as explained in *Lemay v. The King*, (1952) S.C.R. 232. In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this, he has a duty to assist the jury, but he exceeds that duty when he expresses, by inflammatory or vindictive language, his own personal opinion that the accused is guilty, or when his remarks tend to leave-with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty."[2]

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[1] *Boucher v. The Queen*, [1955] S.C.R. 16.

[2] ibid., at p. 19. It should be noted that it is within the discretion of the judge to interfere if he considers the speech of counsel improper, as being unduly inflammatory, or otherwise appealing to prejudice. See, e.g., *R v. House*, (1921) 16 Cr. App. R. 49; *R v. Nerlich*, (1915) 34 O.L.R. 298, 24 C.C.C. 256, 25 D.L.R. 138 (C.A.). In connection with the impropriety of counsel expressing his own opinion as to the guilt or innocence of the accused, see, e.g.: *Pursey v. R*, (1956) 24 C.R. 333, 116 C.C.C. 82 (Que.C.A.). Compare the language used in *Boucher v. The Queen*, with that used in *Hill v. State*, 157 S.W.2d. 369, 373, where the prosecutor's remark in a rape case that a "snake crawls on his own belly, but these human vultures crawl on the bellies of our helpless and defenceless women" was characterized as a "reasonable deduction from facts commonly known."

Unfair comment by counsel for the Crown in his address to the jury will ordinarily not be ground for setting aside the verdict, unless it appears that the jury was thereby misled into finding the accused guilty when the evidence alone did not warrant that finding.[1] Although it is preferable for counsel to abstain from expressing an opinion on the facts, to do so will result in a reversal only when the court finds that the accused suffered a substantial wrong.[2]

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[1]See, *R v. Jasey*, 14 M.P.R. 571, 73 C.C.C. 260, [1940] 2 D.L.R. 168 (N.S.C.A.) applying *R v. Banks* [1916] 2 K.B. 621, 12 Cr. App. R. 74, 25 Cox C.C. 535. For a full discussion of the American position on forensic misconduct see: *The Nature and Consequence of Forensic Misconduct in the Prosecution of a Criminal Case (Note)*, 54, Col. L. Rev. 946, (1954) where the situation is described as follows: (at p. 959): "Despite a few early cases indicating that forensic conduct is within the discretionary control of the trial court alone, it is now the universal rule that if the proper procedure is followed, appellate courts have power to review the conduct of the prosecutor. But the finding that some misconduct has occurred does not lead inevitably to reversal. Rather, the appellate court will affirm unless it believes that the misconduct affected the result, or although it did not influence the outcome, violated due process. Furthermore, reversal or affirmance often seems to hinge on whether the court feels that certain types of conduct by the defense counsel or the prosecuting attorney should be deterred." See, e.g., *United States v. Weiss*, 103 F2d. 348 (2nd Cir. 1939); *People v. Wayne*, 117 Ca. App. 2d. 268, 256 P.2d. 62 (1953); *Haskette v. State*, 65 Okla. Cr. 299, 85 P.2d.761 (1939); *State v. Barone*, 92 Utah 571, 70 P.2d. 735 (1937); *People v. Jackymiak*, 381 Ill. 588, 46 NE 2d. 50 (1943); *People v. Bigge*, 288 Mich. 417, 285 N.W.5. (1939); *State v. O'Donnell*, 191 Wash. 511, 71 P.2d. 571 (1937).

[2]*R v. Moke*, [1917] 3 W.W.R. 575, 12 Alta. L.R. 48, 28 C.C.C. 296, 38 D.L.R. 441 (C.A.) The rule is one of propriety rather than of law. In *R v. Hilborn*, (1946) O.R.552, 12 C.R. 129 (C.A.), Crown counsel distinguished between his position and that of a defence counsel, adding "the Crown never wins and never loses." The Court ruled that to do so and then to criticise defence counsel's conduct was unfair, in bad taste, and may constitute grounds for setting aside a verdict. Contra: *R v. Kelly*, [1917] 1 W.W.R. 46, 27 Man. R. 105, 27 C.C.C. 140 (affirmed [1917] 1 W.W.R. 463, 54 S.C.R. 220, 27 C.C.C. 282, 34 D.L.R. 311 where Perdue, J.A., said: "No English or

PART VI - THE QUASI-JUDICIAL ROLE

> "The zeal and the arguments of every counsel, knowing what is due to himself and his honourable profession, are qualified not only by considerations affecting his own character as a man of honour, experience and learning, but also by considerations affecting the general interests of justice."[1]

Canadian authority was cited for the granting of a new trial or interfering with the verdict on the ground that the language of the Crown counsel toward the prisoner was inflammatory or improper."

With regard to other forms of misconduct: In *R v. Webb*, [1914] 6 W.W.R. 358, 24 Man. R. 437, 22 C.C.C. 424, 16 D.L.R. 317 (C.A.) Crown counsel in his address to the jury told them that certain material evidence for the defence which the trial judge had ruled admissible should not have been admitted. The Manitoba Court of Appeal ordered a new trial on the ground that the effect of counsel's statements may have induced the jurors to disregard such testimony which, if believed, would prevent them rendering a conviction. In *Rex v. Mondt*, [1933] O.W.N. 101, 60 C.C.C. 273, [1934] 1 D.L.R. 382 (C.A.) per Fisher, J.A., the Court ruled it improper for Crown counsel to offer evidence or make statements in open court in the presence of the jury which might prejudice the interests of the accused, and subsequently to retract or admit that the evidence or statements were irrelevant or untrue. The fact that the Judge in his charge told the jury to pay no attention to this evidence does not necessarily correct the procedural defect. c.f. *R v. Sehan Yousry*, (1914) 11 Cr. App. R. 13, 24 Cox C.C. 523: It is improper for counsel to suggest to the jury by cross-examination of a witness, the contents of a writing which, if produced, could not be put in evidence. *R v. Harri*, (1922) 51 O.L.R. 606, 36 C.C.C. 305, 64 D.L.R. 647.

[1] *Swinfen v. Lord Chelmsford*, (1860) 2 L.T. 406. per Baron Pollock at p. 413. In *Queen v. O'Connell*, (1844) 7 I.L.R. 310 Mr. Justice Crompton described the duties of a lawyer (at p. 313): "He will ever bear in mind that if he be the advocate of an individual and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case or for any party or purpose can discharge him from that primary and paramount retainer."

Sir John Simon observed that "fundamentally the position of a barrister who is prosecuting a criminal is a mere example and epitome of the kind of honour and the sort of conscience which ought to be shown in all branches of the advocate's work." [1] Judicial pronouncements upon the role of Crown Counsel, however, have ascribed to him an ethical burden over and above that of the "ordinary" lawyer.

> "The vocation of an advocate who is prosecuting a criminal is to be in the strictest sense a Minister of Justice. His duty is to see that every piece of evidence relevant and admissible is presented in due order, without fear and without favour."[2]

The Crown Prosecutor, it is suggested by a senior Crown Attorney, has a greater ethical burden than his civil law counterpart:

> "The position of the Crown Attorney is not that of ordinary counsel in a civil case; he is acting in a quasi-judicial capacity or as a minister of justice and ought to regard himself as part of the Court rather than as an advocate. He is not to struggle for a conviction nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority and a contest of skill and pre-eminence."[3]

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[1] From an address to the Canadian Bar Association reported in (1922) 25 Law Notes 228 at p. 231.

[2] ibid., p. 231. Mr. Justice Riddell commented as follows: "It is the prosecutor's duty to lay before the Court and jury all the facts no matter how they may tell; he must bring out those which exonerate as well as those which onerate the accused ... When he has brought out all the facts and summed them up fairly for the trial tribunal, his duty is done and he has no concern with the verdict." - from an address to the American Institute of Law and Criminology reported in Bull, *The Crown Attorney Office*, Obiter Dicta, Spring issue, 1954.

[3] Bull, H.H., *The Career Prosecutor of Canada*, 53 J. Crim. L., Criminology and P.S. at p. 95.

Mr. Justice Taschereau, as he then was, delivered the following authoritative opinion:

> "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'impartialité doivent toujour être les caractéristiques de sa conduite devant le tribunal. Il aura en effet honnêtement rempli son devoir et sera à l'épreuve de tout reproche si, mettant de côté tout appel aux passions, d'un façon digne qui convient à son rôle, il expose la preuve au jury sans aller au-delà de ce qu'elle a révélé."[1]

The role of the prosecutor is one which excludes any notion of winning or losing.[2] He is not to press for a conviction but is to lay all the facts both for and against the accused before the jury.[3]

Mr. Christmas Humphreys, Senior Prosecuting Counsel at the Old Bailey, in an address entitled 'The Duties and Responsibilities of Prosecuting Counsel' adhered to the following concept of the prosecuting counsel:

> "Not only are the defence entitled to call upon the prosecution to assist them to find witnesses and bring them forth or even to make wide inquiry for certain evidence believed to exist, and to spend public money in the cause of that inquiry, but I believe it to be the duty of prosecuting counsel to offer that aid. And why? Because the prosecutor is at all times a minister of justice though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of convictions received over a period. The duty of the prosecutor .... is to present to the

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[1] *Boucher v. The Queen*, (1955) S.C.R. 16, 21.

[2] ibid. at 24.

[3] Devlin, *The Criminal Prosecution in England*, op. cit., at 27.

> tribunal a precisely formulated case for the Crown against the accused and to call evidence in support of it. If a defence is raised incompatible with his case, he will cross-examine, dispassionately and with perfect fairness, the evidence so called, and then address the tribunal in reply if he has the right, to suggest that his case is proved. It is no rebuff to his prestige if he fails to convince the tribunal of the prisoner's guilt. His attitude should be so objective that he is, so far as humanly possible, indifferent to the result."[1]

The foregoing represents a description of the prosecutorial system we have posited in Canada. The legislative norms are not easily defined and the attempt to categorize the duties and functions of the Crown Attorney is frustrated by large legislative gaps and the usual inconsistency found in the case-law. Even though limited, the legislative and judicial pronouncements constitute essential materials that set forth the body of rules and procedural prescriptions that regulate the prosecutorial process and the Crown Attorneys' forensic behaviour in Canada. It is with this body of rules in mind that we turn to examine the role of the Crown Attorney and his prosecutorial behaviour in the light of the empirical descriptive data.

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[1](1955) Criminal Law Review 739.

METHODOLOGY

PART I - Evolution of the Research Problem

A. The Setting

The data was drawn from the office of the Crown Attorney in three cities. Two of the three cities are large urban centres in which there is considerable criminal activity and correspondingly a large number of prosecutions. The other city is a small centre with much less criminal activity and a proportionately smaller number of prosecutions. In each of the three cities there has developed a professional core of prosecutors and a clear administrative structure headed by a Crown Attorney who is responsible for the prosecution of offenses committed within the jurisdictional boundaries of the city. In all three cities the Crown prosecutor and his staff are lawyers who are members of their respective bars and full time employees of the Province. Marked differences were found between the prosecutorial organization in each of the three cities studied.

The pilot study was conducted in a large city, which, for the purposes of the study, will be called Cosmopolis. This preliminary study was devoted to the development of interview techniques and to the discovery of areas of interest capable of yielding useful data. The interviewer attempted to narrow the focus of the enquiry by drafting an interview schedule that would encompass and, at the same time, limit the areas considered vital to the study. The data collected

was tabulated and analysed. The interviewing techniques were critically appraised in order to systematize the technique. A second interview schedule was then drafted, based on the enquiries which seemed to elicit the most fruitful responses.

Oncethe interviewing techniques had been revised and the pilot data analysed, a pre-test study was begun. A medium-sized city, which will be called Provincetown, was selected. Since Provincetown is a much smaller city than Cosmopolis, it seemed likely that procedures, practices and Crown Attorney responses might differ from practices and attitudes encountered among those Crown Attorneys interviewed in the much larger Cosmopolis. The methodology was continually tested and adjusted as the focus of the enquiry was sharpened by the patterns of the accumulated data. The pre-test was directed to laying the final ground work for the study.

B, The Research Design

The purposes of the research design were, at the inception of the study, stated in the form of a number of specific objectives. The first draft of the objectives was prepared during the pilot study.[1] These objectives represented a crude definition of the areas of information required to meet the purposes of the study. They specified the individual topics about which information was to be obtained. The first draft of the objectives was based on "hunches" about the areas of information that might provide interesting material. Subse-

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[1]Appendix Number 1.

quently, the objectives were clarified in the light of the data accumulated in the pilot study and the pre-test. The objectives were broken down into sub-objectives in order to ensure the coverage and organization of the data under specific headings.[1]

C. The Schedule

Once the objectives had been constructed, an interview schedule was developed to formulate questions in an attempt to translate the objectives into questions which might lead to responses which could be analysed in the light of the objectives. During the pre-test study, after the objectives had been re-defined, the interview schedule was recast with the dual purpose in mind of providing a basis for the interviewer to obtain information to answer his objectives and to assist the interviewer in motivating the subject's response.[2] The schedule consists of both 'open' and 'closed' questions[3]

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[1]Appendix Number 2.

[2]Appendix Number 3.

[3]A closed question is so worded that it restricts the respondent's answer and is useful when the interviewer wishes the respondent to express agreement or disagreement with some stated point of view. The open question merely establishes the topic for the respondent and allows him the freedom to structure his answer as he sees fit. "The open question appears to be more appropriate when our objective is not only to discover the respondent's attitude toward some issue but also to learn something about his level of information, the structure or basis on which he has formed his opinion, the frame of reference within which he answers the question and the intensity of his feelings on the topic." Kahn, R.L., and Cannell, C.F., *The Dynamics of Interviewing; Theory, Technique and Cases*, New York, Wiley, (1957) 135.

and was supplemented by the use of extensive 'probes' within frames of reference[1]. Consideration was given to the sequence of questions in the schedule and questions were divided into an introductory phase, exploratory phase and target phase.[2] Pressing or threatening questions were avoided until such time as a rapport had developed with the subject and were accordingly placed toward the end of the interview schedule.

D. Interview Techniques

In addition to the interview schedule and the use of probes, problems of response to questions were dealt with by the use of neutral questions such as "How do you mean?"; "I'd like to know more about your thinking on that"; "I'm not sure I understand what you have in mind."[3] The use of probes and neutral questions in addition to the questions developed in the interview schedule eventually led to an interviewing technique whereby the interview schedule was regarded as a base limiting structure from which the interviewer ranged freely, mindful

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[1] "Through the careful formulation of major questions and the use of supplementary probe questions, the interviewer ensures that the flow of communication which he has motivated is directed to specific objectives. It is the ability of the interviewer to so direct that produces a valid interview -- that is an interview which measures the things it purports to measure." ibid. at 108.

[2] ibid. at 157.

[3] ibid., at 207 where the authors suggest the use of neutral questions when the respondent's answers fail to meet the objective of the primary question.

of the objectives and limits, depending on the particular interests of the subject. This technique seemed to encourage a natural transition from topic to topic during the interview. No fixed sequence of questions was found satisfactory for all subjects and the interviewer was guided in part by the objectives and in part by the limits of the interview schedule and in part by the interests of the subject. In this way one response led to another and no rigid sequence of pre-arranged questions were forced upon the subject. The interviewer attempted to cover the objectives and the interview schedule but at the same time attempted to avoid forcing the inquiry, and as a result, the information into pre-conceived patterns that might lead to pre-conceived results.[1]

E. Limitations of Interview Techniques

The interviewer attempted to see the world through the eyes of the Crown Attorneys without engaging in value judgments. The attempt to obtain a picture of the subject that is not distorted by the interviewer's own opinions, judgments and bias,

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[1]Carl Rogers first explained his "controlled non-directive probing", which was utilized as a helpful technique, in his two books on the subject, *Client-Centered Therapy*, (1951), and *Counselling and Psycho-Therapy*, (1942). Kahn and Cannell supra., suggest at p. 209 that "the technique of the information-getting interview becomes in many ways comparable to that of the client-centered therapist. Within the topic dictated by a given content objective, the information-getting interviewer permits the respondent to communicate material at his own pace and in his own way. Like the therapist, the interviewer is permissive and accepting, regardless of the point of view or values indicated in the responses." See also: Merton, R.K., Fiske, M., Kendall, P.L., *The Focused Interview; A Manual of Problems and Procedures*, Glencoe, Free Press, (1956) at pp. 12, 13.

is fraught with difficulties.[1]

Kahn and Cannell suggest that:

> "As in most communications processes, we have in the interview two people, each trying to influence the other and each actively accepting or rejecting influence attempts. The end product of the interview is a result of this interaction. Therein lie the strengths and weaknesses of the interview as an information-getting technique. If the interaction is handled properly, the interview becomes a powerful technique, capable of developing accurate information and getting access to material otherwise unavailable. Improperly handled, the interactions becomes a serious source of bias, restricting or distorting theflpw of communication."[2]

There is a natural tendency of people to judge, approve or disapprove of other persons and their statements. But clearly evaluative behaviour on the part of the interviewer distorts the flow of communication.[3] Awareness of potential

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[1]Weyrauch, Walter O., *The Personality of Lawyers*, New Haven, Yale University Press, (1964) at p. 9 considers the problem of the personality of the interviewer and other factors which influence the results of social research.

[2]Kahn and Cannell supra., introduction, at p. VI.

[3]ibid. at 182, 189. For a thorough review of research dealing with interview bias, see Hyman, H.H., *Interviewing for Social Research*, University of Chicago Press, 1954. There has been considerable research in the area of the psychological factors in interviewing which often illustrate that the responses obtained by interviewers tended to be related to their own opinions and reactions. See, i.e., Cahalan, D., Tamulonius, V., and Verner, H.W., *Interview Bias Involved in Certain Types of Attitude Questions*, International Journal of Opinion and Attitude Research, 1, 63-77 (1947); Wales, H., *Detection and Correction of Interviewer Bias*, Public Opinion Quarterly, 16, 107-127 (1952); Blankenship, A.B., *The Effect of the Interviewer upon the Response in a Public Opinion Poll*, Journal of Consulting Psychology, 4,134-136 (1940).

Interesting studies have been conducted that deal with the effects of the interviewer's expectations rather than of his opinions. Stanton and Baker, *Interview Bias and the Recall of Incompletely Learned Materials*, Sociometry, 5, 123-134 (1942). Where the interviewers seemed to obtain results which favoured a particular response. Interviewers may suggest acceptable answers by comments on answers made by the subject. Guest, L.L., *A Study of Interviewer Competence, International Journal of Opinion and Attitude Research*, 1, No. 4., 17-30 (1947). The interviewer may fail to hear an interviewee's statement or response which conflicts with his own attitudes, or is contrary to his expections of the kind of response the subject should make to the question.

bias is the first step in avoiding the pitfall. The interviewer attempted to 'learn how to act' in the sense of developing an awareness of what one is doing and how one's actions affect the interview setting.[1] The considerable verbal skill of the subjects and the convergence of professional language and background between interviewer and subject may have assisted the flow of communication.

F. Recording the Interviews

Accuracy would have been assured if the interviews had been recorded verbatim by the employment of tape-recording devices. The confidential nature of the interview made such recordings impossible. The presence of a recording device, it was felt, would completely inhibit the subject's response. Extensive notes were taken by the interviewer during the interview. An attempt was made to quote the subject directly. Immediately after the conclusion of the interview, the applicant tape-recorded the interview relying on his notes and memory. The time lapse was minimal between interview and recording. The interviewer was aware that recording errors often occur because of the interviewer's tendency to round-out, amplify or otherwise modify responses. That awareness may have assured some accuracy in the transposition from notes to the tape-recording.

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[1]The noted psychiatrist, Harry Stack Sullivan, *The Psychiatric Interview,* (1954) suggests at p.69 that "...Many inexperienced interviewers, quite exterior to their awareness, communicate to their interviewees a distaste for certain types of data; and their records of the interviews are conspicuous for the fact that the people they see do not seem to have lived in the particular areas contaminated by that distaste. Until such interviewers realize that they are rather unwittingly prohibiting, or forbidding, or shooing the interviewee away from a particular type of data, they continue not to encounter it. Thus, 'learning how to act' is largely a matter of being aware of what one does, and aware of it in terms of how it affects the setting of the interview. As an interviewer does this, he stops doing those things which interfere with the fuller development of the interview."

PART II

The Study

A. The Sample

The selection of a large city, which will be called Metropolis, as the centre for the study was governed by the interviewer's familiarity with the practices and procedures followed by the Crown Attorneys and defence lawyers in Metropolis. Certain background information about the office of the Crown Attorney in Metropolis and the past behaviour of some of the staff would have been unavailable to the interviewer elsewhere without an additional heavy investment of time, effort and cost.

Crown Attorneys are defined, for the purposes of the study, as barristers and solicitors who are members of the Provincial Bar and who are full-time employees of the office of the Crown Attorney in the city of Metropolis. These men may be designated Crown Attorneys, Deputy Crown Attorneys, Assistant Crown Attorneys or Crown Prosecutors. The applicant planned to interview each Crown Attorney who was, as of December 1, 1966, a member of the Crown Attorneys Office in Metropolis. In this way, the sample is not restricted to the elite or experienced Crown Attorneys but represents also the responses of the neophyte Crown Attorney. Although some few part-time Crown Prosecutors were employed on a fee basis, these persons were not interviewed as part of the sample.

Twenty Crown Attorneys in the city of Metropolis were interviewed and each interview lasted from two to five hours. There were twenty-two Crown Attorneys employed in the office at the time the study was commenced but the interviewer was

unable, after repeated attempts, to meet with two of the subjects. The choice of the time and location of the interview was left to the subject. Each subject was contacted individually by the applicant, some on a number of occasions, in order to arrange a convenient time for the interview in order to be relatively free from interruptions. The interviews commenced early in December, 1966 and were completed in mid-April, 1967. The subjects ranged in age from 25 years to 55 years with the majority ranging between 28 and 35 years of age. All the subjects were university trained professional men. Almost all from the upper middle classes of the population although five of the subjects would possibly be classified as members of the social upper class and three or four from the lower middle class.

In addition to the interviews conducted of the Crown Attorneys in Metropolis, informal discussions were held with a number of former Crown Attorneys and defence lawyers, in order to gather further background material to better evaluate the responses of the Crown Attorneys. The data obtained in these additional interviews, although contributing a valuable sense of proportion to the study, was not incorporated into the sample material.

The sample (20) is much too small to contribute to any statistical evaluation. The approach is not a statistical one, nor does it represent a psychiatric delving into the sub-conscious by intensive psycho-therapeutic interview techniques. It is not clinical in the sense of developing comprehensive

theories of personality by intensive case study. It is descriptive and hypothesis-forming rather than statistical and hypothesis-testing. As such, the sample seemed adequate for the purposes of the enquiry.

B. Tentative Hypotheses

It was only after the pilot and pre-test studies were completed and that data analysed that tentative hypotheses were formulated. The hypotheses were based on the applicant's "hunches" and on the patterns and perspectives which seemed to appear from the data already available. There was some reluctance to formulate hypotheses at all since the study was considered basically descriptive. As such, the data, once gathered, lent itself to *ex poste facto* analysis. The following are the tentative hypothese constructed on completion of the pilot and pre-test studies.

1. The Crown Attorney's attitude to his role is largely influenced by external pressures and exposure to group environment.

2. Informal decision-making processes have grown up outside the purview of legislation and case-law.

3. Formal adversarial processes are significantly controlled by informal reciprocal relationships.

4. The Crown Attorney's attitudes and the texture of his reciprocal relationships largely determine his exercise of discretion and his decision-making processes.

THE INTERVIEWS

Introduction

The interviews were analysed in terms of the categories appearing in the objectives.[1] Once the data had been designated to a category, those portions were extracted which displayed certain related characteristics.[2] Each of the following reported extracts is numbered and the number relates the extract to the subject from whose interview it was gleaned and the chronological order of the interviews.

The interview excerpts are presented in chronological order, in the sequence in which they took place, to avoid any suggestion that the excerpts were ordered to present maximum impact or to validate hypotheses. The only excerpts presented are those that reflect a pattern of response. Isolated or individual responses not generally reflected in the data are not presented. Although the following excerpts may appear as isolated opinions not substantiated by concrete examples quite the contrary is the case. For most of the excerpts were illustrated by examples drawn from the subject's own experience. The inclusion of these examples would not only have added substantially to the length of the presentation, but would have created considerable problems in maintaining the anonymity of the interviewee.

Although the material, for the most part speaks for itself, in order to focus the inquiry the interviews are

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[1]Appendix 2

[2]At times the data was found to overlap the categories.

presented under six categories or headings: attitudes to police; attitudes to defence lawyers; disclosure and the operational environment; the exercise of prosecutorial discretion at specific points in the pre-trial and trial process; the prosecutor's attitude toward the accused and his protections; role and professional perspective. Each section is concluded by a brief summary.

THE INTERVIEWS - PART I - Attitudes and Interaction Within the Operational Environment

A. The Police

"The police and the prosecution are thrown together. Ideally, the Crown should be a buffer between the police and the public but necessarily the Crown has to rely on the police. There is a danger because the Crown comes to blindly accept what he is told. Personal friendships develop with the officers since you see them every day and you tend to accept what they tell you. You've got a duty to the police and the public to see that people who break the law get prosecuted and if the evidence is there, that they be convicted. At the same time, you have a duty to the public at large. When you are thrown into the constant contact with the police it's difficult to do both duties. It's something you have to guard against. You have to try to err on the side of the public rather than the police. This is a danger that the system lends itself to....

".... The police often try to influence you, and it is entirely understandable, they tend to feel strongly about their cases and know in their own mind that the accused is guilty and try to instill their beliefs on the Crown Attorney."(1)[1]

"The only problem with the police was a problem as to whether they were well or poorly prepared. .... In most cases, they don't care. Only in the more important cases do they get interested in it.... There are only a half a dozen important cases in the Sessions, most of it is garbage, like juvenile breaking and entering cases, etc. .... I am ad idem with the police on most of these things."(2)

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[1]A number in parentheses is the writer's identification of the interviewee.

"There are no problems. I am generally inclined to believe the police. I believe that most people in the criminal courts know why they are there and their only regret is that they are caught. The police approach which says that they know what they are doing is, in my opinion, a realistic approach. In most cases, I agree with the police. There are no means of independent investigation by our office and we have to rely on the police and it depends how much trust you put into the police force and I put a great deal of trust into the police force. I guess sometimes there are abuses and the Crown doesn't see the whole picture but for the most part I trust the police."

I then asked him what was the relation of the police to the Crown. He said:

"A lot depends on the individual Crown. When a Crown is starting off, police take advantage of him. They mislead him and try to get away with things. It is pretty hard to sand-bag a Crown Attorney after he has had ten years' experience....

".... When a Crown Attorney is young he has certain problems with the police. Typical of these problems is a police officer comes in to a young Crown Attorney and says, 'We haven't got any evidence and we want the charge withdrawn.' Then the Crown withdraws because he is overawed by the police or by the rank of the individual police officer. An older Crown Attorney would not go for that. With a young fellow, the police ask for exorbitant bail for no reason except that charges are outstanding or the excuse that they are about to lay other charges or that they are continuing the investigation or something like that. A young fellow might go along with the police and support their request for a very high bail. When a young Crown Attorney

comes into the office, he is inclined, when he first comes here, to be impressed with a facet of life you know nothing about. For example, in the book-making aspect of things, the police may give the Crown Attorney the feeling that this is highly organized and dangerous and the police might try to make you a crusader and to make you participate in the prevention and the detection of crime. They mold a lot of your thinking - you forget you are an advocate or a barrister and you start fighting the cause of the police. Young Crown Attorneys tend to drink with the police and to fraternize with them and think the police are really good fellows and they adopt the police point of view." I asked him when does this relationship change, if at all. He replied, "It changes when you realize (a) their judgement is faulty. When you move out of Magistrates' Court and up to the Assizes, you get out of the police element and you begin to realize that you are a lawyer and the relationship changes. When you get away from the police influence which pervades the Magistrates' Courts...."

".... When you first join the Crown Attorney's staff, the police make an effort to ask you to go out with them on a night run, particularly the morality squad which might raid a bawdy house, it's sort of becoming part of the investigation." I asked why do they want you to be part of the investigation. He replied, "If you could have seen the victim," the police often say. Because they feel quite often you become more sympathetic to their point of view if you see the results of the offence involved, then you will be on their side...."

".... there is really no control over police practices except one. You can't tell them what charges to lay, you can tell them, but they don't have to accept your advice. But one thing you can always do is withdraw a charge, and in that way you have some control over police action. You can't withdraw a

charge after an indictment has been found but up until that time you can withdraw in your own discretion no matter what the police say." (4)

I went on to ask him what problems, if any, he faced with the police. Again, there was a very long pause and he asked me to be more specific and I repeated the question in more specific terms. He paused again for some time and answered, "Not very many." He then said, "Police will lie to you." (5)

"What influence do they have on Crowns? With me - none. The more experienced you are, the more you are in charge and the more independent you are in thought. As far as problems with the police you have the odd individual who gives you a problem and you chew him out and that's it. There are no general problems, at least not in this jurisdiction. In other jurisdictions you may have problems because the police are stupid. There are no problems between the police and Crown Attorneys. The odd one you might get who would try to influence you but in most cases they say nothing, maybe this is the way they are trained. Maybe they are trained to be diplomatic. ...."

".... It's like a young man who has just got out of law school telling an experienced detective what to do. It may be hard for them to take." (6)

"I like to think that they are just complainants - but because of the frequency of working with them - but try to remember that I'm not a lawyer for the police. ...."

".... It's very easy to find yourself prosecuting for the police rather than the state. Some police are very persuasive and you might work harder on their case than if you had a police officer who wasn't so persuasive on the case." (7)

"The police prepare the dope sheet. And we are dependent on the dope sheet to prepare our case. We don't examine the information in the cases because in order to examine the information that is filed in court we would need half as many again Crown Attorneys to do this...."

"Another subtle area is when you have newer appointees and they come into contact, for the first time, with the police... That is a distinction between the young barrister just called to the bar and counsel for the Crown and on the other hand the old Sergeant of Detectives. Many things may happen. One extreme is that the young barrister may cow-tow to the police officer and I may have to constantly remind the younger fellows that they are a member of the bar and the police officer is there to brief him and that the assistant Crown Attorneys don't go running down to the police office in the City Hall in order to ask them for certain information. They are to get on the telephone and call the police officer in charge and ask him to bring up the dope sheet. When a man is first appointed he may be a little overawed by all this. He may find it difficult to telephone the officer and ask for a dope sheet. He will walk down to their office to get it. You have to restore a balance without the young buck becoming an arrogant buck who will try and push the police around. I have many friends in the police force and can be familiar with them. I can have a drink with them or go hunting with them. But it's like a military situation where a good officer can fraternize with the men but he has to keep a certain barrier, a certain distance. We are not counsel for the

police; we are naturally pleading the cause in which the police are interested; but we are not pleading for the police.[1] We are not on the police side qua being a policeman...."

".... In regard to the control of the police, in American courts they try to control the police by rejecting certain evidence if it's submitted in court. We do it but a different way by finding out the evidence prior to going to court and if you find that the police have used duress on the accused, then the Crown will say that the statement will not be used. And in this way, we control the use of police evidence." (8)

"The chief barrier is lack of communication in advance between me and the police. It's more noticeable down at City Hall. Because down there, there is a wide area and the police don't know what Crown will handle their case and there is a tendency in these cases to leave the Crown in the dark until the last moment." (10)

"There is a large measure of trust between the Crown and the police. You have to take what they tell you on trust."

I asked him if he thought the police were frank with him. He answered, "Not all the time." I asked him if he thought that the police influenced him and he answered, "You are completely reliant on them to know what the case is about...."

".... On occasion there is more to a case than I am told about. There is evidence available that is not on the dope sheet or is not reaching my ears. There are some things I would just as soon not know about. A certain percentage of the statements are obtained improperly and if

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[1] Interviewee emphasis

it comes to my attention I won't allow them in but I don't cross-examine the police officer on whether a statement is improper or not before I introduce it. But we know that there are statements that are taken improperly and certain police officers perjure themselves...."

".... The Crown is to be a buffer between the police - who take themselves a bit too seriously and have little sense of proportion and excessive zeal and dedication or lack of discretion and lay charges where there is no purpose in charges being laid."

".... Many regard the rules of procedure and evidence as a nuisance. When they are convinced the accused is the guilty party they are unhappy about the procedural rules that prevent the presentation of certain evidence." (11)

"That's one problem with the police. They have an emotional attachment by some police officers to the case - that's the greatest problem." (12)

"Also with the police you have to show them who's boss. Once they understand that, they might not like your call on a thing - I'll give them the reasons - if they don't like it, it's too damn bad. They suggest bail on the sheets - they pick it out of a hat, two thousand, three thousand, four thousand, - I call it the way I see it. I had a few blowups but I left no doubt as to who was calling the shot. I'm the guy who has to take the responsibility for the call so I make the decision." (13)

"The police are really nothing sinister. They vary very considerably; they are not driving types. Once the arrest is made, they seem to lose interest in the case. This may be through overwork or it may be through some indifference. As opposed to the James case, which was a big case, the police get up for it. But in a small case, they don't really care." (14)

"They don't let the Crown in on enough information."

".... There are deals between the accused and the police or between the accused's lawyer and the police behind the back of the Crown Attorney. We are ostensibly in control of the case and yet the only person who knows nothing about the deal is the Crown Attorney." (20)

The Police

Summary

Police bias is acknowledged and the problems and pressures that are created by the police concept of administrative regularity[1] "We don't arrest innocent people" often results in an emotional attachment to the case and to the pursuit of an accused to conviction. Police advocacy appears influential in a limited environmental setting. It is acknowledged that novice Crown Attorneys are more susceptible to police pressure than their more senior counterpart and that it is in the Magistrates' Courts that police advocacy is most apparent. In the higher courts police pressures are minimal. The diminution of police pressure at the higher judicial level may result in part from the resistances encountered by the police from the more experienced prosecutors who conduct the trials at this level and in part from the independent judgment exercised by these same Crown Attorneys based, as it is, on the availability of adequate time for the preparation of the case. Whereas, in the Magistrates' Courts the prosecutors are most often inexperienced and are subjected to an assembly-line production of case after case that allows no time for preparation. The administrative demands and the

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[1]For a discussion of this concept see, infra. at p.135.

pressure of the case-load force the Crown Attorney to rely exclusively on police advice and information since independent sources of information about the accused and the case are unavailable. Police information and appraisal dominate the prosecutorial process at this stage. As a consequence of the Crown Attorney's reliance on the police, a relationship of trust often develops within the prosecutorial environment, between the police officer and the Crown Attorney. Police operational biases become contagious in a necessarily intimate relationship.

B. Defence Lawyers

"There are defence counsel you trust and can tell them anything and others, through experience, you can't disclose these matters. Lawyers whose word you can trust and those you can't."

".... Certain defence counsel, who will come into your office and say 'Good morning, lovely day,' and then they will go out and see their client and say to their client 'I have just paid off the Crown and that will be another two hundred dollars.' These same defence lawyers will do the same thing with a magistrate. They'll go in to see him, say good morning, walk out, and tell their client that they've just spoken to the magistrate and that they require another two hundred dollars...."

".... Most of the problems with defence lawyers are really clashes of personality. Human dislike accounts for a lot of the problems. A Crown Attorney is orientated on a volume basis, the volume of work that you have and can do is a prime consideration. You try and pick out the meat of a case and reduce it and it irritates a Crown that defence counsel don't adopt the same attitude. By and large, defence are not moved by the same considerations and are inclined to waste a lot of time, raising alternative defences, etcetera. This makes for disagreement because of the time element. With a few defence counsel you have serious disagreements with their manner in court, but problems generally between Crown and defence are that certain people just can't get along with other people." (1)

"The Sessions cases are there by default. The lawyer hasn't got his money out of them and it happens often the accused elects trial by jury because the lawyer wants a delay so that he can get paid. A lot of these accused end up before jury without a lawyer because they haven't been able to pay him...."

".... There are about ten I trust at the most." I asked him why he felt that way and he said, for example, "You have a case set for trial. It's set peremptory and you find out that the defence has called the witnesses and told them that the case is not proceeding and that they don't have to show up in court the next day. Then he gets up in court the next day and says that he is ready to proceed and that he has not been notified that the Crown is going to ask for a delay. Some lawyers put on five cases in one day so that they can only go on with one and so that the others have to be put over. The more times the Crown witnesses come to court, the more the Crown witnesses get fed up...."

".... I don't like mixing with defence lawyers - they're not buying me meals for the charm of my company...."

".... Most civil rights lawyers have little contact with reality and with the criminal courts. I guess they're in it because it's good publicity, I guess." (2)

"Some whose word you take absolutely and some who you wouldn't trust at all and then there is a sort of grey area in between these two...."

".... You become cynical about the approach you take to defense counsel and their approaches." (3)

"There is one group you like the best. These fellows who don't protract things and who are thoroughly honest and the trial is pleasant. They don't mislead the court and people like ..... who is a lawyer's lawyer. At the other end you have people like ..... and his

ilk. He started as a bar rattler and his only penchant is to make money and he is a lousy lawyer. I hate him so much it's hard to be rational...."

".... I never think I've had a case where I've known that a lawyer has been deliberately dishonest in court." (4)

"There is the honest, straight-forward type. Maybe too idealistic. But most of the senior counsel are in that position. Then there is the general classification and you have to watch them because they may pull some shady deals. One defence counsel says he has to win each and every case or he doesn't get referrals. A young fellow may have to really work at winning his cases because he has a wife and three kids at home to feed. It may become dog eat dog. At the bottom you have the bad rotters who you can't trust and who will mislead the court and who will perjure evidence and who will influence witnesses. The weak bench gobbles this up and that's what makes it difficult. There is no real defence bar and lots of inexperienced people have a finger in the pie and they will pull the damndest thing. If you have a good lawyer, you have a good fight and you enjoy it - win or lose. ...."

".... They haven't got the buffer of the solicitor as they have in England between the client and the barrister and in order to get their fees they have to do many things that may not be proper. If they go on to trial without a fee they know they're not going to get a fee. So they don't want to proceed and think up the damndest excuses. The biggest cross is to get them on to trial...."

".... I don't back down from them. I go into Magistrates Court and as soon as some defence lawyers see me they want a remand.... "

".... You know far more than most defence counsel except that they have a more ingratiating personality." (6)

"That the problems with the defence are very few. It's really the defence who have problems with us." (7)

"The more inexperienced the lawyer, the longer it takes. Some young ones think you are really out to convict their client...."

"....Most of the ones that come in to criminal courts fairly frequently, I don't have too many problems with them. They are a fairly trustworthy bunch...ninety-nine percent of them are quite decent fellows and they seem to know what they are doing...."

".... If you show somebody you trust them, they will trust you. I can't think of anybody around here now that I would hesitate discussing a case with." (13)

"It's a pain in the neck having defence counsel running over all the evidence in all the cases. We have five hundred or six hundred cases a day in this building and one or two long-winded defence counsel plug up the list. I suppose it's a cross we have to bear." (15)

"I have had defence counsel who rather than ask me for a remand phone the Crown's witnesses and tell them not to appear because the case is being remanded, that's one sure way of getting a remand. Some say that they can't go on because they have an important case elsewhere and really they don't want to go on before a particular magistrate. Some lawyers give their clients a good defence and others don't. A lot do their clients more harm than good." (18)

"Sometimes you judge a lawyer by the length of time he takes in court because of the pressure of the list. Like when he continues to cross-examine a witness when there is no hope, in order to impress his client. Some defence counsel who have a commercial practice don't help their client at all and may hurt him in court because they don't know their way around the court at all. Some lawyers, if they are raising a question of law will let you know in advance. Other guys try to soft-soap you prior to trial so that they can take you by surprise at the trial..." (20)

Defence Lawyers

Summary

The Crown Attorney who is motivated by administrative considerations based on a case-volume orientation resists and resents defence actions which cause delay and create obstacles to an otherwise smoothly operating prosecutorial process. The supervisory role, assumed by the Crown Attorney in the lower court, compounds the Crown Attorney's frustration when defence delay, or prolonged defence argument, results in case back-log thereby limiting the efficiency of the process. Defence demands which appear spurious or purely monetary in origin compound the Crown Attorney's frustration and hostile reactions develop. Those defence lawyers who are respected are those who do not protract a case and work well within the expediting-value system.

C. Disclosure and the Operational Environment

"Of those lawyers that you cannot trust, it reduces the relationship to the bare bones of the adversary system." (1)

"If I don't like a certain defence lawyer I can hold his case down on, at the end of the list for two or three days. Or I can decide not to disclose anything to him. It depends on what I think of the defence, how much I will disclose to him. If I trust him, so he won't use the evidence to bring perjured evidence against the Crown, I will disclose to him." (2)

I asked him if his feelings about a lawyer might affect his disclosure and he replied. "I would like to think not...but I can say, from particular cases...occasionally it has...."

".... It's difficult to discuss it in the abstract. Either you know them or you don't. Take ..... I just don't trust him. He's a complete hypocrite and any case I have with him, I wouldn't give him an inch. If it was someone I don't know and they asked me what the Crown's case was, I would tell them but very few defence counsel ask me that. The more experienced ones ask it, if they don't ask the Crown Attorney they might more commonly ask it of the police." (3)

I asked him if his personal feelings or relations with particular lawyers were reflected in his disclosure to them. He said they were. He said that he really wouldn't like to think that it was

but, in fact, he had to answer yes. He said in the first category (lawyers he trusts absolutely) he gives them the fullest and frankest disclosure at the earliest possible moment. He said he would do the same thing with a young lawyer; he would be cooperative and helpful. ".... With bar rattlers I would stick to the law and they would obtain no disclosure until after the preliminary hearing. With ..... and others, I may let my emotions run away with me and try to obstruct him. Theoretically my approach should not be coloured by my feeling in regard to a lawyer but at the same time I guess at certain times it becomes a personal battle."

".... I won't produce the statements prior to the preliminary hearing. The lawyer has asked me for them and I have said no. This was a kid where he had threatened various people and various witnesses. And I don't want the witnesses to be badgered any more than they have been already. I don't like the character of the accused and all the witnesses against him are his friends. So I feel under these circumstances I won't disclose the statements." (4)

"I wouldn't give the time of day to them. Some of these fellows will say we're going to plead guilty and so you don't bring your thirty witnesses and then at the last minute they change their mind and your witnesses aren't there and they scream about the Crown not being able to proceed. Some chaps, you can discuss the whole case with them. Sometimes you know the lawyer and he is trustworthy and the lawyer may be naive and the accused may be a real rounder and you can't tell this lawyer because he is so naive that he is going to go and tell his client what I've said." (6)

"Those I can trust I can communicate with and those I can't, I won't give more than the law requires me to - which isn't very much. Some

practitioners have no scruples in the practice of criminal law. Some are plain dishonest and under the guise of acting in the interest of the client they can be very dishonest. You learn who you can trust. I start out with the premise that I give no more than the law requires me to. I relax that depending on the man I am talking to. If it was a person like ..... I could hand him my brief. I don't say, as some people do, that there is full disclosure by the Crown and I withhold some of that disclosure from those I can't trust. I start out saying that I will give them what the law requires me to and then from there it is ex gratia assistance to those I can trust.

"Of course, there are other factors that govern. A man who begins as a counsel in a criminal case may not be the accused's counsel tomorrow. It's not like in a civil case where he would appear on the record and would have to bring a motion to remove himself from the record. In England, between the barrister and the accused, there is a buffer. The barrister seldom sees the accused and the witnesses. What is communicated to him as crown counsel is what he uses in court. Here the lawyer has intimate contact with the accused. If I disclose to defence counsel what the Crown's case is, he may sit down with the accused, in jail or even more dangerous in his office, and tell him the case and the next thing you know someone has gone to see your material witnesses...."

".... But the manner in which he comes to see me may be important. He may say 'Will you consider this?' - in a dispassionate way. But if somebody belabours me and tells me what I should do I'm not going to give him much in return. He's asking for a favour and when you ask for a favour you don't bludgeon someone into doing you a favour...."

".... Very often the honest ones, if they know the full story, will plead their client guilty. If the Crown hedges and won't tell them what they are going to face they will plead not guilty. If it is a lawyer that you do not trust you will not appraise him fully of the Crown's case. He is going to plead not guilty in any case and he will use the

information, given in confidence by the Crown, in preparing his own defence. I have had a lawyer that I showed a dope sheet to, use the information in the dope sheet in cross-examination and he cross-examined the Crown witness on the dope sheet by saying 'You are saying this now and you didn't say it before.' Now that lawyer will never see any Crown evidence again. Generally speaking, I don't let lawyers see the dope sheet. Ninety percent of the time if a lawyer asks what the case is, I will read the salient facts from the dope sheet - maybe he will decide to plead guilty." (10)

"Where there is no great public interest at stake I can tell them quite a bit but I am more careful of what I tell him if it is an important case. I am more open with defence in an offence of lesser importance. Then you have those who you just don't know that well and you have to sort them out and get some feeling before you authorize a lawyer to see a statement. If an accused thinks that he is guilty and I am satisfied that he is guilty, it's not my duty to disclose to the accused or his lawyer that the Crown is unable to prove their case. If the accused is willing to plead guilty I am not going to let him or the lawyer know that the Crown couldn't prove the case if he pleaded not guilty,..."

".... It's very easy to become too close to them and then throw away a good case by discussing evidentiary defects in the Crown's case." (11)

"I don't see what harm it is in discussing the evidence you have with a lawyer. That's the evidence, and it doesn't make a damn bit of difference if he knows. In the ..... case, I gave the defence counsel all copies of the tape recordings that we were going to use and they listened to the tape recordings even before the preliminary hearing and I gave them a copy

of my research and argument on the point of the admissibility of the tapes. Some guys, it isn't worth discussing it with them because they will fight everything holusbolus anyhow. But in most cases you can save a lot of time. By discussing the case with the defence lawyer you can save much time that might be otherwise wasted...."

".... I might not give him the dope sheet to be xeroxed because of his client. I might hesitate where the client might go out and do something to one of the witnesses. But that wouldn't be because of any lack of confidence in the lawyer." (13)

"I disclose pretty well anything. A lot depends on the approach of counsel. If they're polite with me, then I am polite with them. If it will help us to get a guilty plea, I will give it to him. If it is doubtful, maybe the guy shouldn't have been arrested in the first place. But a lot depends on the approach of the counsel.... Just as people are different, so are defence counsel, and if I have a good relationship with him, and I do have with most of them, then I disclose everything." (16)

"A few want to look at the dope sheet and say they will plead guilty but they want to take a look at the dope sheet and then often once they have seen the dope sheet and they see the Crown's case isn't as strong as they thought it was, they decide to plead not guilty." (17)

"You don't have to suggest to defence that a witness should be called who you don't believe to be credible - you don't have to even disclose the name to the defence unless you believe the witness is credible and helpful to the defence...."

".... The police interview hundreds of people. You don't just give that list to the defence ...."

".... What I am saying represents the principle but it will happen that the Crown will not disclose many of these things. There is no legislation that says he must disclose any material to the defence especially in Magistrates' Court and from day to day in Magistrates' Court there are a number of cases where the Crown has not disclosed even the creditable witnesses to the defence. Often this doesn't happen because of the speed in Magistrates' Court and the need for a certain expediency and disclosure is not made but the principles still apply...."

".... The English barrister is quite remote from the accused and from his witnesses. Hastings once said that he interviewed a witness and he would never do it again. The prosecutor works from a brief and the witnesses might as well be numbers rather than names. They, the barrister and the prosecutor, can apply these principles and are completely aloof. Whereas the District Attorney sleeps in the same bed as the police officer. He is an integral part of law enforcement. Here in Canada, there is no division, therefore, the defence counsel becomes identified with the person of the accused rather than his cause. Therefore, the defence is not as objective as the English barrister is and is in constant contact with his client who may pass on information to others." (19)

"I don't disclose self-serving statements that help the accused. The accused may make a statement and there may be a pre-amble that is self-serving. I may not give that part of the statement to the lawyer. Where it is mostly police evidence, I have no hesitation in disclosing it all, but if they are mostly independent witnesses, sometimes you are more cautious because these witnesses could be influenced." (20)

Disclosure and the Operational Environment

Summary

The quality of the defence-Crown relationship within a mutual operational environment becomes the determining factor in Crown disclosure. Although the words 'trust and trustworthy' often appear to describe that group of defence lawyers to whom disclosure, if requested, is freely volunteered, it may be more accurate to describe those lawyers as 'safe' rather than trustworthy. The defence lawyer will appear safe if he is likely to enter a proportionate number of guilty pleas, if he does not utilize the evidence disclosed by the Crown for purposes of cross-examination or to strengthen his case and if he is appreciative of the courtesy extended to him and will continue to conduct himself according to the established ethics of the Crown-defence reciprocal environment.[1]

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[1]For discussion of reciprocal relationships, see: infra. Reciprocity at p. 128.

A. The Timing of the Crown's Participation

"In ninety-five percent of the time we come in post charge. The other five percent of the time an opinion may be asked by an officer as to what sort of charge he should lay. This doesn't happen nearly enough. If our advice is sought we'd knock a lot of things out, right off the bat. These things later take up time of the courts and end up in acquittals. If the right charge had been laid at the beginning we would avoid a lot of problems later. Out of four hundred cases there are only one or two where the police would have been advised as to the laying of the charge. In the majority of the cases we get introduced to the case the morning of the trial. In Magistrates' Court, we first get instructions in the matter the morning that the case is coming up in court, possibly for a remand. We have little control over the laying of charges." (1)

"On the Magistrates' Court level we first see a case when we call the case. There is no preparation at all at this stage. We may proceed with the trial in Magistrates' Court when we have first seen the case at that stage;..." He said in rape cases the Crown Attorneys did not see the charges before they were laid. Then he said, "I don't see why we should. We are not going to be the judge, that is not my function. I just prosecute what comes before me." (2)

"I get knowledge about the accused from the police and I rarely come into a case prior to laying a charge. If the police want advice it's usually an unusual case and I don't suggest that charges be laid.... A Crown Attorney doesn't complain and you don't institute proceedings." (3)

"In the big complicated frauds we're consulted prior to arrest and also you're consulted more often as you get older because as you are more

senior in the Crown office you're in your office more often and you're available more often because you're not in the Magistrates' Courts all day."

I asked him if he ever drafted charges and he said, "Yes, in a complicated business fraud" he might be asked to draft the charge or when it is an offence that is rarely used he might be asked to draft the charge. For example, a lumber company was selling lumber graded higher than the quality of the lumber permitted. He was consulted and laid a charge in regard to selling lumber with a counterfeit stamp on it. Similarly, a man sent poisoned chocolate candies to his neighbours and in that case he also drafted the charge. "These are cases that are out of the ordinary. In most cases, if the police are the informants they draft the charge and the J.P. swears it. If it's a private complaint, the charge is drafted by an employee of the Magistrates' Court office."

I then asked him when he first came into contact with a case. He said that the point of time of contact with a case depends on the level at which a Crown Attorney is prosecuting. At his present level in many cases, he will take the preliminary hearing and take the case right through until trial, whereas a young Crown Attorney might first see the case just before it was to come up in Magistrates' Court." (4)

"The police may scoop him on a general count of fraud and then consult you in regard to specific charges and the evidence required. But the police, once the charge is laid, you have no control.... Only when you get a complicated case or when a certain amount of diplomacy is required because a big name is involved the police may call you before they nail him. There is no control really until after the charge is laid. Then you can tell them to get further evidence if you think the case

is weak. But you really have no control until the charge is laid. You can't order the police to go and investigate if there is no charge that has been laid." (6)

I then asked him what control the Crown Attorney has over the charges that are laid and he said, "next to none. The police might call maybe twice a week about laying charges on a question of wording. This would be in less than five percent of the charges that are laid. In Magistrates' Court you never see the information or at least I never see it, all I see is the dope sheet in the morning." (7)

There is "a subtle area - when in doing these things the Crown is directing the police in an area where he has no, technically, no power to do so. The police will seek advice and you might say 'Go ahead and lay a charge of fraud' - technically this is advice, in fact it is a command...."

".... I'm not going to direct their investigation of the accused or the witnesses. I have no more right to direct police techniques than they have to direct my trial techniques. I express my opinion to them. It does not happen too much in regard to advising them prior to arrest because they have trained senior officers now who can make as valid a decision as I can. In rural areas you would be called more often.

I then asked him what point in time a Crown Attorney usually comes into contact with a case. He replied, "Usually the first day he walks into court. The day the case comes up for the first time is the first time the Crown sees it. In the major part of the cases he does not even see the police officer first...."

"....It would be ideal if one man (Crown Attorney) could follow it through from beginning to end." (8)

"If the police get into the habit of speaking to the crown we can sometimes avoid laying charges which we cannot prove." (10)

"I may direct the police officer to swear a new information if I think the information is wrong. Or I may direct that another charge be laid. I feel that I'm tidying up legal procedures and stuffing up rat holes so that the wrong charge is not laid." (11)

"I'm not to tell them how to gather evidence. That's not my job. I just tell them what's missing." (12)

"I don't know what I have on from day to day. I enjoy the challenge of walking in cold and looking at the dope sheets." (15)

" I very seldom ask the police how they obtained their statements - that's not up to me to really probe...."

"....In Magistrates' Court in the bulk of the cases you don't come into it until the day of the trial. It's up to the police when you are

going to come in on a case. If the case is of some complexity they will often speak to the Crown and may come in with the dope sheet a week before the trial in Magistrates' Court." I asked him whether the Crown screens any of the charges and he answered "The only screening of the police charges is if they ask you for your advice. Or you may pick up the dope sheet and see the wrong charge and may advise the police to lay a different information - but it is rare - because of the speed of the remands in the cases in Magistrates' Court you don't have much time to catch that." (20)

The Timing of the Crown's Participation

Summary

The timing of the Crown pre-arraignment participation is controlled by the police. It is only when the police request Crown advice on the drafting of charges or the legal sufficiency of the evidence that the Crown Attorney will examine the evidence or the charge prior to the arraignment. Except for the few 'complicated' cases the arraignment represents the Crown Attorney's first contact with the case. At the higher trial level there is some variation in post-arraignment responsibility and an important case may be conducted by the same Crown Attorney from the preliminary hearing through to the trial. In most instances, a balkanization of Crown responsibility persists and the stages in the pre-trial process are conducted by a variety of Crown Attorneys.

B. Reduction of Charges

"There is quite a lot of discretion in the Crown Attorney. He decides what he is going to prosecute and what cases he is going to withdraw. It's in the exercise of that discretion where difficulties can arise. Because this is where the Crown exercises a quasi-judicial and administrative function. It's one-half administrative and one-half judicial.... This is where the power of the Crown Attorney lies. It's the influences that can be brought on the Crown in that area. The Crown must remain untrammelled in his discretion. Again, when the Crown is in constant contact with the police it is difficult to maintain this ideal attitude of self-determination...."

".... If the defence feels that a client is unjustly charged, he will often come and talk to you but it is really only the pressure of logic." He then related a case where there were "thirty-nine counts of fraud and false pretences and possession involving one end of a car theft ring. "It was difficult to establish all the elements of all the offences because it would mean calling about a hundred witnesses, some of them who lived outside of Canada. With an abrasive defence counsel...if I proceeded on all counts the trial might take one month. This would mean tying up the court, yourself and witnesses and a vast expense. Often we start thinking - what do you want to plead guilty to? That situation arises - if that's pressure we bow to it...."

I then asked him if he enters into negotiations whereby if the accused will plead guilty to one charge the Crown will withdraw another. He answered that "Again, it's a matter of getting as much as you can out of a situation. You try and get the best deal you can. You've got to please the police, and justify what you do. You don't have to check with a superior but if you are ever asked you must be able to justify what you have done. Or it may be just a matter of logistics and witnesses don't show up and all you can salvage is a plea to something less. It's the best you can do under the circumstances. There

is no doubt that criminal cases do get settled. It goes on all the time. If we fought out every case on our list you'd be twenty thousand cases behind. As the case-load gets higher and higher there is more and more pressure to settle cases. In the Magistrates' Court, I'd say that twenty percent, one in five, are settled. We'd be willing to settle more of them, but defence counsel are unable to convince their clients to plead guilty to anything. As you get higher - sessions - it would be about the same. In the assizes it's not as easy to do. In the last assizes there were sixteen or seventeen cases. One was a pretty good case of capital murder but there were pitfalls in the case for the Crown witness and the two accused had been drinking. The Crown accepted a plea to non-capital murder. The Crown was delighted and the accused were delighted. There was also a rape case. It was a crummy case and the defence could probably have walked away with nothing but somebody told him to plead guilty to indecent assault and he did that. There was also a criminal negligence case which looked barely like dangerous driving. Defence was happy to get rid of the criminal negligence and wanted to plead guilty to dangerous driving and I was delighted to accept that and even with a plea of guilty to dangerous driving I had to strain to convince the trial judge. So there you are. Three cases settled at that level. The sentence doesn't play much part in settling them. Defence have to take their chance on sentence, but I would let them know what I was going to say as to sentence." (1)

"What burns me is the lawyers who try to settle these cases in chambers with me." He went on to say, "Like these dangerous driving cases where you get these inexperienced lawyers who come up to you and say 'Let him go, he'll plead guilty to a lesser charge.' - to hell with them. If I do something, the lawyers will say 'look how I got to the Crown' and they'll charge their clients for it." (2)

"I should have told defence counsel about the fact that I would take a plea to manslaughter without the psychiatric evidence but I never did and defence counsel never asked me if I would take a plea to manslaughter, maybe because he had little experience with murder cases. The man was convicted of non-capital murder and I was never asked about the reduction to manslaughter." (3)

"If there is no evidence or little evidence or when I know that a jury will most likely not convict on the charge, that is a major factor to me in taking a plea of guilty to a lesser charge. Also I am interested in what is the liklihood of getting a conviction on the higher charge. If the court is going to impose the same sentence on the lesser charge as it would have on the higher charge I am just as happy with a plea of guilty to the lesser offence. If there are thirty-five counts and the accused wants to plead guilty to nine of them, I will go along if the sentence on the nine of them is going to be very similar to the sentence he would get on the thirty-nine counts.... Also the pressure of work will cause you to accept a plea of guilty and to reduce a charge. The overloaded case load that you have is a psychological factor in making you accept a plea on a lesser offence. If accepting a plea on a lesser offence won't shock the public conscience you may go along with it." (4)

"If you have thirty counts of possession, eight will do. The result is never any different and the defence can then tell the client that he has made a deal. Sometimes a charge is a little thick and you'll come down." (6)

"When I speak of the Crown Attorney as a quasi-judicial officer, I'm not referring to his performance in court but his quasi-judicial function may be prior to getting into court - in exercising

his discretion and in deciding whether there should be a prosecution or not. In a vindictive husband and wife case, where the husband has taken the child, we can't use the criminal courts to have the wife vent her spleen because that won't get the child back. The proper course is for her to take an action in the civil courts and let the civil court enforce it. The Crown Attorney exercises this judicial function but he must be very careful in the exercise of this discretion...."

".... Sometimes I will see what magistrate the case is coming before and if I know who it is and know that a plea to a lesser offence will mean that the man gets the same sentence I figure why not the lesser offence. I get the same result and save the time of the jury trial." (8)

"For example, in a case of criminal negligence causing death, ... was the defence lawyer and there was a bare bones prima facie case of criminal negligence but it looked like we could get a conviction for dangerous driving. Without any request from defence I spoke to the Senior Crown Attorney and accepted a plea to dangerous driving with the understanding with the defence that the sentence would be between three and six months. We got together with the magistrate and told the magistrate that anything less than three months on the sentence the Crown would appeal and anything more than six months the defence would appeal. The magistrate gave him four months. This is something I would do with..... but would do with very few other lawyers. It would also have to be the right kind of a magistrate." (11)

"You get a lot of police who are out to shaft somebody. The defence try to get the best for their client and sometimes they try very hard. You have a series of offences and they want to

plead guilty to a liquor offence rather than a careless driving offence because the liquor offence is so minor, if you will withdraw the other. I don't blame the lawyer - that's his job - but I must be a diplomat." (12)

"On a plea on a lesser offence I try to be reasonable." (13)

"Bargaining is a tool to expedite the process and rather than just withdraw I try to get a bargain to a plea and at the same time it means that the defence can offer their client something." (18)

"I am always open to those suggestions - a plea to a lesser offence. Because the pressure of a heavy list is an inducement to make that suggestion when maybe I shouldn't. If the experienced detectives are against reducing the charge or taking a plea to a lesser offence, I probably wouldn't do it. In certain situations, it is almost automatic, for example, in impaired driving and failure to remain charges, we usually drop the failure to remain on a plea of guilty to impaired driving. Sometimes you have to gamble a little bit and consider the strength of your case. You have charges (a) and (b) and if your case on (a) charge is tenuous you may say yes to a plea of guilty to (b). I take into consideration the background of the accused and whether or not he is an informer. There may be a saw-off for an informer. You give him a little bit of a rap, but you don't put him out of circulation so that he knows that he can't get away with it and yet you will have his services in the future...."

".... It doesn't always pay to be too nice a guy and try to please everybody. You have pressure from the cops to push and pressure from the defence to reduce." (2)

Reduction of Charges

Summary

The reduction of charges as consideration for guilty pleas to lesser offences results in the disposition of a large number of cases without the usual demands made on time and personnel by a trial. It represents an informal administrative device used to encourage guilty pleas and the consequent increased flow of case dispositions. Police overcharging, and charging errors are reviewed and the probability of obtaining a conviction on the charge is assessed for the first time by the Crown Attorney at this stage. Considerations, such as the strength of the evidence, the credibility of Crown witnesses, the likelihood of a sentence differential are examined. To 'settle' a case, a variety of incentives may be offered to the defence in exchange for the guilty plea. The participants in this informal environment of exchange are limited. Those accused who are not represented by counsel prior to trial have no access to the environment. Defence counsel's relationships with Crown Attorneys and his skill in pre-trial negotiations may be more valuable to his client than his subsequent advocacy at trial.

C. Withdrawals

"If you are going to withdraw, you try to put it on the record why you are withdrawing the charge. You may check on the facts and make sure your facts are correct...."

"...after the charge was laid, for example there were a couple of kids who shinnied up a flagpole and took a couple of flags and there were also a couple of kids who took some coins from a fountain. What I do is bring them up in court with the parents and say to the magistrate, these are the facts and that it is technically theft and these boys have been arrested and spent the night in jail. Usually the complainant is not interested in pursuing it and I say that the Crown is willing to extend some leniency to the two accused and give them a chance. At this stage, the magistrate usually gives the accused a tongue lashing and the mothers dissolve into tears and then the sheepish kids and the mothers leave the court. That's my discretion and if I have a good reason for it I go ahead and do it." (1)

"The more I am pressed to withdraw, the more I push it."

"If the police want to protect an informer, then they shouldn't charge him." (2)

"Generally, we withdraw if there is some suggestion from the police." (3)

"The police attempt to influence you to withdraw charges and relatives attempt to influence you. The police attempt to withdraw charges because they

say that the accused man is going to do something for the police like find some stolen goods or return some stolen bonds. But as far as I am concerned, in these cases all an accused is doing is purchasing his freedom by giving the police a payoff in a minor way."

"But before I withdraw a charge I usually speak with the police officers involved...."

"When it is a first offender and when the prosecution may ruin his life, these are compelling circumstances in which not to proceed...."

"The police cannot stop you from withdrawing charges...."

"I wouldn't withdraw without speaking to the police first. It's important to keep your relationship with the police smooth." (4)

"I've only been approached by the police to withdraw charges about a dozen times. Police come to you and have a girl charged with vagrancy and they ask you if you can withdraw the charge because she is going to recover something for them. These deals are usually horseshit. The officer is conned or is green enough. (5)

"Hoods will steal bonds and hold them for a rainy day and then when they are charged with something they'll try and make a deal with the police to give them the bonds if the police will withdraw the charge." (6)

"The police officer wants to withdraw a charge he says to recover stolen goods or a saw-off with the accused. He simply has to say to the Crown he couldn't find a witness and a young fellow might agree to that because he agrees to it on face value...."

"The main problem with defence lawyers, as far as I am concerned, or the hardest part as a Crown Attorney, is that exercise of your quasi-judicial function when asked to do so on no more than purely compassionate grounds. That he is a decent young fellow and it will wreck his future and will mean he will never be able to go to the United States and, therefore, will become a second class citizen if he is convicted of an indictable offence. That becomes very hard; maybe he did it because of stupidity rather than cupidity. That's the hardest thing to say to the wife or mother or father of the accused that 'I'm sorry' and that I can't do very much. It's easier to tell a lawyer this. It makes it very hard to say I'm sorry and that I have to go through with it. Maybe I should adopt one Crown Attorney's attitude and that is to adhere to the book absolutely. And if a man is charged with drunk driving, it just cannot be reduced to impaired driving."

"I'll give you an example of these withdrawals. There was a middle-aged man who was caught in ..... The police were hiding in the bushes and they waited until the two of them were in the act and they caught them. One man was a hotel proprietor outside of town and a conviction for gross indecency - and there was no substitute charge of a lesser nature - would mean the loss of his hotel and then he would be blacklisted as far as his liquor licence. The standard punishment, if he was convicted, for gross indecency between consenting males would be a twenty-five or fifty dollar fine and that's it. One of the accused could pay the fine and there would be no other consequences but for this other man, he would be ruined. This was a case of two consenting males, virtually in private in the bushes and they were not molesting anybody and if I withdrew against the one man I would have to withdraw against the other. When I said that I was going to withdraw these charges there was something like a palace revolution in the morality squad. The Deputy Chief of Police came over to see me and I told him that I make the decision and not the police."

"There is nothing in the legislation which authorizes a withdrawal. Once the police have laid the charges they have no status other than that of a witness. Once the wheels are in motion the only person who can countermand what the Crown says is the Attorney General or his deputy." (8)

"I don't withdraw charges unless there are very good grounds. Otherwise I feel I'm left open to action for malicious prosecution." (10)

"I don't like a crook buying immunity because he knows other crooks and can turn them in to save his own skin." (11)

"When I think an accused should be treated in a lenient way, especially teenage defendants, I say something. Or I get charges withdrawn in the backroom. So a kid comes and steals a few hubcaps or coke bottles, I don't think that he should be convicted of a criminal offence. I get the parents, the police, and the lawyer, if he has one, in the backroom and tell the kid that he has one strike against him and I really put the fear of God into him and then I withdraw the charge. If the police object, I try and use diplomacy. This is why I have the police there when I am talking to the kid and I have the kid apologize to the police. There should be a provision for whitewashing convictions. The idea of justice comes - in the backroom - I try to frighten him - some of the kids cry and really I guess I'm kind of holding court in my own office.

"I might withdraw the case quicker because of the family background. But if he has a bad background; his father isn't working and he's been hanging around on the streetcorners, I might go into the

case deeper before I withdraw it and I may even remand the case for a month, to see if he behaves, and then maybe withdraw the charge after a month or two. I let the charge hang over his head...."

"So I try to teach him a lesson in the backroom - I don't think I'm doing wrong, at least I haven't any complaints so far." (12)

"But if some police officer comes and asks me to withdraw, I'm very careful because I have to take responsibility for that withdrawal and if (the senior Crown Attorney) asks me why did I withdraw, I can't say, because some cop told me to. He would say what the hell do you think we are paying you for." (13)

Withdrawals

Summary

Crown Attorneys suggest that the exercise of their prosecutorial discretion to withdraw charges is absolute even in the face of police resistance. This admittedly quasi-judicial discretionary decision is limited in application to two situations; withdrawals for compassionate reasons at the request of the defence and withdrawals for police investigatory purposes. Police requests for withdrawals in exchange for information seem prevalent and usually meet with considerable Crown opposition.

D. Bail

"The judges usually do whatever you say in regard to bail. We are getting very soft-hearted. We are interested in whether the accused has any roots in the community. We have now come more to the view that it doesn't matter much what the offence is but are more concerned with what kind of person the accused is. Is he living with his family, etcetera. If he doesn't have a terrible record for that offence so he won't go out and pay for his defence by committing further offences, we are fairly lenient." (1)

"The police sometimes may suggest unrealistic bail. They pick somebody up and suggest high bail because they say there are further charges pending and I will put him over for a day or so. The people who don't show up are amateurs, juveniles. The steady criminals, they know the ropes, they get bail. They get a good lawyer and they fight like hell." (2)

"Most magistrates accept my submission on bail." (3)

"The things that concern me are the usual concern with the tampering of witnesses or committing other offences when he is out on bail." (4)

He said that he had a recent example where he was tough on bail with a girl because of what she had done and because of the seriousness of what she had

done (she had shot her boyfriend) he opposed bail because she might be a dangerous person and she might do the same thing if she was allowed out on bail. (5)

"I don't think whether a man can raise bail is very important. Either you are out on your own bail or you're not. If you can raise bail, that's the breaks of the game. Money buys privileges." (7)

I then asked him what reasons he would have for opposing bail. He said, "If the accused was going to commit a further offence while out on bail or if I thought he was using it to get out to buy a lawyer or to put something away for the family while he was going to be in jail...." (11)

"The factors I go by are the man's previous record and I seem to stress the number of times a man has moved around in the last year or two, his residence and the seriousness of the charge. Recently in a kidnapping case the police suggested a ten thousand dollar bail. This man had no previous record and I set it at five thousand dollars. When the police came in and told me they wanted ten thousand dollars bail, I said I was going to let him go on his own personal bail. The police started to shout so I agreed to the five thousand dollars." (12)

"As far as I am concerned, more people ought to be allowed out on bail." (13)

"I suppose everyone tries to influence you - but I have the last say. On bail, the police have the most influence because they advise you about a guy's past. A lot of times they suggest five thousand dollars or something - you have to make yourown decision - every situation is different. When I set bail I look at the charge and I look at his record to see if he has similar offences in his record or whether he might commit these offences while he is out on bail. I make sure that there is a string on him - and he'll come back - sometimes you can tell by his looks - just by looking at a guy you can tell more or less about him. And I take into consideration his appearance, whether he is well-dressed and looks like he is established in the community - if he is dressed like a bum it's likely he is a bum." (16)

"Too many people are getting bail. I believe you can release more people on their own recognizance and at the other end of the scale there should be a lot of people who shouldn't get out on bail at all." (19)

"When I started in 1964, we had a kid up on a breaking and entering; it was unthinkable to let them go home on their own bail. Usually, bail was set at $1,000. Now we let them go home on their own bail on the first offence. One reason that we do this now is that we are now enforcing the abscond bail provisions. A guy shouldn't sit in the bucket for a week or two and then be fined twenty-five dollars and given two months to pay. But the professional criminal - bail should be denied in more cases than it is. When they are out on bail they are just going to pull more jobs to pay for a lawyer or something. For example, in County Court it may be nine months from the time that they are first arraigned and the trial, and a fellow may commit two or three offences before

he gets to trial on the original offence. I think that when a man is up on a charge of breaking and entering and he has a record of breaking and entering convictions and the Crown has a solid case against him there should be no bail. There is no presumption of innocence at this stage, that only arises when the trial begins." (20)

Bail

Summary

Judges, for the most part, accept the Crown's submission regarding bail. The Crown Attorney's submission is based on limited sources of information; the accused's criminal record, the police synopsis of the offense, and the arresting officer's recommendation. The factors which influence his submission are, in order of importance; the police recommendation, the criminal record, the seriousness of the offense, the likelihood of the commission of further offenses if the accused is released on bail, the likelihood of the accused tampering with witnesses if released on bail, the accused's roots in the community and his physical appearance.

PART III - The Prosecutor's Attitude Towards the Accused and his Protections

A. Sentencing

He said that in regard to making submissions as to sentence, "Only if the defence made inaccurate submissions would I contradict those submissions. Most of the time," he said, "I say nothing as to sentence and only if I am asked for a submission as to sentence will I give it." (3)

"It is my habit on sentence to read the accused's record and to sit down and I seldom say anything as to sentence...."

"The question would be whether you would speak to sentence, to mitigate sentence. I agree.... I may agree with the defence that if they make a submission as to sentence, they can say that I agree with it. But I feel that it is wrong for the Crown to speak to sentence. We are not qualified to assist the court in imposing sentence. What right have I got to suggest the quantum? What right have I got? I'm no penologist. I don't know this man. It's no part of my business. It's not a job for a lawyer." (4)

"I only speak to sentence when defence counsel makes a big spiel. I may point out to the court that the first consideration is the protection of the public from the accused's behaviour but this depends on the magistrate." (11)

"As to sentence, I agree with defence as to the submissions that should be made on sentence when I think he's right. I've done that quite often. If I am asked to speak to sentence I try and bring out the mitigating circumstances as well as other circumstances." (12)

"I don't sentence them. Sometimes I think it is kind of a stiff sentence and it's not going to do him any good but what the hell.... I'll bring out all the mitigating factors when I speak to sentence. I have no absolute right to speak to sentence unless I'm asked or unless I ask permission to speak to sentence but I never hesitate if I think...you know, say there were factors which should be brought to the court's attention. I never hesitate. I get a good deal of satisfaction in doing that. My duty is not only to prosecute but to see that they get a fair shake. Like I've let quite a few people off because I've spoken to sentence." (13)

"We negotiated about the sum and we agreed on two hundred dollars a month to the old lady and I remanded the case for six months and I said that I would remand it for a further month if the accused kept up the payments. Meanwhile the old lady is getting paid and if this fellow had gone to jail, she would have seen nothing. Maybe after a year, if he keeps up payments, the charge will be withdrawn." (15)

"Very rarely do I speak to sentence. I only speak when I have a particular reason to do so. For example, in a case of two shoplifters; these were two girls from out of the province and they were professional boosters and had a number of previous convictions and were travelling through the country doing this. I said something re sentence because I thought that they should get a jail term and that the magistrate should know something about them." (18)

"There is an obligation to make sure that the court is told of the legal sentence; if there is a minimum the court should be aware that it should be imposed

and that suspended sentence cannot be granted where it shouldn't be. Also the Crown Attorney has a responsibility to refer to the incidence of a particular crime in the community and that an exemplary sentence may be required. It may be up to the Crown to point out to a court who is the ringleader of the group and who is the dupe. The individual characteristics of the accused may be only within the knowledge of the Crown Attorney and it may not be avilable through other sources to the judge. The Crown further has a duty to counterbalance the representations made by the defence as to sentence. In other words, the Crown must give a certain sense of proportion to these representations. If the court is being misled by the defence in regard to sentence the Crown must point that out. It is not the function of the Crown to recommend sentence. He may make general remarks about the fact that the man is a hardened criminal or that the man is the kind of man who would be helped by a reformatory sentence or by a suspended sentence. The Crown Attorney may be before an inexperienced judge - I remember the case where a magistrate was on the bench for the first time and he didn't know what kind of sentence to give to the accused and he looked at the Crown Attorney and the Crown Attorney put up three fingers and the magistrate gave the accused three years on a minor offence. The Crown Attorney had meant three months." (19)

Sentencing

Summary

Crown reluctance to speak to sentence unless requested to do so by the Judge seems general. The few exceptions to this position are; to answer exaggerated defence submissions on sentence, to present particularly relevant facts which are not before the court, to speak to mitigation of sentence or to request an exemplary sentence in exceptional circumstances.

B. The Right to Counsel

"There is no doubt that there is a right to counsel at the trial. The accused should be allowed to get in touch with his counsel. It would save us a lot of grief if counsel was present. We've had counsel present during a line-up or an impaired driving test and if he sees that everything is in order he can't later object to it. If the officer at the station won't let the accused call a lawyer it taints the whole prosecution. There is nothing worse than trying to prosecute a person who doesn't have counsel either at the preliminary or at trial. And it is impossible before a jury." (1)

"What does he need a lawyer for, before trial - all a lawyer is going to tell him is to shut up and fall on the floor." (2)

"I agree with it absolutely. Why shouldn't they? If they make a request for a lawyer, they should be given an opportunity to get the lawyer at the point when they make that request." (3)

"I believe there is a psychological compulsion on an accused to get it off his chest and having a lawyer at this first instance would not be beneficial to police investigation." (4)

"I heard the Deputy-Chief say that to have a lawyer before trial is obstructing justice and some of the Crown Attorneys feel the same way." (5)

"As soon as these guys are arrested they want to phone a lawyer and that impedes investigation. If you let that happen you would have chaos." (6)

"If a man asks for a lawyer he has a right to see him. Yes - anytime." (7)

"If an accused has a lawyer as soon as he is being investigated by the police, he, the lawyer, will try to prevent the conviction of his client and his obvious advice is shut up and say nothing. The protection of the community is opposed to that. My opinion is that presence of defence counsel at that stage of the proceedings is detrimental to the process." (11)

"If he asks for a lawyer - sure, why not. That's the rules of the game. If they haven't got enough evidence without depending on the statement, if they need the statement in order to get a conviction, it's a weak case and they should go out and get the evidence." (13)

"It doesn't upset me either way but a significant number of cases turn on statements, especially young offenders - thefts and breaking and entering, and possession of stolen goods - forty percent I would say depend on the statements." (17)

"Well, I don't agree with advising an accused of his right to counsel at a station house. It is difficult enough to combat crime and this would mean that there would be fewer statements." (20).

C. Detention Prior to Trial

"It doesn't soften them up for a guilty plea. In fact, it may be the opposite. They get into jail and they talk to the old hands in the jail and when they are remanded into jail they won't plead guilty the next time up. They change their mind after the first appearance because they have had the advice of jailhouse lawyers. There is an exception. Quite often an accused wants to get it over with and he doesn't want to spend another week in jail. You have to see both angles." (1)

"In some cases, it tends to wear them down. After the fourth remand, they are likely to cop out in some cases." (3)

"In the case of a young fellow I feel a couple of days in jail, for a student, might help him to smarten up. It also serves the purpose that if the police want to question him he's available." (4)

"If a person is caught in the act of smash and grab and has a record for breaking and entering why should he be allowed freedom prior to trial? Some want out so that they can make enough money. If in custody then they want the trial on in a hurry or will plead guilty. The thing that masks all this is that there is a theory that a man is innocent until proven guilty but this is purely an evidentiary mask. Innocent people aren't arrested, guilty people are arrested. A fellow who is dead on the evidence shouldn't be allowed out on bail...."

He pointed to a file on his desk and he said, "This case, the man is dead on the evidence and he has been out for two years on bail. If he was in custody, this trial wouldn't drag on for two years. These guys raise alibis about a year later." (6)

I asked him what he thought of custody prior to trial. He said that it served a useful purpose because the accused "may commit other offences in order to raise money for his defence on the first one. If you have that kind of accused you see to it that the bail is substantial. The only other benefit is to insure his appearance. If he is likely to take off - apart from that I don't think he should be kept in custody - except in very serious offences. Or if I consider him to be dangerous - if I open the gate the responsibility for what he does will fall back on me. It's wrong in principle to hold him. He's not convicted and it doesn't give him a reasonable opportunity to get together with his defence counsel." (10)

D. Characterization of the Accused

"The accused man? You couldn't care less after a while. It's pretty hard to work up much enthusiasm after your twentieth indecent assault in a row. You get dull and stale and he (the accused) is just another face in the crowd. He is number 656 on the list...."

"It's difficult to maintain objectivity and difficult not to treat the accused as animals and shout at them and order them around. The whole system lends itself to that sort of behaviour and this appeals to certain individuals. They have authority and can order people around." (1)

He said a complainant in a rape charge would not testify against the accused because she was threatened by another person and he charged this other person with threatening and had her (the complainant) locked up for the night until she decided to tell the truth. He said, "What else could I do?" (2)

"The presumption of innocence as far as I am concerned is an evidentiary device and I would have to be mad to think that some of these people were innocent up until the time they are convicted." (8)

"On sentencing they spend too much time ringing their hands over the plight of the accused and forget about the victim...."

"You must condition yourself to set aside your sympathetic tendencies. You can't be taken in by every sob story or else you won't prosecute anything." (11)

"You never see the accused during the trial because he is behind you. He becomes just a name on the file. It's like dropping bombs from fifty thousand feet up - you have little contact with the humans below." (14)

Right to Counsel,
Detention Prior to Trial
Characterization of the Accused

Summary

There is general agreement that an accused should be represented by counsel at the trial but most Crown Attorneys view representation prior to trial as a serious impediment to police investigation.

Detention of an accused prior to trial is said to serve a number of useful purposes in addition to assuring his attendance at the trial. Pre-trial imprisonment may encourage an accused to plead guilty or even if not convicted 'to teach him a lesson'. This Crown position is consistent with the presumption of administrative regularity, "we don't arrest innocent people". Considerable remoteness from the accused and his plight is current and is encouraged as a healthy professional adjustment.

PART IV - Role and Professional Perspective

"I cast around for a job...and decided that the Crown Attorney's office was a good place to start, that it would provide good experience...."

"....After four or five years it is self-defeating. ... As in any civil service employment, the longer you are employed - it's the law of diminishing returns after a given time. I thought it would start in four or five years. At the end of four or five years I have done everything that it is possible to do and everything from now on would be repetition. Up until the fall, there was always something to challenge me but now I have done it and as they say, familiarity breeds contempt. The work is boring and especially when you are doing the same thing day after day. It becomes so that it is no different than any other routine job and with pitfalls and drawbacks that you would have in any other routine job. It's like getting out of a nice, warm bath but I knew that I had to make this break. That is what the civil service is. That is what the civil service is - a warm bath. You just sit there and you get paid. There is always something to do but there is not the challenge of looking out for yourself... As years go by, you shut off more of your mind..."

"... There are guys who after twenty years in this job are using very little brain matter because there is so little that is new or challenging. Persons who are in this office for years are bored to tears..."

"...The job is not hard enough. It's too easy. There is no diversity of experience after four or five years. I would recommend that the whole office be abolished as presently constituted. It's fine for keen people out of law school for two, three, four years but after that period of time, after that, an attitude can settle in. An attitude develops, a fixed sort of an attitude. You look at the job just as a job and that's bad because it's a job that requires a flexible attitude." (1)

"The beauty of the job is that you are alone on the job and you make your own decisions but at the same time you have other people around to pick their brains if you need to." (2)

"I became interested in the work. I could hardly believe I was being paid for it. This attitude lasted for about three years.... I thought that it would be good experience in court for four or five years. The first time I began standing up in court it scared the wits out of me. I've now been in the Crown Attorney's Office eight years." (3)

"Guys at the bottom don't do the interesting stuff." (6)

"So I decided to try law for a year or so and kept trying. I was never a very good student. Last thing in the world I intended to be was a Crown Attorney." (7)

"I have always been interested in trial work, especially criminal trials and I used to come down to the courthouse to watch cases when I was in high school. It was my hobby even before I got to university and I used to sit in court and I was always interested in the prosecution of criminal cases...."

".... After seven years I'm still enjoying it. There is lots of variety and you deal with people and there is lots of court work." (13)

"I am completely happy because I like the action. Every day is different. It's not a routine existence." (20)

"That there is a danger here that you end up fighting the other lawyer rather than bringing out the facts of the case. With a permanent Crown Attorney there is a danger of asserting yourself against the defence. The Crown is trapped in this adversary system and it becomes for many Crowns the most important thing of all. They might use tactics that he might not otherwise use - in the heat of the adversary system. It may be unfair to the accused but the accused fades into the background of the fight between lawyers. That happens to all Crown Attorneys and happens more to some than to others...."

".... You can't identify yourself with each case and you can't identify yourself with each accused. You've got to keep a detached view of the whole thing. It's no place for somebody who needs hours to prepare things. You have to make snap decisions and usually on your feet...."

".... It is not the Crown's job to be fighting crime. All we do is prosecute what the police bring to us. We don't investigate crime, we don't institute criminal proceedings. We are not District Attorneys who go out with the police on the investigation. Perhaps the police should have their own solicitor or barrister to assist them in their own investigations...."

".... It is a position of some power and it goes to their (Crown Attorneys') heads. Like judges - they get this power and they never get over it. Everyone is coming to us, asking us 'Can I have a remand, can I, will you,' - people always come to you and want things from you - that kind of power could corrupt. Some Crown Attorneys talk like 'This is my court' or that 'I run this court' and if a magistrate thinks it is his court, you're in trouble. One thing the job gives you is independence.... I make my decisions on my own and no one bothers me." (1)

He said that he felt that it was "a fantastic job" and that he was "getting a great bang out of it". He went on to say that he "enjoyed arguing in court and having a good fight with someone".

".... I never thought I had any power." (2)

"You must keep in mind public policy and what is the best form of public interest...."

".... What do you get out of being a Crown Attorney?" "The positive side is sort of a satisfaction in the manipulation of power. You've got to escape from yourself as a person because you are in public life and you have to attempt to be a reasoned, thinking human being and you must attempt to curb your natural emotionalism. I feel I'm a public person and must conduct myself accordingly. It makes me an interesting person at a cocktail party. As long as you are a Crown Attorney, in your private life you must conduct yourself in the light of that, - with respect...."

I asked him whether there was any pressure to produce and he answered, "You mean successes? Yes, I think there is. It stems from the realization of those in office for some time, that people before the courts are justly accused of their wrongdoing. By coincidence, once in a while you get a string of not guilty cases but if it persists for too long maybe you are not prosecuting with vigour. The reason for it is a general feeling that before someone is charged that there is evidence indicative that they committed the offence with which they are charged. There is a feeling that if you have been going for quite a while with few convictions there is something wrong. I think you should inject some of yourself and your own ideas into a case as to whether a person should be convicted and not just put in the evidence and leave it at that. If you don't, you're not much more than civil servant or penpusher. I like to think of myself first and foremost as a lawyer - a lawyer who happens to be prosecuting. If you feel strongly about a case, it's natural and I think you should say so." (3)

I asked him what he thought was the role of a Crown Attorney. He replied, "It is a limited role. He is confined to those functions set out in the Crown Attorney Act. He has no right to reflect public opinion or what he considers to be the community view. The only place he is not confined is in the area of prosecutorial discretion...."

".... He should be thick-skinned, this is pretty important. If not, the pressure of work and the split second decisions that you have to make on your feet in Magistrates' Court would really bother you. The defence football huddle around the Crown Attorney when he comes in at ten o'clock in the morning and the yak of the police and magistrates and the hurly burly of Magistrates' Court - if you were sensitive - you would have an ulcer. You have to learn to make up your mind quickly and you need a form of aggressiveness. You also need a desire to continue to learn now because the calibre of defence counsel has improved and they are no longer the kind of people who just come into court and wave their hands and raise their voices. Unless there is a continuing education by the Crown on these points, he will be lost. You also have to learn to keep your own counsel. There are some things that you learn here that should not be bandied about over a drink. You have to have the ability to respect a confidence. You must have also a certain sense of integrity so you don't lose sleep at night...."

".... It (the Crown Attorney's Office) attracts more of one type - more neurotics - more people who are not completely integrated in their social relationships. The people who are not particularly sensible and well-adjusted, more isolated types. The violence and dishonesty attracts certain people. It's a world of cunning, unlike the world that they are used to... Also there is a certain sense of power and it may be a person who feels insecure and not particularly well-adjusted in his social relationships, that the power in court helps to make up for this lack of security outside the courtroom. The status of the Crown Attorney within the profession has been improving in recent years...." (4)

"You try not to get worked up about the case. You may have a jury panel that gives you no convictions at all. You can't get emotionally involved or you would go squirrely." (6)

"He would need to be able to withstand pressure. The pressure of having to prosecute cases where you are not familiar or prepared. He would have to be prepared to...lose cases. If he is a man who has to succeed every time, he had better stay away from it." (10)

"The role is to see that the criminal court processes function properly...."

".....You can't afford to have too many people found not guilty. Better not to prosecute them in the first place...."

".... Ninety-five percent of the people are guilty as charged. Those cases that are thrown out are thrown out mostly on evidentiary gaps in the Crown's case." (11)

"It does attract a certain type of individual. It's the type of job that is easily abused. It can go to your head. You can think that I'm the boss and I'm it. This is part of the reason some of the police don't get along with Crown Attorneys. But it is a long life and you have to keep that in mind. It's the kind of job where you can release suppressed superiority desires. At the outset you mention the name Crown Attorney and it has a glamorous sound to it. You have a superiority over defence counsel and the police. It either stays with you or you mellow into a diplomat. The job can go to your head and it does influence your social habits. I can't drink now in certain places where I know the hoods hang out." (12)

"In a jury case, you have to be convinced in your own mind and if he is guilty and if you know he is guilty, you're more interested in winning." (13)

"Boredom emanating from the never ending stream of cases. If you are a defence lawyer you have a personal stake and personal involvement in each case and you're dealing with a human being. Here, as a Crown Attorney, you don't get that. You get file after file after file and you try one case after another, day after day. It becomes sort of clinical...."

".... You can become desensitized by Magistrates' Court and the assembly line procedure there and the officers shouting at the accused to keep quiet or to take the gum out of his mouth. This can be very influential on a young fellow when he sees these accused men herded into the dock and pushed together and treated like animals. If a young man is of an authoritarian or jackboot mind, he would think of these people in the docket as something a little sub-human. But there are very few like that but it is the volume, the mass of people and the mass of cases and the never ending assembly line that can infuence the outlook of a Crown Attorney. It's a strange system, and it's strange that it works as well as it does, and that there isn't more injustice." (14)

TENTATIVE HYPOTHESES RE-CONSIDERED

1. The Crown Attorney's attitude to his role is largely influenced by external pressures and exposure to group environment.

2. Informal decision-making processes have grown up outside the purview of legislation and case-law.

3. Formal adversarial processes are significantly controlled by informal reciprocal relationships.

4. The Crown Attorney's attitudes and the texture of his reciprocal relationships largely determine his exercise of discretion and his decision-making processes.

TENTATIVE HYPOTHESES RE-CONSIDERED

I. The Environment

> "The technical demands of a man's work tend to specify the kinds of social relationships in which he will be involved and to select the groups with whom those relationships are to be maintained. The social definition of the occupation invests its members with a common prestige position. Thus, a man's occupation is a major determining factor in his conduct and social identity. This being so, it involves more than man's work and one must go beyond the technical in the explanation of work behaviour. One must discover the occupationally derived definitions of self and conduct which arise in the involvements of technical demands, social relationships between colleagues and with the public, status and self-conception. To understand these definitions, one must trace them back to the occupational problems in which they have their genesis."[1]

Sociological theory holds that, given a certain

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[1] W.A. Westley, *Violence and the Police*, (1953-54) 59 Am. J. Soc. at p. 34. Westley has examined the police within their occupational environment, *The Police: A Sociological Study of Law, Custom and Morality*, unpublished Ph.D. thesis, University of Chicago, 1951, and suggests that it is only from the occupational context that the position of a policeman gains its meaning. E.C. Hughes originally developed this thesis in 'Work and Self' in Rohrer and Sherif, *Social Psychology at the Cross-Roads*, New York, Harper Bros., 1951. Hughes has suggested that "A man's work is as good a clue as any to the course of his life, and to his social being and identity .... a man's work, to the extent that it provides him a subculture and identity becomes part of his personality." Hughes, *Men and Their Work*, Free Press of Glencoe, 1958 at p. 23. Karl Mannheim has also suggested that ideas and sentiments which motivate an individual do not necessarily have their origin in him alone, or can be adequately explained solely on the basis of his own life experience .... men in certain groups often develop a particular style of thought ... In accord with the particular context of collective activity in which they participate, men always tend to see the world which surrounds them differently .... Accordingly, conditioned by the same social situation, they are subject to the same illusions." K. Mannheim, *The Meaning of Ideology*, in Man, Work and Society, A Reader in the Sociology of Occupations, 1962, edit. by S. Nosow and W.H. Form, N.Y., Basic Books, 1962 at pp. 408 and 410.

structured social milieu, persons playing various culturally defined roles will acquire certain personality attributes.[1] This same social milieu will influence the Crown Attorney's conception of his obligation to the community at large. The Crown Attorney may be regarded by the police as one of them and part of the police sub-culture and by defence lawyers as part of the legal fraternity and as such responsive to concepts such as the rule of law and traditional legal norms. It is from this occupational context that his position gains its meaning and from which career orientations take their shape. Conflicting concepts conditioned by the demands of the adversarial environment and the public image on the one hand, and the administrative demands and informal relations on the other, contribute to the problem of defining the occupational values of the Crown Attorney.

The occupational attitudes of the Crown Attorney are reflected in his relationship with defence lawyers, the police and the accused. Defence-Crown interaction creates tensions in the Crown Attorney that are not revealed in his other relationships within the environment. The adversary

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[1]see G.H. Mead, *Mind, Self and Society*, Chicago, University of Chicago Press, 1944 at p. 144; D. Reisman, *The Lonely Crowd*, New Haven, Yale Univ. Press, 1950, pp. 1-35, 115-129; A. Kardiner, *The Individual and His Society*, New York, Columbia University Press, 1939; E. Fromm, *Escape from Freedom*, N.Y., Reinhart & Co., 1941, pp. 18 ff.; R. Linton, *The Cultural Background of Personality*, N.Y., Appleton-Century Co., 1945, pp. 25 ff.

system engenders this tension between 'opponents' who represent conflicting interests. Although the formal organization of the adversary system encourages mutually exclusive stances on the part of the Crown Attorney and the defence lawyer, the network of their informal relationships ameliorate and adjust the harshness of the formal confrontation.

The manner in which the Crown Attorney sees the role of the defence lawyer may influence the Crown Attorney's conception of his own role in relation to the defence lawyer.[1] Turner points out that "Once the actor formulates a conception of the role of the other, the manner in which that conception serves to shape his own behaviour is unaffected by the accuracy or inaccuracy of that conception."[2] Role conceptions of the defence lawyer and his actions may be simply imputed to him by the Crown Attorney by projection rather than from personal knowledge of the other's behaviour.[3] At the same time the Crown Attorney's reaction to the defence

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[1] "Role refers to behaviour rather than position, so that one may enact a role but cannot occupy a role ... The role is made up of all those norms which are thought to apply to a person occupying a given position." R.H. Turner, *Role-Taking, Role Standpoint and Reference - Group Behavior,* (1955-56), 61 A.J.S. 316 at 316 and 317.

[2] R.H. Turner, *Role-Taking, Role Standpoint and Reference - Group Behavior,* ibid. 318.

[3] In the case of projection, one constructs the other role as he would if he himself were in the situation or had made the particular gesture. When role-taking proceeds in this manner, the particular identity of the other is immaterial to the role content, since the role conceptions of the actor are simply imputed to the other. ibid., at 319.

lawyer may be made on the basis of prior experience with that particular defence lawyer or with other lawyers assumed to be like him. Turner suggests that "the actor engages in role-taking in order to determine how he ought to act toward the other."[1] Often the Crown Attorney shapes his own role behaviour according to what he judges to be the probable effect of interaction between his role and the inferred role of the defence lawyer.

Mead has pointed out that the actor in the 'game' must have in mind the roles of the other players as illustrated in the following example in baseball.

> "The skilful player in a game such as baseball cannot act solely according to a set of rules. The first baseman can learn in general when he is to field the ball, when to run to first base, etc. But, in order to play intelligently and to be prepared for less clearly defined incidents in the game, he must adjust his role performance to the roles of the other players. This adjustment is in terms of the effect of interaction among roles to the end of minimizing the score of the opposing team. When the first baseman fields the ball, runs to first, throws to home, etc., will depend upon what he thinks each of the other players will do and how his action will combine most effectively with theirs to keep the score down."[2]

The Crown Attorney, similarly, does not act solely according

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[1] ibid. at 320.

[2] G.H. Mead, *Mind, Self and Society*, Chicago, University of Chicago Press, 1934 at p. 149. Turner has pointed out, ibid. 321 that "while role-taking is a process of placing specific behaviours of the other in the context of his total role, the attention of the actor is never equally focused upon all the attitudes implied by that role. Rather, one's orientation determines that only certain attitudes of the other-role will be especially relevant to the determination of his own behaviour. .... The demands of the actor's role determine the selection of aspects of the other-role for emphasis."

to a set of rules but acts in a manner conditioned by his environment and the actions of the other participants in the prosecutorial environment, the police, the defence lawyers and the judiciary. His actions are reactions to the actions of these other players and his responses reflect his best judgment of how the game is to be played in order to keep the adversary's score down.

Some Crown Attorneys identify themselves with the values of a defence lawyer and accord those values prestige. This, in turn, is reflected in the Crown Attorney's own self-conception and interaction with defence lawyers. For example, if a man has practised law for a number of years before becoming a Crown Attorney and has defended a number of criminal cases, he may accord prestige to this occupation. Another Crown Attorney who has come directly from law school into the Crown's office may have so thoroughly identified himself with the office of the Crown that he has little sympathy for the role of the defence lawyer.[1] Those Crown Attorneys who have not practised law prior to entering the office of the Crown Attorney not only have little sympathy for defence problems but tend to associate the defence lawyer, not only with the cause of his client, but with the client himself. These men do not acknowledge police pressure and welcome police advice and information without criticism.

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[1]Becker and Carper, *The Development of Identification with an Occupation*, (1956), 61 A.J.S., 289.

These same Crown Attorneys, in contrast to those with some defence experience, display little concern for the integrity of the system of rules by which they function and exhibit reactions of frustration and tension when faced with a defence lawyer's use of a 'technicality' or 'delay tactics'. Similar responses were indicated by their reaction to the 'sentimental exaggeration' of an accused's defence and defence submissions relating to sentence. Suspicion characterized their relations with defence lawyers and resulted in limited responses to defence requests for pre-trial disclosure of Crown evidence.

Those Crown Attorneys who have had some experience in the general practice of law seem more sympathetic toward the defence and this is often reflected in their flexible attitude to pre-trial negotiations and Crown disclosure. They are particularly aware of police pressures and are critical of police who move beyond their investigatory function to participate in the prosecutorial process.[1]

For the most part there was rarely any consideration

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[1]Only two Crown Attorneys appear as exceptions to the foregoing impressions. These two individuals appear authoritarian in personality. See: *The Authoritarian Personality*, ed. by Richard Christie and Marie Jahoda, Glencoe, Free Press, 1954, and Adorno, T.W., and others, *The Authoritarian Personality*, New York, Harpers, 1950. These men were punitive and condescending, insensitive to interpersonal relationships and were prone to attribute their own ideas to others. They appeared to tolerate no ambiguities and no equivocations and seemed to view their rigid attitude as evidence of their toughness and masculinity.

by the Crown Attorneys of the ideals, aspirations, or goals posited by the criminal justice system. The Crown Attorneys appear to reflect a self-image of men of action and are not for the most part contemplative of their professional values and the system within which they play a major role. The choice of associations within the office helps to reinforce common attitudes to customary patterns of action.[1]

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[1]See: Alexander, F., and Staub, H., *The Criminal, the Judge and the Public*, (1956). The authors suggest at p. 25, that prosecuting attorneys may be activated by a set of unconscious, sadistic trends "which not only play an important role in the given professional activities but are not infrequently the decisive factors in the matter of choosing a profession .... the endeavour to assure the security of state order permits the attorney to give vent to his unconscious tendency to inflict suffering upon others; his official work keeps the unofficial work of the subconscious unnoticed."

II. The Profession

The sociological approach to professionalism is one which views a profession as "an organized group which is constantly interacting with the society that forms its matrix, which performs its social functions through a network of formal and informal relationships, and which creates its own subculture requiring adjustments to it as a prerequisite for career success."[1] Although the legal profession clearly falls within the definition, the office of the Crown Attorney has acquired certain attributes of a subculture which sets it apart from the larger professional lawyer culture. The Crown Attorney has developed skills and sympathies which are not reflected in the general professional culture and are part of a segmented interest group within the interstices of the profession as a whole.[2]

Crown Attorneys cannot fit into a legal tradition of

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[1]E. Greenwood, "Attributes of A Profession", in *Man, Work and Society*, ed. S. Nosow and W.H. Form, New York, Basic Books, 1962, p. 206 at 207. See also: Oswald Hall, *The Stages of a Medical Career*, (1948) 53, Am. Journal of Sociology, pp. 327-336; *Types of Medical Careers*, 1949(55), Am. Journal of Sociology, pp. 243-253; *Sociological Research in the Field of Medicine: Progress and Prospects*, American Sociological Review, Vol. 16, October, 1951, pp. 639-644.

[2]see H.L. Smith, "Contingencies of Professional Differentiation" in *Man, Work and Society*, ibid. at pp. 219-222 and also see T.H. Marshall, "Professionalism and Social Policy", in *Man, Work and Society*, ibid. at pp. 225 and 226. See also: *Professions*, (1963), 92 Daedalus at p. 655 and at 657. E. Hughes suggests that "collective claims of a profession are dependent upon a close solidarity, upon its members constituting in some measure a group apart with an ethos of its own."

individualism in terms of the individual trust relationship between solicitor and client. Crown Attorneys may reject the social and political role often associated with the extra-professional life of the lawyer and find their own role without these social, political or client obligations more satisfying. There are no pressures upon the Crown Attorney to fulfil any extra-professional role and social, political or extra-professional activity plays no part in the Crown Attorney's career advancement.[1] In some provinces, since the Crown Attorney is appointed by the provincial Attorney-General's department, men affiliated with the party in power may be favoured. But once the full-time appointment is made, the Crown Attorney becomes a civil servant, and plays no part in political activity.[2]

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[1]W.I. Wardell and A.L. Wood, *The Extra-Professional Role of the Lawyer*, (1956) 61 A.J.S., 304.

[2]This is not the case in the United States. "Although he [the prosecutor] was under relatively little supervision in his daily activities, he had to be careful to stay in the good graces of the U.S. Attorney who, holding an essentially political position, was very sensitive to the criticism of the press, the judges and the defence bar, all of whom were quick to note a rising number of acquittals" ... Kaplan, J., *The Prosecutorial Discretion, - A comment*, 60 Northwestern Univ. L. Rev. 174 at 184, (1965).

Contrast the freedom from political interference in appointment of the Crown Attorney with the situation reported in New York where a District Attorney admitted his assistants were selected for him by his political organization and assigned it as a reason why he should not be held to account for the deficiencies of his office. *Drukman Investigation*, 15 Panel 13 (June, 1937.).

Crown Attorneys feel relatively free from administrative control by superiors and exercise independent judgment and responsibility within general policy guidelines. Crown Attorneys do not view themselves as employees subject to the control of their employer. They feel free, as lawyers, to exercise complete discretion within a general structure. The senior Crown Attorney suggests that he supervises the Crown Attorney office as a senior law-partner might his junior partners. In a large law office, the usual pattern is that of 'colleague control'. In the office of the Crown Attorney, although there may be a myth of 'colleague control' the pattern of authority in the organization is that of 'superordinate control', control by a superior.

Professional education is deemed sufficient training for the position of a Crown Attorney. Specialized skills are acquired on the job. Certain work and procedures are considered more worthy than others. The young Crown Attorney begins his on-the-job training at the lowest prestige level, the impaired driving court, and will, after a few months, conduct cases in the general Magistrates' Courts. After a year or two in the Magistrates' Courts, where he may also conduct preliminary inquiries, he will be moved up to conduct trials at the general sessions and eventually before the Supreme Court at the assizes. The hierarchical transition represents a series of rewards for competent

skills displayed at the lower levels.

While the office of the Crown Attorney is considered an excellent training ground for a young lawyer, the lack of adequate time for preparation at the lower levels encourages a certain rough and ready approach to Crown representation in the Magistrates' Courts. After a number of years, some Crown Attorneys express concern about the repetitive nature of the experience, and suggest that the sameness may breed boredom. Crown Attorneys are concerned with their status in the eyes of the legal profession as a whole. One way in which an occupation can document its high status is by being able to take the pick of the young graduates. The office of the Crown Attorney does not yet attract these men.

III. Reciprocity

> "All contacts among men rest on the schema of giving and returning the equivalence. The equivalence of innumerable gifts and performances can be enforced. In all economic exchanges in legal form, in all fixed agreements concerning a given service, in all obligations of legalized relations, the legal constitution enforces and guarantees the reciprocity of service and return service - social equilibrium and cohesion do not exist without it. But there are also innumerable other relations to which the legal form does not apply, and in which the enforcement of the equivalence is out of the question. Here gratitude appears as a supplement. It establishes the bond of interaction, of the reciprocity of service and return service, even when they are not guaranteed by external coercion ...."[1]

Simmel's suggestion that "all contacts among men rest on the schema of giving and returning the equivalence" is a useful theory for analysing the texture of the interaction between the Crown Attorney and the defence lawyer. The data suggests that the Crown Attorney and the defence lawyer are bound together within the prosecutorial environment by a variety of informal relations. The concept of social exchange or reciprocity is helpful in an analysis of these associations. It is this concept of reciprocity which directs attention to

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[1] George Simmel, *The Sociology of George Simmel*, translated and edited by Kurt H. Wolff, Glencoe, Ill., Free Press, 1950, p. 387.

social interaction and personal relations within the legal environment.[1] Cicero pointed out that "there is no duty more indispensable than that of returning a kindness" .... and that .... "all men distrust one forgetful of a benefit."[2] Social exchange does not resemble economic or contractual exchange because social exchange is based on unspecified obligations.[3]

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[1]George C. Homans, *Social Behaviour*, New York; Harcourt Brace and World, 1961, p. 13, has developed this theory in his *Social Behaviour as Exchange*, (1958) 63 A.J.S., 597-606. A number of scholars have commented on the importance of this theory; Claude Lévi-Strauss, *Les Structures élémentaires de la parenté*, Paris: Presses Universitaires, 1949; Raymond Firth, *Primitive Polynesian Economy*, New York, Humanities Press, 1950; Emile Durkheim, - *Suicide*, ed. by George Simpson, Glencoe, Ill., Free Press, 1951; Marcel Mauss, *The Gift*, translated by Ian Cunnison, Glencoe, Illinois, The Free Press, 1954 at pp. 1-2, 3, 10-12, 69-77; Malinowski, B., *Crime and Custom in Savage Society*, London, Littlefield, 1932. Most recently the concept of reciprocity has been developed by P.M. Blau, *Exchange and Power in Social Life*, N.Y., John Wiley and Sons, 1964; Howard Becker, *Man in Reciprocity*, New York, Prager, 1956, and in a cogent paper by A.W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, (1960) 25 A.J.S. 161 (1960).

[2]reported in A.W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, ibid., at p. 161.

[3]Formal contracts stipulate the exact quantities to be exchanged. Contractual provisions specify the sums to be exchanged. "Social exchange, in contrast, involves the principle that one person does another a favour, and while there is a general expectation of some future return, its exact nature is definitely not stipulated in advance." - P. Blau, *Exchange and Power in Social Life*, op.cit. at p. 93.

Social bonds are created within the legal environment by the exchange of a service and the expression of gratitude by the recipient by a return of a service on an appropriate occasion. If the recipient continues to reciprocate the exchange indicates a continuing gratitude and serves as an inducement to further exchange of kindnesses which create a social bond between the two.[1] A sense of trust is required for the exchange of services or kindnesses and is promoted by it. The continued association in a relation of trust alters the isolated position of the individuals and groups them into a new social relationship.[2]

To arrive at an understanding of the dynamics of the legal environment and the prosecutorial system, these social groupings must be investigated in terms of the values that reinforce the social interaction within the static legal structures. Exchange relations, or relations of trust, evolve as a slow process. A testing period, where little trust is required and little risk is involved, becomes a precondition to reciprocal relationships based on proven trustworthiness and a continued feed-back of appreciation.[3] Blau suggests that

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[1]see P. Blau, *Exchange and Power in Social Life*, ibid. at p. 4.

[2]see E. Durkheim - *Suicide*, ed. by G. Simpson, Glencoe, Free Press, 1951.

[3]This feed-back may be in terms of favours, but excessive reciprocation at this early stage may prove embarrassing and limit the future relationship. See P. Blau, *Exchange and Power in Social Life*, op.cit., p. 94.

> "by discharging their obligations for services rendered, if only to provide inducements for the supply of more assistance, individuals demonstrate their trustworthiness and the gradual expansion of mutual service is accompanied by a parallel growth of mutual trust. Hence, processes of social exchange, which may originate in pure self-interest, generate trust in social relations through their recurrent and gradually expanding character."[1]

Impressionistic observation suggests the growth of this relationship between young defence lawyers and Crown Attorneys, or young Crown Attorneys and defence lawyers where pre-conceptions and barriers have not been formed by prior associations or reputation. The failure on the part of a defence lawyer to reciprocate, results in loss of trust and ultimately brings about exclusion from further exchanges and an immediate decline in social status among the Crown Attorneys.[2] If a defence lawyer fails to discharge an obligation, for example, if he utilizes Crown evidence disclosed to him in confidence for purposes of cross-examination, the exchange relationship will be terminated. If the defence lawyer does not participate himself in exchanging services as an expression of gratitude, the exchange relationship may be ended. Moreover, if a defence lawyer exhibits ingratitude in the foregoing manner, it is likely that the Crown Attorney will tell other Crown Attorneys about the ingratitude of this individual with the result that this defence lawyer's general reputation in the

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[1] P. Blau, ibid., 94.

[2] This exclusion and decline of social status may be likened to the situation where a person does not honour his commercial obligations and his reputation in the commercial community suffers accordingly.

Crown Attorney community will suffer.

Once the initial problem of proving oneself trustworthy has been successfully accomplished, the question arises what mutuality is there in the exchange of services between the Crown Attorney and the defence lawyer? The Crown Attorney is purchasing speed and the efficient disposal of cases, by guilty pleas. In return he exchanges pre-trial disclosure of Crown evidence, the acceptance of a plea to a lesser charge and the withdrawal of other charges. The data suggests that the Crown Attorney views pre-trial disclosure, pleas to lesser charges and the withdrawal of charges as Crown favours to be exchanged with certain defence lawyers. This exchange represents a rough equivalence.[1] These favours will not be available to abrasive or demanding defence counsel but will be available to those defence counsel who have proven themselves part of the trustworthy social grouping.

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[1]Gouldner discusses the problem of the 'equivalence of the exchange.' He suggests that equivalence may take two forms. "In the first case, heteromorphic reciprocity, equivalence may mean that the things exchanged may be concretely different but should be equal in value, as defined by the actors in the situation. In the second case, homeomorphic reciprocity, equivalence may mean that exchanges should be concretely alike, or identical in form, either with respect to the things exchanged or to the circumstances under which they are exchanged. In the former, equivalence calls for 'tit for tat'; in the latter, equivalence calls for 'tat for tat'. Historically, the most important expression of homeomorphic reciprocity is found in the negative forms of reciprocity, that is, in sentiments of retaliation where the emphasis is placed not on the return of benefits but on the return of injuries, and is best exemplified by the lex talionis." A. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, op.cit. p. 172.

The element of bargaining for the valuable sought in the exchange becomes part of the reciprocal process.[1] The Crown may view the impending exchange with some suspicion and may hesitate to part with his valuables until he has gained his objective. It is the practice when withdrawing charges or when accepting a plea to a lesser charge or included offence, for the Crown to call the charge or charges on which it was agreed he would proceed; and only when the guilty plea has been recorded by the court will he inform the court that he is not proceeding on the other charge or charges.

Exchange processes within the legal environment give rise to differentiation of power.

> "A person who commands services others need, and who is independent of any at their command, attains power over others by making the satisfaction of their need contingent on their compliance."[2]

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[1]Newman suggests four general types of considerations in return for guilty pleas: bargains concerning the charge, bargains concerning the sentence, bargains for concurrent charges and bargains for withdrawals. Newman, D., *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. of C.L. & Criminology & P.S. 780, 787 (1955-56). See also: Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. Chi. Law Rev. 167-187, (1964-65); Polstein, *How to 'Settle' a Criminal Case*, 8 Proc. Law 35, 37 (1962), Weintraub & Tough, *Lesser Pleas Considered*, 32 J.C.L. & Criminology, 506, 529 (1949).

[2]P. Blau, op.cit., at p. 22. Power is defined by Max Weber as "The probability that one actor within a social relationship will be in a position to carry out his own will despite resistance." M. Weber, *The Theory of Social and Economic Organization*, New York, Oxford University Press, 1950, at p. 152. Tawney similarly defines power: "Power may be defined as the capacity of an individual, or group of individuals, to modify the conduct of other individuals, or groups, in the manner which he desires, and to prevent his own conduct being modified in the manner in which he does not." R.H. Tawney, *Equality*, London, Allen and Unwin, 1931, at p. 229.

Impressions gained from the data suggest that the defence lawyer most often requests the service of the Crown Attorney and correspondingly pays the cost in the subordination involved in expressing the request and manifesting gratitude for the exchange. In requesting the favour, he rewards the Crown Attorney with prestige and power in the relationship.[1] Some Crown Attorneys appear indifferent to the exchange process and in doing so modify the process so to increase their position of power. The Crown's refusal to participate in the reciprocal relationships may imply his lack of respect for a particular defence lawyer or for defence lawyers generally and that he considers them unworthy of being his companion in an exchange. This attitude may be based on the hostility of the Crown Attorney toward defence lawyers and his refusal to participate creates rigid and sometimes hostile relationships.

Crown Attorneys establish reciprocal relationships primarily with those who are able to reciprocate resulting in the neglect of those who are unable to do so. Reciprocity is largely confined to thosedefence lawyers who have been admitted to the social circle dependent, as it is, on the quality of their relationship with the Crown Attorney. Reci-

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[1]P. Blau, ibid., 108 and also see the discussion in Homans, op.cit., pp. 318-319 and Mauss, op.cit., pp. 10-11, 39-40. Emerson has presented a schema for examing "Power dependence": Richard M. Emerson, *Power-Dependence Relations*, (1962) 27 American Sociological Review, 31-41.

procity results in discrimination, for benefits are limited only to those lawyers who happen to be suppliers of benefits.[1] Reciprocity, standing alone, constitutes a violation of the rule of law and the principle of equality before the law. It tends to create an exchange situation outside normal court procedures which is anti-adversarial and which discourages participation in the trial process.[2]

IV. The Administrative Perspective

The police often interpret procedural requirements as frustrating the efficient administration of criminal justice.[3] This interpretation is reflected in some of the responses of Crown Attorneys and their consistent assumption of administrative regularity. Professor Packer has constructed two theoretical models, the 'due process model' and the 'crime

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[1]Those lawyers who do not supply their 'quota' of guilty pleas and contest every case are subjected to 'the bare bones of the legal system' by the Crown Attorneys. The unrepresented accused has no opportunity to engage in pre-trial reciprocal exchanges. See Newman, *Conviction*, op.cit., at p. 197 where he discusses the function of defence counsel in 'non-trial adjudication'. He suggests at p. 241 that "if the lawyer is to achieve maximum effectiveness he must also be familiar with informal procedures and with bargaining possibilities and avenues ..."

[2]For a criticism of Reciprocity in a commercial law context, see G.E. Hale and R.D. Hale, *Reciprocity Under the Anti-Trust Laws: A Comment*, 113 U. of Pa. L. Rev. 69 (1964), and A. Phillips, *Reciprocity Under the Anti-Trust Laws: Observations on the Hales' Comment*, 113 U. of Pa. L. Rev. 77 (1964).

[3]Skolnick, op.cit., p. 183.

control model' which represent polarities that illustrate some of the underlying and competing values within the administration of criminal justice.[1]

His 'due process model' represents the traditional judicial approach to the criminal process as one which conforms to the rule of law. The due process model, unlike the crime control model, stresses the frailty of human judgment, the possibility of human error and the requirement of legal guilt rather than factual guilt. It is only when a man has been proven guilty in law, in a procedurally regular fashion, before a judicial tribunal acting within its jurisdictional competence that his guilt is established. Until that judgment of legal guilt has been rendered there is a continuing presumption of innocence from his arrest up to the judicial assessment.

The crime control model is primarily an administrative model which exalts administrative regularity over procedural regularity. Administrative efficiency is obtained through the competent administration of the "system's capacity to apprehend, try, convict and dispose of a high proportion of criminal offenders...."[2] There is a presumption of regularity based on the confidence placed in the law enforcement personnel

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[1]Packer, Herbert L., *Two Models of the Criminal Process*, 113 U. of Pa. Law Rev. 1-68 (November, 1964).

[2]ibid., at p. 10.

'that they don't arrest innocent people'.[1] In order to 'fight crime' the criminal administrative process must function smoothly and those arrested must be expediently convicted within the context of a mass system for the administration of criminal law. The law is perceived, not primarily as an instrument for guaranteeing individual freedom, but as a means of protecting public order and preserving the efficient administration of justice. The arrested accused is presumed, both by police and Crown prosecutors, guilty, and the requisite procedural and judicial requirements are often perceived as obstacles to the efficient administration of the process.

The contrasting values presented by the two models contribute to an understanding of the Crown Attorney's reaction to defence requests for postponements, procedural and other delays. Procedural requirements, such as the presence of counsel prior to arraignment, are seen as contributing to the frustration of those charged with the investigation and those charged with the prosecution of crime. The Crown Attorney's easy acceptance of an accused's imprisonment prior

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[1]Skolnick, op.cit., says of the police (at p. 187): "In contrast to the criminal law presumption that a man is innocent until proven guilty, the policeman tends to maintain an administrative presumption of regularity, in effect, a presumption of guilt. When he makes an arrest and decides to book a suspect, the officer feels that the suspect has committed the crime as charged. He believes that as a specialist in crime, he has the ability to distinguish between guilt and innocence."

to trial is understandable if one views that acceptance in the light of his presumption of administrative regularity and his corresponding presumption of the accused's probable guilt.

JUDICIAL GOALS AND EMPIRICAL FACT

Introduction

Earlier in this paper it was suggested that the principles and theories propounded in the law do not automatically become part of the patterns of prosecutorial behaviour. The interview data suggests that there is a substantial dichotomy between the substantive law and the empirical fact. For the most part, the spectrum between the two appears self-evident from the foregoing text. In the concluding sections an attempt is made to summarize and comment upon some of the major contradictions between the judicial goals and current prosecutorial practice.

Discretion and Pre-Trial Practices

A. Discretion

Major discretionary choices appear at each stage of the prosecutorial process.[1] The propriety of such discretionary power has been the subject of much debate.[2] Though little has been written on the Canadian experience, the American literature indicates that prosecutors, in that country, do exercise a broad discretion in deciding whether

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[1]LaFave, Wayne R., *Arrest: The Decision to Take a Suspect into Custody*, Boston, Little Brown and Co., 1965, p. 9, where he points out that the system of criminal justice may be viewed as "a series of inter-related discretionary choices." See also: Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543 (1960). Discretion has been defined as "the power to consider all circumstances and then determine whether any legal action is to be taken, and what kind and degree and to what conclusion." Brietel, *Controls in Criminal Law Enforcement*, 27 U. of Chi. L. Rev. 427 (1960). Pound suggests that discretion is "an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience. It is an idea of morals, belonging to the twilight zone between law and morals." - Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U.L. Rev. 925, 926 (1960).

[2]LaFave, op.cit., points out at p. 9 that the exercise of discretion is common to all stages in the administration of criminal justice, but is recognized as proper only at the post-conviction stages. See generally: Brietel, ibid., Moley, *Politics and Criminal Prosecution*, New York, Minton, Balch and Co., 1929, pp. 74-94. Arnold, T., *Law Enforcement - An Attempt at Social Disection*, 42 Yale L.J. 1, 18 (1932),

to prosecute offenders,[1] and whether to enforce certain laws.[2] The decision to initiate prosecutions is, in many jurisdictions in the United States, the prosecutor's primary responsibility.[3] Despite statutory provisions, there appears to be little state control over the local prosecuting

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[1]See, Inbau and Sowle, *Cases on Criminal Justice*, 33-35 (1960); the series of articles by Baker and De Long, 23-26 J. Crim. L. C., and P.S. (1933-36); Munro, *Functions of a Prosecuting Officer*, 11 U. Det. L. Rev. 1 (1927); Snyder, *The District Attorney's Hardest Task*, 30 J. Crim. Law, C., and P.S. 167 (1939). It has also been suggested that "the discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution, gives him more control over an individual's liberty and reputation than any other public official." - Note, *Prosecutor's Discretion*, 103 U. of Pa. Law Rev. 1057 (1954-55) See: Hobbs, *Prosecutor's Bias, An Occupational Disease*, 2 Ala. L. Rev. 40, 41 (1949); Jackson, *The Federal Prosecutor*, 31 J. of Crim. L. and Criminology, 3 (1940); Baker and De Long, *The Prosecuting Attorney and His Office*, 25 J. Crim. L. and Criminology, 695, 719 (1935).

[2]Smith points out that public attitudes concerning which laws should and should not be enforced have an important influence upon the administration of justice: Smith, *Police Systems in the United States*, 5-7, 18-19, 285-286, 366-367 (1940). Thurmond Arnold argues that "most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct." Arnold, *The Symbols of Government*, 160 (1935). See also: Cohen, *Positivism and Idealism in the Law*, 27 Col. L. Rev. 237, 246 (1927).

[3]See, Baker and De Long, *The Prosecuting Attorney - Powers and Duties in Criminal Prosecution*, 24 J. Crim. L. and Criminology 1025, 1064 (1934); Baker, *The Prosecutor - Initiation of Prosecution*, 23 J. Crim. L. and Criminology 770 (1933); Klein, *District Attorney's Discretion Not to Prosecute*, 32 L.A.B. Bull, 323 (1957). LaFave suggests that the police seek a warrant when they desire the advice of the prosecutor before arrest. He concludes (op.cit. at p. 46): "In these cases the prosecutor quite clearly makes a decision to prosecute when he approves the warrant." Snyder, op.cit., suggests at p. 173 that it is the prosecutor's primary duty to select only the strategic cases for prosecution: " ... the best of district attorneys must still winnow his cases in order to select the most strategic, if his efforts are to be successful in any measurable degree ... [otherwise] ... he would create an adverse public clamor about persecuting so many cases instead of prosecuting the right ones."

attorney in the United States.[1] Debate has centered on the question whether it would be desirable to impose limitations on prosecutorial discretion.[2]

B. The Timing of the Crown Attorney Participation

In Canada the legislative provisions indicate that the Crown Attorney first participates in the accusatorial process after the charge has been laid.[3] The legislation indicates that the Crown Attorney's first duty is to examine the charge or information in order to make the decision to prosecute,[4] and in this way he performs a screening function by reviewing the sufficiency of the evidence before initiating the prosecution. The exercise of an independent judgment, in addition to the police judgment, provides some protection against the institution of prosecutions based on insufficient evidence.

The empirical data clearly indicates that the Crown

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[1]Ploscowe, *The Significance of Recent Investigations for the Criminal Law and Administration of Criminal Justice*, 100 U. of Pa. Law Rev. 805, 824 (1952); See: Report of the *A.B.A. Commission on Organized Crime*, 76 A.B.A. Rep. 385, 402 (1951).

[2]'Plea-bargaining' has been criticized as unethical and contrary to Anglo-American notions of criminal justice. See, Arnold, *Law Enforcement - An Attempt at Social Disection*, 42 Yale L. J. 1, 18 (1932).

[3]see supra at p. 10. Although there is considerable authority which suggests that the Crown Attorney has the power to initiate proceedings, see supra at p. 11.

[4]see supra at p. 10.

Attorney does not consider the information nor the charge until the accused is arraigned before the court. The sufficiency of the evidence against the accused is reviewed by the Crown Attorney immediately prior to the trial or at the preliminary hearing and not before.[1] The timing of the Crown Attorney's participation is in sharp contrast to the prosecutorial practice reported in most of the cities in the United States.[2] The decision then to institute a prosecution is made by the arresting officer when he makes the decision that there is sufficient evidence of the commission of an offence to cause him to effect an arrest.[3] Arrests may be

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[1]The Federal prosecutor as a rule reviews police evidence prior to the laying of charges in prosecutions under the Nar *Narcotic Control Act*, 1960-61, R.S.C. Cap. 35. In those cases where the questions of law are complex, the Crown Attorney may advise the police prior to the laying of the charge. For example, "a plain clothes officer purchased a number of magazines at a newstand. Upon examining the magazines, he reached the conclusion that they contained obscene matter. However, rather than make an immediate arrest, the officer took the magazines to the prosecutor's office, where an assistant prosecutor examined them with great care, concluded they were obscene and approved the issuance of a warrant for the arrest of the newsstand operator." LaFave, opcit. p. 46. This example corresponds to the practice observed in Metropolis.

[2]LaFave, op.cit. 32 and 33 and see also Barrett, *Police Practices and the Law - From Arrest to Release or Charge*, Calif. L. Rev. 11 at 45: "the data presented ... amply demonstrate that our system of criminal courts is organized to deal with a situation which police and prosecutors screen out all but the most clearly guilty before involving the courts."

[3]The standards required for an arrest, 'reasonable and probable grounds', may not correspond with the standards of evidence required to institute a prosecution. In Canada we equate the two. LaFave ibid. p. 58 concludes: "While the arrest decision quite clearly sets the outer limits of law enforcement, it does not in the usual case set the actual limits of prosecution. The separate and distinct decision on whether to prosecute, ordinarily made by the prosecutor (U.S.), serves both as a safeguard to insure that individuals are not prosecuted when adequate evidence is lacking or when sound policy reasons dictate to the contrary and also as a screen against the system becoming clogged with insignificant cases."

made upon evidence which, if reviewed, might not be considered of sufficient weight to subject the suspect to prosecution.[1] Little control is exercised by the Crown Attorney over the police decision to proceed.[2]

Abdication, by the Crown Attorney, of the responsibility for the initial prosecuting decision has been criticised.[3] Police emotional attachment to the case is not conducive to a disinterested or independent judgment whether a prosecution is warranted by the facts. In addition, the decision not to invoke the criminal process against a person is best made by

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[1]See LaFave, ibid., p. 32. At p. 188 LaFave suggests that the police may arrest a person in order to take him into custody "because it is thought that by conducting an in-custody investigation further evidence will be found which will either clear the suspect or provide an adequate basis for prosecution."

[2]It has been suggested by the writer, March 1967, Symposium Police Practices in Canada, Quebec Society of Criminology, University of Montreal, unreported, that if charges laid by the police were screened by a Crown Attorney in order to assess the sufficiency of the evidence needed for a conviction on that charge, the court case load would be decreased by fifteen per cent, and the number of convictions would correspondingly increase by fifteen per cent. For only those cases would proceed where, in the judgment of a Crown Attorney, trained in the law, the evidence was sufficient to support a conviction for that offence. Under these circumstances, those cases that eventually proceeded to trial would more likely result in a conviction.

[3]Foote, *Problems of the Protection of Human Rights in Criminal Law and Procedure*, Santiago, Chile, May 19-30, 1958. [U.N. Doc. TE 326/1 (40-2)]

the prosecutor rather than the police.[1] Those Crown Attorneys who are designated special prosecutors, or those who take responsibility for a limited area of prosecutions,[2] examine the sufficiency of the police evidence prior to the laying of the charge and may even assist the police in the wording of the appropriate charge. Generally the prosecutorial advice at the pre-charge stage is conditional on the police decision to seek the advice of the Crown Attorney. Crown attitudes to, and relations with the defence and the accused are largely determined by the point in time when he first participates in the accusatorial process. It was observed that those Crown Attorneys who participated in advising the police at pre-charge stages and who examined the evidence prior to the laying of the charge, were more partisan toward the police and less critical of police practices and pressures.

It may be suggested that it is not the Crown Attorney's

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[1]Goldstein, *Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Criminal Justice*, 69 Yale L. J. 543 (1960).

LaFave, op.cit., suggests at p. 48, "sometimes the criminal process is not invoked against a person guilty of criminal conduct because it is felt that the resultant risk to society is less than the harm which would result to the defendant and his family if prosecution were undertaken ... One of the facts of the case which often indicates that excessive harm to the offender would result is that of his standing in the community as a respectable citizen. The very fact of an arrest may do substantially more harm to him than it would to the usual criminal suspect." He suggests that thepprosecutor and not the ppolice are best equipped to render the policy decision involved.

[2]This is only done in non-routine cases, those which pose difficult questions whether the offence has been committed and the questions of law, in that regard, are complex. This is particularly true in cases of 'white-collar' crimes: bankruptcy, fraud and larceny.

function to participate at these early pre-charging stages. It is just that remoteness, encouraged by the Crown Attorney's practice of not supervising police decisions to prosecute, that insures his impartiality at trial. For if the Crown Attorney, in screening charges, renders the decision to prosecute after having reviewed the evidence, he might become convinced that the evidence is sufficient for a conviction and prosecute with more partiality and interest in proving his original assessment correct. His impartial attitude at trial, might accordingly be affected.

C. Bail

The decision whether bail should be granted and the determination of the amount required is, in law, the sole function of the judge.[1] In practice the judge often accepts the suggestion of the Crown Attorney for the judge has, at this stage, no independent source of information. The Crown's recommendation is not the product of independent information relating to the accused's roots in the community but is based on a general rule of thumb assessment of the seriousness of the charge, the amount of bail traditionally

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[1]Code S.S. 463, 464, and see *Re Sommervill's Prohibition Application*, (1962), 38 W.W.R. 344 at p. 352 "The agents and officers of the Department of the Attorney-General have the right on any such application to make such representations as they see fit to the presiding magistrate in court, but they do not have 'a scintilla of right' to hinder or delay the making of the application or to instruct a magistrate as to what his decision should be in any judicial matter." See also cases cited supra p. 28, note 2.

required for a charge of that nature, the present policy of the Crown Attorney's office, and the advice of the police officer.[1]

The one criterion recognized, in law, for determining the requirement and amount of bail, is the likelihood that the accused, if released on bail, will appear voluntarily in court at the time of his trial.[2] The factors which influence the Crown Attorney's recommendation in regard to bail are the following, in order of importance; the police recommendation, the accused's criminal record, the seriousness of the offence, the likelihood of the commission of further offences if the accused is released on bail, the likelihood of the accused tampering with witnesses if released on bail, the accused's roots in the community, and his physical appearance.

Failure to appear, it seems, is not considered, by the Crown Attorneys, as the only risk of pre-trial liberty. There is the added concern that a known criminal will commit further crimes while awaiting trial if free on bail. For certain youthful offenders, a short period of pre-trial de-

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[1]See generally, for an excellent account of bail practices in Canada, Friedland, M., *Detention Before Trial*, Toronto, University of Toronto Press, 1965.

[2]For a statement of the principles in the granting of bail, see *R v. Wing*, [1964] 3 C.C.C. 102, disapproving *R v. Henderson*, (1963) 45 W.W.R. 55 and see also Rodway *and Okipnik v. The Queen*, (1964) 44 C.R. 327 and *R v. Johnson's Bail Application*, (1958) 26 W.W.R. 296, 29 C.R. 138, 122 C.C.C. 144.
See also cases cited at p. 28, supra, note 1.

tention is often considered as a helpful 'taste of jail'. particularly if it is likely that when convicted, the offender, because of his youth, will receive a suspended sentence. Pre-trial detention is viewed by some Crown Attorneys as a useful inducement for guilty pleas. Rather than spend weeks or months in prison awaiting trial the accused may enter a plea of guilty rather than risk conviction at trial.

Restrictions upon an accused's freedom prior to trial and prior to a judicial assessment of his guilt, suggest that a sanction is imposed on a man, presumed innocent, before any assessment of blameworthiness. Pre-trial imprisonment is a major sanction, for it impedes an accused's preparation for trial; it may destroy his family life, his employment and his reputation.[1] Imprisonment before trial is only supportable when there is a real risk that the accused will deliberately subvert the orderly processes of criminal justice, by absenting himself at the time and place

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[1]There is, in addition to the injustice of imprisonment imposed prior to trial some evidence that pre-trial imprisonment affects the success of the trial itself and is reflected in the sentence imposed. "The appearance and demeanor of a man who has spent days or weeks in jail reflects his recent idleness, isolation and exposure to the jailhouse crowd. He is apt to be unshaven, unwashed, unkempt and unhappy as he enters the courtroom under guard. How subtly do these factors interweave with all the legitimate but unknowable elements of the sentencing decision? A judge's right to base findings of fact on witness 'demeanor' is unchallenged: is he immune from the same reflex action in sentencing?" Wald, P., *Pre-Trial Detention and Ultimate Freedom: A Statistical Study - Forward*, 39 N.Y.U.L. Rev. 631 at 632 (1964). And the important study itself, Rankin, A., *The Effect of Pre-Trial Detention*, 39 N.Y.U.L. Rev. 641 (1964).

appointed for the trial.

> "It is antithetical to our conceptions of justice to permit pre-trial detention to be used as a kind of informal punishment in advance of (or instead of) a formal determination of guilt and sentence. To speak of the possibility that the accused may commit further crimes if left at large begs the question, since it has not yet been determined that he has committed any crime at all."[1]

D. The Plea of Guilty - The Withdrawal and Reduction of Charges

> "When a prosecutor reduces a charge it is ordinarily because there has been 'plea-bargaining' between him and a defence attorney .... There is no way of judging how many bargains reflect the prosecutor's belief that a lesser charge or sentence is justified and how many result from the fact that there may be in the system at any one time ten times as many cases as there are prosecutors or judges or court-rooms to handle them, should every one come to trial. In form, a plea bargain can be anything from a series of careful conferences to a hurried consultation in a court-house corridor. In content it can be anything from a conscientious exploration of the facts and dispositional alternatives available and appropriate to a defendant, to a perfunctory deal .... Plea-bargaining is not only an invisible procedure but, in some jurisdictions a theoretically unsanctioned one."[2]

Guilty pleas, for consideration, play a large part in the administration of criminal justice in Metropolis. The reduction of a charge to a lesser included offence and the reduction of the number of charges, as a concession for a plea of guilty, is a major characteristic of the prosecutorial

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[1]Packer, supra, 43.

[2]United States, Presidents' Commission on Law Enforcement and the Administration of Criminal Justice, *The Challenge of Crime in a Free Society*, report Feb., 1967, Washington, D.C., G.P.O. at p. 11.

process. The continuous flow of guilty pleas and the corresponding avoidance of time, expense and the uncertainty of trial, is regarded by police, Crown Attorneys, defence lawyers and even judges as an important factor in the efficient functioning of the criminal courts.

The Crown Attorney makes a series of interrelated discretionary decisions at a number of stages in the pre-trial process. The interview data suggest some of the factors which influence the exercise of prosecutorial discretion. Under what circumstances will a Crown Attorney act to reduce or withdraw charges? The reduction must be actively sought by the defence as the Crown Attorney will rarely initiate negotiations. The Crown Attorney will gauge his chances for success at trial on the charge as laid, against the speedy disposition of the case by a guilty plea on a reduced charge. Considerations which influence the Crown Attorney's decision to exercise his discretion to reduce the charge are the following; when he is doubtful that the accused can be convicted on the more serious charge, when the police have over-charged on the basis of the evidence available,[1] when he is doubtful of jury reaction because of mitigating circumstances in the case, the skill of the lawyer who will be defending the accused at the trial, the un-

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[1]Newman, ibid, suggests at p. 79 that the police often file maximum charges in order to provide 'leverage' for a guilty plea and that "only real issue is the range of that reduction."

reliability of certain Crown witnesses, the accused is a first offender with no criminal record, the accused offers to exchange information for the charge reduction, the provision for a mandatory sentence if the accused is convicted of the higher offence,[1] on compassionate grounds,[2] to facilitate probation in order that the accused make restitution to the victim.[3]

The decision to withdraw a charge completely may be exercised in the following circumstances; private complaints arising out of marital unrest, where the accused is a young first offender, when the accused is a respectable citizen and the notoriety of the charge may seriously harm his reputation, where there is no evidence to support the charge or any included offence, in exchange for important information, in offences committed by women during menopause, for psychiatric reasons when accused is under treatment.

It is the practice in charges involving private complaints to address the complainant's request, that the charge be withdrawn, to the judge in open court. This practice is followed in order to minimize the further laying of charges in private marital disputes. Also the court may

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[1]Impaired driving, Code S. 223, Second offence there is a mandatory prison sentence. Rather than reduce the charge the Crown Attorney may agree not to introduce before the court, the accused's record for the same offence.

[2]When the accused has stolen bread to feed his family, or similar compassionate grounds.

[3]If the accused is sentenced to prison, the victim may suffer considerable financial hardship, if on probation he may be ordered to make restitution.

scrutinize with some care private complaints withdrawn because restitution has been made. The Judges in the criminal courts are reluctant to act as a 'collection agency'.

The actual disposition of the case on the guilty plea, whether by sentence, probation, or fine, is usually not the subject of negotiation.[1] The Crown Attorney may, in certain circumstances, agree with the defence not to oppose the defence submissions with regard to sentence. The notoriety a particular case has gained in the press may force it to trial where otherwise a compromise on a plea of guilty would have been reached.

The legislation is silent on the issue of reductions and withdrawals and yet Crown Attorneys feel free to reduce or withdraw charges on their own initiative. There are, however, circumstances in which a prosecutor will seek the approval of the senior Crown Attorney before agreeing to a reduction or withdrawal. In a serious charge, such as murder, or in cases of public notoriety, the prosecutor will normally seek senior approval before exercising his discretion. A particular problem is presented by police requests for withdrawals based on a proposed exchange of information by the accused. In order to minimize the purchase of immunity by known criminals, the police request is usually directed to the senior Crown Attorney.

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[1]There are exceptions. When a strong reciprocal relationship exists between the Crown Attorney and the defence lawyer, they may visit the Judge in Chambers and suggest that an agreement has been reached on a plea of guilty if the sentence is likely to be within suggested limits.

E. Disclosure

The lack of legislative provisions allows the Crown Attorney to exercise wide discretion in terms of pre-trial disclosure. There is little in the case-law or literature which describes the factors which influence Crown disclosure. The interview data suggest that the quality of Crown-defence reciprocal relationships are a determining factor in the exercise of Crown discretion within the skeletal structure posited by the legislative rules and the case-law. Access to Crown pre-trial disclosure and, to a lesser extent, to the negotiated plea is limited to those lawyers familiar with the informal processes and part of the reciprocal exchange relationship. Defence lawyers, who are outside these relationships cannot successfully represent their clients in pre-trial negotiations. The unrepresented accused has no access to pre-trial negotiations and his subsequent representation at trial subjects him to adversarial processes by-passed by others.

F. The Quasi-Judicial Role of the Prosecutor

The statements of Baron Pollock, Sir John Simon, Mr. Justice Tachereau, Mr. W.B. Common and Mr. Christmas Humphreys describe the quasi-judicial role of the Crown Attorney as one which "excludes any notion of winning or losing[1]." The Crown Attorney ought to regard himself as

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[1]These statements have been cited, in extenso, supra at pp. 36, 37.

part of the court rather than as an advocate and his primary function is to see that justice is done.

If the adversary system culminates in a trial that pits the skills of one lawyer against another, is it more realistic to assume that this clash will breed a certain spirited debate? Is there not also that fighting spirit present which drives a man to seek success in combat and victory for his team? Are these motives not engendered by the adversary system and is it not psychologically unlikely that such a spirit will disappear in the court-room? If it appears in the court-room, is that the first stage in a spirited adversarial combat or is it the last? Does this spirit of combativeness and natural desire to win emanate from the Crown Attorney's prior judgment about the guilt of the accused made on the basis of police enthusiasm for conviction, or his own? Some few Crown Attorneys seem to acknowledge the detached and quasi-judicial standard as a valid theoretical principle. But even those who acknowledge the standard recognize the inaccessibility of a God-like detachment in an adversarial arena. Most acknowledge that they enjoy a good fight.

CONCLUSION

The purpose of this research has been to heighten visibility and to answer the question: 'Does the legal norm posit one theory of prosecutorial behaviour and actual practice reveal another?' It is only when practices are revealed in the light of legal principles that we are realistically able to consider alternatives. Once aware of the spectrum of prosecutorial practices, the legislature may prescribe certain criteria to guide the exercise of prosecutor discretion. The recognition by legislative authorities of prosecutorial powers and the dangers of informal processes may initiate a re-evaluation of the processes. Such an evaluation may lead to the development of basic tenets of defence-prosecutorial ethics[1] or principles applicable to the administration of criminal justice with corresponding administrative controls.

The empirical data suggests that the prosecutorial values and processes resemble more administrative and managerial values than they do adversary and judicial goals. The implementation of legislatively approved criteria may represent a first step in the prosecutorial learning process which may eventually lead to a high level of conformity

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[1]See *Code of Ethics and Principles for the Prosecution and Defence of Criminal Cases*, adapted in 1941 by the New York County Criminal Court's Bar Association, reported by Daru, in *The Code of Ethics and Principles for the Prosecution and Defence of Criminal Cases*, Alabama Lawyer 39 at pp. 49, 50,51 & 52.

OBJECTIVES

1. To discover the Crown Attorney's attitude toward his role as a Crown Attorney.

2. To discover the background, schooling, legal experience and social philosophy of Crown Attorneys in order to better understand what part these influences might play in forming attitudes to his present role.

3. To discover the Crown Attorney's attitudes toward the police, defence lawyers and the judges with whom he comes into daily contact and how these attitudes affect his conscious or unconscious decision-making practices.

4. To discover the decision-making processes and exercise of discretion of Crown Attorneys at specified points in the pre- and post-trial processes.

    (a) Arrest
    (b) Bail
    (c) Plea-Bargaining
    (d) Sentencing

5. To discover the Crown Attorney's attitudes toward an accused's rights, protections and person.

    (a) Right to prompt arraignment
    (b) Interrogation
    (c) Right to counsel
    (d) Legal aid
    (e) Characterization of accused

6. To discover the external pressures, influences and controls that affect the day-to-day performance of the Crown Attorney and his attitudes to these pressures.

    (a) Press pressures
    (b) Political pressures
    (c) Legislative pressures

7. To discover the internal pressures and influences that affect the day-to-day performance of the Crown Attorney and his attitudes to these pressures.

    (a) Superiors
    (b) Court system
    (c) Administration
    (d) Case-Load

Appendix #2

OBJECTIVES

1. To discover the Crown Attorney's attitude toward his role as a Crown Attorney.

2. To discover the background, schooling, legal experience and social philosppphy of Crown Attorneys in order to better understand what part these influences might play in forming attitudes to his present role.

3. To discover the Crown Attorney's attitudes toward the

   (a) police
   (b) defence lawyers, and
   (c) judges with whom he comes into daily contact, and how these attitudes affect his conscious or unconscious decision-making practices.

3A. To describe the texture of the Crown Attorney's interaction with the police, defence lawyers and the judges with whom he comes into daily contact, and how this interaction affects his conscious or unconscious decision-making practices.

4. To discover the decision-making processes and exercise of discretion of Crown Attorneys at specified points in the pre- and post-trial processes.

   (a) arrest and charge
   (b) bail
   (c) plea-bargaining - police withdrawals -
   (c) withdrawing charges
   (d) sentencing
   (e) timing of Crown participation

5. To discover the Crown Attorney's attitudes toward an accused's rights, protections and person.

   (a) right to prompt arraignment - delays
   (aa) detention prior to trial
   (b) interrogation
   (c) right to counsel
   (d) legal aid
   (e) characterization of accused

6. To discover the external pressures, influences and controls that affect the day-to-day performance of the Crown Attorney and his attitudes to these pressures.

   (a) press pressures and public relations
   (b) political pressures
   (c) legislative pressures
   (d) police pressure

7. To discover the internal pressures and influences that affect the day-to-day performance of the Crown Attorney and his attitudes to these pressures.

    (a) superiors
    (b) court system
    (c) administration
    (d) case-load

8. A. Informal procedures

    B. Formal procedures.

Should defence counsel be present to represent an accused prior to trial? Why?
Do you feel that the arrangements made for legal aid are adequate?

What type of negotiations might you enter into with defence counsel when an accused wishes to plead guilty to one charge, if you will withdraw another?
What are the factors that you might consider before acquiescing in this request?
Would you use your own discretion or check with a superior?
Once a charge is laid under what circumstances might you not proceed; under what circumstances might a charge be withdrawn?
Who would make these decisions - to drop one charge and to proceed with another, or to accept a plea of guilty to one charge and drop the others?
What factors influence you in making these decisions?
Are there any offences where it is more common to agree to a reduction of the charge on a plea of guilty? i.e. Where there is a mandatory minimum sentence (theft from mails).
Under what circumstances when an offence has been committed, might a charge not be laid -

once laid, withdrawn
once laid, nolle prosequi

- set out hypothetical - university medical student - theft of hubcap (smoking marihuana) would prejudice his career, etc.

Under what circumstances might you agree with the defence as to submissions to be made on sentence?
Information by accused? (informer)

In what areas do you exercise your discretion? (sentencing? bail? plea-bargaining? charges?)
In what situations might you feel you should check with a superior?
What are the factors that influence your decision to oppose bail in a particular case?
How do you find judges react to the Crown's submissions regarding bail?
Do they follow your submission? If not, why not? If they do - why do you think they do?

What are the benefits of having a man in custody pending his trial?
Are there any problems - that might delay the prompt arraignment of an accused?
Is the present bail system adequate?

If you were asked to advise a young lawyer who wished to become a Crown Attorney - what are the qualities or characteristics a Crown Attorney should have in order to do an effective job?

What are the barriers, if any, to effectively carrying out your function?
Do defence lawyers limit you? In what way?
Does legislation limit you? In what way?
Do the police limit your effectiveness? In what way?
What is your opinion of the quality of the bench before whom you practise?
What are your relations with the bench? (good? bad? - why?)

What made you decide to become a Crown Attorney?
Age.
Marital status - children.
Education.
Attitudes toward legal education.
What did you do after graduation?
Number of years in practice.
Were you satisfied with practice before entering the Crown Attorney's office. - Probe.
When did you join the Crown Attorney's office?
How many years as a Crown Attorney.
What kind of work did you do when you were first appointed?
For how long? Training process?
What type of work do you do today as a Crown Attorney?
What are your responsibilities? How do you spend your day?
Salary and attitude to income.
What do you do to relax? Pastimes. Participation in public life.

What pressures do you have to deal with as a Crown Attorney - that a lawyer would not normally have to face?
Political pressures?
Press coverage - how might that influence you? - the case; your decision to accept a plea to a reduced charge. How does an awareness of public relations affect you in carrying out your job?
Any pressures to produce - convictions - by superiors - by police.
What pressures might the police attempt to exert?
Pressures from the court - judges.
Administrative pressures - case-load.
How many cases do you normally handle in a week?

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