

ROLE OF THE PROSECUTOR: FAIR MINISTER OF JUSTICE WITH FIRM CONVICTIONS

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Your duty, Mr. Prosecutor, is to seek justice, not to act as a timekeeper.¹

INTRODUCTION

The above statement was made by Judge Learned Hand of the United States Court of Appeals during the early 1950's conspiracy case² in which Julius and Ethel Rosenberg were sentenced to death for agreeing with others to give the secret of the atomic bomb to Russia. After President Eisenhower had denied their petition for clemency, defence counsel sought relief from the death sentence which only the Supreme Court of the United States could grant. When the prosecutor pointed out that the proceedings had lasted for years, and that it was time they came to an end, he was promptly reminded of his proper role in the administration of justice. In granting a stay of execution on the ground of possible prejudice, Judge Learned Hand maintained:

There are some Justices on the Supreme Court on whom the conduct of the Prosecuting Attorney might make an impression.³

Unfortunately for the Rosenbergs, and for their devoted counsel Emanuel and Alexander Block, the prosecutor's conduct did not make enough of an impression on the Court to save them from the electric chair on June 23, 1953.

Over a quarter of a century later, despite capital punishment having been abolished in Canada and in most of the States, our lives are still gravely affected by the potentially explosive means to which government may resort in order to prove its case. The present decade has witnessed analogous "political" trials in which the Department of Justice has relied on "the prosecutor's darling", i.e., conspiracy, to keep opposition to certain foreign and domestic policies of the government in check.⁴ Prosecution, like atomic energy, may be a powerful tool to promote justice or, where improperly handled, a weapon lethal to the fabric of a balanced criminal justice system. In other words, the prosecutor's discretionary power is such as to be capable of being made into an instrument for justice or an instrument for injustice.⁵ The Rosenberg prosecution for instance, is viewed by those of the Louis Nizer school as having been conducted properly. On the other hand, some feel that the real crime lay *inter alia* in their prosecution:

Contrary to Mr. Nizer's conclusions, the Schneirs' study suggests that the Government executed the Rosenbergs for a crime that they did not commit and for a conspiracy that

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1. Nizer L., *The Implosion Conspiracy* (1974) 455.

2. *Rosenberg v. U.S.* (1953), 346 U.S. 273.

3. *Supra* n. 1.

4. Reference is made to the Chicago Seven Trial in 1969-70, the Harrisburg Seven Trials in 1972, and the Ellsberg Russo and Gainesville Eight Trials in 1973. At the State level, were the trials of Bobby Seale and Ericka Higgins in Connecticut in 1970-71 and the trial of Angela Davis in 1972: D.E. Wilkes Sr., Book Review Clinizer, *The Implosion Conspiracy*, (1973), 8 *Georgia L. Rev.* 279 at 282-283.

5. Roscoe Pound has referred to the prosecutor's discretion as one of "a great series of mitigating agencies whereby individual offenders may be spared or dealt with leniently.": Pound R., *An Introduction to the Philosophy of Law* (1954) 66.

Cf. Professor Vorenberg of Harvard University, who favors narrowing the discretion of criminal justice officials, defines the power as a "residual concept - the room left for subjective judgment by the statutes, administration rules, judicial decisions, social patterns and institutional pressures which bear on an official's decision.": J. Vorenberg, "Narrowing the Discretion of Criminal Justice Officials" (1976), 4 *Duke L.J.* 651 at 654.

existed only in J. Edgar Hoover's press releases, in the prosecution's aspirations, and in the bizarre fantasies of Harry Gold.⁶

Whether or not the particular prosecution of the Rosenbergs was proper is not for discussion here. One issue that does arise from such a case, however, and that is very much alive today in the Canadian criminal system, is the degree to which "psychological awe of government counsel"⁷ stems from the very nature of the prosecutor's role, both in theory and practice.⁸

It is said that our system of jurisprudence is predicated on the rule of law and not of men. Yet the making, administering, and interpreting of law involves a continual exercise of discretion in order to balance competing interests;⁹ and discretion stems from the rule of men. The men who possess the greatest part of discretionary power in our judicial system are the prosecutors.¹⁰

The present writer is concerned with the ideology and conduct of Attorneys General and prosecutors who exercise discretion on a daily basis in the course of administering criminal justice in Canada. In principle the exercise of prosecutorial discretion should call into play all the leniency and fairness of a minister of justice.¹¹ Thus the prosecutor's duty is to seek justice. Yet the ends of justice often demand of the prosecutor a firm adversarial stance.¹² Since efficiency and expediency are germane to any viable system of justice,¹³ Crown Counsel may indeed be called upon to perform in his capacity as time keeper. Therefore the role of the prosecutor involves aspects of both a quasi-judicial and adversarial nature.

At first blush these two aspects seem to be in conflict. Part and parcel of the prosecutor's function in the adversary system is to advocate to the best of his professional ability the case for the Crown. Yet, as a sort of minister of justice, he is asked to do so in an impartial manner. That is not unlike asking a professional chess player to put his heart and soul into making efficacious moves for one side, consistent with all the rules of the game,¹⁴ while at the same time urging that he not be concerned with its outcome. Furthermore, not only must he be indifferent to the final result and devote himself to the making of fair prosecutorial moves, but he must be *seen* to do so in order to maintain the

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6. J.H. Faulk, Book Review C.L. Wizer, *The Implosion Conspiracy* (1973), 51 *Texas L.J.* 1026 at 1032. The author declares there were allegations that the prosecution both suppressed evidence and used forged evidence with respect to the testimony of Harry Gold and David Greenglass. If the two gave false testimony at the trial, the prosecution had no case.
 7. *Supra* n. 1, at 200.
 8. W.B. Common, former Attorney General of Ontario for many years, describes the Crown Attorney as the "Key man in law enforcement", W.B. Common, "The Crown Prosecutor - Key man in Law Enforcement" (1966), 14 *Chitney's L.J.* 12.
 9. "By discretion, one refers of course to the power to consider all circumstances and then determine whether any legal action is to be taken. And if so taken, of what kind and degree, and to what conclusion."; Schwartz, M.L., *Cases and Materials in Professional Responsibility and the Administration of Criminal Justice* (1967) 13.
See also, Davis K., *Discretionary Justice: A Preliminary Inquiry* (1969) 29, who defines discretion as decisions made without "the application of known principles or laws."
 10. G.F. Thorne, "The Rural Prosecutor and the Exercise of Discretion" (1976), 12 *Crim. L. Bulletin* 301.
 11. In the words of Compton J., prosecutors "are to regard themselves as ministers of justice, and not to struggle for a conviction nor be betrayed by feelings of professional rivalry ..."; *Regina v. Paddick* (1865), 176 E.R. 662 at 663.
 12. Lord Eldon in *Ex Parte Lloyd*, [1882] Mont. 70, stated that "truth is best discovered by powerful statements on both sides of the question." *See also*, B.A. Grosman, "Conflict and Compromise in the Criminal Courts: New Direction in Legal Research" (1968), 11 *Criminal Law Quarterly* 292 at 294: "The trial process encourages each side to maintain polar positions and a combative or at least a competitive spirit."
 13. C.P. Bubany, F.F. Skilleen, "Taming the Dragon: An administrative Law For Prosecutorial Decision Making" (1975), 13 *Am. Crim. L. Rev.* 473 at 495: "Unfortunately, expediency seems to have become the primary objective of the criminal justice system. ... The protections of our advisory system cannot ensure consistency and impartiality in the non-adversary milieu of the pretrial stages."
 14. *Cf. Bull, infra* n. 51; Bowen-Colhurst, *infra* n. 45; *Contra* Grossman, *infra* n. 50.

appearance of justice.¹⁵ Obviously such a notion of fair play compels him to refrain from letting out a cheer, for example when the other's king is in jeopardy; but whether or not he has a duty as a quasi-judicial officer to bring helpful defensive moves to the attention of obtuse or inexperienced defense counsel, is not entirely clear.

Questions arise as to the extent to which Crown Counsel should conduct criminal proceedings as a fair minister of justice without undermining the adversary process upon which our legal system is firmly based. At what point does the Crown Attorney as advocate step out of bounds with respect to notions of impartiality and fairness? To what length, according to the legal powers vested in him, *may* the prosecutor go to obtain a conviction? To what extent *should* he go, in accordance with professional and personal ethics? In light of the operational realities germane to the Canadian system of criminal justice, one wonders just how far the prosecutor *does* go to obtain a conviction.

NATURE OF THE OFFICE OF ATTORNEYS GENERAL AND PROSECUTORS

An examination of the nature of the office of the Attorneys General and prosecutors shows a tremendous discretion to conduct criminal proceedings.¹⁶ But all the discretionary powers in the world are of little use to the prosecutor unless he is free to enter into the exercise of them. In one sense then, the scope of effective prosecutorial discretion depends on the degree of independence enjoyed by the one who is to exercise it.

The *British North America Act, 1867*,¹⁷ establishes that the administration of criminal justice is a provincial matter and, therefore, it falls within the responsibility of the provincial Attorneys General and those delegated with the powers of prosecution. Keith Turner, of the Manitoba Law School in 1962, had the following to say:

A decision by an Attorney General or prosecutor to prosecute or not to prosecute, ... which calls for the exercise of a discretion, involves considerations which go to the very root of what may be termed 'the notions of justice of English-speaking peoples.'¹⁸

The thrust of Turner's message is that the prosecutor's role is to ensure that the accused receives a fair trial in accordance with The *Canadian Bill of Rights*,¹⁹

15. "Justice should not only be done but should manifestly and undoubtedly be seen to be done." See *Res v. Sussex Justices ex parte McCarthy*, [1924] I.K.B. 256 at 259. *per* Hewart L.C.J.. Cf. Klein, *infra* 47.
16. The late Henry H. Bull (who was Crown Attorney in the County of York, Ontario, in 1962) did not espouse a concept of wide discretionary powers, but only of prosecutorial discretion during the actual trial: H.H. Bull, "The Career Prosecutor of Canada" (1962), 53 *J. Crim. Lic. and P.S.* 89 at 95. Since the early sixties the notion of discretion has been broadened, and as a result there has been a recent re-thinking of the role of the prosecutor. The issue is no longer whether prosecutorial discretion exists, but the extent to which it should, or does exist. Given that the machinery of prosecution may be a powerful tool or weapon, and given the low visibility of its exercise, "the days of uncontested prosecutorial discretion are nearing an end." G.F. Thorne, "The Rural Prosecutor and the Exercise of Discretion" (1976), 12 *Crim. L. Bull.* 301 at 305.
17. 30 *Vict.*, c. 3, s. 92(14) (U.K.).
18. K. Turner, "The Role of Crown Counsel in Canadian Prosecutions" (1962), 40 *C.B.R.* 439. The existence of broad discretion on the one hand enables flexibility and creates the opportunity for individualized justice. On the other hand it creates potential for arbitrary decision-making and unequal treatment of defendants in similar situations: S.J. Cox, "Prosecutorial Discretion: An Overview," (1976), 13 *Crim. L. Rev.* 383 at 397. For example, the varying degrees of prosecution applied to the participants in the Rosenberg Conspiracy, and indeed the non-prosecution of Ruth Greenglass despite her confession, give rise to the question: "Should the prosecutor have the power to decide that one defendant is more important than another?" *Supra* n. 9, at 27.
19. *Canadian Bill of Rights*, R.S.C. 1970, Appendix III.

and this brings to mind the amount of independence enjoyed by provincial Attorneys General.

In Canadian theory, the provincial Attorney General is supposed to exercise his criminal jurisdiction entirely free from political influence.²⁰ His independence in controlling prosecutions is not unlike that of the Attorney General in England.²¹ The rationale for allowing prosecuting authorities plenty of autonomy is that justice can best be achieved by deciding on the merits of the case, rather than as a result of political pressures. Thus it is suggested that the exercise of discretion based only on the merits of the case is more likely to ensure a fair trial than prosecutions affected by political considerations. Turner aptly describes the office of the Attorney General:

A present-day Attorney General or prosecutor is not a servant of the Crown, a servant of his party, a servant of the government, a servant of Parliament, or a servant of the rigour of the law. Rather he is a servant of justice.²²

Given that the Attorney General, as principal, enjoys a broad discretion and wide control over criminal proceedings, it would seem to follow that in exercising his duties as the local agent of the Attorney General, the prosecutor should likewise enjoy a reasonable degree of control over the handling of cases. How much discretion resides with the prosecutor as local agent for administering justice? In one sense he appears to have more say in the practical workings of the system than does his principal, because the prosecutor's *de facto* exercise of discretion at the local level has an immediate effect on the control of prosecutions. An argument can be made that the prosecutor's role as agent may restrict his independence and consequently his effective exercise of discretion, because in another sense, his discretionary powers are ancillary to those of his principal to whom he is accountable as a creature of statute. Morris Manning comments on this as follows:

After all, it is argued, since the Crown Attorney is the agent of the Attorney General ... and since the Attorney General is a member of the Government and a Cabinet Minister, then he is answerable for his agent's actions in the Legislature and this process should be sufficient to safeguard against any abuse. In theory this may well be the case. In practice it is unrealistic to think that matters practised on a daily basis in many parts of the Province will be revealed, let alone questioned in the Legislature.²³

As ministerial accountability is not a sufficient safeguard to control the abuse of prosecutorial discretion, Manning maintains that the ultimate power should rest in the discretion of the courts and not in the prosecutor.

20. *But compare* comments on his American counterpart: "The most powerful men in our criminal justice system [in the United States] are prosecutors. They are politicians first, and law enforcement officials a distant second." Rosenblatt S., *Justice Denied* (1971) 93.

21. On account of such theoretical independence, the Canadian prosecutor is professed to remain beyond the sort of reproach heaped on his neighbor to the south: "We must remove our [American] prosecutors from politics. They must become law enforcement specialists not just lawyers on the make for higher office." *Id.* at 132.

22. K. Turner, *supra* n. 18, at 440.

23. M. Manning, "Abuse of Power by Crown Attorneys" (1979), *L.S.U.C. Special Lectures* 571 at 611. The author concludes at 615: "A system of justice cannot say to the prosecutor, 'do not be abusive', and which has not the means to sanction cases of abuse is merely a system of prosecuting people and not one of administering justice."

THEORETICAL POWERS AND DUTIES

As an agent for the state and for the Crown, the prosecutor holding public office is entrusted with tremendous powers in the administration of justice:

The prosecutor occupies a quasi-judicial position which the courts, so far, have not seen fit to control. That position administers power.²⁴

Some of the more important powers of Crown Counsel are:

- (a) the power to detain in custody;
- (b) the power to utilize police forces (*a fortiori* in the U.S.);
- (c) the power to prosecute;
- (d) the power to charge multiple offences and multiple accused persons;
- (e) the power to negotiate pleas;
- (f) the power to disclose or not disclose evidence prior to trial;
- (g) the power to prefer indictments;
- (h) the power to decide to proceed summarily or by indictment on hybrid offences;
- (i) the power to stay proceedings; and
- (j) the power to appeal at no personal expense.

With respect to prosecutorial powers, Morris Manning comments as follows:

... [S]o long as we have an imperfect system which allows police to lay the wrong charge, so long as a weak case can be allowed to proceed up to trial, as long as the prosecutor has a discretion to overcharge, plea negotiations or bargains should be totally acceptable. The problem arises because of the role of the prosecutor. He is an administrator trying to process cases, a judge who attempts to divine the best interests of the public, and a legislator where he tries to implement realistic and necessary changes which Parliament fails to provide.²⁵

Accordingly, the prosecutor has his role cut out for him. Manning states that judicial intervention may be necessary to keep prosecutorial discretion from becoming an exercise in abuse:

No one can dispute that the prosecutors have powers which Parliament has granted them. On the other hand, no one can dispute that prosecutors have powers which the courts have "given" them, by a recognition of a common law right to act and their own decision to avoid controlling the actions of the prosecutors. The real issue is not whether these powers exist, but rather what remedy the courts could provide if these powers are abused or misused.

One can conclude that a solid foundation for the exercise of discretion is provided by the legal powers in Crown Counsel. It is "not without significance

24. *Id.* at 588. The issue raised here is: where does discretion, properly exercised, end and abuse of power begin? Manning maintains that it is an abuse of power for the prosecutor to identify with the police to the point of sharing the sole aim of securing a conviction. See also, *supra* n. 18, at 488.

25. *Supra* n. 23, at 593.

26. *Id.*, at 612.

that it is the Minister of Justice who is the Attorney General of Canada''.²⁷ The prosecutor is a servant of justice and not of government; and given the vast discretionary powers of the Minister of Justice, the prosecutor as representative of the Attorney General is virtually independent in his own locale. Therefore the Canadian prosecutor's powers provide sufficient scope for him to be *able* to engage in the role of a fair and impartial advocate of justice.

IDEOLOGY

Objection could be taken to the present writer's use of the term "impartial advocate" in that the words suggest a *prima facie* contradiction. It is submitted that the term is not inappropriate to describe the role of the Canadian prosecutor. The terms are reconcilable if one again envisions the notional chess player who is asked to skillfully advance the position of one side in accordance with the rules, without concerning himself with winning or losing. Instead he is to advocate each and every move on one side's behalf and possibly even to assist the other where this would promote fairness without unduly prejudicing the side he is asked to represent. Decisions as to when or how to assist the other party would be based on the exercise of his discretion, bearing in mind at all material times his role as impartial advocate. Thus, the object would not be to win, but to fulfill his designated role of eliciting the truth through the appropriate exercise of discretion at each relevant step in the proceedings.²⁸

A perusal of the legal literature on the role of the prosecutor reveals a similar duality of ideological and practical aspects. The guidelines of the *Code of Professional Conduct* stipulate *inter alia* that: the prosecutor "should encourage public respect for and try to improve the administration of justice"²⁹; "must discharge his duties ... with integrity"³⁰; and,

"when engaged as a prosecutor the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately...he should make timely disclosure to the accused or his counsel (or to the court if the accused is not represented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence".³¹

In the leading case on the subject, *Boucher v. The Queen*,³² Rand J. places limitations upon the length to which the Canadian prosecutor may go in order to obtain a conviction:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal

27. K. Turner, *supra* n. 18, at 440-441.

28. See *Rex v. Chamandy*, *infra* n. 39 and *Regina v. Forrester*, *infra* n. 41.

29. C.B.A. *Code of Professional Conduct*. (1975) 48.

30. *Id.*, at 1.

31. *Id.*, at 29.

32. *Boucher v. The Queen* [1955], S.C.R. 16 at 23-24.

proof of the facts is presented; it should be done *firmly* and pressed to its legitimate strength but it must also be done *fairly*. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. (Emphasis added.)

It is submitted that this properly depicts Crown counsel as a fair minister of justice with firm convictions. However it is by no means the only tenable view of his role.

Compare the style in which Sir Edward Coke used to prosecute. During the trial of Sir Walter Raleigh in 1603, A.G. Coke saw fit to address the accused with such expressions as:

“I will prove you the notorious Traitor that ever came to the bar”;

“Thou are a monster. Thou hast an English face, but a Spanish heart”;

“Thou viper; for I thou thee, thou Traitor”.³³

Hardly impartial. Indeed it appears A.G. Coke was absolutely convinced beforehand that defendants, like monsters and vipers, were to be presumed guilty beyond a reasonable doubt. Perhaps even more damning to the right of the accused to a fair trial than the prosecutor's inward assumption of guilt, is the outward manifestation of such with its consequent effects on the trier(s) of fact. The prosecutor who presumes a defendant's guilt though, neglects his role as an impartial advocate in the administration of justice.

The present day Crown Attorney should no longer resort to arguments purely *ad hominem* that could deprive the accused of his right to a fair trial.³⁴ The *Boucher* case underscores that while the prosecutor is free to exercise his discretion as to what witnesses to call for example, he must not resort to emotive reasoning unbecoming his role as a fair minister of justice:

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 (S.C.C.). 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 ... but he exceeds that duty when he expresses by inflammatory language his own personal opinion that the accused is guilty, or when his remarks tend to leave with the jury an impression 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.³⁵

Clearly the prosecutor's role involves a duty to be fair to the accused in the administration of criminal justice. Political, personal and private considerations must be set aside so far as the exercise of discretionary power is inherent in the office of the prosecutor. No matter how much pressure is put on him due to the heinous nature of an offence, the surrounding publicity,

33. K. Turner, *supra* n. 18, at 442.

34. A modern example of a situation in which public and political factors caused the prosecuting attorney to lose his aplomb is *Dupuis v. The Queen* (1968), 3 C.R.N.S. 75 (Que. Q.B., Appeal side). Dupuis, a respected Member of Parliament, was granted a new trial on a charge of conspiracy to commit a fraud upon the government because "... counsel for the Crown had sought to render the accused ridiculous and odious in the eyes of the jury and had succeeded in influencing them to the prejudice of the accused." *per* Montgomery J. at 75. In an annotation to the case (at 90) B. Clive Bynoe observes that the Court, in applying *Boucher*, is reiterating that prosecutors must "continually caution themselves against the ever present pitfalls they must avoid to assure an accused person has a fair trial."

35. *Supra* n. 32, at 16.

or the parties involved, the prosecutor must retain an inward sense of impartiality and display outward objectivity.³⁶

Another closely related pitfall that should be eschewed by Crown Counsel is the tendency to become too conviction-minded.³⁷ The English notion of the prosecutor as an equitable minister of justice³⁸ has been incorporated into the Canadian adversary process.³⁹ The goal of the adversarial or accusatorial system is the same as that of the continental or inquisitorial system: to elicit the truth. Both systems provide the accused with the right to a presumption of innocence and the right to remain silent.⁴⁰ Dealing with a question of abuse of process in the recent Supreme Court of Alberta (now Court of Queen's Bench) case of *Forrester*,⁴¹ Quigley J. emphasized that every safeguard should be provided by the prosecutor to ensure that the accused receives a fair trial:

It has always been a supposition in the administration of criminal justice that as a general rule "the prosecuting counsel is in a kind of judicial position". The idea of a contest between party and party should not be allowed to creep in where a prosecutor in a criminal case is concerned because he might then "forget that he himself was a kind of minister of justice": *R. v. Berens* (1865), 4 F. & E. 842, 176 E.R. 815.

Since our criminal justice system is firmly based on the adversarial concept of truth emerging from the heat of battle, it is debatable whether the idea of a contest between party and party can be said to be creeping in. *Seem* more likely what the learned judge is stressing here is that no matter how many prosecutions he undertakes, the Crown Attorney must refrain from taking on the role of an advocate out to win. In any event, what definitely emerges from Canadian jurisprudence, is the position of Crown counsel as a fair minister of justice in the adversary process.

THE RECONCILIATION OF IDEOLOGY WITH OPERATIONAL REALITIES

The image of the prosecutor as a quasi-judicial officer whose duty is not to win or lose,⁴² but to administer justice fairly, is just fine as far as ideology goes. But how far is that? An examination of relevant legal materials is instructive as to how far the prosecutor is empowered to, and how far he ought in principle, to go in the course of seeking justice. This does not however, say how far the Crown actually will go in practice. It is one thing to philosophize like the

36. Such discretion must be exercised solely upon grounds calculated to maintain, promote and defend the common good: K. Turner, *supra* n. 18, at 488.

37. The cases of *Boucher* and *Dupuis* emphasizing the impartiality of advocacy have their roots in *Regina v. Thursfield* (1838), 173 E.R. 490, *per* Gourney B. who stated: "The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the court in the furtherance of justice and not to act as counsel for any particular person or party"

38. Archbold, S.F., *Criminal Pleadings, Evidence and Practice* (2nd ed., 1949) 195: "Prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration rather than as advocates."

39. "It cannot be made too clear that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted, but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth." *per* Riddell, J.A. in *Rex v. Chamandy*, [1934] O.R. 208 at 212 (Ont. C.A.).

40. Unlike the continental system, the adversarial one does not permit an inference to be raised where the accused exercises his right to remain silent. Despite this theoretical difference, the practical effect may be much the same as exemplified by the trial of the Rosenbergs.

41. *R. v. Forrester*, [1977] 1 W.W.R. 681 at 688 (Alta. S.C.T.D.).

thirteenth member of the jury; it's a different game to behave like a bloodhound.

The emergence of the prosecutor as the central figure in the administration of criminal justice raises serious questions concerning the virtually uncontrolled exercise of his discretionary powers.⁴³ The doctrine of abuse of process aside, there is a real danger in the area of prosecutorial discretion if those that exercise it as such do not consistently practise what legal ideology is preached. The threat is not only to the individual accused, but goes to the very heart of our system of justice. Unless the prosecutor's *de facto* role in the criminal process is governed by firm convictions of impartiality in handling cases, i.e. unless the theory of fairness is put into uniform practice, the entire system of justice will suffer. For, the members of the public respect (and disrespect) what they see, and not what is *supposed* to be seen.

Not only is it important that the prosecutor unequivocally refrain from becoming a bloodhound of the Crown, but he must be careful not even to look like he is out for blood.⁴⁴ He must strive to act out his part openly, so that the accused and the public will feel that justice is being firmly and impartially administered. In the words of Lord Chief Justice Hewart as quoted by T.G. Bowen-Colhurst:

It cannot be too often made plain that the business of counsel for the Crown is *fairly* and *impartially* to exhibit all the facts to the jury. (Emphasis added).⁴⁵

The author cautions that a continued citation of Lord Chief Justice Hewart's admirable *dictum*⁴⁶ in *Rex v. Sussex Justices*⁴⁷ may lead to an erroneous impression that it is more likely that justice should appear to be done than that it should in fact be done. Obviously justice is not truly justice if it is a mere facade; and the prosecutor must conduct criminal proceedings so that fact and appearance of fair play coincide. Again, this means putting theory into consistent practice.

Whether or not ideology is consistently being practised by prosecutors in Canada is difficult to ascertain. Brian Grosman laments that administrative decisions based on the exercise of prosecutorial discretion are not normally visible to the public eye.⁴⁸ Consequently little is known about the operational factors affecting the exercise of prosecutorial discretion.

42. Note C. Humphreys, Sr., "The Duties and Responsibilities of Prosecuting Counsel" (1955), *Crim. L.R.* 739 at 746 where he notes that: "always the principle holds, that Crown Counsel is concerned with justice first, justice second, and conviction a very bad third."

43. "... enforcement of criminal laws in many cases may depend on the sole judgment of one person the prosecutor." *Supra* n. 13 at 473-474.

44. "It must be emphasized that it is not the aim of an Attorney General or of counsel for the prosecution to obtain convictions in criminal proceedings. Nor, in any case, should it be permitted even to appear that such is his aim." K. Turner *supra* n. 18, at 443.

45. T.G. Bowen-Colhurst, "Some Observations on the Duties of a Prosecutor" (1968), 11 *Crim. Law Quarterly* 377 at 380.

46. *Supra* n. 14.

47. *Rex v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256 at 259. Compare the "appearance of justice" principle with comments by John Klein on the efficacy of making prosecutorial deals: "Case load pressures aside, there are other reasons for resorting to a system of negotiated pleas of guilt. The *appearance* of efficacy may be just as important as actual efficiency." Klein, J.F., *Let's Make a Deal* (1976).

48. "In Canada the administration of criminal justice remains an area which is for the most part *terra incognita*." In this area decisions are made and discretion is exercised, based on criteria which are seldom articulated, are often instinctive and differ from one jurisdiction to another." B.A. Grosman, "Conflict and Compromise in the Criminal Courts: New Direction in Legal Research" (1968), 11 *Crim. Law Quarterly*, 292.

In *Trial By Jury*⁴⁹, Sir Patrick Devlin suggests that the welcome transition in the role of the prosecutor from persecuting advocate to minister of justice runs the risk of counsel not prosecuting firmly enough. So the adversarial role is not fulfilled and the Crown's case is not adequately presented. The result of the deficiency is that the duty of seeing that the prosecution's case is effectively put to the jury is sometimes transferred to the judge; and the balance of trial is thereby upset.

Grosman would take issue with Devlin here because he sees the problem as being just the reverse. In *The Prosecutor*⁵⁰ he argues that Crown Attorneys in Canada too often are much too firm in pressing for a conviction, even in a "crummy case". According to Grosman, the role of the prosecutor as a minister of justice is not generally evidenced in practice due to the very nature of the adversary system in which he thrives. He goes further than most commentators⁵¹ by emphasizing the adversarial nature of the prosecutor's role, and by describing the search for truth as an "... all or nothing engagement."⁵² This suggests that if the prosecutor does not succeed on behalf of the Crown at the end of the day, then he has done nothing. Implicit in such reasoning is the notion that the premise "to serve justice" is tantamount to the premise "to obtain a conviction." But even if one accepts his belief that "the 'win-or-lose' outcome ... characterizes the adversarial system"⁵³, it does not necessarily follow that the "win-or-lose" attitude characterizes the prosecutor's role in administering justice.⁵⁴ Such an all or nothing outcome may well characterize the *game* of chess for example, but that hardly precludes our player from adhering to a fair and impartial *approach* throughout the process.

If Professor Grosman's position is correct, however, the prosecutor generally wears two hats: one for ideology, and another in which to practise:

The dichotomy between the legal theory and the practice is not so much a disassociation from the ideal as it is an accommodation to competing considerations. There are considerable and important differences between what the prosecutor does and what the legal literature and judicial decisions say he should do. In any legal structure there is a multiplicity of aims and values. Informal adjustments are continually made in order to cope with operational realities while at the same time lip service is paid to officially stipulated means and required ends.⁵⁵

In response to the question of how far ideology goes in actual practice, this suggests that the prosecutor's quasi-judicial role is envisaged purely in legal theory and it is the adversarial one that is evidenced in practice.

The matter of plea bargaining serves to illustrate the continuing dichotomy between ideology and reality. In theory, criminal cases cannot be settled.

49. Devlin, P., *Trial By Jury* (1966).

50. Grosman, B.A., *The Prosecutor: An Inquiry into the Exercise of Discretion* (1969).

51. Compare H.H. Bull, for example, where he notes that criminal prosecution "is not a contest between individuals" but must be conducted "with a single view of determining the truth." H.H. Bull, "The Career Prosecutor of Canada" (1962), 53 *Journal of Crim. Law, Criminology and Police Service* 89 at 95-96.

52. *Supra* n. 48, at 294.

53. *Ibid.*

54. *Note Supra* n. 45, at 377. The following comment is made in regard to Grosman's assertion that "one side will win and the other will lose.": "The Crown, of course, never wins or loses and there is no room in one system of criminal justice for cynicism in connection with this statement."

55. *Supra* n. 48, at 301.

Conciliation and compromise belong in the realm of civil law. In criminal prosecutions, the accused is either guilty or not guilty; he can't be somewhat guilty or somewhat innocent.⁵⁶ Yet the compromise of charges in return for the entry of a guilty plea occurs daily in the courts. Grosman sees the plea bargaining process as representing "an informal administrative device used to encourage guilty pleas and the consequent increased flow of case dispositions".⁵⁷ Theoretically, the prosecutor is a minister of justice concerned with eliciting the truth; but in practice he must be free to "settle" criminal cases:

Freedom to enter into negotiations with defence counsel and to accept pleas to lesser offences, to reduce charges and to withdraw charges is a major aspect of the key position that the prosecutor plays in the administration of criminal justice.⁵⁸

Supervisory control over the flow of case dispositions, therefore, is made viable due to the important exercise of discretion and the prosecutor's sense of independence. It is not too difficult to believe that a Crown Attorney who lacked the firm convictions and credences of a quasi-judicial officer, could become so immersed in his role as advocate that he would seek a conviction even in a "crummy case", and try to get the "best deal"⁵⁹ possible. In suggesting that it is a general practice for prosecutors to reduce a charge in return for a plea of guilty, Grosman paints a bleak picture of the Canadian Crown Attorney's observable conduct.

Conclusion

Legal policy on the role of the prosecutor is only as reassuring as operational realities reveal in fact. If the prosecutor's duty to seek justice results in his acting as time-keeper or bloodhound, then his role in the administration of justice is clothed in hypocrisy. Prosecution thereby runs the risk of becoming a weapon of injustice instead of remaining an instrument for justice. What the prosecutor must guard against is the tendency to become too conviction-minded, and the inclination to lose sight of his role as a fair minister of justice. For, "the role of the Crown Attorney as a 'quasi-judicial' officer is not an easy one either in theory or in practice."⁶⁰ On top of being fair, he should do his best to appear to be fair so that the public at large, including the accused, have the feeling that justice has been done. Finally, regarding the concept of fairness to be displayed by the prosecutor, the story of the cab driver who is handed a two dollar bill for a two dollar fare comes to mind. Upon being asked if that is right, he replies, "It may be correct, but it sure as hell ain't right!"⁶¹

56. *Sed quare* whether this is any less inaccurate than the adage, "one can't be somewhat pregnant". The principle of plea bargaining may suggest degrees of guilt, just as the possibilities of miscarriage or therapeutic abortion recognize degrees of pregnancy. The difference would appear to be that in law one is presumed innocent until convicted, i.e. proven guilty. Pending such proof, however, the somewhat guilty (or in other words less innocent than persons not in criminal jeopardy) often negotiate a plea to avoid the likelihood of conviction.

57. *Supra* n. 48, at 298.

58. *Id.*, at 297.

59. *Supra* n. 50, at 42.

60. B.C. Bynoe, "The Role and Function of Crown Counsel". Annotation to the *Dupuis* case, (1968) 3 *C.R.N.S.* 90 at 102.

61. *Supra* n. 45, at 379. Similarly K. Turner *supra* n. 18, at 459 concludes, "Attorneys General and Counsel for the Prosecution ... must be guided by that law which is written in the hearts of men."

In performing his obligation to seek justice therefore, Crown Counsel should strive to be fair in his firmness. The words of B. Clive Bynoe sum up the role of the Canadian prosecutor as a fair minister of justice with firm convictions:

The Crown's conduct before the court should at all times and in all cases be characterized by moderation and impartiality. He will honestly have performed his duty, and will be completely beyond reproach, if after dispensing with any appeal to passion, he places the evidence before the jury in a dignified fashion befitting his role, without going beyond what the evidence has revealed.⁶²

It is the writer's conclusion that the dual aspects of the prosecutor's adversarial and quasi-judicial role are reconcilable. Through the appropriate exercise of prosecutorial discretion, harmony can be achieved with the other participants in a workable system of criminal justice.

62. *Supra* n. 60, at 95.