APPEARING FOR THE CROWN

A legal and historical review
of criminal prosecutorial authority in Canada

A study conducted for the
LAW REFORM COMMISSION OF CANADA

by

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(ii) *Prosecutorial discretion with respect to the initiation of criminal proceedings and the granting of immunity*

The preceding review of the provisions of the *Criminal Code* concerning prosecutorial authority will have made it abundantly clear that implicit in those provisions, and more particularly in the permissive language used in many of them, is a high degree of prosecutorial discretion. In general, however, the courts have recognised that prosecutorial discretion derives from the common law, rather than solely from statutory provisions. Judicial expression of the common law origins of prosecutorial discretion is most clearly to be found in the reasons for judgment of the Chief Justice of the Ontario High Court in *R. v. Smythe* (1971), 3 C.C.C. (2d) 97 (subsequently affirmed by the Ontario Court of Appeal (*ibid.*, at 122), and the Supreme Court of Canada: (1971) 3 C.C.C. (2d) 366). After reviewing the origins of the Attorney General's office in Canada and, before that, in England, Wells, C.J.H.C. observed (at p.103) that "since the criminal law of England came into effect, its enforcement has been in the hands of an Attorney General". He went on (at p.104):

> "There is no suggestion that the decision of an Attorney General as to how to prosecute was at any time looked on as an act of discrimination. Instead, it was his duty to perform such an act in a judicial manner without any suggestion of fear or favour for anyone".

Noting that the preamble to the *British North America Act* of 1867 spoke of "a constitution similar in principle to that of the United Kingdom", Wells, C.J.H.C., concluded (at pp.104-105) that:

> "The result is that our constitution is the same in principle as that which existed in the United Kingdom in 1867. It had been the same so far as the criminal law is concerned since shortly after the middle of the 18th century. The Attorney-General's discretion springs from the Royal Prerogative of the Justice and its enforcement in maintaining the King's Peace".

The abiding influence of this conclusion[149] as to the origins of an Attorney General's discretion in criminal prosecutions over the attitude of the courts with respect to the control of prosecutorial discretion, will be evident from the discussion of the accountability of prosecutorial authorities in Part III below. It appears as a constant theme throughout the case law on this topic.

In *R. v. Catagas* (1978), 38 C.C.C. (2d) 296, however, the Manitoba Court of Appeal recognized some limits to prosecutorial discretion with respect to the initiation of criminal proceedings. In that case, a native Indian was accused of illegally hunting on unoccupied Crown land, contrary to the federal *Migratory Birds Convention Act*, R.S.C. 1970, c.M-12. He applied to the trial court to stay the prosecution as an abuse of the process of the court on the ground that it was in direct violation of an explicit policy of non-prosecution of native Indians for such offences in the province of Manitoba, which had been promulgated internally by Departments of both the federal and the provincial governments. The trial court accepted this argument and dismissed the case. In allowing an appeal by the Crown from this decision, the Manitoba Court of Appeal, in a unanimous judgment, held (at p.301) that "what we have here is a clear case of the exercise of a purported dispensing

149. A similar conclusion was reached in the case of *Re Baldwin and Bauer and the Queen* (1981) 54 C.C.C. (2d) 85 (Ont.H.C.).

power by executive action in favour of a particular group". The Court held that: "Such a power does not exist. The dispensation which it sought to create was, in the words of Halsbury, "void and of no effect"" (*Ibid*). In disposing of the case, the Court said that two points had to be noted. The first was that the fact that "the attempted dispensation was no doubt benevolent in purpose" could not affect its illegality:

> "The purported dispensation would have given legal validity to the judgment of the minority and negated the judgment of the majority. And that of course cannot legally be done, no matter how sympathetic one may be towards the Indians and his hunting rights" (*Ibid*).

The court concluded its analysis of the nature of prosecutorial authority in this regard with the following important statement of legal principle:

> "The other point is that nothing here stated is intended to curtail or affect the matter of prosecutorial discretion. Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket. An Attorney General, faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence, may decide to prosecute on the latter and not on the former. And the Attorney-General may in his discretion stay proceedings on any pending charge, a right that is given statutory recognition in s.508 [am. 1972 c.13, s.43(1)] and s.732.1 [enacted *idem*, s.62] of the *Criminal Code*. But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group or race. Today the dispensing power may be exercised in favour of Indians. Tomorrow it may be exercised in favour of Protestants, and the next day in favour of Jews. Our laws cannot be so treated. The Crown may not by Executive action dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle" (*Ibid*).

Similar reasoning was recently applied in *R. v. Wood* (1983), 31 C.R. (3d) 374, discussed at pp. 317-318, below.

In *R. v. Betesh* (1975), 30 C.C.C. (2d) 233 (discussed above at pp. 195-196) the exercise of prosecutorial discretion to grant prosecutorial immunity to a potential accused in a particular case was given judicial recognition. In rendering his decision in that case, Graburn, Co. Ct. J. said (at p. 243):

> "The powers of an Attorney-General, whether he be the chief law officer of the Crown for a Province or at the federal level, are those powers long exercised and held by the Attorney-General in England.
>
> It is clear that the Attorney-General in addition to prosecuting someone, has the right to select on what charges that person shall be prosecuted. He has the further right to decide to terminate a prosecution once begun, and the concurrent or analogous right to decide not to prosecute a person at all for offences that that person has allegedly committed."

In response to the argument which had been made that the power to grant immunity from prosecution cannot be recognised in Canadian law because it is not expressly provided for in the *Criminal Code*, Graburn, Co. Ct. J., had this to say (at p.245):

> "...while it is true that the *Code* does not authorise the grant of immunity from prosecution, *neither does it exhaust the traditional powers of the chief law officer of the*

> *Crown*. For example, the *Code* does not authorise the withdrawal of a charge, once laid, nor does it authorise plea bargaining as to sentence upon a plea of guilty by a co-accused, so that the latter may give evidence against his co-accused. The latter power was recognised and adopted through his agent, by a former Attorney-General of this Province in a case involving one Rush and Williams in 1969.
>
> Therefore, notwithstanding the lack of any express provision in the *Criminal Code* allowing a grant of immunity by the Attorney-General for Canada, I am satisfied he possesses such a power and that with rare exceptions he can be trusted to exercise it in accordance with the highest traditions of the administration of justice."

(iii) *The power to withdraw charges*

As Graburn, Co. Ct. J. noted in the passage of his judgment in *R. v. Betesh* just cited, the *Criminal Code* nowhere provides expressly for any power to withdraw charges which have been instituted through the laying of any information or the preferring of an indictment. Despite this, the courts have held that prosecutorial authorities have authority to withdraw charges, sometimes without leave, and sometimes with leave of the court.

The power to withdraw a charge with leave of the court has for a long time been recognised as having survived the enactment of the *Criminal Code* in 1892: see e.g. *Fancourt v. Heaven* (1909), 18 O.L.R. 492, and *R. v. Karpinsky*, [1957] S.C.R. 343. Despite this, the power seems to have been the subject of a sort of judicial "rediscovery" in the 1960's. In *R. v. Leonard, Ex parte Graham* (1962), 133 C.C.C. 230, Kirby, J., of the Alberta Supreme Court, said (at pp. 233-234):

> "There is no provision in the *Criminal Code* with respect to withdrawal of a charge. I have been unable to find a report of any case dealing specifically with this matter, other than *Abbott v. Refuge Assurance Co.* referred to below. The Attorney-General in withdrawing the charge was exercising a judicial discretion in his capacity as the Chief Law Enforcement Officer in the Province. The Courts have been most reluctant to interfere with the exercise of this discretion."

Kirby, J., went on to cite with approval the following observations of Salmon, J., in the English case of *Abbott v. Refuge Assurance Co.*, [1961] 3 All E.R. 1074 (at pp. 1084-5):

> "It is a long established practice that, if counsel in charge of a prosecution at any stage is convinced that there is no evidence against the defendant, or so little evidence that it would not be safe to leave the case to the jury, it is then the duty of counsel to acquaint the court with his views and to ask for leave to withdraw the prosecution. I certainly have never known such an application to be refused."

Kirby, J., distinguished the power to withdraw charges from the power to stay proceedings under what is now section 508 of the *Criminal Code*, in the following way:

> "The terms "stay of proceedings" and "withdraw a charge" are not synonymous. When a charge has been withdrawn, there is no charge on record, and in order to continue the prosecution a new charge would have to be laid. Withdrawing a charge has the effect of ending the proceedings. When a stay has been entered however, the Crown can at any future time continue the proceedings without laying any charge. Entering a stay of proceedings has the effect merely of suspending them."

The existence of the power to withdraw charges was confused in the *Leonard* case, however, by the fact that on appeal the Alberta Court of Appeal held that in that case