

**The Office of the Attorney-General**  
**- New Level of Public Expectations and**  
**Accountability**

## The Office of Attorney-General: New Levels of Public Expectations and Accountability

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### I Introductory Review

Since I wrote my discussion paper for the Law Ministers' Conference held in Canada more than 15 years ago, several major developments have occurred that challenge the traditional functions and powers associated with the office of Attorney General. All the more reason, therefore, to welcome this opportunity to revisit with those of you who are now in office what in 1977 I described as "Emerging Problems in Defining the Modern Role of the Office of Attorney General in Commonwealth Countries". In re-reading what I wrote on that occasion I have to admit that many of the major issues identified in that paper remain as fresh now as they were then. Others have surfaced in the intervening years. In some respects, such as the entrenchment of the Charter of Rights and Freedoms in the Canadian Constitutional Act of 1982, and parallel initiatives in many parts of the Commonwealth towards constitutionalizing basic human rights, the role of the Attorney General as "guardian of the public interest" has scarcely evoked any serious attention. This meeting, hopefully, will address some of the central questions associated with that long neglected aspect of the Attorney General's responsibilities.

During the same period there has been increasing evidence of disagreement between the courts and the Law Officers in the area of judicial reviewability of prosecutorial decisions made by the Attorney General or his agents, the Crown or State prosecutors. In 1977 the House of Lords, in the landmark decision known to every Commonwealth Attorney General as the *Gouriet* case, disavowed any jurisdiction in the courts to review the exercise by the Law Officers of their prerogative discretionary powers. Over the intervening years, however, this decision has been assailed from many perspectives, not the least of which has seen the adoption, across the entire Commonwealth spectrum, of the doctrine of abuse of process which was first enunciated by the same court in *Connelly v. D.P.P.* [1964] A.C. 1254. The task of reconciling these patently divergent theories has yet to be undertaken by the court that originally spawned them. In the meantime, this gathering should take heed of the constant chipping away at the fundamental principle established in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, as well as the long-term ramifications of the abuse of process doctrine as justification for asserting the judicial reviewability of prosecutorial decisions. More on this subject later in this discussion paper.

Not all member countries of the Commonwealth have, as a central feature of their criminal justice systems, an office of Director of Public (or Criminal) Prosecutions.

Those jurisdictions which do not have such an office must now be in a clear minority. In the vast majority of the countries represented at this meeting the basic characteristics of the office, and in particular the relationship between the Director of Public Prosecutions and the Attorney General or Minister of Justice, and between the D.P.P. and the Government, are spelt out in the respective constitutions, thus underlining the critical importance of the position in the legal machinery of government. If any of you are unfamiliar with the wide disparity of constitutional arrangements on this subject in different parts of the Commonwealth take a look at my 1977 discussion paper. Later on I shall try to update this mosaic which, quite frankly, bewildered me when I first encountered it.

What is of considerable interest to note is the surge of activity in this field by those older member states, such as Australia and Canada which, for so many years, had seemingly never felt the necessity to examine, let alone alter, their existing systems of criminal prosecutions. Having been directly involved in the Royal Commission on the Donald Marshall Jr. Prosecution in Nova Scotia (1986-89), from whose recommendations emerged the first statutorily independent office of Director of Public Prosecutions anywhere in Canada, I believe it is only a matter of time and political enlightenment before this significant reform is adopted in all the other provinces, and federally, across the country. In Australia, the process of change had begun several years earlier with the State of Victoria and the Commonwealth Government leading the way. Notable differences, however, are evident in their respective approaches to the basic elements of independence and accountability. As to these, whether we are speaking of the office of Attorney General or that of the Director of Public Prosecutions, it is very apparent to my mind that important questions arise from the new directions reflected in the Australian and Canadian initiatives. These basic elements need to be addressed by every jurisdiction represented at this meeting, no matter which model was originally adopted or is in place as of this moment.

I include in this exercise England and Wales that gave birth, as far back as 1879, to the original office of Director of Public Prosecutions. As is probably well known by now, after a mere 150 years or so of intermittent debate, the Westminster Parliament in 1985 inaugurated a dramatic turn-around by establishing for the first time in its history a system of full-time State prosecutors acting under the overall direction of the Director of Public Prosecutions who, in turn, remains subject to the supervision and control of the Attorney General. Scotland, I

hasten to add, whose indigenous system of criminal justice, dating back to the 17th century, long precedes that of nearly every other country in the Commonwealth, must have experienced more than a fleeting spasm of national pride in seeing its neighbour embrace the principle of a single national prosecution service for England and Wales controlled and directed by the Director of Public Prosecutions.

Far from signifying a total merger of institutions involving the police and prosecutors, certain features continue to distinguish the prevailing systems within England and Scotland respectively. And these differences mark an apparent divergence of approach to some of the ever present central questions that every jurisdiction in the Commonwealth must resolve to meet its particular circumstances. Whether the differences are more apparent than real remains an open question. I propose to revert to some of these differences more fully in a moment, but for now let me identify the issues that continue to plague many of the countries represented at this gathering. Thus, should departmental control over the conduct of police in criminal cases and that of supervising prosecutors be unified or be completely separate? Irrespective of ministerial responsibility for the police and prosecutors, as distinct entities, should the investigating police have an acknowledged right to determine whether or not to set the criminal process in motion by laying a formal complaint before a justice of the peace (or magistrate), and this notwithstanding the Attorney General's undoubted right to decide whether the ensuing criminal prosecution should be continued or terminated by entering a stay of proceedings?

These very familiar questions were thoroughly canvassed and resolved, or so it was thought, so far as English criminal justice is concerned, by that country's Royal Commission on Criminal Procedure in 1981. Its principal recommendations are to be found reflected in the statutory landmark, the Prosecution of Offences Act, 1985. Before the ink on the statute book had scarcely dried, the same old questions resurfaced in the wake of an unprecedented erosion of public confidence that resulted from the handling of what came to be known as the "Birmingham Six", the "Guildford Four" and the "Maguire" cases, and the wrongful incarceration over many years of alleged members of the Irish Republican Army. These flagrant miscarriages of justice spread across the entire system, from the original police investigation and the seriously flawed scientific evidence to the appellate process. No professional group was immune from the outburst of public criticism that fed upon the spate of revelations. So, once again, an embarrassed government resorted to the traditional malady for neutralising, for a while at least, hostile public opinion, namely, the creation of yet another Royal Commission. Judging by the dramatic and unexpected nature of the reforms advocated by the legal professional bodies in their submissions to the Royal Commission on Criminal Justice, major changes were envisaged in some of the areas with which this paper is presently concerned. The Commission's recommendations have now been released but the final report contains no structural proposals that could be described as fundamental. To move on to another very specific subject on which I have expressed my views repeatedly in other of my pub-

lished writings, I confess to being disappointed at the slowness with which Attorneys General, in whichever Commonwealth country they may have the ultimate responsibility, have taken the bold initiative of making publicly available the policy guidelines that shape individual decisions in matters of prosecution. In my book, *The Attorney General, Politics and the Public Interest* (1984), I traced the origin of this major contribution towards full public accountability for prosecution decisions. In doing so, I recognised the leadership shown by the Attorney General of the Commonwealth of Australia (in 1982) and by the Attorney General of England and Wales (in 1983). My own country, Canada, with the occasional exception, has lagged sadly behind in this kind of endeavour but I hasten to applaud the recent release by the Attorney General of Canada, earlier this year, of the federal Justice Department's "Guidelines for the Making of Decisions in the Prosecution Process". Equally impressive, though not publicly disclosed, was the unprecedented scale of the consultation process that preceded the manual's public availability. My ignorance of similar developments in other parts of the Commonwealth, if they have occurred, is readily admitted and I hope the ensuing discussion will enlighten all of us as to what action is contemplated elsewhere along the lines I have described.

Before leaving this introductory note on the subject of public dissemination of prosecution guidelines, I want to emphasize the central place which the principle of full pre-trial disclosure must be accorded in any such prosecution policy statements. Much as it may offend the more reactionary exponents of prosecutorial responsibilities, the time has come to recognise the damaging effects, in terms of public confidence, of any perception that the State is prepared to seek convictions even at the expense of placing the accused at an acute disadvantage by withholding evidence that could benefit his defence. For too long, in many jurisdictions, the prevailing principle has been that the provision of pre-trial disclosure to counsel representing the accused was a matter of grace and favour. In Canada, the turning point in this outmoded thinking came with the decision of its Supreme Court in the *Stinchcombe* case [1991] 3 S.C.R. 326. Noting that, despite recommendations by the Law Reform Commission of Canada for legislative action on this subject, Parliament has been content to leave the development of the law of disclosure to the courts, the Supreme Court of Canada has now chosen to do just that. In an unanimous judgment, the Justices based the new disclosure principles squarely within the accused's ability to make "full answer and defence", which right, the Supreme Court pointed out, "has acquired new vigour by virtue of its inclusion in section 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice." As the chief prosecutor in every jurisdiction, the Attorney General bears the primary responsibility to see to it that this philosophy is fully reflected in the operating guidelines that govern the individual prosecutor's discretionary authority. As I was putting the finishing touches to this paper the final report of the broadly based Advisory Committee to the Attorney General of Ontario, chaired by the former doyen of criminal law judges in Canada, Hon. G. Arthur Martin, was publicly released. Its far

reaching recommendations, with respect to charge screening, disclosure and resolution discussions, will reverberate across and beyond Canada.

Associated with many of the issues I have introduced in the previous paragraphs is a relatively new development that has begun to surface in parts of Canada and Australia. Nothing approaching an epidemic is evident as I write, but the subject is of sufficient potential significance to the office of Attorney General, in every member country, that this assembly should be informed as to what is happening elsewhere. The issue quite simply is this - to what extent are the Attorney General and his agents, be it the Director of Public Prosecutions, Crown Counsel or State prosecutors, amenable to the disciplinary processes of the professional body that is responsible for maintaining minimum standards of professional conduct? The universality of these standards in any particular jurisdiction is not in issue. What cannot be ignored, however, are the serious constitutional issues that emerge from the shadows if the breadth of the professional body's disciplinary powers are expanded in a way that crosses the boundary line between (i) the prosecutor as an ordinary member of the legal profession who, like his colleagues in the defence bar, specializes in the practice of criminal law, and (ii) the State or Crown Prosecutor in his capacity as the public embodiment of the Attorney General's constitutional powers and prerogatives in the area of criminal law. To clarify the true character of this demarcation line was the challenge presented a few years ago before the British Columbia Court of Appeal in *re Hoem and The Law Society of B.C.* (1985) 20 C.C.C. (3d) 239. No one questioned the statement made by that court that: "The researches of counsel have turned up no case in which a governing body of the legal profession has asserted the power to discipline an Attorney General, or counsel instructed by him, in respect of the exercise of prosecutorial discretion". Such a lack of authority no longer prevails in Canada, but the decisions by the courts in one province have in no way deterred the governing bodies in some other parts of the country from pressing forward with their claims to exercise another level of supervisory accountability over the Attorney General and his agents. I should like to share with you my views on this contentious development, in the hope of clarifying the principles and prerogatives involved.

## **II A New Level Of Accountability: How Far Does The Disciplinary Arm Of The Legal Profession's Governing Body Extend To The Actions Of The Attorney General Or His Agents, Particularly In The Area Of Prosecutorial Discretion?**

The emergence of this question as an additional level of accountability, over and above that of parliamentary accountability and judicial reviewability, should not be dismissed as an abstract academic problem. Up to now, so far as I am aware, this potentially new field of conflict involving the Attorney General and the pertinent governing body of the legal profession has manifested itself only in Canada and Australia. And even in these countries the subject has scarcely been recognised as a pressing issue among the rank and file of the legal profession, let alone amidst the wider public. That it will nevertheless do so, in the fullness of time, would seem

to be inevitable, so this is an opportune moment to take stock of what is involved.

To begin with, it may be useful to recall the solitary instance in which an English Attorney General was held to be amenable to answer charges of unprofessional conduct before the Benchers of his Inn of Court. In what at the time, 30 years ago, was considered to be a situation without precedent, Sir John Hobson, Attorney General in the Harold Macmillan Administration, did not challenge the jurisdiction of his fellow Benchers in the Inner Temple to adjudicate charges against him of unprofessional conduct in the handling of the *Enaharo* case (1963). The original complaint arose out of the heated controversy engendered by the Government's refusal to grant political asylum to Chief Enaharo of Nigeria. The specific allegations directed against the Attorney General were that, in the course of habeas corpus proceedings that preceded the deportation of Enaharo to stand trial for treason felony in Nigeria, brought before the Divisional Court and, subsequently, before the House of Lords Appeal Committee, Hobson had presented an affidavit sworn by the Home Secretary which he, the Attorney General, knew to be inaccurate and misleading. The affidavit had failed to disclose that the Nigerian Government had informed the Home Secretary that senior English counsel, whom Enaharo had wished to represent him before the Nigerian courts, was to be excluded from the country. Among the alternative dispositions available to the Inner Temple Benchers assembled to adjudicate the serious allegations were a reprimand, suspension or disbarment. The Attorney General was represented by counsel and gave evidence refuting the allegations made against him. At the conclusion of the hearing the assembled Masters of the Inn of Court found that the charges were unfounded and that there were no grounds for criticising the Attorney General's conduct.

Shortly thereafter in 1965, and perhaps prompted by the events just described involving the Attorney General of England and Wales, the flamboyant Minister of Justice and Attorney General of Québec, Claude Wagner, found himself having to meet charges of unprofessional conduct arising out of a speech, made at a public meeting, in which Wagner had sought to awaken the conscience of the Bar to the widespread erosion of public respect for the Bench and Bar. The complaint in this case was lodged by the judge whose conduct had been attacked in the course of the Minister's speech. An essential part of the Attorney General's unsuccessful defence before the Montreal Bar Council was that his actions were outside the disciplinary jurisdiction of the professional body. There followed a series of convoluted appeal proceedings culminating in a very brief judgment by the Québec Court of Appeal, in *Barreau de Montreal v. Wagner* [1968] B.R. 235, declaring that the disciplinary powers of the Bar did not extend to the Minister of Justice when exercising the executive powers of the Crown.

My own reading of the two cases suggests that the circumstances of the *Enaharo* case, involving Sir John Hobson, are clearly distinguishable from those just described in relation to Claude Wagner in Québec in 1965. Both of the complaints in the case involving the English Attorney General referred directly to judicial proceedings and the professional conduct of the Senior

Law Officer in his handling of those processes. The political implications of the Enaharo case were properly the subject of debate and accountability in the House of Commons. The professional conduct of the Attorney General, on the other hand, was concerned with his observance of the appropriate standards by which every lawyer is subject to the assessment of his peers. Hobson enjoyed no preferential status in this regard, simply because he was the incumbent Attorney General. An additional complication, regrettably not addressed by the Québec Court of Appeal in the Wagner case, arises if the Attorney General also happens to occupy the portfolio of Minister of Justice or its equivalent. In this paper I intend to focus my attention on the amenability of the Attorney General qua Attorney General, and that of his agents, to the professional judgment of their peers with respect to decisions made under the umbrella of prosecutorial discretion.

Much confusion exists on this subject. The phrase "prosecutorial discretion" is often used as if there existed a universal understanding of what it encompasses. Unfortunately, this is far from being an accepted fact. To avoid any misconceptions as to my basic premise, I understand the concept of prosecutorial discretion to include, but not to be restricted to, decisions by the Attorney General or any agent of the Attorney General as to: (i) preliminary questions of law that derive from the definitional, substantive, procedural or jurisdictional aspects of the offence(s) in question; (ii) the sufficiency of the evidence collected by the police and which is legally admissible to support the proposed charge(s); and (iii) whether the prosecution or its termination is called for in the public interest. The challenges presently being mounted by various of the provincial Law Societies in Canada are directed towards one or more of the above instances of prosecutorial discretion. Other aspects, such as the decision to grant statutory consent to the commencement of criminal proceedings, to exercise the right of appeal against conviction or sentence, or to proceed summarily or by indictment, have not figured prominently in the debate.

Without going into the details I interpret the Canadian trend, whenever it has surfaced, as an attempt to legitimize the exercise of disciplinary jurisdiction with respect to the professional competence of the Crown prosecutor in particular cases. Thus in the case previously referred to, Re Hoem et al., involving criminal proceedings against municipal politicians, the Law Society of British Columbia took the position that Crown Counsel should have appreciated that there was no evidence to prove material allegations and, therefore, the charges should not have been proceeded with. Even this assertion on the facts was highly questionable (see Gillen v Law Society of B.C. (1985) 63 B.C.L.R. 1), but the Appeal Court chose to reject the Law Society's position on more fundamental grounds, saying:

"The concession that the Law Society has no concern with policy considerations is significant... The limit suggested by the Law Society in that passage is that it is within its powers to determine whether there was a legal foundation for a prosecution. If that were so it would mean in practice that the Law Society rather than the Attorney General would be the final arbiter as to what is an adequate legal foundation .... the determination whether there is legal foundation for a charge

will always be open to doubts, disputes and differences of opinion, and that is essentially a question of policy whether any given set of facts justifies a prosecution. It is not in the public interest that that determination should be made by the Law Society rather than the duly appointed Law Officers of the Crown... The distinction sought to be made between the exercise of the discretion, and the question whether the lawyer was competent in performing the work leading up to its exercise is an unworkable one ... the separation cannot feasibly be made". (op. cit., pp. 253-255.)

In this passage, the appellate court was emphasizing the importance of keeping in mind the distinction between two essentially separate issues. Blurring of the boundary line separating the two issues should prompt a strong reaction on the part of any Attorney General conscious of the importance of defending his independent status in matters of prosecution. Thus, there should be no serious question raised if what is at issue is the professional conduct of the prosecutor in the handling of a case as it proceeds through the criminal courts. If the alleged breach of ethical standards consists of, e.g., misleading the court, pressurising Crown witnesses as to their forthcoming testimony, or failing to observe the essential requirements of pre-trial disclosure to the defence, no exemption based on the office should protect the prosecutor from his or her accountability to the disciplinary processes that extend to all members of the profession.

By virtue of the very office that is under scrutiny there is an inherent expectation that every Crown or State prosecutor will demonstrate his compliance with the fundamental principles of fairness and justice in relation to the accused before, during and after the trial and the appeal process. The boundary line, of which I speak in the present context, is crossed if the body seeking to exercise the disciplinary review powers of the Law Society focuses its attention on the decisions made by the prosecutor in charge of the case. Such decisions are invariably an amalgam of many considerations including, but never confined to, an assessment of the available evidence and the pertinent law. Whatever may be the theoretical chronology of an individual prosecutor's exercise of the discretionary powers associated with his office, there will always be a consideration of the "public interest" or "public policy" dimensions of the individual case.

There is no need for me in this paper to expand on this major aspect of prosecutorial discretion. I have done so at length in my other writings. Increasingly, the dimensions of these prominent factors are spelt out in some detail in the policy guidelines issued by the Attorney General or the Director of Public Prosecutions. For any Law Society to claim for itself the right to judge what, in any particular set of circumstances, is or is not in the public interest - as was the case in one province of Canada - demonstrates the dangers of sacrificing to another body the constitutional independence and its concurrent responsibilities historically associated with the office of the Attorney General. For the same reasons given by the Court of Appeal in the Hoem case, any attempt to separate the inter-related stages in the prosecutor's decision-making process is both impractical and devoid of any sustainable principle. Each stage, in practical terms, is so interwoven with the others that

any attempt by a disciplinary committee to isolate parts of the process from the others would quickly demonstrate the futility of such a review procedure.

To sum up, I can find no justification for the injection of yet another layer of accountability to which the Attorney General and his prosecutorial agents are capable of being rendered subject. Difficult as it may be in the ordinary run of the mill cases to maintain the demarcation line that I described earlier, especially in the face of claims that what is at issue is nothing more than a simple matter of professional conduct, the larger constitutional ramifications should not be ignored. At the same time, I disapprove strongly of any legislative immunity which is designed to insulate the holder of the office of Attorney General from all forms of professional accountability. In the case involving Sir John Hobson in 1963 no such claim to total immunity from the disciplinary processes of the Inner Temple was made on behalf of the then Attorney General. All the more reason, therefore, to react adversely to the provision, still extant, in the Law Society of Upper Canada Act (R.S.O. 1990, Chap. L.8, s.13(3)) which states:

"No person who is or has been the Minister of Justice and Attorney General for Ontario is subject to any disciplinary proceedings of the Society or to any penalty imposed in Convocation or in a committee of benchers for anything done by him while exercising the functions of such office."

There may be other examples of this kind of extraordinary protection conferred on Attorneys General in other parts of the Commonwealth with which I am unfamiliar. Certainly, I am unable to cite any other historical precedents for this kind of immunity. To say the least, it seems incongruous to confer upon every Attorney General in Ontario the ex-officio rank of a Bencher of the governing body and simultaneously clothe the same person with total immunity from the disciplinary powers of the Law Society. In my opinion, the Ontario provision cited above, or any parallel enactments, should be totally removed from the statute book.

Its underlying philosophy is in stark contrast to the landmark decision of the Supreme Court of Canada in *Nelles v. R. in right of Ontario et al.* [1989] 2 S.C.R. 170. After examining the common law precedents and traditional arguments supporting the principle that the Attorney General and Crown prosecutors enjoy absolute immunity from civil liability for malicious prosecution, the Supreme Court (by a majority) ruled that such immunity could no longer be justified in the interests of public policy. As the majority judgment concluded: "...the inherent difficulty in proving a case of malicious prosecution, combined with the mechanisms available... to weed out meritless claims, is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important duties" (*ibid.*, p. 199). The adverse reactions of prosecutors across Canada to the ruling in *Nelles* was to be expected but this attitude could not be supported rationally. Having previously argued in favour of the reform, I welcome this additional form of public accountability encompassing the office of Attorney General and its prosecutorial agents. In handing down its decision the Supreme Court of Canada believed it was breaking new ground so far as Commonwealth

countries are concerned. I imagine that this meeting would be interested to learn of any similar departures from the traditional common law position.

### **III Dimensions To The Principles Of Independence and Accountability As They Relate To The Attorney General And Director Of Public Prosecutions.**

At the conclusion of their meeting in 1991 the Commonwealth Heads of Government issued what they described as the "Harare Commonwealth Declaration". Such high sounding pronouncements tend to lose much of their initial impact with the passage of time and, if proven to be inconvenient or impossibly ambitious, their message tends to be quickly forgotten by future governments committed to their own political priorities. Nevertheless, I think it is important, especially for this gathering of Law Ministers and Attorneys General, to keep in mind the commitment made in Harare on behalf of all member countries:

"to work with renewed vigour, concentrating especially on the protection and promotion of the fundamental political values of the Commonwealth ...the rule of law, the independence of the judiciary and just and honest government..."

At a time of widespread public cynicism and disillusionment among all age groups towards their particular political system and its elected representatives, it would be easy to dismiss out of hand the First Ministers' unqualified commitment towards the pursuit of "just and honest government". I, for one, am not prepared to dismiss this ideal as wishful thinking nor do I think it appropriate at this time to dwell on the vastness of such an undertaking in every part of the Commonwealth. It is, however, my firm belief that there are few areas of greater importance in maintaining public confidence in government than the ordinary citizen's respect for the administration of justice. That respect, when accorded, springs from the depth of the ordinary person's basic values and hopes. Violate those values and you quickly begin to see the erosion of society's confidence in those to whom the enormous powers of government have been entrusted. Nowhere is this more evident than in the institution and conduct of criminal prosecutions. Among the central criteria by which a country's justice system is publicly judged are fairness and evenhandedness in the handling of criminal proceedings, the absence of any perception of bias or political interference on the part of those exercising police and prosecutorial authority, as well as professional competence and integrity throughout the system. As often as not the public focus will be directed towards the highest echelons in the system and, particularly, those holding the critical offices of Attorney General and Director of Public Prosecutions. This is where the ultimate authority for prosecuting crimes is vested and from which source is delegated the broad range of discretionary powers exercised daily by the State's prosecutors.

In my earlier discussion paper for the Commonwealth Law Ministers meeting in 1977, I warned against any attempt fully to understand the bewildering series of alternative arrangements for the offices of Attorney General and Director of Public Prosecutions, as reflected in the respective constitutions of the member countries,

without reference to the prevailing political context of each individual country. For what seems like obvious reasons I eschewed that task in 1977. The sheer magnitude of the exercise explains why I intend to follow the same sound advice today. Buried beneath these constitutional arrangements, but ready to erupt once the surface is scratched, are the broad principles of independence and accountability, with respect to which my own views are probably by now well known. What has engaged my attention more recently, in a series of opinions entitled *Walking the Tightrope of Justice* that I prepared in 1988 for the Nova Scotia Royal Commission into the miscarriage of justice involving Donald Marshall, a young Micmac Indian wrongfully convicted of murder, is the flurry of major reforms instituted in Australia, Canada and Britain, countries which for so many years had adhered, rather complacently, to the status quo with respect to their respective machinery of criminal prosecutions.

The prelude to major institutional changes can usually be traced to public dissatisfaction with, or worse the collapse of public confidence in, the existing structures of government. So it was in Australia in the 1970s. Commencing with indications of possible involvement by the Federal Crown Solicitor's office in Western Australia in a highly organized system of tax evasion, to the series of scandals involving political figures and members of the judiciary in the activities of organised crime, Australia was subjected to the embarrassing findings of one Royal Commission after another. Public confidence in the normal machinery of justice was shaken to the point that Special Prosecutors were appointed, with total independence from the Attorney General, under new legislation providing for such extraordinary appointments. Significantly, the transition from ad hoc Special Prosecutors to the establishment of a permanent statutory office of Director of Public Prosecutions was foreseen and strongly advocated by each of the Special Prosecutors appointed by the Australian Government. With this kind of momentum building up for radical reform the pressures for change were inescapable. The State of Victoria was first off the mark with the smooth passage of its Director of Public Prosecutions Act (No. 9848 of 1982). The following year saw the Commonwealth of Australia introduce legislation on the same subject, and this enactment too (No. 113 of 1983) proceeded quickly through both Houses of the Legislature without amendment or indeed much debate. The particular provisions of both measures demand careful attention if the nuances of the legislation are to be fully appreciated. This comparative exercise will quickly demonstrate the striking disparities between the federal and State philosophies on the questions of independence and accountability.

Subsequent initiatives by the other States in Australia reflect a strong preference for the model originally embodied in the State of Victoria enactment in 1982. It envisages a totally independent Director of Public Prosecutions of the kind familiar to many of the Commonwealth countries represented at this meeting. Time, however, will tell whether the assumed independence claimed for the Director of Public Prosecutions in the State of Victoria is reconcilable with the terms of section 9(2) of the parent statute declaring the Director to be "responsible to the Attorney General for

the due performance of his functions under this Act or any other Act".

Turning to the philosophy reflected in the Commonwealth of Australia statute of 1983, the most notable provision is section 8(1) which states unequivocally that "In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney General, after consultation with the Director, gives or furnishes to the Director in writing". Opportunity is provided for the Director to express his reactions to any proposed directive before the Attorney General's views are finalized and committed to written form. When the exchange of ideas has run its course the instructions of the Attorney General must always prevail. Even more fundamentally, the two jurisdictions in Australia diverge markedly on the issue of involvement in the handling of a particular case. Experience has taught us that public scrutiny is likely to be magnified proportionately if the accused is a political or other public figure and questions of non-prosecution or non-enforcement of the criminal law become the subject of public comment in the media or in the legislature.

It is in these kinds of exceptional circumstances that confidence in the doctrine of ministerial accountability is put to its most severe test. The State of Victoria, and those other jurisdictions (e.g., Queensland (No. 95 of 1984); New South Wales (No. 207 of 1986)) that have followed its example in their sensitiveness to the perceptions of political interference, have legislatively deprived the "independent" Director of Public Prosecutions of any right to issue guidelines or directives in relation to individual cases. He must be content with the formulation of general policy directives. In sharp contrast to this statutory policy of enveloping the Attorney General and Director of Public Prosecutions in a shroud of total insulation from decision making with respect to individual cases, the Commonwealth of Australia expressly authorises its Attorney General to give the federal Director of Public Prosecutions directions in individual cases. Such directions, however, it is important to note, must always be made in writing.

Sceptics will not readily be assuaged by this requirement. The real sting, as I see it, is contained in the supplemental requirement that the Attorney General's written instructions to the Director of Public Prosecutions be published expeditiously in the Official Gazette and, in addition, be communicated directly to the House of Representatives. Some delay is permitted if this is necessary to safeguard the interests of the accused or potential witnesses. Such postponement has to be justified before the House of Representatives when the case has finally been disposed of. There has been, as yet, little enough experience in Australia to determine the practical effects of these innovative reforms. Nevertheless, I want to revert shortly to the inherent nexus between these mandatory obligations placed upon the Attorney General and the effectiveness of the doctrine of ministerial accountability.

Understandably, the Australian debates on the measures just described are replete with references to the difference between their indigenous solutions to the problems associated with public prosecutions and that which defines the original office of Director of Public

Prosecutions established for England and Wales in 1879. If for no better reason than its antiquity and the experience it represents, the English office is often used as a talisman by which all later versions of that office are assessed. In considering the significance of the major reforms instituted by the Prosecution of Offences Act, 1985, c.23, and any new directions which the English criminal justice system may be destined to take in the wake of that country's latest Royal Commission's report, it is important to remember that it is the language of the original statute of 1879 that, to this day, authoritatively defines the status of the Director of Public Prosecutions for England and Wales and that office holder's constitutional relationship to the Attorney General.

Despite frequent changes over the intervening years to the subordinate regulations in the field of prosecutions, the essential character of this relationship is expressed in section 2 of the 1879 enactment which speaks of the Director acting "under the superintendence of the Attorney General" and "as may be directed in a special case by the Attorney General". In what has come to be regarded as an authoritative exposition of the respective responsibilities of the two offices, speaking in the House of Commons in 1979 the then Attorney General, Sir Michael Havers, declared:

"My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship is such that I require to be told in advance of the major, difficult, and from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction". (H. C. Debates, Vol. 176, Written Answers, cols. 87-88).

Whenever there is envisaged a system of collaboration between the Attorney General and the Director of Public Prosecutions in the decision making process, as exhibited in the Australian legislation referred to earlier, it is impractical to define with much greater particularity, than in the above quoted passage, the circumstances wherein consultation is mandated. Obviously, any such consultation must precede the making of final decisions, otherwise the Attorney General will be placed in the invidious position of having to defend the exercise of discretionary authority without having had the benefit beforehand of ascertaining the facts and law involved, assessing the public interest dimensions, and rendering his own decision whether to approve or reject the Director's advice and recommendations.

In this regard, the former English Attorney General was at pains to emphasise that his ultimate power to give directions had to be viewed in conjunction with his ultimate responsibility to defend his actions before the pertinent legislative body. Regrettably, it must be acknowledged that few champions are to be found nowadays who are ready to extol the demonstrated value of parliamentary accountability as a key element in controlling the exercise of prosecutorial discretion. Such

lack of support for this principle is readily explained by the relative infrequency of such public challenges, and the customary inadequacy of the questioner's preparation and determination to elicit the full picture of what took place prior to making the decision to prosecute or to stay the proceedings. I am persuaded that something more concrete is called for if we are to inject real backbone into the principle of ministerial accountability for prosecutorial decisions.

Because I retain a fundamental commitment to this constitutional principle as a central element of parliamentary democracy I find myself favourably drawn to the openness aspects of the Commonwealth of Australia's approach to the Attorney General's accountability. Thus, according to the federal statute (No. 113 of 1983, s.8), whenever the Attorney General chooses to intervene in a particular case and to give instructions to his subordinate, the Director of Public Prosecutions, such instructions must be committed to writing and, subject to reasonable delay if it is shown that the interests of the accused or a witness may be seriously prejudiced, the written instructions must be made available for public information. This process necessarily mandates (1) the publication of the Attorney General's written directive, with any accompanying reasons, in the Government's Official Gazette (or its equivalent) and (2) tabling the same information promptly in the Legislature. The contrast between, on the one hand, this kind of specific obligation publicly to disclose the thinking behind questionable decisions and, on the other, the veil of secrecy that prevents any realistic assessment of the values and variables operating at the time of decision making, makes it imperative that every jurisdiction represented at this meeting take a good hard look at the Australian initiatives and then ask themselves, can we justify not accepting a similar degree of total prosecutorial accountability?

Not for one moment am I suggesting that this process represents a panacea for all the weaknesses in the doctrine of parliamentary responsibility as it relates to the office of Attorney General. That doctrine should not be relied upon as the single foundation stone on which the Attorney General's accountability can be guaranteed. As this discussion paper recognises, there are several lines of accountability that must be taken into account by any Attorney General wishing to fulfil his or her constitutional obligations as the responsible member of the Executive. Requiring any interventionist directions in an individual case to be committed to writing and published will not, in one stroke, secure the twin goals of openness and accountability. Nevertheless, I believe this reform has the potential for making a major contribution towards both these central objectives.

As part of my series of opinions *Walking the Tightrope of Justice* in 1988, I undertook a detailed review of the constitutional provisions in a large number of Commonwealth countries whose ostensible purpose is to insulate the exercise of prosecutorial discretion from the negative features associated with partisan political interference. Most have been content to retain the provisions of their original independence constitutions that were designed to achieve that goal. Some have felt obliged to make changes. Nowhere, apart from the specific reforms to which I have alluded, did I find anything approaching the more recent experiments

introduced throughout Australia. A few developments, especially in the Caribbean region, deserve mention for their attempts to wrestle with the protection of the independent process of prosecutorial decision making. The variety of the approaches adopted strongly suggests that there is no single, pre-eminent solution to this enduring problem.

Thus, in Trinidad and Tobago whereas under its independence constitution of 1962 the Attorney General was given power "in any case in which he considers it desirable so to do to institute and undertake legal proceedings against any person before any court" that country's 1976 Republican Constitution (s.90(2)) makes provision for a Director of Public Prosecutions to operate separately from the Attorney General who is "charged with the administration of legal affairs" in the courts. When I visited Trinidad and Tobago I think it fair to observe that there was considerable uncertainty among the principals involved in exactly determining where the boundary lines should be drawn, as reflected in the language of their constitution. No such uncertainty was evident in Jamaica where I was reminded, by almost the last surviving member of its delegation that negotiated Jamaica's independence constitution, it was at the insistence of Mr. Michael Manley and Mr. Alexander Bustumante (the then leaders of the main political parties) that the critical section 94 was inserted as a vital part of their new Constitution. It creates the office of Director of Public Prosecutions as a public office with security of tenure equivalent to that of a Supreme Court Judge. The same protection is to be found, e.g., in the constitutions of Zambia (art. 59) and Sierra Leone (art. 66), and might well have served as a precedent for the Australian incorporation of the same principle into their various statutes.

Perhaps the most frequent provision to be found in the respective constitutions is that which reads as follows: "In the exercise of the powers conferred upon him by this section the Attorney General [or the Director of Public Prosecutions, as the case may be] shall not be subject to the direction or control of any other person or authority". The origin of this provision can confidently be traced back to the classic Commonwealth Office model which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many Commonwealth countries. Explicit as the language of this provision appears to be, its proponents may never have anticipated the emergence of situations in which both the language and the underlying principle of unconditional independence have been assailed from a number of perspectives. This has resulted in constitutional amendments being enacted in certain countries, either by way of completely eliminating the independence of the Director of Public Prosecutions (e.g. in Nigeria) or by placing restrictions requiring the Director to act in accordance with the general or specific directions of the Attorney General in prescribed circumstances. (e.g. in Barbados). Furthermore, in more recent years, we have begun to witness a new phenomenon in which the judiciary are to be found invoking the abuse of process doctrine to challenge the literal interpretation of the constitutional independence accorded to the office of Attorney General or that of the Director of Public Prosecutions. This fairly recent development needs separate attention in order to empha-

size its implications. I shall do so in the next section of this paper.

During my series of visits within the greater Caribbean region in 1988-89 I sensed varying degrees of satisfaction, among different segments of society and among members of the main political parties, with the degree of independence exhibited by successive occupants of the office of Director of Public Prosecutions in the course of fulfilling their constitutional functions. This experience confirmed the first hand impressions I gained in the late 1960s when I had the good fortune to visit a large number of African and Asian member states of the Commonwealth. This should occasion no great surprise, since it is unrealistic to place exaggerated, even exclusive, faith in the independent characteristics of the office as provided for by statute or in the country's constitution. Of no less significance, and in my opinion of even greater importance, are the personal qualities of the office holder and that person's commitment to meeting the highest expectations of ordinary people in terms of personal integrity, impartiality and steadfastness in the face of pressures from whatever quarter.

Even if we assume the possibility of exercising the independent powers of the Director of Public Prosecutions' office with such elevated personal qualities, the principle of total independence without the accompanying sanction of parliamentary accountability is, to my mind, too high a price for any society to pay in achieving the goal of keeping partisan political pressures away from the exercise of prosecutorial discretion. On the other hand, to observe what often amounts to no more than paying lip-service to the principle of ministerial accountability does little to reinforce public confidence in the integrity of prosecutorial decisions. When questions are directed towards the responsible Minister, usually the Attorney General, one major flaw that emerges repeatedly is the absence of hard evidence associating the Attorney General directly with the controversial decision, whatever form it may take. It is this absence of any real basis for invoking effective sanctions against the Attorney General or other responsible Minister that prompts many critics to pour scorn on the principle of ministerial accountability as it relates to the office of Attorney General. Instances of an Attorney General publicly acknowledging his or her direct involvement in a case, with commensurate personal responsibility, are few and far between.

If, therefore, the principle of accountability is viewed as an essential component in preserving the independence of prosecutorial decision making, a solution must be found that will overcome the major flaw to which I have referred above. In my opinion, the answer to this problem lies in the imposition of a statutory duty upon the Attorney General to commit to writing his decision to intervene in a particular case and to do so as an essential part of communicating his decision to the otherwise independent Director of Public Prosecutions. Obviously, the greater the statutory insulation of the Director from any interference by the Attorney General so, in turn, does the doctrine of ministerial accountability assume a more theoretical quality and become of less practical importance. These conclusions were the essence of my

principal recommendations to the Nova Scotia Royal Commission in 1988. In due course, they became incorporated in the legislation enacted by that province in 1990 establishing, for the first time anywhere in Canada, a statutorily independent office of Director of Public Prosecutions.

The legislation adheres closely to that enacted by the Commonwealth of Australia in 1983 and rejects the totally independent model exemplified in many Commonwealth countries and which has been adopted by the States of Victoria, New South Wales, Queensland and South Australia. As I indicated in my introduction, it is disappointing to have to record the absence of any similar initiative in other parts of Canada. Whilst providing in its "purposes of the Act" clause for "the independence of the Director of Public Prosecutions and the public prosecution service" the Nova Scotia statute authorises the Attorney General, after consultation with the Director of Public Prosecutions, to issue instructions in a particular prosecution. These must be in writing and must be published as soon as practicable in the Royal Gazette except where, in the opinion of the Director of Public Prosecutions, publication would not be in the best interests of the administration of justice, in which case the Director, instead, shall publish as much information concerning the instructions as he considers appropriate in his next annual report to the Legislative Assembly. Looking at the various Australian statutes and their remarkably divergent approaches to this question, what I find lacking, especially in those instances where the annual report of the Director of Public Prosecutions is designated as the time and place in which to disclose the issuance of particular directives, is the special effectiveness that I associate with the contemporaneous public disclosure of what is going on in the offices of the Attorney General and of the Director of Public Prosecutions. The passage of time somehow diminishes the bite that can be exhibited when the conduct of a Minister or public official or public figure is examined close to the time of its actual occurrence.

Nothing that I have said in the preceding paragraphs should preclude either of the senior State officials, personally or through counsel, making a public statement in court by way of explanation as to the decision that has been taken. The same observation applies to a situation where the Attorney General is of a mind to make a formal statement on the floor of the Legislature. I see no conflict of principle between the discretionary initiative that has always been at the disposal of an Attorney General "to go public" and the mandatory obligation that, in my opinion, should be imposed by statute to ensure that the written record of the Attorney's or the Director's directives are made available for public scrutiny.

In the same vein, and here I reiterate another major concern upon which I have endeavoured to make my views known, there is an ever growing necessity for making publicly accessible the relevant considerations and criteria that enter into prosecutorial decision making. Ever so slowly the movement towards this laudable goal is gaining new adherents with the Attorneys General of the United States, England and Wales, Australia and, more recently, Canada leading the way. I do not propose in this paper to delve into the specifics of the published guidelines that are now readily available in

each of the above countries. There will be an opportunity in the next section of my paper to touch upon the potential significance of specific guidelines when we turn our attention to the burgeoning subject of judicial review of prosecutorial decisions.

Before doing so, this gathering may be interested to learn how fragile the Canadian initiative might turn out to be in establishing its first statutorily independent Director of Public Prosecutions. Barely 3 years after the office was created, the newly elected Government of Nova Scotia, representing a different political party, is about to launch an independent review of both the legislation establishing the office and the first Director's handling of several high profile cases. During that short period of time the Director of Public Prosecutions's office has received more than its fair share of misconceived criticism. The principal criterion dictating the public response in Nova Scotia to the new office has been the failure rate of prosecutions in which the Director himself has been closely associated. To anyone acquainted with the history of the earliest years of the same office in England and Wales from 1879 onwards (see *The Law Officers of the Crown*, chap. 17), it all sounds like a familiar refrain. The annual reports to Parliament by the English Director of Public Prosecutions between 1884 and 1894 should be required reading for every modern holder of the office, as well as any person who is called upon by government to examine its operation and to make recommendations. What cannot be doubted is that future reform in this area across Canada will be significantly influenced by the outcome of the current Nova Scotia review.

#### **IV Judicial Review Of The Attorney General's Actions**

Surveying the most notable legal developments within the Commonwealth in the past 25 years a prime candidate for inclusion in any such list must surely be the growth in judicial readiness to review the exercise of discretionary power by the executive arm of government. What was once in far off days a fairly restricted and straightforward jurisdiction has been expanded in more recent times to what has aptly been described as a "terminological lottery". Judicial review is now predicated on a combination of basic elements as to which many formulae have been advanced by way of explaining the circumstances in which the courts are prepared to intervene. Among the more prominent of these triggering conditions are indications of illegality, irrationality or procedural impropriety on the part of the executive's decision maker. Other broad ranging concepts invoked by the courts to justify their intervention include the unreasonableness of the executive's position or the manifestation of unfairness in the process of decision making. Also lurking in the shadows of any judicial review proceedings is the determination of whether the subject-matter of the exercise is itself justiciable and amenable to judicial review by the courts. My concern in this paper is to examine the application of this growing trend towards an interventionist approach on the part of the judiciary with special reference to the broad range of discretionary powers exercisable by the Attorney General and his agents.

Given the fluid state in which the law of judicial review can presently be described, and the inevitability of its continuing evolution, there are certain central questions which must be addressed as they relate to the office of Attorney General. First, in terms of "justiciability" and "judicial reviewability", what significance should be attached to the historical fact that many of the Attorney General's prosecutorial powers derive from the prerogative, as opposed to the legislative, source of governmental authority? Secondly, in light of the courts' widespread adoption of the doctrine of abuse of process as an expression of its inherent jurisdiction to control its own processes, how far is this development reconcilable with the Attorney General's historic right to determine all questions relating to the institution or discontinuance of criminal prosecutions? Although, as we shall see, there is a certain amount of overlapping in the judicial precedents that touch upon these questions it will be advisable, in the first instance, to treat them separately.

### Judicial Review and the Prerogative

One bastion that for the longest time was stubbornly resistant to the encroachment of judicial intervention involves the prerogative basis of executive discretion. Here, the long standing principle of constitutional law kept separate two distinct questions, viz., (i) the scope of the prerogative, in the face of legislative inroads over several centuries, has always been recognized as within the competence of the courts to decide; (ii) questioning the actual exercise of prerogative power, however, was said to be beyond the jurisdiction of the courts. This dichotomy can no longer be sustained, though the exact nature of where the law presently stands is a matter of less certainty. The earliest signs of questioning the immunity of prerogative decisions from judicial review occurred in the English Court of Appeal in *Laker Airways Ltd. v. Dept. of Trade* [1977] 2 All E.R. 182 at pp. 192-3, where Lord Denning is to be found changing his previously expressed adherence to the orthodox constitutional position (see *Hanratty v. Lord Butler*, (1971) 115 Sol. J. 386 and *Blackburn v. A.G.* [1971] 1 W.L.R. 1037). In the High Court of Australia, in *re Toohey* (1981) 56 A.L.J.R. 164 at pp. 183-4, Mason J. (as he then was) gave the first indications of that court's dissatisfaction with the traditional common law position, though in another decision in the same year, *Barton v. R.* (1980/81) 147 C.L.R. 75, the same court refused to encroach on the Attorney General's prerogative power to launch criminal proceedings. As to the reviewability of prerogative decisions, generally, the landmark decisions by the House of Lords in the *G.C.H.Q.* case, [1985] A.C. 374, and by the Supreme Court of Canada in *Operation Dismantle Inc. v. R.* [1985] 1 S.C.R. 441, which followed each other in quick succession, represent a frontal assault that was designed to sweep aside the constitutional barriers referred to earlier.

It should be noted at once that the language of section 32 of the entrenched Canadian Charter of Rights makes it abundantly clear that the potential reach of the Charter extends to all activities of the executive branch of government, at both the federal and provincial levels. In confirming this interpretation, the Supreme Court of Canada in the *Operation Dismantle* case declared that,

henceforth, all governmental actions, derived from whatever source of legal authority including the prerogative, are amenable to the scrutiny of the courts provided it can be established that any of the Charter's enumerated rights and freedoms have been infringed, denied or imperilled. No such entrenched legislation was available in English law to support the position taken by the members of the Appellate Committee of the House of Lords in the *G.C.H.Q.* case, in the course of which Lord Scarman boldly stated:

"... the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say is a matter for which the courts can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. (emphasis added). (*ibid.*, p. 407)."

In deciding which of the prerogative areas of executive action might "by their very nature" not be susceptible to judicial review, some clarification was forthcoming in the same *G.C.H.Q.* case. Without offering any elaboration as to what considerations dictated the hoisting of a "No trespassing" sign beside certain classes of prerogative decision making, Lord Roskill suggested that the following categories would be beyond the reach of the doctrine of justiciability: the making of treaties, the granting of honours, national security, the prerogative of mercy including the granting of pardons, the dissolution of Parliament and the appointment of Ministers (*ibid.*, p. 418).

The fallibility of relying too heavily on such a list has already been demonstrated in the context of the prerogative of mercy. In *Burt v. Governor General* [1992] 3 N.Z.L.R. 672, the New Zealand Court of Appeal, whilst declining to review the decision in question, went on to say: "The claim that the courts should be prepared to review a refusal to exercise the prerogative of mercy, at least to the extent of ensuring that elementary standards of fair procedure had been followed, could not by any means be brushed aside as absurd, extreme or contrary to principle" (*ibid.*, p.61). More recently, the English Divisional Court in *R. v. Home Secretary ex p. Bentley*, (1993) New L.J.L.R. 1025-6, recommended that the Home Secretary should look again at the file of Derek Bentley who had been executed for the murder of a police officer in 1953. The trial jury had recommended mercy and the then Home Secretary's most senior advisers had urged that effect be given to this recommendation. The trial judge, Lord Chief Justice Goddard, however, when consulted by the Secretary of State, had replied that he could find no mitigating circumstances. The death sentence was carried out. In the view of the members of the Divisional Court, sitting in 1993, even by the standards prevailing 40 years earlier, the Home Secretary's decision was clearly wrong. Disavowing any intention on its part to review the formulation of policy for the grant of a pardon "which was probably not justiciable", the Divisional Court nevertheless went on to say that it was far from satisfied that the Home Secretary, in announcing his decision in October 1992 to refuse a free pardon, had given sufficient considera-

tion to his power to grant some other form of pardon that would be suitable in the particular circumstances.

Reading the report of *ex p. Bentley* the feeling is inescapable that the judges reviewing the decision of the Home Secretary in 1992 were uncertain as to the extent of their jurisdiction in this precedent setting case. Satisfied as they were that the decision to withhold a free pardon was clearly wrong, the court nevertheless acknowledged that it had no power to direct the way in which the prerogative of mercy should be exercised. The solution to this dilemma was to assert that the court "had some role to play" but this did not extend to making any formal order or granting a declaration. In the result, the Divisional Court invited the current Home Secretary to conduct a fresh review of the *Bentley* case. It can be confidently assumed that the expectations of the court will be fully met in removing the long standing injustice. A saga of a very different order, involving the same kind of judicial uncertainty as to its powers vis-a-vis the Attorney General, is revealed in the Kenya High Court's disposition of the remarkable *Githunguri* cases (Crim. Applic. 180 and 271 of 1985). As to the wider ramifications of the English Divisional Court's decision, all that can be said at this point in time is that the exercise of the prerogative of pardon is no longer unassailable from judicial review. Initially, the boundaries of judicial intervention are likely to expand or constrict according to the court's subjective view of the merits of the particular circumstances. If that seems a somewhat jaundiced view of the development of judicial review it finds reinforcement in a balanced and insightful essay on "Justiciability and the Control of Discretionary Power" by Professor D.G.T. Williams who concludes:

"Justiciability is inevitably bound up with issues of judicial restraint, judicial techniques, political understandings, and particular controversies; and the determination of justiciability at judicial or political level, should depend in each case on good sense and good timing." (- *Judicial Review of Administrative Action in the 1980s*, O.U.P. 1986, 103 at p. 122.)

Allowing for the uncertainty that seems to be gathering force as to the existence of any prerogative category that *per se* is beyond the reach of what is justiciable by the courts, what does seem to be uniformly accepted by the highest courts is that adherence to the principle of fairness does not mean that it is open to the courts to determine whether a particular policy or a particular decision is fair. Rather, the ambit of judicial review is to be confined to determining whether the process of exercising the discretionary power and the manner in which prerogative decisions are made and carried into effect reflect the duty to act fairly. There are no absolutes and it is generally recognized that the extent of such a duty will vary greatly from case to case.

It is interesting to note that among the catalogue of excluded categories, referred to in the leading English and Canadian cases, no reference is made to the prerogative powers historically associated with the Law Officers of the Crown. Familiar examples include the power to initiate and to stay criminal proceedings and (under Canadian law at least) to prefer a direct indictment; the exclusive authority to grant immunity to witnesses who

agree to appear on behalf of the Crown; the right to appear *ex officio* as "guardian of the public interest" to protect or enforce public rights; the power to control the issue of the Attorney General's fiat with respect to the institution of relator proceedings; and the right of intervention in a private suit whenever it may affect the prerogatives of the Crown, including the Government's relations with foreign states. It is obviously out of the question in this paper to explore the current state of each of these discretionary powers. Instead, I shall endeavour to identify the more general strands of development in the area of judicial reviewability as these relate to the office of Attorney General, wherever these have emerged in recent years.

When I last addressed this gathering in 1977 a major constitutional crisis, involving the Attorney General and the judiciary, was gathering steam in the United Kingdom. Its echoes rapidly reverberated throughout the Commonwealth and are still to be heard from time to time. The instigation for this confrontation was the view trenchantly expressed by Lord Denning, M.R., in *Gouriet v. Union of Post Office Workers* [1977] Q.B. 729 (C.A.). Presiding over the Court of Appeal on that occasion, Lord Denning claimed that, in matters pertaining to the institution of civil proceedings for injunctive relief against threatened breaches of the law, the courts have the right to review the Attorney General's decision and, if necessary, to substitute its own views for that of the Senior Law Officer of the Crown. As is now well known, each of the Law Lords, in the subsequent appeal to the House of Lords, categorically rejected any jurisdiction on the part of the courts to review and control the Attorney General's decisions in matters effecting public rights and the public interest generally. Delivering the leading judgment, Lord Wilberforce declared it to be:

"... a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney General enforces them as an officer of the Crown ... That it is the exclusive right of the Attorney General to represent the public interest - even where individuals might be interested in a larger view of the matter - is not technical, not procedural, not fictional. It is constitutional ... it is also wise". ([1978] A.C. 435 at pp. 477, 481.)

The theme running throughout all the *Gouriet* judgments in the House of Lords is the rejection of the invitation to stake out a jurisdictional claim whereby the decisions of the Attorney General, in the exercise of his prerogative authority, could become the subject of disputation in the courts. In the words of Lord Fraser:

"If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression, of course, not in a party sense but in the sense of weighing

the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts". (op. cit. p. 524).

In emphasizing the remedy of parliamentary accountability, in contradistinction to judicial accountability, as the proper avenue to follow where a challenge is mounted against the Attorney General's decision to withhold his fiat in relator proceedings, the views expressed by the Law Lords in *Gouriet* seem to be out of step with the position taken by the same court in the later *G.C.H.Q.* case, opening the door as it did to a general reviewability of prerogative decisions made by any sector of the executive branch of government.

This new judicial philosophy stands in marked contrast to the same court's refusal in the *Gouriet* case to undertake precisely such an exercise with respect to prerogative decisions of the Attorney General in matters affecting public rights and the public interest. The apparent divergence in judicial doctrine, represented by the two cases, was not addressed in the *G.C.H.Q.* case, and it will be recalled that the prerogative powers associated with the office of Attorney General do not appear among the list of excluded categories which the House of Lords has suggested might not be amenable to judicial assessment and review. This singular omission may or may not have been deliberate, but there already exist a number of instances, drawn from different countries in the Commonwealth, that indicate a judicial disposition to tread carefully when encroaching upon those clearly defined prerogative powers that historically are associated with the office of the Attorney General in England and Wales. The principal body of evidence that supports this conclusion derives from the mounting volume of judicial precedents applying what has come to be known as the abuse of process doctrine. As we proceed to analyze the jurisprudence that governs this new relationship between the Attorney General and the judicial power of controlling any abuse of its processes, a special watch should be focused on parallels with the principles of judicial review as formulated in the broader context just concluded.

#### **Abuse of Process and Judicial Review**

The advent of the modern doctrine that there exists an inherent power in the courts to prevent an abuse of its process, even to the extent of staying the trial of an indictment which has been properly filed, is generally attributed to Lord Devlin's judgment in the House of Lords case of *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254. Reinforcement of the doctrine by the House of Lords in *R. v. Humphreys* [1977] A.C. 1 and by the Judicial Committee of the Privy Council in *Bell v. D.P.P. of Jamaica* [1985] 1 A.C. 937, coupled with similar pronouncements of the highest appellate courts in Canada, Australia and New Zealand, leave little room for doubt that the abuse of process doctrine is now an integral part of the common law.

Of all these jurisdictions the Canadian courts appear to have contributed the most guidance in determining the exact scope of the doctrine and what limits prescribe its availability in the circumstances of a particular case. And even there the story of the doctrine's evolution has not been straight sailing. After the general principle was first tentatively invoked by a provincial court of appeal in 1969, it was not until 1978, in *Rourke*, that the

Supreme Court of Canada gave the abuse of process doctrine, what many observers felt was, a confusing and, at best, ambivalent endorsement. Speaking for the majority of the court, in a 5 to 4 decision. Pigeon, J, concluded that:

"... I cannot admit of any general discretionary power to stay proceedings regularly instituted because the prosecution is considered oppressive. In fact, I think the correct view is that which was expressed as follows by Viscount Dilhorne in *D.P.P. v. Humphreys* [1976] 2 All E.R. 497:

"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 functions of prosecutors and of judges must not be blurred... If there is the power which my noble and learned friends think there is to stop a prosecution in limine it is my view a power that should only be exercised in the most exceptional circumstances". (ibid., pp. 510-511).

Two schools of thought emerged in the Supreme Court of Canada as the Justices wrestled with this new frontier of judicial involvement in the administration of criminal justice. Set against the principle reflected in the passage quoted above was the interpretation of abuse of process as a wide-ranging technique for control by the criminal courts of criminal procedure, a technique illustrated but not limited by the special pleas of *autrefois acquit* and *convict, res judicata* and *issue estoppel*. Although not couched in this precise language one senses the same underlying tug-of-war going on in courts across the Commonwealth, as they come to decide upon the application of abuse of process in particular cases. The latest pronouncement on the present state of Canadian law on the subject is contained in the judgment of former Chief Justice Dickson, speaking for a unanimous Supreme Court in *R. v. Jewitt* (1985) 21 C.C.C. (3d) 7. Acknowledging the previous uncertainty which surrounds the common law position as to the availability of a stay of proceedings to remedy abuse of process, Dickson C.J. concluded:

"...there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases." (my emphasis). (1984) 13 C.C.C. (3d) 1 at p. 31.

This declaratory statement reinforces the view expressed by Lord Dilhorne in *D.P.P. v. Humphreys* that abuse of process "is a power that should only be exercised in the most exceptional circumstances". Amplification by the Supreme Court of Canada of the pertinent criteria by which abuse of process is to be judged was forthcoming in *Keyowski* (1988) 62 C.R. (3) 349, where the Crown had proceeded with a third trial following two hung juries. In interpreting what constitutes "oppressive" proceedings as the basis for an abuse of process plea the Supreme Court ruled that to require proof of prosecutorial misconduct or improper motivation would unduly restrict the operation of the doctrine. These are relevant factors, it was said, but the decision regarding abuse of process should not hinge solely and

exclusively on those aspects of the Crown's decision to relay the indictment.

These references to Canadian decisions may strike you as somewhat parochial on my part. Perhaps. It is, nevertheless, a fact that the development of the abuse of process doctrine has been invoked in the Canadian courts to an extent not paralleled in other common law jurisdictions. There is also an additional element that explains the prominence of abuse of process issues in Canadian criminal trials. This derives from the Charter of Rights and Freedoms, and especially the extremely broad interpretation accorded to section 7 of the Charter since it was first invoked before the Supreme Court. That provision declares: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Despite the widespread opinion, expressed by provincial appellate courts, that the common law doctrine of abuse of process has now been subsumed in the above section of the Charter, with all the remedies available under its section 24, there are outstanding questions as to the onus of proof which are yet to be ruled upon by the Supreme Court of Canada. No less importantly, we have yet to discover how far the Supreme Court Justices, as opposed to the lower courts, are disposed to press their claims to oversee the exercise of prosecutorial discretion under the jurisdictional umbrella of the Charter of Rights, and especially the potent section 7 quoted above.

On the present available evidence the Canadian Supreme Court appears to be working in tandem with its counterpart, the High Court of Australia. Beginning with *Barton v. R.* (1980/81) 147 C.L.R. 75, the Justices of Australia's highest court squarely addressed the conflict of principles inherent in the constitutional question as to who, ultimately, determines where the line is to be drawn between the executive and judicial functions in supervising matters of prosecution. On the particular issue before it in *Barton*, the High Court Justices upheld the New South Wales Attorney General's right to file an *ex-officio* indictment, with a majority inclined towards the view that "a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair" (*ibid.*, p. 100). Perceptions change, and I venture to suggest that little, if any, support exists today for such an extreme position. Relying upon the House of Lords speeches in *Connelly* and *Humphreys*, the Australian High Court showed no equivocation in declaring the existence, as an integral part of Australian common law, of the power in the superior courts to prevent an abuse of process in criminal cases and to ensure the right of the accused to a fair trial. At the same time, the Australian Justices expressly disavowed any intention on their part to examine the Attorney General's original decision, under his prerogative powers, to launch the criminal prosecution, stating:

"The courts exercise no control over the Attorney General's decision to commence criminal proceedings, but once he does so, the courts will control those proceedings so as to ensure that the accused receives a fair trial." (1980) 147 C.L.R. 75, 96.

Similar judicial statements, reconciling the principles

that underlie the constitutional separation of functions as they involve the Attorney General and the courts, are to be found in the law reports of many Commonwealth jurisdictions. Repetition, however, does not conceal the simplistic character of the dividing line expressed by the High Court of Australia in the passage quoted above from *Barton v. R.* Just exactly what is comprehended in the phrase "the Attorney General's decision to commence criminal proceedings" is far from clear. Earlier in this paper, when discussing the problems surrounding the scope of the Law Society's disciplinary jurisdiction as it relates to the Attorney General and public prosecutors, I tried to stress the importance of preventing the governing body from intruding upon a range of subsidiary issues that are part and parcel of the discretionary power entrusted to the Attorney General to institute or to stay a criminal prosecution. Legal, evidentiary and policy questions are incapable of being assigned to wholly separate compartments within the decision to commence or halt criminal proceedings. Therein lies the same danger that I perceive exists in not keeping a vigilant eye on the extent of judicial interpretation of abuse of process. If the resolution by any court of that question involves a substantial constraint on the Attorney General's discretionary powers, whether to institute or to stay the proceedings, and whether at large or in a particular case, there should be no reluctance on the part of any Attorney General to confront the underlying constitutional question of the separation of functions in the administration of justice.

In the course of preparing this paper I engaged in a comparative review of Commonwealth cases where the question of abuse of process has been invoked. I found this exercise helpful in assessing how far the courts are prepared to go in pressing their claims to supervise the prosecuting arm of the State with the goal of ensuring a fair trial. It is now generally accepted that, as Lord Diplock observed in *R. v. Sang* [1980] A.C. 402, 437, "...the fairness of a trial is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted". Consequently, whereas at first there was a distinct impression that the courts viewed delay on the part of the prosecution solely from the perspective of whether it was justifiable or not, this approach has now been replaced with a more stringent test as to whether the delay on the part of the prosecution has resulted in the defendant being substantially prejudiced in the preparation or conduct of his or her defence. Different jurisdictions appear to agree that the reneging by a prosecutor of an agreement to extend immunity from prosecution to an accused in return for cooperation which is in fact given constitutes improper conduct and an abuse of process. More recently, the English Divisional Court, following an all too rare review of a wide range of Commonwealth cases on the issue before the court, ruled that the prosecution of a person who has received a promise, undertaking or representation by the police that he will not be prosecuted is capable of being an abuse of process, and his committal to the Crown Court to stand trial in breach of such a promise may be questioned in judicial review proceedings. (*R. v. Croydon Justices, Ex p. Dean* [1993] 3 W.L.R. 198.

Considerably more reluctance is evident, at least in

Canada, on the part of the courts to question the route chosen by the Attorney-General or his agents in launching a prosecution, whether by way of a preliminary hearing or by direct indictment. Although the question has yet to be determined in the Supreme Court of Canada, both the Ontario and Manitoba Courts of Appeal have ruled that the principles of fundamental justice, now entrenched in s. 7 of the Charter of Rights, are not per se violated by the Attorney General exercising his long established right to prefer an indictment directly, thus depriving the accused of the opportunity to cross-examine key Crown witnesses by way of a preliminary hearing. Two important caveats, however, suggest a recognition on the part of the provincial appellate courts that there are no absolutes on this question. In declining on the grounds of the separation of constitutional functions, to recognize any power in the courts to review the prosecutorial functions of the Attorney General, the Chief Justice of Manitoba in *Balderstone v. R.* (1983) 8 C.C.C. (3d) 532 qualified this immunity by reference to the caveat "barring flagrant impropriety" (at p. 534). This is an emotive phrase that judges in several jurisdictions have invoked to describe the principle of last resort when assessing the fairness of the adjudicative process.

More specific dimensions are contained in the important ruling of the Ontario Court of Appeal in *Re Regina and Arviv* (1985) 19 C.C.C. (3d) 1985. After acknowledging what has been said, in countless authorities, to be the unfettered jurisdiction of the Attorney General to exercise his discretion in resorting to a direct indictment, Martin J.A. (speaking for the court) declared:

"The preferring of a direct indictment under s. 507(3) of the [Criminal] Code in combination with the failure of the Crown to make adequate disclosure might, however, result in an accused being unable to make full answer and defence at his trial, thereby contravening s. 7 of the Charter and enabling the trial judge to fashion a remedy under s. 34(1)". (underlining of the Court) (at p. 404).

The same court, in the later case of *R. v. Ertel* (1987) 35 C.C.C. (3d) 398, put the whole issue in an even broader context stating:

"...the power of the Attorney-General to prefer an indictment is in accord with the principles of fundamental justice and forms part of the large arsenal of discretionary powers that the chief law enforcement officers must possess in order to effectively discharge their high constitutional duties. In the exercise of these discretionary powers the Attorney-General is accountable to Parliament or the legislature and the exercise of the power may be reviewed by a court of competent jurisdiction if it results in a denial or infringement of a constitutionally protected right." (*ibid.*, p. 415).

The accountability of the Attorney-General to Parliament or the Legislature has not figured in this paper as prominently as the subject deserves, and as I have given to it in my other writings. The introduction of the Charter of Rights as part of the Canadian Constitution may have resulted in diminishing the parliamentary role in holding the Attorney-General to account for his or her actions, especially in the discharge of prosecutorial functions. It is my belief, however, that the passage

quoted from *R. v. Ertel* (*supra*) would receive, at present, the universal support of the Canadian judiciary, including the members of the present Supreme Court of Canada.

Assuming, as my previous review of the authorities demonstrates, that the exercise of prerogative powers is no longer per se beyond the reach of judicial review, what importance should attach to the fact that most of those erstwhile prerogatives in the criminal justice field are now embedded in statutory form? This may be in the form of specific provisions in a criminal code or other legislation or, as will be familiar to many Commonwealth countries, in their constitutions where statements of fundamental principles are enshrined. Whichever of these alternative forms is used, the statutory language gives some precision to the particular form of discretionary powers. In many instances, the legislative body has given delegated authority to the Director of Public Prosecutions to administer every aspect of prosecutorial discretion. The Attorney General may or may not have concurrent authority or even residual powers, the answer to which must be sought in the specific laws of each country. Nevertheless, bearing in mind the major changes in the modern approach to judicial reviewability subscribed to by the leading appellate courts in the Commonwealth, the question remains, does the incorporation into legislation of the Attorney General's former prerogative powers automatically preclude any consideration of the original source of the same powers? It is my feeling that the historical roots of the Attorney General's prerogative authority to commence or to stay criminal proceedings continue to exert a major constraint upon the judiciary, no matter which Commonwealth country is involved. To rely upon the original source of the Attorney General's discretionary powers as justification for treating the subject as one of the "excluded categories" beyond the reach of judicial review, it might also be thought, would be substantially diminished if these discretionary elements were now to be found embedded in statute law. How valid are these impressions?

Looking at the cases decided in the English courts since the enactment of the Prosecution of Offences Act, 1985, with its detailed provisions governing the duties, powers and responsibilities of the "new" Director of Public Prosecutions and the members of the Crown Prosecution Service, there is nothing that suggests a declaration of "open season" on the part of the judiciary to review the exercise of prosecutorial powers. On the contrary, the approach has been uniformly circumspect and heavily weighted towards concentrating on the process of decision making, as opposed to evaluating the particular decision. For example, in the recent case of *R. v. D.P.P. ex parte B (a minor)* [1993] 1 All E.R. 756, the Divisional Court was invited to review the decision of a Crown prosecutor who had refused to discontinue the prosecution of a minor. The police had earlier decided against administering a caution in the particular circumstances. The approach, reflected in the court's decision, is consistent with that expressed in several other recent cases which have explored the limits of judicial review in prosecution matters. According to Watkins L.J.:

"I find it very difficult to envisage, with regard to that policy [of cautioning], a circumstance, fraud or dishonesty apart possibly, which would allow a challenge to a decision to prosecute or to continue proceedings unless it could be demonstrated in the case of a juvenile, that there had been either a total disregard of the policy or, contrary to it, a lack of inquiry into the circumstances and background of the person, previous offences, general character and so on, by the prosecutor and later by the Crown Prosecuting Service ...."

Therefore, although the C.P.S. decision may in principle be reviewed, in practice it is rarely likely to be successfully reviewed ... my view as to the position of adults, on the other hand, in this respect is that judicial review of a decision not to discontinue a prosecution is unlikely to be available. The danger of opening too wide the door of review of the discretion to continue a prosecution is manifest and such review, if it exists, must, therefore, be confined to very narrow limits" *ibid.*, pp. 770-771.

To summarise what has been happening on the judicial review front as it relates to actions taken by, or in the name of, the Attorney General, I would describe the underlying constitutional questions as relatively dormant at this time. There have been the occasional skirmishes on the edges of the battleground. The Gouriet principle of the Attorney General's total insulation from judicial review in exercising his prerogative authority is no longer sustainable in its entirety. Where the encroachment springs from adherence to the abuse of process doctrine I see no intrinsic reason to bemoan the new order. There are obvious pitfalls of excessive judicial ardour in wanting to oversee every aspect of the administration of justice. The most effective response to such potential excesses is to determine, in advance, the ground upon which the constitutional duties and prerogatives of the Attorney General will be defended on grounds of principle. This paper, in part, has been concerned to provide some guidance in anticipation of these future conflicts.

## **V Chief Legal Adviser to Government and Guardian of the Public Interest**

It remains for me to draw to your attention some features of the Attorney General's additional responsibilities as the government's chief legal adviser and as guardian of the public interest. Public discussion of these roles is rarely undertaken and, as I observe recent developments in certain parts of the Commonwealth, I am forced to wonder as to the level of understanding and commitment that prevails with respect to these important functions. Harking back to the laudable objectives enshrined in the Harare Declaration, with the commitment made by First Ministers to the goal of "just and honest government", I suggest that we not overlook the contributions that are within the grasp of every Attorney General to make when called upon to discharge what, at first glance, might seem like vastly different duties.

It is not difficult to envisage, as a regular occurrence in every Commonwealth country, situations in which the Administration's choice of options calculated to realise

its political objectives will be dictated by what it conceives, or what it claims, to be in the public interest. Such decisions might diverge widely from a non-partisan view of what policy position best represents the public interest. Whether the particular decision is made by the Cabinet, an individual Minister or at the departmental level by senior public servants acting in the name of the Minister, there will always be the possibility of conflicting interpretations as to where the public interest lies, especially in contentious and high profile situations. It is in these kinds of circumstances that the Attorney General must have a clear grasp of his wider constitutional responsibilities. Reference merely to the specific statutory formulation of the Attorney General's duties is not enough. These may be embedded in the country's constitution, in the statute describing the functions of the Minister of Justice and Attorney General (if these are separate portfolios), or by way of a common understanding derived from the history of the office of Attorney General in England and Wales.

Typical of statutory formulations of the duties that are attached to the office would be provisions stating that the Attorney General "shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him by the Government" and "shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies". In some Commonwealth countries it may still be possible to visualise a centralised group of lawyers acting under the personal superintendence of the Attorney General, fulfilling all of the above responsibilities in the most direct and personal manner. More than likely nowadays is the existence of a cadre of legal advisers located within each of the ministries of government. Where this system prevails the legal staff naturally come to regard themselves as specialists in the particular areas of law devoted to that ministry's concerns. Furthermore, the argument is often heard that, in those government departments where law and policy considerations are highly intermingled and where legal advice is expected to reflect that body of experience, it is essential that the departmental lawyer regard himself, and be viewed as such, as a fully integrated member of the departmental team. The contrary perspective expects the professional detachment of the trained lawyer to be maintained alongside his or her readiness to share in the common goal of implementing the ministry's objectives.

In these kinds of contexts what importance should attach to the principles of independence associated with the office of the Attorney General in whose name, constitutionally speaking, all advisory opinions and rulings of a legal character are proffered to the department or agency involved? My growing feeling is that the nature of this important feature of the Attorney General's unique position in government is being threatened by a number of developments, some recent and some of perennial frequency. Among the more recent developments is the move in some countries, of which I single out Australia because of the available documentation, towards the commercialisation of the legal services performed on the civil law side of the federal Attorney General's Department. The Treasury's accent on productivity, cost effectiveness and competitiveness

through the user-pays principle is calculated to fragment still further the unified role traditionally vested in the Attorney General as the chief legal adviser to the Crown, its executive council, its individual ministers and all the branches of government. Reading the Australian papers outlining the purposes of the present commercialisation drive, I am not impressed by attempts to single out certain areas of the Attorney General's responsibilities as possibly requiring a different approach. These special areas, to which economic standards of performance are said not to apply, include policy questions, the drafting of subordinate legislation and other legislative instruments, constitutional issues, treaties and other international questions. This approach towards ad hoc compartmentalising of the Attorney General's disparate functions lacks credibility. The dominance of economic standards is also evident in the New Zealand Justice Department's "Management Plan 1992/93" with its themes of "increased efficiencies", "fiscal responsibility" and "implementing productivity improvement projects".

From my admittedly distant vantage point, there appears to be a lack of appreciation amongst politicians, Treasury mandarins and members of the government legal service alike as to the full scope of the Attorney General's responsibilities in the overall machinery of government, and as to the degree of political independence with which the Senior Law Officer discharges his advisory functions. The truth of the matter is that there exists a widespread perception among ministers and public servants that the Attorney General is nothing more than the government's lawyer, and the Department of the Attorney General is, in effect, the law firm that is always on call to serve the interests of its client, the political party that is in power. To take this reasoning one step further, as reflected in the practice of some Commonwealth jurisdictions, if the deputy minister in the Attorney General's department is appointed by the Prime Minister, the perception exists that this public servant, the Minister's senior adviser, is in the ultimate analysis accountable to the Prime Minister. The practical effects of this "understanding" can lead to all kinds of pressures being applied by the political office of the Chief Minister. This may never be pressed to a show-down but it would be difficult to deny the simple fact that senior public servants are not totally impervious to the realities of their career paths.

It requires a very strong Attorney General, fully cognisant of the history of the office he or she holds and confident of his constitutional position, to withstand the political pressures communicated to his office, no matter how subtle or sophisticated the tone of the messages might be. There should never be any doubt as to the single line of accountability that flows upwards to the desk of the Attorney General, as the accountable Minister of the Crown. This problem of educating ministers and members of the public service is a never ending task that must be shouldered with a greater commitment than current evidence suggests is being undertaken by those who are appointed to this unique office. Regrettably, I am forced to conclude that, perhaps in the majority of cases, the new incumbent comes into the office of the Attorney General with only the vaguest comprehension of the high demands that go with the territory just inherited.

Now another major dimension has been added to the Attorney General's variegated functions. With the advent of human rights as a subject of increased public debate in every part of the Commonwealth, the question I wish to address, in concluding this paper, are the proper principles that should guide an Attorney General in fulfilling his role as "guardian of the public interest" with respect to maintaining fundamental rights and freedoms. The idea of exploring ways and means to expand the judicial enforcement of human rights, by incorporating well established international norms into the domestic laws of each country, has captured the imagination of senior members of the judiciary in several continents. Testimony to this fact is provided by the well attended conferences specifically devoted to this enterprise in such diverse locations as Zimbabwe and Grenada (in 1989), The Gambia (1990), Nigeria (in 1991) and Balliol College, Oxford (in 1992). At the conclusion of their deliberations each conference released for public information a formal statement committing its participant countries towards bringing the principles of fundamental human rights into the daily consciousness of domestic courts and public officials alike. The thinking behind this potentially very significant development in the Commonwealth is captured in the statement issued at the conclusion of the Balliol colloquium in 1992, where the view is expressed:

"The international human rights instruments and their developing jurisprudence enshrine values and principles long recognised by the common law. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. They should be interpreted with the generosity appropriate to charters of freedom. They reflect international law and principle and are of particular importance as aids to interpretation and in helping courts to make choices between competing interests. Whilst not all rights are justiciable in themselves, both civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights. They serve as vital points of reference for judges as they develop the common law and make the choices which it is their responsibility to make in a free and democratic society."

Every student familiar with the independence constitutions that heralded the advent of full sovereignty in Commonwealth countries will have noted the list of basic rights that grace those constitutions. Nevertheless, the gulf between theory and practice in the matter of ensuring adherence to human rights precepts is illustrated daily across the Commonwealth, to the point that ordinary citizens may be forgiven if they entertain reservations as to the practical value of legal texts that enunciate rights and freedoms but provide no effective sanctions where violations are shown to have occurred. There are many improvements which could be effectuated given the political or judicial will to do so. This is reason enough to applaud the present initiatives, heralding what is hoped will be a more receptive approach by the courts to legal arguments based on human rights jurisprudence that derives from such sources, for exam-

ple, as the decisions of the European Court of Human Rights in interpreting provisions of the European Convention on Human Rights. When the immediate dispute before the ordinary courts calls for making a choice between conflicting statutory interpretations of a domestic law or the resolving of an ambiguity in the common law, it is encouraging to visualise the prospect of an open-minded judiciary in every part of the Commonwealth willing to draw upon the insights of other legal minds who are daily engrossed in interpreting international conventions that embody universally recognized human rights.

Expressing support for this kind of innovative approach in the atmosphere of a conference is one thing. Adhering to the same approach in the course of performing the regular functions of a trial or appellate judge is a challenge of different proportions. But there is growing evidence that the initial barriers are gradually being removed. Nowhere is this phenomenon being watched more closely than in the older members of the Commonwealth, in Australia, New Zealand and the United Kingdom. In 1960 Canada enacted its Bill of Rights as an ordinary statute. It made little impact on judicial decision making. It will be intriguing to watch what happens in New Zealand which has chosen to reject the entrenched option in favour of a declaratory but unenforceable Bill of Rights (1990, No. 109). New Zealand's experience may well emulate that of Canada in the 1960s and 1970s. This picture changed in Canada with the enactment in 1982 of its constitutionally entrenched Charter of Rights and Freedoms. That momentous event has produced a notable transformation in judicial thinking, both in terms of direction and in the methods of legal reasoning. Furthermore, with several law clerks now available to assist each Justice of the Supreme Court its judgments have become inordinately long. The centrality of the Charter's provisions to all branches of the law has been made manifest in the first decade of its existence. In keeping with the guiding principles contained in section 1 of the Charter which declares:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." and the all pervasive section 7 which states:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

the Justices of the Supreme Court of Canada have revealed unexpected levels of judicial creativity and reformist zeal. In demonstrating their readiness to venture down unfamiliar paths in which the interplay between legal, political and social considerations becomes very apparent, there have been occasions when the predilections of individual Justices have demonstrated, sometimes to an acute degree, the dangers of exaggerating the judicial power to override the will of Parliament. No matter how categorical the language used to express individual rights and liberties, there remains the unexpressed element of balancing conflicting values which even the panoply of the constitution cannot eliminate. The more recent judgments handed

down by the present members of the Supreme Court exhibit a more restrained approach to the judicial task of interpreting the Charter of Rights.

As Canada adjusts to the realities of the entrenchment of fundamental rights in its constitution, as part of the supreme law of the land, Australia and New Zealand seem to be of one mind in resisting what has become commonplace throughout the rest of the Commonwealth. The United Kingdom, it is true, has for many years been engaged in a simmering debate on the question whether or not to adopt a judicially enforceable Bill of Rights. To put this debate into proper perspective, it should be remembered that Britain was a signatory to the European Convention on Human Rights as far back as 1951, and since 1966 it has consistently accepted the jurisdiction of the European Court of Human Rights. Successful recourse by its citizens to that court over the years has been frequent and multi-faceted. Many of the ensuing rulings have compelled the Government of the day to introduce legislation bringing the law of the United Kingdom into line with the decisions of the Court of Human Rights. As one of the present Law Lords has recently written: "It is a most singular feature that the law of this country, which has for so long prided itself on protecting individual freedom, has been found to be in breach of the European Convention on Human Rights on more occasions than any other signatory." (per Lord Browne-Wilkinson, [1992] Public Law 397 at p. 398).

The tedious and cumbersome nature of the present procedures to enforce the provisions of the European Human Rights Convention has been the subject of persistent criticism. That criticism has now been given added weight by the public declarations of the newest appointees to the country's most senior judicial appointments. Speaking extra-judicially on an occasion calculated to attract public attention, Lord Chief Justice Taylor, delivering the 1992 Dimpleby Lecture on British television, expressed his unambiguous support for incorporating the provisions of the European Convention into domestic law by legislation. "Our ratification of the Convention" he declared "obliges us in the end to accept it, but our refusal to incorporate means acceptance occurs only after a decision in Strasbourg, much delay and humiliation." (1993) 19 C.L.B. 323, at p. 329. Speaking in the same vein, Lord Justice Bingham, Master of the Rolls, has stated: "It would be much better if the implementation of the convention at first instance was in the hands of British judges...I take a rather historical view. The traditional protection of the rights of British citizens lay in the hands of British judges. It is a sad thing it should lie somewhere else." (The Times, Aug. 14, 1992) The advent of such a fundamental reform may not be too far distant if one is to judge the current political climate in the United Kingdom.

In the meantime, as I have already pointed out, there are increasing indications of the preparedness of leading spokesmen on the Bench, in different Commonwealth countries, to espouse the need for construing legislative provisions and applying common law doctrines in the light of principles enshrined in established codes including the United Nations' Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Freedoms (1950),

the Inter-American Convention on Human Rights (1969) and the African Charter on Human and Peoples Rights (1981). Whatever route is followed by individual countries would seem to be a matter for their own determination. As the Chief Justice of Pakistan saw fit to remind the participants at the Oxford colloquium in 1992, international human rights norms cannot override national constitutional standards. Whether they can exist comfortably in situations of patent disagreement as to the values at stake may be a more contentious problem.

This review of active judicial participation in the advancement of human rights as a central plank in every legal system has rightly emphasised the opportunities available to the judiciary to demonstrate their commitment to upholding the public interest in situations of conflict between the State and the citizen. Representative of this approach are the words of the Chief Justice of Australia, Sir Anthony Mason, who recently observed: "Human rights are seen as a countervailing force to the exercise of totalitarian, bureaucratic and institutional power - widely identified as the greatest threats to the liberty of the individual and democratic freedom in this century." ((1988) *Aust. Bar Review* 79). This kind of message fits naturally within the present expansion in the scope of judicial review of actions by the executive branch of government. New reference points, derived from the wider acceptance of human rights norms, can be anticipated as judicial strategies for interventionist review develop in future years.

The prospect of an increased commitment by the judiciary throughout the Commonwealth to securing adherence to internationally recognised human rights norms is a trend that must be warmly welcomed. At the same time, I would be very remiss if I did not remind you of the Attorney General's expansive role, with historic roots in the common law, as one of the State's principal "guardians of the public interest." In both of my books, *The Law Officers of the Crown and The Attorney General, Politics and the Public Interest*, I describe the wide range of circumstances in which the Attorney General is clothed with authority to represent the public interest and to appear *ex officio* in court to protect or enforce public rights. Notwithstanding the more generous approach evinced by the courts and law reform bodies in various parts of the Commonwealth on the subject of *locus standi*, there remains a constitutional responsibility on the part of the Attorney General to intervene directly, in the courts or otherwise, if he deems public rights to be in jeopardy.

Procedural distinctions made in the field of relator proceedings between public rights and private rights, whereby to obtain standing a prospective litigant has to establish a direct pecuniary or other special interest, are not germane to the arguments I wish to make in this paper. Placed in the context of fundamental human rights, whether these are entrenched in a constitution or incorporated by specific reference in the statute book, I maintain that, in every sense of the word, these basic human rights provisions are public rights and not private rights in the procedural sense of conferring standing before the courts. Every individual citizen is entitled, without establishing additional qualifications, to invoke human rights provisions in his own cause. The absence or failure of a citizen to set the human

rights laws in motion, however, in no way precludes the Attorney General from exercising his prerogative powers to ensure conformity with what are quintessentially public rights. Indeed, if the title "guardian of the public interest" is to gain credence as something more than a high sounding but empty formula, it calls for recognition by every Attorney General that his constitutional duties demand a constant regard for the impact of human rights proclamations on every branch of his country's internal laws. In a State where these provisions are constitutionally entrenched they form part of the "supreme law" of the land and, to borrow the words of a former Chief Justice of Canada, this means that "these values are higher, more sacred than other public interests." ((1983) 13 *Man. L.J.* 175 at p. 185). I believe the message for Attorneys General should be basically the same where something short of constitutional entrenchment exists but there are other forms of national commitment to the principles of universal human rights.

To be more specific, in discharging his role as chief legal adviser to the government, if the issues that give rise to consultation with the Attorney General are strictly matters of law few serious problems can be anticipated in acknowledging the paramountcy of the First Law Officer's opinion. Where, however, legal and policy issues are intertwined and the policy aspects involve adherence or non-adherence to the legal standards incorporated in human rights provisions, the situation may well arise in which the Ministry responsible for the policies at stake, and its legal advisers, take a diametrically different position to that subscribed to by the Attorney General. How should this impasse be dealt with? If I may be permitted to draw upon my previously expressed views on this question, in the context of the Canadian Charter of Rights & Freedoms:

"...the first Law Officer may choose to defer to the policy position taken by the other branch of the Executive. If so, this will be by choice and not through any constitutional obligation to confine himself to expressing a legal opinion in the narrowest sense of that expression. The Attorney General is entitled to oppose the policy of his ministerial colleagues at every stage of its formulation and implementation including discussions with the appropriate cabinet committee or in the cabinet itself. If the full weight of the Attorney General's office is to be sustained it must be seen that the so-called policy imperatives derive from the legal implications of the proposed policy. Nowhere is this likely to be more apparent than if the proposed legislative or executive action is calculated to invite a major Charter challenge. For the government to reject the Attorney General's advice would be quite exceptional and, in my view, should lead the Attorney General to question seriously his commitment to serve the Government as its chief legal adviser. This threat should not be lightly undertaken but if the claim to the title of "guardian of the public interest" is to be reinforced it must be shown that the Attorney General is totally committed to upholding the "supreme law" as the embodiment of society's deepest convictions." ("*The Attorney General and the Charter of Rights*" in *Charter Litigation*, 1987 (ed. Robert J. Sharpe), 45 at pp. 52-3.)

Should the application of the human rights provisions and related jurisprudence be less than clear and the

prospect is entertained of referring the dispute to the courts for resolution, what further responsibility derives from the special constitutional position occupied by the Attorney General? Viewed from the narrow perspective of his role as the Minister responsible for regulating all litigation involving the government, or any ministry or agency of the government, it will suffice if the Attorney General ensures that the government is represented by counsel in the ensuing litigation. Beyond this minimal stance, in my view, lies the larger constitutional duty to ensure that the wider public interest is adequately represented, particularly in determining the ambit of a hotly contested human rights provision. Furthermore, to quote my previously expressed views on this same subject in the context of the Canadian Charter of Rights:

"It is not enough to assume that a public spirited citizen or interest group will step forward to assert a Charter challenge. Merely ensuring that the necessary funding is forthcoming to maintain such a suit, including the costs of providing legal counsel to represent the citizens' claims, is not sufficient. These alternatives may be sufficient to meet most of the claims deserving support and recognition. The door, however, must be left open, in my judgment, for the extraordinary demonstration of the Attorney General's independent status and independent responsibilities by way of active representation in the courts, in his own person if that is necessary, to argue the case on behalf of the public interest.

Steps to ensure that the government's more restricted interests are adequately represented can readily be accomplished through senior departmental counsel. It could be argued that the objective described above could just as readily be discharged by engaging the services of independent counsel, drawn from the ranks of the private Bar. This suggestion is deserving of implementation in appropriate circumstances. My concern, however, is not merely to observe the minimum dictates of adequate representation on behalf of the maligned citizen, or a specially disadvantaged or threatened group in society, but to underline the

significance that attaches to the unique constitutional place occupied by the office of the Attorney General in Canada and in so doing to strengthen in the public mind an awareness of the Attorney General's determination to uphold the essential qualities of this historic office." (op cit., pp. 53-54.)

Those remarks, I suggest, have equal application to every member state in the Commonwealth. It defines what I consider to be the constitutional mandate of the Attorney General to assume a leadership role in sustaining public rights in general and fundamental human rights in particular. Experience to date suggests that, where there is strong evidence of the violation of human rights, the role of public advocate in pursuing judicial remedies has been left to non-governmental organisations or private groups to spearhead. The existence of such bodies, in the various regions of the Commonwealth, has been largely instrumental in generating a heightened public awareness of the whole question of human rights.

There has never been a time in which the judiciary has been more vocal in examining different ways whereby the common law courts themselves can, in the words of one English judge, "insist upon and secure a high degree of priority for those central rights which broadly find their place in the principal substantive provisions of the European Convention on Human Rights and Fundamental Freedoms" ((1993) Public Law 59 at p.60). In posing the question "Is the High Court the Guardian of Fundamental Constitutional Rights?" the same author (Sir John Laws) argues the case for a different approach to that espoused in the various judicial colloquia previously referred to in this paper. Each approach is focused on the judicial initiatives that are now being increasingly recognised. Without in anyway seeking to diminish the significance of that noteworthy development, my purpose is to remind this meeting of the challenge facing every Attorney General throughout the Commonwealth to assert, by personal example, the traditional leading role of the office of the Attorney General as "guardian of the public interest" in upholding the fundamental rights of every citizen and, if necessary, actively representing this noble cause before the courts.