Controlling the English Prosecutor

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CONTROLLING
THE ENGLISH PROSECUTOR

By DOUGLAS HAY*

I. INTRODUCTION

In two 1971 appeals, both the Ontario Court of Appeal and the Supreme Court of Canada affirmed a High Court ruling upholding the Attorney-General’s discretion to conduct criminal prosecutions as he saw fit, particularly with respect to the decision to prosecute and the mode of proceeding.1 In the course of its judgment, the High Court had recapitulated the English history of the Attorney-General’s exclusive rights to issue a fiat for a writ of error, to exhibit an *ex officio* criminal information, to enter a *nolle prosequi* or stay of proceedings, and to act in relator actions.2 Not confining itself to the delineation of these powers, however, the Court expressed some general propositions about the right to prosecute:

there has existed in the United Kingdom, and thus in Canada, a constitutional discretion in the Attorney-General, which discretion is exercised on behalf of the Crown, to deal with the institution and control of prosecutions. *It therefore follows* that the right of the individual to equality before the law . . . is modified by the exclusive constitutional right of the Attorney-General, as the chief law officer of the Crown, to deal with the prosecution of the offences under our law. [Emphasis added.]3

This says, or appears to say, too much. If “exclusive” means that particular powers of the Attorney-General are not subject to judicial supervision, and that the Attorney-General is answerable for them only to Parliament, it is an unexceptional statement of the law. But it would be a mistake to take this to mean that in England only the Attorney-General or his agents could prosecute,4 although such an interpretation would be consistent with an at-

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2 For a full account of the history and powers of the Attorney-General, cited by the court, see Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964). The *ex officio* information was abolished by the *Criminal Law Act*, 1967, c. 58, s. 6 (6) (U.K.). The fiat for the writ of error was replaced by judicial certificate in 1960: *Administration of Justice Act*, 1960, 8 Eliz. 2, c. 65, s. 1 (U.K.).

3 *Supra* note 1, at 222 (O.R.), 402 (D.L.R.), 109-10 (C.C.C.).

4 A misreading might be fostered by the statement (at 219 (O.R.), 399 (D.L.R.), 107 (C.C.C.) ) that “it was the King’s constitutional right to prosecute all [emphasis added] crimes, and it was on his behalf that the Attorney-General instituted the prosecutions.” The reference here is to a paragraph in *Wilkes v. The King* (1768), Wilm. 322, 97 E.R. 123, which in fact established only that an *ex officio* information could be exhibited by servants of the King other than the Attorney-General. In any case, it said nothing about any other criminal prosecutions, that is, the vast majority. See text accompanying note 15, *infra*. 

Attitude to prosecutorial powers that can be found in other Canadian cases, which have held that "the State alone can prosecute," that the Attorney-General is the proper representative of the State, and that when a private individual attempts to prosecute any but minor offences, law or policy or both suggest that he or she should not be encouraged to do so. English as well as Canadian authorities have been cited in support.

What follows is not a discussion of the present law of Canada. It is a brief sketch of the origins of a different attitude, in England, to the wider implications of private prosecutions. Much of the emphasis in Canadian cases and comments is on the malignant dangers lurking in private use of the law. Farris C.J. in a decision on an appeal before the British Columbia Supreme Court, said in 1946:

For individuals who are thinking only of themselves and not of society as a whole to have the right to institute and carry on criminal proceedings would destroy the whole fabric of the recognised fairness of our criminal prosecutions.

Another statement, often quoted, is that of Miller J. of Manitoba in 1964:

[Greater rights to private prosecutors would] unnecessarily widen the field of prosecution of Her Majesty's subjects to any obsessed, vindictive, unscrupulous, self-styled saviour. Her Majesty's subjects are entitled to freedom from unwarranted prosecution.

And in 1976, Gushue J. of Newfoundland on an appeal from a conviction obtained by a private prosecutor without the knowledge or concurrence of the Attorney-General, declared that without such concurrence the result of private prosecutions "could very well be anarchy." These and other judgments emphasize the beneficent effects of the Crown's quasi-judicial role in protecting the rights of the accused, notably as a shield to unjust and malicious accusations. Almost entirely absent is consideration of two facts of striking significance to an historian of English criminal law: that private prosecution was carefully protected until the recent past, and that it was thought an important constitutional guarantee of civil liberty.


6 Whiteford, supra note 5, at 906 (W.W.R.), 76 (C.C.C.).


8 Dalton, supra note 5, at 294 (A.P.R.), 294 (N. & P.E.I.R.).

9 Mandelbaum, supra note 5, at 638 (W.W.R.), 126 (C.C.C.); and Dalton, supra note 5, at 293-94 (A.P.R.), 293-94 (N. & P.E.I.R.).

10 The fullest account of this "basic right, derived from English Law" is that of Wilson J. in R. v. Schwerdt (1957), 23 W.W.R. 374, 119 C.C.C. 81 (B.C.S.C.), in which the possibility that an Attorney-General might refuse to prosecute where he should do so is considered at 385 (W.W.R.), 91 (C.C.C.); that possibility is also mentioned in R. v. Weiss (1915), 8 Sask. L.R. 74 at 76, 23 D.L.R. 710 at 712, 23 C.C.C. 460 at 463 (S.C.C.). See also Re McMichelle (1912), 22 Man. R. 693 at 701-702, 8 D.L.R. 550 at 556, 20 C.C.C. 334 at 342 (C.A.); and R. ex rel. McLeod v. Boulding (1920), 53 D.L.R. 657, 33 C.C.C. 227 (Sask. C.A.). The place of private prosecution in Canadian law has arisen recently in two cases, decided in the Ontario Court of Appeal, for which leave to appeal was granted by the Supreme Court of Canada on 17 December, 1981 (Re
In the words of Sir James Stephen, writing in 1883, private prosecutions "both in our own days and in earlier times, have given a legal vent to feelings in every way entitled to respect, and have decided peaceably and in an authentic manner many questions of great constitutional importance." Many other commentators in the nineteenth century were more emphatic: they argued that the engrossing of all criminal prosecutions into the hands of the law officers of the Crown, or the police, was to be resisted vigorously. The constitutional history of England suggested to them that, far from being the proper source of protection for the citizen against unjust charges, the executive could well be the most dangerous of oppressors. One of the crucial safeguards of the citizenry against an executive contemptuous of liberty was the right of private prosecution. In the twentieth century that tradition has not been so strongly expressed, but there are signs that it may be reviving. A review of its history suggests that Canadians should be more attentive to it also.

II. THE ENGLISH PRIVATE PROSECUTOR

It invites confusion to suggest that the English Attorney-General since the mid-eighteenth century has held a virtual monopoly "to deal with the prosecution of the offences under our law." Nor is it very helpful to look at the treatises for the evidence: the right of any private citizen to initiate and conduct a prosecution through to conviction, whether he was the victim or not, was so constantly exercised in the eighteenth century that it needed no comment. It was in fact the paradigm of prosecution. More than eighty percent of indictable offences (all of them tried by judge and jury, and constituting about one half of all criminal cases) were prosecuted by the victim of the crime or his agent. Most of the remaining offences were prosecuted by ordinary citizens who happened to occupy the rotating office of parish constable at the time and who had been bound over by magistrates to prosecute because the victim of the crime was too poor or otherwise incapable. A handful of cases were prosecuted by the Treasury Solicitor, acting for the government in coining cases and thus in some sense as a state prosecutor.

Finally, a very small number of cases, fewer than one percent of the total, were prosecuted at the direction of the Attorney-General or his agents. Almost all of these were state trials, usually for treason or seditious libel. The latter,

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\[Dowson and The Queen\] (1981), 62 C.C.C. (2d) 286, 24 C.R. (3d) 139; \[Re Inderpaul Candhoke, ex p. Howard Buchbinder\] (unreported), decided at the same time for the same reasons). These judgments turned on the question of the point at which the Attorney-General's power to direct a stay may be exercised, but implicitly raise many of the policy issues discussed in this article. See Kopyto, \[Dowson/Buchbinder Case Comment\] (1982), 25 Crim. L.Q. 66, published after the lecture on which the present article was based, for a discussion of some of the legal and policy issues. Kopyto's Comment is unfortunately marred by serious errors in the brief and undocumented historical account he gives at 90-92.


12 \[infra\] note 68.

13 Smythe, supra note 3.

14 The numbers given here and below are those for Staffordshire in the second half of the eighteenth century; it is likely that they are comparable to those for other counties. See Hay, War, Dearth and Theft in the Eighteenth Century: the Record of the English Courts (1982), 95 Past and Present 124 at 131. For the nineteenth century cf. Philips, Crime and Authority in Victorian England (London: Croom Helm, 1977) at 123 ff.
which were more numerous, were usually prosecuted in the eighteenth and nineteenth centuries by the Attorney-General, exercising his unique privilege of prosecuting grave misdemeanours by an *ex officio* information in King's Bench. This procedure eliminated the grand jury, could allow the careful packing of a special jury, and saddled the defendant with heavy costs even if the Crown lost. The information was therefore often attacked as the monstrous offspring of Star Chamber, an anomaly of which the constitution should be purged. The courts upheld *ex officio* informations, but they fell into disuse in the latter part of the nineteenth century because of their connotations of political oppression. They were always few in number.  

Thus the typical prosecution in England was on indictment at the initiative of a private citizen who was the victim of a crime and who conducted the prosecution in almost all cases. Blackstone's only mention of this most obvious fact of eighteenth-century English criminal law was the remark that "indictments . . . are preferred . . . in the name of the King, but at the suit of any private prosecutor. . . ." Chitty began his account of the criminal law with the observation that "as offenses, for the most part, more immediately affect a particular individual, it is not usual for any other person to interfere."  

When he went to law (ninety-four percent of prosecutors were men), the private individual enjoyed discretion at many crucial points. He could often choose the charge on the indictment, either because the recognizance binding him to prosecute did not specify the offence exactly, or because the court did not inquire provided some indictment was preferred, or because he exercised the prerogative of any citizen to charge any other with any offence before the grand jury. Even the indictment, the only formal written record of the charge, could be drawn by his own lawyer on his instructions, rather than by the Clerk of the Court. The effective result was often that the prosecutor could choose among a variety of likely penalties, or do his utmost to ensure that technical drafting problems (a frequent cause of failed prosecutions) were dealt with by his own solicitors. Thus Matthew Boulton, head of the famous engineering firm of Boulton and Watt, was well pleased with the craftsmanship of his lawyers in a difficult burglary prosecution in 1801. Boulton wanted a death sentence, and had high hopes for the trial: the indictment measured two feet by four, contained eight counts, and, according to Boulton's son, "it appears to be formed like a swivel gun and may be directed to all points as circumstances require."  

The private prosecutor also had much influence in deciding what witnesses to take before the magistrate for the preliminary hearing (which was  

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15 Although approximately 6,000 indictments were laid at Quarter Sessions and Assizes in Staffordshire, the Attorney-General exhibited fewer than twenty *ex officio* informations against defendants in the county between 1742 and 1802. About twice that many criminal informations were exhibited by private prosecutors through the Master of the Crown Office (author's unpublished findings).

16 *Commentaries* 303.


18 *Supra* note 14.

not a necessary step), and before the grand jury (which was necessary for the finding of any indictment). The fact that a preliminary hearing was optional, but that it was always followed by a grand jury hearing, increased the discretionary powers of the prosecutor. If he decided to avoid the preliminary hearing and go directly to the grand jury with what came to be called a "voluntary bill", on which only his own witnesses were heard, he could seek an indictment for any offence and construct a case without the accused even being aware that proceedings had begun.\(^{20}\) If he chose to go before a magistrate first, his evidence was sometimes heard ex parte, and it was said in both the eighteenth and nineteenth centuries that lay magistrates were loath to dismiss charges, apparently believing that that was the proper role of the grand jury, and perhaps influenced by clerks with a pecuniary interest in prosecutions.

If, for whatever reasons, the prosecutor decided to drop the charge, he could do so without resulting official inquiry. In the case of a voluntary bill, this could be done at will and without penalty, as there had been no recognizances. On the other hand, a prosecutor bound over in preliminary hearings could drop the charge by forfeiting the recognizance or, with a little care, perhaps at no cost at all. A new witness with contradictory testimony, or hesitation and a contrived appearance of insincerity on the part of the prosecutor, might convince the grand jurors (who had no depositions from the preliminary hearing) to throw out the charge.\(^{21}\) In the early nineteenth century, critics argued that both the collusive dropping of charges and vexatious or malicious prosecutions were facilitated by the nature of preliminary inquiries and grand jury hearings.\(^{22}\)

The private prosecutor also strongly influenced the outcome of the trial through the fact that he chose his own solicitor, who instructed counsel (if a barrister was retained) to conduct the case in the manner most likely to yield the outcome he wished. In these circumstances, it was not unknown for the prosecuting lawyer to be unhappy with the result. In one case in 1787 the barrister petitioned for a pardon for a prisoner whom he had just successfully prosecuted, declaring that he:

\(^{20}\) Replaced by "bill of indictment" proceedings since the abolition of the grand jury in 1933: *Administration of Justice (Miscellaneous Provisions) Act, 1933*, 23 & 24 Geo. 5, c. 36, s. 2 (U.K.). Its recent use by the Crown to avoid preliminary hearings in cases in Northern Ireland has drawn criticisms reminiscent of those directed against the *ex officio* information, now defunct, in earlier centuries. See *The Guardian*, Oct. 6, 1982, "Crown Tries to Avoid Supergrass Hearing."

\(^{21}\) On the other hand, to get a *nolle prosequi* with the consent of the prosecutor or at his request required the fiat of the Attorney-General: *R. v. Emlyn* (Trinity 1820; Chitty, *A Practical Treatise on the Criminal Law* (2nd ed., 1826) vol. I at 479); *R. v. Cranmer* (1700), 12 Mod. 648, 88 E.R. 1578, 1 Ld. Raym. 721, 91 E.R. 1381. See also Edwards, *supra* note 2, at 238.

\(^{22}\) For evidence that such practices occurred before some magistrates and grand juries in the 1840s, see the *Appendix to the Royal Commission on Criminal Law, Eighth Report* (c. 656, 1845). A summary of some of the testimony on these points is given in *Pue, The Criminal Twilight Zone: Pre-Trial Procedures in the 1840's* (1983), 21 Alta. L. Rev. 335 at 338-39, 352-53 (*ex parte* or inadequate preliminary hearings), 347-49, 355 (perjury before grand juries), 354 (pecuniary interests of clerks and weak cases going forward), 356 (malicious use of voluntary bill). Widely scattered evidence in other sources supports such assertions. On the *Report* see also Cornish, "Defects in Prosecuting: Professional Views in 1845," in Glazebrook, ed., *Reshaping Criminal Law* (London: Stevens, 1978).
was so unfortunate as to be Counsel against the prisoner at his trial, that His prosec

cutors discovered the most rancorous malice and revenge upon the Occasion, and that there were not wanting circumstances on his trial which rendered him an Ob

ject of great Compassion. 23

Finally, after a conviction, the Government and the King would pay great atten
tion to the wishes of the prosecutor in deciding whether or not to grant a free or conditional pardon, particularly in cases in which the death sentence had resulted.

Small wonder, then, given the range of prosecutorial discretion, that one frequently finds eighteenth-century private prosecutors reflecting gravely on their power. As one observed in 1796 in a theft case:

If I succeed I shall most certainly hang the culprit. It is certainly more honourable to detect felons than it is to committ Felonys. However I wish to hold the scales of justice even and never suffer one's power to border upon Tyranny. 24

His words betray an acute awareness that he would be the focus of much local attention by both the propertied and the poor. Because his discretion was so wide, the private prosecutor's acts were constantly scrutinized and subjected to the ethical judgments of the community, and of the different classes of which it was composed. Because he might be made to change his course, the pressure could be very great. When the prosecutor was determined to proceed in the face of sharp public criticism, he would commonly defend his actions in the press, as in this appeal published after an execution in 1802:

Edward Allen, one of the unfortunate Men who suffered on Washwood Heath on Monday last for a Forgery on the Bank of England, having persisted in his Innocence to the last, and accused me of being his Murderer, I think it a Justice due to myself to state to the Public, through the Medium of your Paper, the Circumstances which led to his detection and Conviction.... 25

Such a declaration might help to meet the objections of the propertied and the literate, but prosecutors affronting popular opinion had to decide whether to take the chance (by prosecuting rigorously, or even prosecuting at all) that their hedges would be broken, their saplings slashed or their animals maimed. The danger of anonymous malicious damage to property, particularly in rural parishes, undoubtedly subjected some prosecutors to strong pressure to drop charges, to reduce the charge between the preliminary inquiry and the grand jury hearing, or not to begin at all. Within the community itself this greatly accentuated the pressure to reach accommodations outside the courts. In each case, the pressure exerted on the prosecutor differed according to the norms of the community, the personal reputations of the prosecutor and the accused, and the degree to which the particular offence appeared to threaten others.

For much of the eighteenth century, the disadvantages that resulted — indifferent enforcement, widespread compounding of offences between thieves and victims, fear of retaliation — were not felt to be a serious disadvantage by the political elite that controlled Parliament. Their own property was relatively secure; they rarely used the more severe penal laws against theft; and the

23 Letter of Theophilous Swift (July 31, 1787), Public Record Office, HO42/12 fol. 98.
24 Mr. Lampton to M. Boulton (June 7, 1796), Birmingham Reference Library, Boulton and Watt MSS, Parcel D.
25 Swinney's Birmingham Chronicle, April 22, 1802.
discretion that private prosecution gave them to forgive the offender in the interests of noblesse oblige was very useful as a means of maintaining consent to their oligarchic rule. However, as the subsequent history of attempts to develop a state prosecutorial function suggests, their attachment to private prosecution probably derived above all from their abhorrence of the alternative, a state prosecution. The political elite of the eighteenth century were bred in a constitutional tradition that celebrated the recent humbling of tyrannical kings by Parliament. Many came from families in which executive tyranny under the Commonwealth or the Stuarts had caused much personal suffering, and the memory was still sharp. Star Chamber had been abolished in 1641 and the monarchy restored and made beholden to Parliament in 1660 and 1688, and the gentlemen of England were not now going to be party to any increase in the power of the executive to set the criminal law in motion. Even the extant powers of the Attorney-General, such as the ability to proceed by way of ex officio informations, were the targets of strong parliamentary criticism as a dangerous inheritance from the past. It was almost inconceivable that the Attorney-General should act as the protector of the ordinary citizen from oppressive prosecutions. The law officers of the Crown knew nothing of the vast majority of prosecutions and there was no administrative machinery to provide that information. The nolle prosequi was a practical nullity in day-to-day prosecutions. The protection of the innocent was instead confided in the main to the grand jury, and properly so, in the view of contemporary opinion. Grand juries did indeed throw out twenty-five percent of the bills of indictment (compared to four percent by the late nineteenth century), although what proportion of these was rejected as malicious, or vexatious, or poorly drawn or unsupported by the evidence, one cannot say. It is clear, however, that controlling the abuse of prosecution was, like its use in the first place, principally in the hands of the citizenry rather than the government.

From time to time, and for particular classes of the propertied, the disadvantages of relying on the private prosecutor brought changes that nonetheless never touched the principle. Legislation enacted in the eighteenth and, especially, the nineteenth centuries gradually increased the costs granted to prosecutors, in an effort to spur them on to greater action. It had some unforeseen results (discussed infra) in opening the law to more democratic uses. The other expedient was even more typical of the period; it fact, it epitomizes all the assumptions on which the enforcement of the law was based. It was the private "Association for the Prosecution of Felons". There were hundreds of such groups throughout the country — probably about a thousand by the mid-nineteenth century. Their growth is discernable from the middle of the eighteenth century, although some appear as early as the late 1600s.

28 Philips, Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1770-1860, paper presented at a conference on The History of Law, Labour, and Crime, Univ. of Warwick, School of Law, Sept. 15-18, 1983.
In a typical case the members entered into articles of association and agreed to share costs, pool any rewards obtained on convictions, offer rewards to witnesses, and elect a committee to decide which cases to prosecute. Sometimes associations also organized foot and horse patrols, paid retainers to keepers of turnpike gates to watch for stolen horses, and agreed at least to consider undertaking cases on behalf of poorer victims of crime who could not afford to go to law themselves. Such benevolence was not always fully appreciated; in one Birmingham case, in which the association prosecuted for a poor woman and then kept the substantial parliamentary reward for getting a capital conviction, "[t]he poor woman says now with tears, that the society Robbed more than the thief did of what was her due in reason."29 In most cases, however, associations prosecuted only on behalf of their own members, and only after a committee decision as to which offences to pursue.

These private bodies undoubtedly affected the administration of the criminal law to a considerable extent. Although their members probably constituted fewer than ten percent of the adult male population, they accounted for as much as a quarter or more of prosecutions.30 Some sought even greater influence. A few of the most active associations attempted to compel their members to surrender the most important discretionary decision of the private prosecutor, the right to forgive the offence entirely. One Midlands association in the 1770s provided that if any members should "screen, forgive, or otherwise overlook any Felony or Felonies" they should pay a healthy fine. Others promised to prosecute their members for compounding offences. Still others provided for expulsion from the association.31 Such terms were by no means general, probably because insistence on them would diminish memberships in the prosecuting associations, particularly from among the gentry. Prosecutorial discretion was so pervasive, so useful in negotiations between the victim of the crime and the accused, and so coloured with libertarian constitutional meaning, that even wholly voluntary bodies rarely succeeded in curtailing it in the eighteenth century.

This system persisted to some extent throughout the nineteenth century. In particular, the right of the private prosecutor to initiate and conduct proceedings was largely untouched. The private prosecutor remained uncontrolled except by grand and petty juries, to a lesser extent by magistrates, and by the remote possibility of a nolle prosequi. There were changes, however. The most significant was the creation of the new-style police forces between 1829 and 1856, beginning with the Metropolitan force in London and gradually extending to boroughs and counties by the enactment of permissive and eventually compulsory legislation. In roughly the same period successive Acts of Parliament, most notably in 1826, provided for ever more generous costs for prosecutors.32 A major reason for both the new police forces and the more generous costs, and almost certainly a result of them as well, was the phenomenal increase in indictments between 1815 and the late 1840s. At a time

29 James Murray to Henry Kempson (Sept. 12, 1785), Birmingham Reference Library, 259647.
30 An estimate based on the activity of 21 Staffordshire associations active in the 1780s: see Hay, supra note 27, at Table 7.3.
32 1826, 7 Geo. 4, c. 64 (U.K.). For a brief outline of the legislation see Philips, supra note 14, at 112-13.
when population in England increased by perhaps fifty percent, the number of indictments for felonies and misdemeanours increased seven-fold. Contemporaneous accounts argued that this massive increase in indicted crime represented to some degree a real increase in crime, and it is likely, in view of widespread destitution in this period, that they were right. One response was to increase the granting of costs to induce more private prosecutors to come forward in the public interest.

The creation of the police had various purposes: preventive surveillance to deter criminals, and especially the calculated use of moderate force to deal with political demonstrations and other disorder, in which the use of the army had often proved to be worse than useless. However, when the modern police were invented in the second quarter of the century it was certainly not envisaged that they should come to control the prosecutorial process. The police were regarded at first by the middle and upper classes, as well as the working class, as a potentially dangerous innovation — the creation for the first time since the seventeenth century of an executive force that might be used to subvert political liberty through spying, harassment, and the exercise of arbitrary power. Their powers and their operations, especially in London, were strictly controlled to avoid exacerbating such criticisms, and it was only the level of crime and working-class confrontations with employers and government that convinced Parliament to create the new police. To propose entrusting all prosecution to them was, in the early years, unthinkable. The point is to be emphasized, because by the mid-twentieth century the police prosecuted in eighty-eight percent of indictable cases in England: the proportions of "official" (although not "state") prosecutions compared to those brought by private individuals had been wholly reversed from the eighteenth century.

See Gatrell and Hadden, "Criminal Statistics and their Interpretation," in Wrigley, ed., Nineteenth-Century Society (Cambridge, 1972) at 387 ff. is the most convenient summary for this period.


Devlin, The Criminal Prosecution in England (London: Oxford Univ. Press, 1960) at 20-21. (See also text accompanying note 65, infra.) Devlin distinguishes the latter as "unofficial" on the grounds that "to call such prosecutions ‘private’ would be misleading: the great majority of prosecutions are in theory private. It is true that the proceedings are in the name of the Queen, but then in any civil action it is the Queen who issues the writ of summons and in whose name the attendance of the defendant is commanded; in each case the Crown is acting at the request or upon the information of an individual. Again, every police prosecution is in theory a private prosecution; the information is laid by the police officer in charge of the case, but in so doing he is acting not by virtue of his office but as a private citizen interested in the maintenance of law and order." (Id. at 16-17). Maitland commented on the ambiguities of the term when systems were compared: "To speak of the English system as one of private prosecutions is misleading. It is we who have public prosecutions, for any one of the public may prosecute; abroad they have state prosecutions or official prosecutions." (Supra note 27, at 141). I have nonetheless used the word private to describe what Devlin and Maitland call "unofficial" prosecutions because it accurately describes not only the theory but the practice in England for much of the period under discussion, and because it reflects Canadian usage.
How and when that occurred is not yet clear. But most of the change probably occurred in the second half of the nineteenth century, with some further change even in the early twentieth century. The context in which it occurred is important for understanding the second salient feature of the English prosecutorial system that is overlooked by contemporary Canadian courts: the constitutional significance traditionally attached to private prosecution.

III. THE PRIVATE PROSECUTOR’S ROLE PRESERVED

By the 1830s and 1840s, features of private prosecution that had satisfied upper-class political opinion in the 1700s were instead arousing profound concern. It was a period of rapid population increase, urbanization, and momentous economic change such as England had never known. In many areas of English life the classes represented in Parliament and the professions felt a dismaying loss of control. The acute political conflict accompanying these changes had particular significance for the criminal law because it was in part class conflict, at a time of widespread destitution and revolutionary criticism of the political and economic structure. For many propertied Englishmen, the mounting crime rate summarized all these issues. Publication of criminal statistics had begun in 1805, and the data indicated ever-increasing rates of prosecutions and (so it was believed) of crime. In the same period the early Victorian legislature was embarked on a thorough examination of all aspects of the criminal as well as civil law, spurred on in part by the self-interest of the lawyers, whose professional consciousness was developing rapidly in a period of high professional unemployment.

In these circumstances the personal knowledge, local scale, and discretionary accommodations of the eighteenth-century system of private prosecution seemed far less acceptable. Lawyers and magistrates increasingly castigated serious defects: the compounding of offences that should have been prosecuted, the malicious prosecution of innocent individuals by personally interested or blackmailing prosecutors, the inability of grand jurors to sift the evidence when three or four hundred cases now came before them in a week, the blow to the legitimacy of the law when injustices were perpetrated, and the weakening of social and political authority when serious cases were not pursued. Equally distressing, the increased granting of costs had probably admitted more poor prosecutors to the system, and they sometimes used it for their own dubious ends. As a result, critics in Parliament, some of them Chief Justices and Lords Chancellor, attempted in the 1830s, again in the 1850s, and finally in the 1870s, to introduce a system of public prosecution in England.36 Extensive evidence was gathered from the United States, Scotland, Ireland, and France, where public prosecution was long established. Detailed bills providing for a new system under one form or another were introduced repeatedly in the House of Commons. All of them failed to become law, and when Parliament finally created the office of Director of Public Prosecutions, in 1879, it was hardly what the name implied. Holding a watching brief, with limited powers, the Director of Public Prosecutions until the twentieth century had

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36 An outline of the early legislative history is given in Kurland and Waters, Public Prosecution in England, 1834-79. An Essay in English Legislative History (1959), 9 Duke L.J. 493. A more detailed account of the period from the 1870s is in Edwards, supra note 2, especially chs. 16 and 17.
relatively little power over the course of the vast majority of prosecutions. The private prosecutor continued to reign supreme. It is important to see the reasons for this.

First, however, we should note that by 1879 the private prosecutor had begun, slowly, to turn blue. The police had become convenient substitutes for private prosecutors who would not, or could not, go to the trouble or expense of proceeding. As new police forces were created throughout England, they increasingly shared prosecutorial duties with private citizens, with prosecuting associations, and with a competing group of “official” (in fact semi-official) prosecutors, the magistrates’ clerks. In a few towns chief constables, with selected barristers, came to dominate prosecutions. It was partly in response to these developments that some Members of Parliament sought to introduce a professional, lawyerly public prosecutorial system. Parliament was presented with extensive evidence by the 1850s that the police in some parts of the country, attracted by the award of costs, were responsible for a great many malicious and vexatious prosecutions, usually initiated with the assistance of disreputable attorneys. The mover of the abortive legislation of the 1850s gave as one of his most important goals in seeking a public prosecutorial system the removal of policemen from the sphere of prosecution:

The Crown, indeed, was the nominal prosecutor, but the consequence [of the lack of a public prosecutor] was that we gave to policemen, to a class amongst whom were to be found some of the most hardened and profligate of mankind, and over whom the most incessant vigilance was requisite to prevent flagrant and cruel abuses of their authority, we gave to these men [when they prosecuted] an unlimited power of pardon and connivance; and we entrusted them with an authority which in every country—but England was regulated with as much anxiety as the functions of the Judge himself.\textsuperscript{37}

Sir Alexander Cockburn, Attorney-General in 1855, probably expressed the Parliamentary consensus about the practical and constitutional implications of police prosecutors:

I will add another, to my mind, very serious evil which I have observed very often myself, when sitting as recorder, and that is the manner in which policemen mix themselves up with these prosecutions. I must say that I think it is a great scandal (to use no milder term) to see a case brought into court by one of the inferior ministers of the law such as a policeman. I do not think it is consistent with the proper administration of public justice, in a great country like this, that you should have a subordinate officer, who is merely the keeper of the prisoner, clothing himself with the functions of a public prosecutor. I think it has, also, this further mischievous effect. I have observed often, and have had occasion to notice it in court, how policemen become over-zealous in the conduct of prosecutions. I can quite account for it now . . . [that I know] . . . that the promotion of policemen is made to depend upon the prosecutions which they successfully conduct.\textsuperscript{38}

The apparently logical solution, a system of professional prosecutors who would wholly replace both the police and unofficial private prosecutors, never came into being. Instead, the police came to dominate what in England remains, in theory, a system of private prosecution. And for that there are three main explanations.

\textsuperscript{37} 136 \textit{Parl. Deb.}, H.C. (3rd ser.), col. 1651 (1855) (John George Phillimore). For a brief biography of Phillimore, a Liberal jurist and Q.C., see 15 \textit{D.N.B.} 1071.

\textsuperscript{38}(1854-55), 12 \textit{Parliamentary Papers} at 186. (Question 2396).
One was vested interest: solicitors who were magistrates' clerks, the other main body of semi-official prosecutors, feared that if deprived of their right to prosecute they would suffer a significant loss of income. By the 1850s, solicitors were a formidably organized group. Another explanation for the resistance to a system of public prosecutors was Parliament's concern about the political effects and legal costs of creating more patronage positions. Finally, there was the old eighteenth-century Whig argument, sometimes implicit, sometimes in very clear terms, that the consequences of prosecution were too important for the political liberties of the nation to entrust it to the executive. In 1844 James Paul Cobbett, a London barrister, son of William Cobbett, and a democrat in an age when few men of his class or profession were such, protested to the Criminal Law Commissioners that public prosecution would be a most dangerous innovation.

In this country [he wrote] any man has a right to indict any other man upon any charge. We are so accustomed to this right, and are so completely free from trammels to interfere with it, that it is no wonder if, having often to consider the unavoidable trouble of the duty, we are not always alive to the advantages of the right. This right, when exercised, is not without its responsibilities; another part of the law has wisely taken care of that; but it is a most valuable right, and perhaps next only to that of being fairly tried when we are ourselves indicted. Set up the “public prosecutor”, and then you have, at once, a power of veto against every man’s prosecution; and the great offender, with great interest, may be allowed to escape by this new fangled authority, without even the intervention of a Grand Jury’s “ignoramus”. If we absolutely prohibit the common law prosecutor, that is, the party injured or complaining, from taking legal steps, this is the result which will happen to a certainty... I repeat that you have no right to deprive the subject of his liberty, so long enjoyed, and with such good effects, by preferring a criminal charge against others who may have at once done him and his country a wrong, to strip him of the power of enforcing that redress, and making that example which the law requires for the good of both.  

Cobbett foresaw the corrupt protection of the powerful offender, and a danger of the kind of oppression associated with Star Chamber. The Clerk of the Peace of Wigan was more succinct; a public prosecutor, he said:

would have the power of refusing to proceed in cases where parties thought there ought to be a prosecution, and this power might (and particularly in cases of political excitement) cause a denial of justice. I think that in all cases any man who has sustained injury, ought to be at liberty to put the law in force, and not be deprived of his remedy through the malice or caprice of a public prosecutor refusing to proceed, and therefore leaving him without remedy. If this power is entrusted to a public prosecutor, it will be a greater encroachment upon the right of a trial by jury than any encroachment there has been, and these are not a few.

By the late 1800s, the mid-century attack on police prosecution and the insistent demand for a professional state prosecution had largely disappeared. The creation and consolidation of the limited powers of the Director of Public Prosecutions after 1879 can be only part of the reason. Other possible influences include the gradual development of a more judicial preliminary procedure (codified in 1848) under more diligent magistrates; the increasing professionalization of the provincial police forces so that they increasingly resembled that of London; and perhaps the absorption of a certain amount of pre-existing resistance to police prosecution.

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39 Royal Commission on Criminal Law, Eighth Report (c. 656, 1845) at 295-96.
40 Id. at 226.
professional unemployment that had prompted briefless young barristers to campaign for a prosecutorial system. A more general influence may have been the long, largely uninterrupted secular decline in the number of prosecutions from the 1850s to the end of the century. The fears of the early-Victorian middle class that political and social authority was dangerously threatened, and that the criminal law was being abused, yielded to the greater confidence that characterized the second half of the century when the policeman came to epitomize (for much of the middle class) security and order. Exactly when and why police prosecutions came to predominate is not yet known, but it was probably in this period. The policed society came to be perceived as the normal society and the prosecuting constable as, for many, part of the efficiently functioning modern state, even if the law considered him as simply another private prosecutor.

Nonetheless, few formal and no substantial curbs were put on the private prosecutor before 1900. The 1859 Vexatious Indictments Act, introduced by the Government, reflected criticisms made by the Chief Justice in 1854, and was apparently inspired by a few prosecutions for conspiracy launched against respectable solicitors who had acted for less respectable clients. A very limited measure touching only voluntary bills and then only for some misdemeanours, it left the right of private prosecution otherwise unaffected. It nevertheless aroused in some the usual constitutional anxieties: one Member of Parliament protested that although he was concerned to guard against abuses, he doubted that this was the proper way. "The measure was one [he said] which proposed a fundamental change in the constitutional rights of a British subject, and which appeared to him to be totally subversive of his liberty in those matters." In 1879 the Criminal Code Commissioners recommended that the Act be extended to control all voluntary bills and in 1883 Stephen (a member of the Commission) argued that the 1859 legislation imposed wholly inadequate limitations on "a dangerous right":

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41 One study (from imperfect sources) shows that the new police were prosecuting in only a minority of cases at quarter sessions in the Black Country in the 1830s and 1840s (Philips, supra note 14, at 101, 124-25). It appears that most associations for the prosecution of felons abandoned their prosecutorial duties to the new police within a period of years, especially after the compulsory establishment of forces throughout the country after 1856 (Philips, supra note 28).

42 1859, 22 & 23 Vict., c. 17 (U.K.).

43 Perjury, subordination of perjury, conspiracy, obtaining money or other property by false pretenses, keeping a gambling house, keeping a disorderly house, and any indecent assault.

44 Report of the Royal Commission on Criminal Procedure (Cmd. 8092, 1981) at 161 para. 7.50-7.51: a private citizen would apply first to the (proposed) Crown prosecutor and, if blocked, would then be allowed to make application to a magistrate's court of two justices and a clerk. The Crown prosecutor would be required to attend the hearing, in private, to explain the decision not to prosecute. If leave were granted the private prosecutor would be allowed to employ his own solicitor and to expect automatic payment of reasonable costs. In its submission to the Commission (no. 161) the Criminal Bar Association recommended (part 4, paras. 36-37) the enactment of some equivalent to the sixth clause of the 1879 Act (supra note 36). In 1972 the government rejected an amendment to the Criminal Justice Bill to limit the right: Mr. Mark Carlisle, Minister of State at the Home Office, H.C. Standing Committee G. Proceedings 11 April 1972, cols. 1139, 1144. Similar comments were made in the Lords.

45 Royal Commission Appointed to Consider the Law Relating to Indictable Offences, Report (c. 2345, 1879) at 32-33; (1878-79), 20 Parliamentary Papers at 200-201.
It is a monstrous absurdity that an indictment may be brought against a man secretly and without notice for taking a false oath or committing forgery but not for perjury; for cheating but not for obtaining money by false pretences; and for any crime involving indecency or immorality except the three . . . [of] keeping gambling houses, keeping disorderly houses, and indecent assaults.46

Parliament’s inaction in the face of such strictures suggests the strength of the reluctance to interfere with the right of private prosecution, even in its most extreme form, except where vexatious and malicious prosecutions were notoriously common. Judges, too, found it useful to cite the possibility of recourse to the voluntary bill when allowing magistrates a wide discretion in refusing to hear an information. In 1849 it was decided that “when an information is laid before justices of the peace for an indictable misdemeanour, it is in the discretion of the justices to hear it, or refuse to hear and leave the complaining party to originate his prosecution before a grand jury.”47 Mr. Justice Coleridge observed, “[t]he refusal of this rule [to compel the justices to hear evidence] does not prevent a trial if the prosecutor chooses to go before a grand jury. We only say that we will not oblige the justices to hear an information.”48 Those words were quoted in 1902, when the Chief Justice remarked that in cases where a wide discretion should be preserved:

I think the magistrate, as was pointed out in Reg. v. Ingham (sup.), is entitled to take into his consideration the fact that his decision is not final, but that a bill can be preferred by any person, and that a private person can present that bill of indictment, if he is disposed to do so.49

A reluctance to interfere with the private prosecutor in the nineteenth century can also be inferred from the infrequency of the more important inroads on his discretion, such as the various provisions requiring official consent to prosecute, or the statutory prohibition of private prosecutors. The 1793 Lottery Act50 is apparently the only eighteenth-century legislation. The 1829 Roman Catholic Relief Act51 required that informations to recover penalties be filed in the name of the Attorney-General, and it has been termed the first significant inroad on the rights of private prosecutors — or at least the first to provoke legislative comment.52 Two statutes of 183953 and 184654 introduced a

46 Supra note 11, at vol. I, 294.
48 Id. at 401 (Q.B.), 158 (E.R.).
49 R. v. Kennedy (1902), 20 Cox C.C. 230 at 237, 86 L.T. 753 at 757, 50 W.R. 633 at 636. Alverstone C.J.’s observation that in ordinary criminal prosecutions it was “not convenient” that there should be no preliminary proceedings, is evidence of the increasing distaste for the voluntary bill, and perhaps of its decreasing use. Darling J. mentioned in passing (at 242 (Cox C.C.) ) the banal general truth: “The legislation . . . is put in the form of an criminal offence, and as it is put in the form of a criminal offence it appears to me that a private individual is entitled to prosecute for it.”
50 1793, 33 Geo. 3, c. 62, s. 38 (U.K.). This and following examples are taken from the list of statutes with exclusion clauses or consent provisions that is given in Dickens, The Discretion to Prosecute (in England and Wales) (Ph.D. thesis, London, 1971) at 54-59, 69-72.
51 1829, 10 Geo. 4, c. 7, s. 38 (U.K.).
52 Dickens, supra note 50, at 54; Edwards, supra note 2, at 239. The Parliamentary concern was partly that its enforcement might fall into the hands of a Catholic Attorney-General. The Act was considered in Kennedy, supra note 49, where Alverstone C.J. and Darling J. (at 238 (Cox C.C.) ) gave their opinion that s. 38 in no way prevented a private prosecutor from acting under other sections.
requirement for the consent of the Attorney-General to any penal actions for sedition, or its encouragement, under legislation originally enacted without such provisions in 1799 and 1817. Several statutes put excise prosecutions in the hands of the Commissioners or required that they be in the name of the Attorney-General. Finally, seven other statutes concerning specific offences gave prosecuting powers only to certain inspectors or local authorities, or required the consent of (variously) Police Chiefs or magistrates, a Secretary of State, the Director of Public Prosecutions, or the Attorney-General. The last three were named respectively in three statutes likely to be used in cases with sensitive domestic or international implications: Terminal Waters (1878), Newspaper Libel (1881, changed to consent of a judge in chambers in 1888), and Explosive Substances (1883). With these few exceptions (compare the number of current ones), the private individual maintained his full status as a prosecutor in English law into the twentieth century. Moreover, in almost all cases of indictable offences he could bypass the preliminary inquiry and take his accusation directly to a grand jury.

The legislation in fact manifested substantial support for the general right of the private prosecutor to proceed in most cases without any interference from the Attorney-General (apart, of course, from the latter’s ancient right to enter a nolle prosequi). All the bills for the creation of a public system introduced to Parliament in the nineteenth century specifically protected the right of the private prosecutor, as did the Prosecution of Offences Acts of 1879 and 1884. Only in 1908 did it become possible for the Director of Public Prosecutions to assume a private prosecution and then drop it, with no recourse for the private prosecutor. Professor Edwards argued persuasively that this was a significant blow to a constitutionally significant right, and that the right of the original prosecutor, if the Director withdrew a prosecution, to apply to a judge of the High Court to have the prosecution reinstated and continued either by the Director or by the private prosecutor himself — part of the 1879 Act but abolished in 1908 — should be re-enacted. He has also expressed disquiet, as have others, with the plethora of consent provisions

53 1839, 2 & 3 Vict., c. 12, s. 4 (U.K.) (revised as 1859, 32 & 33 Vict., c. 24 (U.K.) ).
54 1846, 9 & 10 Vict., c. 33, s. 1 (U.K.); the preambles refer to vexatious prosecutions by common informers under 1799, 39 Geo. 3, c. 79 and 1817, 57 Geo. 3, c. 19 (U.K.).
55 1827, 7 & 8 Geo. 4, c. 53, s. 61 (U.K.); Inland Revenue Regulation Act, 1890, 53 & 54 Vict., c. 21, s. 21(1) (U.K.).
56 The Sunday Observation Prosecution Act, 1871, 34 & 35 Vict., c. 87, s. 1 (U.K.); Metalliferous Mines Regulation Act, 1871, 35 & 36 Vict., c. 77, s. 35 (U.K.); The Public Health Act, 1875, 38 & 39 Vict., c. 55, s. 253 (U.K.); The Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict., c. 73, s. 3 (U.K.); Newspaper Libel and Regulation Act, 1881, 44 & 45 Vict., c. 60, s. 3 (U.K.); The Explosive Substances Act, 1883, 46 & 47 Vict., c. 3, s. 7 (U.K.); Law of Libel Amendment Act, 1888, 51 & 52 Vict., c. 64, s. 8 (U.K.).
57 See the list given by the Attorney-General in 1977 of those offences requiring the consent of the Attorney-General or the DPP: 928 Parl. Deb., H.C. (5th ser.), Written Answers, cols. 37-45. The total number was given as 96 in Home Office Evidence to the Royal Commission on Criminal Procedure: Memorandum No. VIII. The Prosecution Process (London: Home Office, 1978) at 11. All were under review.
58 1879, 42 & 43 Vict., c. 22 (U.K.) and 1884, 47 & 48 Vict., c. 58 (U.K.). The 1879 Act provided that none of its terms should “interfere with the right of any person to institute, undertake, or carry on any criminal proceeding” (s. 7). It also gave the injured party the right to appeal to the High Court if the Director dropped a prosecution (s. 6).
59 Prosecution of Offences Act, 1908, 8 Edw. 7, c. 3, s. 2(3) (U.K.).
that have marked the legislation of the twentieth century. The Official Secrets Act, 1911, was of a piece with the few late nineteenth-century statutes with consent provisions, but the great flood of legislation requiring the consent of a variety of public officials for particular prosecutions began during the Second World War. It has been variously explained as the logical outcome of the assumptions of total war and of the welfare state, of a belief that regulatory legislation will be most responsibly enforced by officers who are publicly accountable, and of the rationalizing tendencies of modern government. It has also been argued that consent provisions, particularly those naming the Attorney-General, arise:

particularly in sensitive areas of public affairs in which law-enforcement would tend to be not simply a matter of routine recourse to criminal courts, such as for the usual property offences and assault cases, but an occasion of public and political significance in which issues of public policy and challenge would be inclined to arise attracting widespread attention and debate and permitting the accused to appear to defend important principles and freedoms.

These conclusions, partly historical generalizations, partly normative judgments, summarize twentieth-century views quite well. However, a full explanation of why modern Parliaments have been so insensitive to the constitutional significance of private prosecutions as it appeared to their predecessors over at least two hundred years would take us far into the history of government and public opinion in this century. In the light of the longer history, the widespread assumption that a criminal trial should not be allowed (without high approval) to be "an occasion of public and political significance" concerning "important principles and freedoms," is a strange one. It marks how far memories of executive tyranny have receded, as well as how far the assumption that a universal franchise ensures benign government has proceeded, in this century.

IV. THE FUTURE ROLE OF THE PRIVATE PROSECUTOR

It might seem that the right of private prosecution is now of little constitutional significance in England. Most prosecutions, although in theory private, are conducted by the police, their solicitors, or other official agents. Fewer than three percent of defendants are prosecuted by private individuals (most such prosecutions are for common assault) and about three times that number are prosecuted for shoplifting by retail stores. Although roughly one quarter of adult prosecutions on non-traffic offences are not brought by the police,
more than half of these originate with other official bodies. In light of
these facts, and of the expense of prosecution and the legal bars to private ini-
tiative enacted by Parliament, there is good reason to doubt the accuracy of
judicial and other pronouncements of the importance of private prosecution.
However, such pronouncements continue to be made. The most widely quoted
in recent years are probably those of Lords Diplock and Wilberforce, in 1977,
that the right is "a useful constitutional safeguard against capricious, corrupt
or biased failure or refusal of [the prosecuting] authorities," a right that "re-
mains a valuable constitutional safeguard against inertia or partiality on the
part of authority." More specific arguments have suggested that private
prosecution is less restricted than sometimes thought. In his evidence to the
Royal Commission on Criminal Procedure, the Director of Public Prosecu-
tions observed that the 1908 Act explicitly preserved the right, although it
allowed the Director to take over at any time. He added:

With this in mind, I and my predecessors have always considered that taking over a
private prosecution with a view to offering no evidence would be an improper exer-
cise of the power to intervene, save in the exceptional circumstances of a case like
Turner's. The protection against unjustified prosecution lies, in my view, with the
Courts.... If process is granted to a private prosecutor, the case should, in my
view, be allowed to proceed subject to the normal rules of evidence and
procedure.

But about the very extensive consent provisions, and what constituted excep-
tional circumstances, he had on this occasion little to say.

There is recent evidence, however, that the private prosecutor may still
have constitutional significance in England. Accepting the argument of many
witnesses before it that private prosecutions should be retained and strengthen-
ed "as an effective safeguard against improper inaction by the prosecuting
authority," the Royal Commission on Criminal Procedure recommended, as

Lidstone, Hogg and Sutcliffe, Prosecutions by Private Individuals and Non-
Police Agencies, Royal Commission on Criminal Procedure, Research Study No. 10

All E.R. 70 at 79, 97, [1977] 3 W.L.R. 300 at 310, 329. Other frequently quoted
statements are those of Glanville Williams in The Power to Prosecute (1955), Crim.
L.R. 576 at 599; the late Viscount Dilhorne (then Attorney-General) in 604
Parl. Deb., H.C. (5th ser.), col. 840; Wilcox, The Decision to Prosecute (London: Butterworths,
1972) at 6; Maitland, Constitutional History of England (Cambridge: Univ. Press,
1965) at 481; Stephen, supra note 11, at vol. I, 495-96.

Evidence no. 167, paras. 214, 209, copy deposited in the Library of the Institute
of Advanced Legal Studies. Written submissions and Oral Evidence Minutes to the
Commission are hereafter cited by number. Turner, convicted of robbery on the
evidence of his accomplice Sags, prosecuted Sags, to whom the DPP had given an
undertaking not to prosecute. The Director subsequently intervened and offered no
evidence. See para. 212 and Turner v. DPP (1979), 68 Cr. App. R. 70. The Attorney-
General, Sir Michael Havers, stated to the Commission that he did "not think it right
that any attempt to control generally the private prosecutor should be made through the
Directors' powers to take over a case and offer no evidence or my power to enter a nolle
prosequi. Both would smack of interference by the Executive in the citizen's right of
free access to the Courts; it is better that the control be by judicial process." (Oral
Evidence Minute 16, para. 32). For the power of the Director to intervene with the in-
tention of ending a prosecution see Raymond v. H.M. Attorney-General (The Times,
Mar. 15, 1982). The relevant provision of the 1908 Act (supra note 59) now appears in
the Prosecution of Offences Act, 1979, c. 31, s. 4 (U.K.).
part of a new system, an innovation that would allow a private prosecutor to contest the decision of a Crown prosecutor not to proceed.\textsuperscript{68}

Of interest, at least to those who are aware that few of our civil liberties were established without strong, sometimes violent, popular support, is the range of lay and legal organizations, as well as officials, who told the Royal Commission that it was important to preserve or strengthen the rights of private individuals to prosecute. A partial list includes Justice, the Association of Liberal Lawyers, the Society of Conservative Lawyers, the Society of Labour Lawyers, the Criminal Bar Association, the British Legal Association, the Law Society, the Council of Her Majesty’s Circuit Judges, the British Society of Criminology, the Police Superintendents’ Association of England and Wales, the Police Federation of England and Wales, the Association of County Councils, the National Council of Women of Great Britain, the National Federation of Women’s Institutes, the National Union of Conservative and Unionist Associations Women’s Advisory Committee, the Lambeth Central Constituency Labour Party, the Residential Care Association, the Royal Societies for the Protection of Birds and Animals, Friends of the Earth, the Commons, Open Spaces and Footpaths Preservation Society, and the Automobile Association.\textsuperscript{69}

It may be hazarded that they did not all have the same motives. Certainly many of the last-mentioned groups were anxious to preserve or extend their right to bring prosecutions of immediate interest to their own constituencies (although Friends of the Earth understandably interpreted that term widely). Likely concerns of the police were to preserve their current powers in face of a

\textsuperscript{68} Report of the Royal Commission on Criminal Procedure (Cmnd. 8092, 1981) at 161 para. 7.50-7.51: a private citizen would apply first to the (proposed) Crown prosecutor and, if blocked, would then be allowed to make application to a magistrate’s court of two justices and a clerk. The Crown prosecutor would be required to attend the hearing, in private, to explain the decision not to prosecute. If leave were granted the private prosecutor would be allowed to employ his own solicitor and to expect automatic payment of reasonable costs. In its submission to the Commission (no. 161) the Criminal Bar Association recommended (part 4, paras. 36-37) the enactment of some equivalent to the sixth clause of the 1879 Act (supra note 58). In 1972 the government rejected an amendment to the Criminal Justice Bill to limit further the right of private prosecution: Mr. Mark Carlisle, Minister of State at the Home Office, H.C. Standing Committee G. Proceedings April 11, 1972, cols. 1139, 1144.

\textsuperscript{69} Evidence nos. 174, 152, 208, 367, 161, 122, 252, 237, 148, 163, 176, 126, 159, 107, 56, 83, 139, 91, 157, 103, 115, 112. The right of private prosecutions was supported also by the Metropolitan Police Commissioner (179), the London Criminal Courts Solicitors’ Association (194), the Metropolitan Stipendiary Magistrates (220), the Senate of the Inns of Court and the Bar (Oral Evidence Minute 9) and witnesses from the Home Office (Oral Evidence Minute 4), all explicitly on the constitutional ground, and by the Penal Affairs Committee of the Religious Society of Friends (198), the British Council of Churches and the Free Church Federal Council (218), the Magistrates’ Association (231), the London Magistrates’ Clerks Association (233), the Greater London Regional Council of the Labour Party (317), the Association of Magisterial Officers (372), and the Nationwide Festival of Light (316). Evidence by individuals, including academic and practising lawyers, was also heavily in favour. All this suggests that if Edmund Davies L.J. was right in saying in 1968, in \textit{R. v. Metropolitan Police Cmmr., ex. p. Blackburn}, [1968] 2 Q.B. 118 at 149, [1968] 1 All E.R. 763 at 777, [1968] 2 W.L.R. 893 at 914, that private prosecution was “a process which . . . is becoming regarded with increasing disfavour in this country,” that statement is no longer true today.
reform that would create professional state prosecutors, and to avoid being forced under the existing system to assume prosecutions for minor assaults or other offences that are now only prosecuted privately. A few witnesses were interested only in furthering private prosecutions against pornographers. But most witnesses who gave reasons for supporting the right of private prosecution argued for the general constitutional importance of an ultimate safeguard against official inaction, whether due to corruption, inefficiency, or other causes. Many thought it as much a part of the constitution as had James Paul Cobbett in 1844. Those who knew most about the present state of the law criticized consent provisions and the powers of the DPP to intervene. Only a very small minority argued that the twentieth-century pattern of increasing restrictions was justified and should be carried to its logical conclusion, the abolition of private prosecutions.

A constitution exists not only in law and convention but in the minds and the actions of those who live within it. Much of the English public apparently still values the right to prosecute, either to circumvent a negligent, corrupt, or unwise prosecuting authority, or to bring charges when necessary against the police or other representatives of government. Whether that right will once again be extended will depend upon the evolution of English opinion, and its awareness of the existing state of the law, as much as upon the recommendations of Royal Commissioners and the dicta of judges.

It seems more doubtful that Canadians will rediscover an attitude and a right that has a much more attenuated existence in Canada. Nevertheless, some other features of Canadian prosecutorial traditions suggest that what remains of the right of private prosecution in Canada should be cherished rather than scorned. And here one more contrast with England is apposite.

Professor Edwards argued in The Law Officers of the Crown that one of the most important constitutional safeguards against abuse of the pros-

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70 Chief Constable of Cleveland (evidence no. 147); cf. the Home Office Memorandum, supra note 57, at para. 61.

71 The Legal Action Group suggested abolition in a new system of public prosecution, with a right of appeal up the hierarchy (226; in the existing system it has urged the provision of legal aid to private prosecutors in cases of domestic violence and when local authorities fail to enforce the Public Health Act; LAG Bulletin, January 1976, at 6). The National Council for Civil Liberties, suggesting a full public scheme, advocated abolition only after proof of the success of a new system, which would include a tribunal with a strong lay element to make final binding decisions on appeals by private individuals against official decisions not to prosecute (250). It has emphasized the importance of the right in the existing system: see Cox, Civil Liberties in Britain (Harmondsworth: Penguin, 1975) at 100. New limitations to prevent misuse were suggested by the Association of Metropolitan Authorities (limit to those with a direct interest, especially where a local authority has a licensing or regulating duty, as with films; 185), the Association of Chief Police Officers of England, Wales and Northern Ireland (limit to less important offences; 221), and the London Gay Activist Alliance (limit to prosecutors who are victims; 363). Finally, Lord Lloyd of Hampstead, Q.C. (33) argued that the "so-called right" of private prosecution was "more in the nature of a historic accident stemming from the very early Common Law" and open to abuse because "officious" private individuals might "at their pleasure . . . invoke criminal proceedings. . . ." He therefore advocated abolition as the best course. It seems misleading, however, to describe as an accident the survival of a right explicitly preserved by Parliament over a period of centuries, and with strong academic, professional and lay support to the present day.
ecutorial system in England in this century has been the insulation of the Attorney-General from the more obvious forms of political pressure by the convention that he cannot sit in the Cabinet, by the fact that responsibility for the efficiency of the police lies with another minister (the Home Secretary) and especially by the convention, established only by the fall of the first Labour government in 1924, that an Attorney-General must be above the suspicion that narrow political considerations have caused him either to institute or halt a prosecution. In particular, he must never take direction from the Government in such matters. To further enhance the rule of law over the pressures of political expediency, Edwards advocated the restoration of the right of the private prosecutor, taken away in 1908, to ask a judge to re-institute proceedings in a private prosecution that the Attorney-General has assumed only to drop. In short, the English constitutional convention of a quasi-judicial Attorney-General kept at a distance from his political colleagues did not appear to the closest student of the subject to offer a sufficient guarantee of untainted and responsive administration of the criminal law. It was necessary to re-invigorate the older guarantee of the private prosecutor’s power.

The contrasts with this approach that are presented by some of the Canadian cases cited at the outset of this article, and by some of the conventions of our constitution and our political culture, are dismaying. In Canada it has been common to give both police and prosecutorial supervision to one minister. The practice was in fact embedded in the earliest post-Confederation legislation, in 1868, by the provision that the Minister of Justice at the federal level should also be the Attorney-General, a plan imitated in the provinces. And in marked contrast to the English convention that the Attorney-General should be excluded from the Cabinet to help preserve his quasi-judicial state of mind from the immediate pressures of political colleagues, the Canadian Attorney-General has typically been a central figure in the Government. Often, with the advent of responsible government, he was the Prime Minister himself. Finally, there has been a widespread assumption that private prosecutions are somehow less than legitimate parts of the common law inheritance.

These differences must have historical explanations, some of which are as yet unclear. One explanation is that the separation of functions represented in the respective offices of the Home Secretary, Attorney-General, and Lord Chancellor had no equivalent in Canada from colonial times. In the eighteenth century, and indeed throughout the period of direct colonial rule, the Attorneys-General of the several parts of British North America were important instruments of London’s rule, and the joining of both political and quasi-


73 Here again Professor Edwards has done the pioneering work. The comments that follow are based on information in his study for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (the McDonald Commission): Ministerial Responsibility for National Security as it Relates to the Offices of Prime Minister, Attorney-General and Solicitor General of Canada (Hull: Min. of Supp. and Serv. Canada, 1980) especially chapters 7, 8, and 10. The conclusions drawn are my own.

74 Department of Justice Act, 1868, S.C. 31 Vict., c. 39, s. 1.
The English Prosecutor

judicial functions, begun at that early date, has continued to this day. When the English came to elaborate a new constitutional convention, following the Campbell case of 1924,\(^7\) that sought to protect the prosecutorial function from political interference, they had a separation of functions that could be adapted for that purpose and a conception of the Attorney-General that allowed the easy grafting on of a newly-articulated principle of non-interference. In Canada the historical inheritance of an Attorney-General centrally connected with (among other things) the repression of colonial demands for self-government, and then charged later with control of the police forces and their secret services, made such an engrafting of new constitutional convention far less likely, even had events analogous to the Campbell case occurred here.

If private prosecutions have also been less prominent in our constitutional tradition, perhaps it is because they were less important in the daily administration of the law than in England over the last two centuries. The research remains to be done, but it appears likely that the interest of colonial Attorneys-General in fees, and the lineal influences of New France, the Thirteen Colonies, and perhaps Scotland, had that effect.\(^6\) Also relevant is our political tradition, one of strong state activity in many areas, coupled with a pervasive and deep-rooted belief, particularly among politicians, that the governing of Canada is a difficult art precariously achieved. It may well be that the difficulties of maintaining party unity and avoiding explosions of intergovernmental and inter-regional animosity have dulled sensitivity to the very different question of the relationship of government to citizen. A strong state is not an unmixed blessing.

We might, in Canada, ask ourselves about the result of our own peculiar development. Like the English, we have not had in the twentieth century anything resembling the eighteenth- or nineteenth-century liberty of the ordinary citizen in England to put the criminal law in action, if necessary against the authorities themselves. Nor have we developed what perhaps in England became a partial compensation for increasing state control of private prosecution, the principle that control should be in the hands of a minister who is better able to resist party or personal political pressures because he is responsible neither for penal and police policy nor for the administration of the courts, and is even excluded from the Cabinet. Whether such conventions will ever surround the office of Attorney-General in Canada is a moot point. It is unfortunate, however, that we also have a bench, a bar, and a general public that appear to be either unimpressed by, or wholly ignorant of, the argument that private prosecutions, instead of being merely good opportunities for malicious misuse of the criminal law, may sometimes be important means to safeguard crucial rights. Even if, by making private prosecutions easier, we found "some

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\(^7\) In 1924, the Attorney-General authorized, then withdrew under pressure of the Cabinet, a prosecution under the \textit{Incitement to Mutiny Act} of J.R. Campbell, a Communist leader. The resulting furore led to the downfall of the Labour Government.

\(^6\) In addition to Edwards, \textit{supra} note 73, see the brief outline in \textit{R. v. Hauser}, [1979] 1 S.C.R. 984 at 1028-33, [1979] 5 W.W.R. 1 at 38-43, 8 C.R. (3d) 89 at 129-34. For the wider significance of the issue in Scots law, see the account of the most notorious recent case in Harper and McWhinnie, \textit{The Glasgow Rape Case} (London: Hutchinson, 1983), and also Moody and Tombs, \textit{Prosecution in the Public Interest} (Edinburgh: Scottish Academic Press, 1982).
obsessed . . . self-styled saviours\textsuperscript{77} taking cases before the courts, that might not be a bad thing. It is worth remembering that of those litigants who brought the most important criminal and civil cases of the last three centuries that helped establish what civil liberties we do have, many fit that description perfectly. A number of such cases might make it hard for governments or Attorneys-General to assume that their judgment of the public interest is invariably the right one. In particular, it might be more difficult to stifle with a stay of proceedings politically sensitive prosecutions, at least without arousing public opinion.

Such developments would be healthy ones in our constitution. The responsibility of the Attorney-General to Parliament for prosecutorial decisions, in Canada as in England, is not an impressive safeguard, since a quasi-judicial role can easily become an excuse for the most terse of explanations.\textsuperscript{78} Moreover, that the democratic franchise is the only necessary safeguard of civil liberties, and that the Crown will always be vigilant in their protection, are assumptions that have not been tested and that never can be. In the late twentieth century new technologies make misdirected surveillance, misinterpreted intelligence, and covert illegality a standing temptation to governments and to their police forces. It is an unwise person who assumes that the case for criminal proceedings by private citizens, even against agents of the state or against their will, is now wholly irrelevant.

\textsuperscript{77} Supra note 7. Even those few commentators impressed by the potential usefulness of the right of private prosecution in Canada have for the most part ignored the constitutional argument. Thus Burns (Private Prosecutions in Canada: The Law and a Proposal for Change (1975), 21 McGill L.J. 269 at 288-91, 297 n. 160) recommends their contribution to the enforcement of environmental regulations, and as a safe outlet for the ineradicable human passion for revenging a wrong. He cites Glanville Williams' statement of the constitutional point (supra note 66) but does not explore it.

\textsuperscript{78} E.g., the evidence of Professor Michael Zander (249) to the Royal Commission on Criminal Procedure supra note 67, at 3: "Even the control of the House of Commons on prosecution decisions of the Attorney-General is more notional than real. MPs can question the Attorney-General as to why he consented or refused consent for a prosecution in a particular case — but it is unlikely that his reply will reveal any significant information." Zander supported the retention of private prosecution, the reporting of such prosecutions to the Director of Public Prosecutions, and the status quo with respect to the right of the Attorney-General to intervene.