APPENDIX H

[See page 77]

DISCUSSION PAPER ON PRIVATE PROSECUTIONS

[This paper was prepared at the request of the Federal-Provincial-Territorial Working Group on Criminal Procedure.]

The federal Parliament has codified in section 504 of the Criminal Code the common law precept by which any person may swear an information against the alleged perpetrator of a crime.

> "Section 504 of the Criminal Code is a long standing provision [...] it has its roots in English criminal law [...] and reflects a fundamental precept in the right of an ordinary citizen, the victim of a criminal offence, to lay an information against the offender [...]. Members of the community were thus given a role in the enforcement of public order, and their involvement in the criminal process carried over into Canadian prescriptions adopted by the Parliament of Canada." (*P.G. (Québec) v. Lechasseur et autre* [1981] 2 S.C.R. 253 p. 261)

It is in this fashion that for all offences punishable by summary conviction by virtue of Part XXVII of the Criminal Code, any person may, with exceptions, launch proceedings and even conduct the prosecution. The same applies with respect to indictable offences within the absolute jurisdiction of a judge of the Provincial Court, however, for other indictable offences the trial may not take place without the presenting of an indictment from the Attorney General or from one of the Attorney General's agents or without the advance authorization of a judge.

If the initiative for criminal prosecutions in Canadian law is with ordinary citizens, the ultimate responsibility for them rests with the Attorney General of each of the provinces and, when charges are brought by virtue of a federal act other than the Criminal Code, the federal Attorney General.

In effect, one or the other has the power to stay proceedings at any stage. Also, they may intervene to assume the conduct of a prosecution although this

authority that derives from the authority to stay proceeding is not likewise legislatively provided or entrenched in the Criminal Code.

This responsibility of the Attorneys General flows from the very nature of criminal prosecutions. It is frequently ignored as are the difficulties in exercising it when private complainants have commenced proceedings. This reality has been recognized in these terms by the Law Reform Commission of Canada in its working paper number 52 entitled "Private Prosecutions" :

> "It is the essence of a crime that it is a wrong of so serious a nature that it is regarded as an offence, not merely against an individual but against the State itself. In the context of the Canadian Criminal Justice system, it is respect for this fundamental principle which is at the heart of the duty of the Crown prosecutor or Attorney General. Effectively, being acts against the State, it is to be expected that they will be pursued in the name of the State by its representatives. These public officials conduct and oversee the vast majority of criminal prosecutions in Canada. Although relatively few in number, the cases outside this general rule still constitute a source of considerable concern for the actors in the administration of justice in Canada. The extent of the difficulties which the law and the status of private prosecutions create in the pursuit of criminal violations is much greater that one would think considering the statistically modest number of private prosecutions statistically." [This translation expresses more accurately the ideas put by the LRC in the French version.]

The Law Reform Commission of Canada which recognized the necessity for a power of surveillance and control by Attorneys General over private prosecutions has given more attention to the means to preserve these prosecutions in Canadian Law rather than to arrange the Criminal Code to better permit Attorneys General to fully assume their responsability in this matter.

Because of the enormous powers (e.g. seizure, arrest, detention) associated with criminal prosecutions and the social opprobrium that these prosecutions bring upon those against whom they are directed our society must better protect the ordinary citizen against the initiatives of private complainants who are not always animated by noble sentiments. In fact, we are not lacking in examples each year in each province to convince us that amendments must be brought to

the Criminal Code to better entrench the position that the party responsible ultimately for these prosecutions, namely the Attorney General, be assured as soon as possible that a criminal prosecution is not only founded in law but is also in the public interest.

While permitting the Attorney General to exercise an adequate surveillance over private prosecutions, the present document attempts to reconcile the legitimate interest of the private complainant to denounce crime and participate in the administration of justice with the right of the ordinary citizen not to be revengefully prosecuted.

Recognition of the Exceptional Character of Private Prosecutions

While there may have been a time when society relied on the ordinary citizen to enforce the criminal law, that is not the case any longer and the Criminal Code ought to recognize this reality. In effect, it is no longer the citizen but to the peace officer whom society turns for the repression of criminality. However, the Criminal Code makes no distinction between one and the other at the level itself of the laying of an information. When the peace officer denounces the author of a crime before a court, he does it as a simple citizen and not in the capacity as a peace officer charged with the enforcement of the law (See *Philip C. Stenning.* Appearing for the Crown, Brown Legal Publications Inc., Cowansville (Qué.) 1986, p. 271-272).

While criminal prosecutions are started and conducted in the name of the Sovereign, it would be better to clearly bring out their public nature and affirm the exceptional character of private prosecutions by framing them as we will see in the coming sections.

Affirmation of the Power of Oversight and Control by the Attorney General

The Criminal Code recognizes in section 579 that the Attorney General has the power to stay proceedings but there is no specific recognition of any role in regard to private prosecutions.

Like the Québec Act respecting Attorney's General prosecutors which foresees that "every agent shall oversee cases commenced by private prosecutors and if the interest of justice so requires, assumes the conduct of the prosecution", the Criminal Code ought to clearly define that the Attorney General has the responsibility to oversee both summary conviction and indictable offence prosecutions commenced by private complainants. The Criminal Code ought to foresee as well that the Attorney General may intervene at any stage to observe, assume, continue or stay private prosecutions and in order to do so, have the power to cross-examine witnesses, summons witnesses and present any relevant evidence.

Mandatory Hearing with Witnesses by a Professional Judge Wherever the Informant is not a Peace Officer

An information by a private complainant does not offer the same guarantees of objectivity that flow from a peace officer which, moreover, is in many provinces authorized in advance by an agent of the Attorney General. Furthermore, when the private complainant lays an information it is often following a refusal by the Attorney General to proceed in the matter by reason of insufficiency of proof.

In this context and because of the heavy consequences which a criminal accusation may bring against a person who is its object, no effect should be given to any charges brought by a private complainant unless having been proceeded by the hearing of witnesses which should be held by a professional judge to use the expression employed by Mr. Justice Lamer in *Descôteaux et al v. Mierzwenski* [1982] 1 S.C.R. 960, p. 896.

There should be no question, therefore, of the judicial authority giving credence to allegations even if under oath, by a private complainant when the latter's reasonable grounds in believing that an infraction has been committed are based on information obtained from others. These persons must be heard at a préenquête and if not by a professional judge, at least by a judge of the same authority as the one who would have to sit on the merits of the case. The testimony received at the préenquête must be transcribed in order to be given to the accused to permit full answer and defence.

Furthermore, no search warrant should ever be issued on the request of a private complainant except following a préenquête of the same kind and with the same conditions if we are to adequately protect the citizen. In addition, such a warrant should not be executed by any one other than a peace officer.

Notice to the Attorney General of the Laying of an Information by a Person Other Than a Peace Officer

It is not enough to consecrate legislatively the power of oversight to the Attorney General over private prosecutions. The means to effect an adequate oversight at the first opportunity must also be granted. At present, the Attorney General usually cannot intervene until such time as a summons has been issued or an arrest warrant executed. Not being advised of the holding of a préenquête the Attorney General has no opportunity at this stage to evaluate the probative value of the evidence which the private complainant may have. This creates difficulties in arriving at a studied and clear decision. Therefore, the Attorney General will sometimes orders a stay of proceedings in order to have a police inquiry and that in turn delay the proceedings. Above all, if the Attorney General cannot assume the prosecution or put an end to it, he will not be able to do so until the person accused has been exposed to the consequences of a criminal charge.

It is of vital importance in these cases that the Attorney General be informed of any laying of an information coming from a person who is not a peace officer. No préenquête on such an information should be held without proof that the Attorney General has been informed in a timely fashion. It should be the same for any application for a search warrant presented by a private complainant.

This done, an agent of the Attorney General could from the outset be present at the préenquête with the power to cross-examine witnesses, issue summonses and present any relevant evidence. Consequently, the Attorney General would learn if there is evidence in the possession of the private complainant which might round out (depending on the case) evidence already obtained by peace officers which had been earlier judged insufficient to justify an information, evaluate its probative value, and be in a better position to determine if there are grounds to assume and continue the prosecution or to stop procedures at this stage.

No Access for Private Complainant to Information Held by Government Agencies

As part of the fight against crime, peace officers may obtain information (by means of arrest, search warrants, electronic interceptions or information between police agencies) which ought not to be divulged except in the course of a criminal prosecution. If all citizens were permitted, by virtue of the laying of an information against a person, to have access to information held about that person, this could incite others to have recourse to criminal prosecutions to obtain evidence to assist civil actions or to cause a nuisance to others.

To eliminate undue prejudice to innocent persons, the Criminal Code should expressly deny private complainants the right of access to reports of peace officers as well as all data revealed by the police investigation or personal information held by any public agency. On the other hand, this data being available to the Attorney General's representatives may permit them to determine if the addition of this information to the evidence furnished by the complainant at the préenquête is sufficient to require the issuing of a summons or an arrest warrant by the court.

Closed Door Hearing Accompanied by Non-Publication Order

The Criminal Code ought to envisage every préenquête be held behind closed doors and only the private complainant, the representative of the Attorney General and, if authorized by a judge, a peace officer may participate. In addition, the préenquête ought to be automatically accompanied by an order of non-publication. These requirements are justified particularly because we are talking about ex parte procedures and there is not yet an "accused".

No New Information Without Presentation of New Evidence

It is not unusual that a private complainant having been refused the issuance of a summons lays a new information in the hope a different judge may be more receptive. To avoid such situations it would be appropriate to set out within the Criminal Code that no new information against the same person arising from the

same affair or one substantially the same may be received without proof in advance of new evidence.

Such a requirement may prevent abuse while not closing the door to a rehearing in the eventuality that the private complainant acquires new evidence for the case. To this end, it would certainly be better that this new evidence be examined in the form of a re-opening of the préenquête rather than being viewed simply as the issuing of a new information. Therefore, a record should be kept of all those préenquêtes which did not result in a formal information.

Judicial Authorization reconsidered

English law has long concerned itself over the means to exercise control over private prosecutions. One of the methods appears to have been to require advance authorization from the Attorney General or a judge for the presentation of an indictment before the grand jury. This method of control was introduced to Canadian law for certain infractions by a pre-Confederation law in 1861 with a strongly evocative title: *An Act to Prevent Vexatious Indictments for Certain Misdemeanours* 1861 (Can.) 24 Vic. c. 10, s. 1. This was progressively extended by the Criminal Code to the majority of crimes[1].

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[1] One understands clearly why the thrust of this pre-Confederation law, inspired by an 1859 British law, was enlarged by our Criminal Code by reading the following proposals written by Sir James Stephen, to whom we basically owe our Code.

"Theoretically, or at least according to the earliest theory upon the subject, the court does not look beyond the grand jury. The result is that in this country any one and every one may accuse any one else, behind his back and without giving him notice of his intention to do so, of almost any crime whatever. Till very lately the word "almost" ought to have been omitted, but in 1859 one of those small reforms was made which are characteristic of English legislation. In that year it was provided by 22 & 23 Vic. c. 17, that no person should indict another for perjury, subornation of perjury, conspiracy, obtaining money by false pretences, keeping a gambling house, keeping a disorderly house, or any indecent assault, unless he is permitted to do so by a judge or the Attorney or Solicitor General, or unless he is bound over to prosecute by a magistrate. These provisions were extended to libels by 44 & 45 Vic. c. 60, s.6. It is impossible to give any reason why the limitation so imposed on a dangerous right should not be carried much further, indeed it obviously ought to be imposed on all accusations whatever. 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 above

The Criminal Code amendments of 1969 and 1985 set out a precedence of judicial control over the Attorney General with the result that today when the trial of an accused for an indictable offence requires the presentation of an indictment and the prosecution has been brought about by a private prosecutor, section 574(3) anticipates that an indictment may be presented with the consent of the court or a judge before whom the accused has been sent to undergo his trial. The same applies by virtue of section 577(d) when the accused was discharged following a preliminary inquiry or none was held.

It would be appropriate to seriously question the maintenance of this judicial oversight over private prosecutions in indictable offences because this is essentially a responsibility that rests with the Attorney General. In fact, subsection 3 of section 577 of the Criminal Code ought to be eliminated because it is based on an erroneous conception on the functions of the Attorney General and the Courts and leads to inconsistencies.

On the one hand, the judge who refuses to authorize a private complainant to present an indictment is reviewing the decision to commit to stand trial when this ought to be done by way of certiorari. Furthermore, is this review on the basis of new proof, substituting a different appreciation of the evidence for that of the inquiring judge, applying the law differently, etc.? On the other hand, if the judge consents to the presentation of an indictment when the Attorney General has refused to assume the conduct of proceedings, this is reviewing the decision of the Attorney General not to intervene. Such decisions respecting criminal prosecutions rest with the Attorney General alone. They are not subject to judicial review unless they constitute an abuse of process or are contrary to the Charter.

From this, therefore, when a private complainant demands that the Attorney General take his or her case in hand and the Attorney General refuses to present

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specified, namely, keeping gambling houses, keeping disorderly houses, and indecent assaults. There are many such offences (rape, for instance, and abduction) which are quite as likely to be made the subject of vexatious indictments intended to extort money. The Criminal Code Commissioners of 1878-9 recommended that this act should be applied to all indictments whatever, and that the power of secret accusation, which came into existence only by an accident, should be altogether taken away." (A History of the Criminal Law of England, Vol. 1 (New-York, Franklin, reprint 1964) p. 293-4.)
(emphasis added)

an indictment, no judge ought to have the power to authorize a private complainant to present one. Therefore, section 577(d) and section 485.1(b) of the Criminal Code ought to be also abrogated as they confer on the courts a power to insert themselves into the prosecutorial discretion of the Attorney General which ought not to be a power of theirs, as was well explained by the Law Reform Commission of Canada:

> "We have considered, and rejected the possibility of giving the judiciary a general power to review the exercise of Crown discretion. Our reasons are the following: First, we think such a power of review would impose on the judiciary a burden its resources could not bear. Second, it is not possible to put the judiciary in possession of all the information they would require in order to properly review prosecutorial decisions. Third, judicial review of Crown discretion would involve the judiciary in undesirable political controversy, and identify them too closely with police and prosecutorial functions." (p. 59-60)

On the other hand, some may wish to preserve the judicial authorization as a means of making the Attorney General more accountable before Parliament (cf. *Dawson v. R.* [1983] 2 S.C.R. 144, p. 155) or as a means to allow him to permet a private prosecution to run its course by not interfering.

Each has its own problems. The Attorney General is accountable regardless of whether the decision is to refuse to endorse a prosecution following committal to stand trial or to stay proceedings except that in the first place an undesirable confrontation with the judiciary occurs. As to merely letting matters run their course one could achieve the same end by requiring the private complainant to obtain authorization from the Attorney General to prefer an indictment and conduct proceedings.

For all that, it seems preferable to invest the Attorney General with the responsibility to oversee private prosecutions, not only because the Attorney General is better placed than the courts to do so but as was mentioned recently by Madam Justice L'Heureux-Dubé in the Supreme Court, the ultimate discretion for criminal prosecutions is within the exclusive mandate of the Attorney General:

"Moreover, should judicial review of prosecutorial discretion be allowed, courts would also be asked to consider the validity of various rationales advanced for each and every decision, involving the analysis of policies, practices and procedures of the Attorney General. The court would then have to "second guess" the prosecutor's judgment in a variety of cases to determine whether the reasons advanced for the exercise of his or her judgment are a subterfuge. This method of judicial review is not only improper and technically impracticable, but as Judge Kozinski observed in *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), at page 1299:

[...]

Such a situation would be conducive to a very inefficient administration of justice. Furthermore, the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it. Judicial review of prosecutorial discretion, which would enable courts to evaluate whether or not a prosecutor's discretion was correctly exercised, would destroy the very system of justice it was intended to protect." (*U.S. v. Redondo-Lemos*, supra., at page 1300).

In *Director of Public Prosecutions v. Humphrys*, supra., at p. 5611, Viscount Dilhorne provides a further reason why judicial screening of prosecutorial discretion is not mandated:

> "A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The function of prosecutors and of judges must not be blurred. If a judge has power to decline a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval." [Underlining by Judge L'Heureux-Dubé]

> In our system, a judge does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them.
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> [...]
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> My colleague's invitation to the Court of Appeal to interfere with prosecutorial discretion, absent abuse of process, goes against the grain of doctrine and jurisprudence. It also carries with it the dangers that have been outlined above." (*R. v. Power* [1994] 1 S.C.R. 601, pp. 626 to 629)

Finally, let us add that in accordance with the above-mentioned principles and in line with Bill C-41 which from its proclamation will confer upon the Attorney General, as it ought to, the alternative disposition of taking the matter outside the judicial forum; no charge respecting offences which have been the subject of such earlier scrutiny can be brought without the advance authorization of the Attorney General.□

RECOMMENDATIONS

(1) That the Criminal Code preserve the option for a citizen to swear an information in writing before a judge.

(2) That the Criminal Code clearly establish the public character of prosecutions by making the laying of an information by a peace officer the rule and that by a private citizen the exception.

(3) That the Criminal Code clearly set forth that the Attorney General has the responsibility to supervise all criminal prosecutions brought by private complainants in summary conviction matters as well as indictable ones.

(4) That the issuing of summonses or warrants be preceded by a mandatory hearing of witnesses when an information has been sworn by a private citizen.

(5) That this préenquête will be held before a full-time judge.

(6) That no préenquête will be held unless the Attorney General has received timely notice.

(7) That the authority of the Attorney General to intervene at any préenquête to observe, conduct or stay proceedings and to that end, to cross-examine and summons witnesses and present all relevant evidence be clearly recognized.

(8) That such préenquête must be held behind closed doors in the presence of the private complainant, the Attorney General and upon authorization by a judge, a peace officer and this be accompanied by a non-publication order.

(9) That it be clearly set forth in the Criminal Code the private complainant has no right of access to police reports or such information held by governement agencies.

(10) That the obtaining of a search warrant by a private complainant be subjected to the same procedure as that required for the laying of an information.

(11) That no new information may be sworn relating to the same infraction or the same matter by a private complainant in the absence of new evidence.

(12) That sections 574(3), 577(d) and 485.1(b) of the Criminal Code be abrogated.