The Future of the Office of Attorney-General in New Brunswick*

Ever since the founding of this province in 1784 there has been as part of our government a public officer called the attorney-general. That officer's duties are essentially:

- to conduct or superintend criminal prosecutions;[1]
- to conduct civil litigation in which the interests or responsibilities of the Crown are engaged;
- to advise the Crown on technical legal matters generally; and
- to exercise those functions specifically accorded the office of the attorney-general by or pursuant to statute.[2]

Given the nature of these duties and functions it will be seen that only in exceptional circumstances could the office be discharged by one who is not a lawyer. Indeed an incumbent attorney-general is *ex officio* titular head of the provincial bar.

In contrast to the office of attorney-general, the office of minister of justice came into being in New Brunswick only in 1967. The responsibilities attached to the justice portfolio are basically those concerned with the functioning of the policing and correctional systems, together with those miscellaneous functions transferred to the department of justice when the office of the provincial secretary was abolished. There

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*Text of a submission to the Law Amendments Committee of the New Brunswick Legislature by Peter S. Glennie on behalf of the Canadian Bar Association (New Brunswick Branch) on 3 February 1987 (appendices omitted). The submission was prepared by a committee consisting of the Hon. Charles J.A. Hughes (Chair), Ronald Godin, Joseph C. Michaud, Thomas G. O'Neil, G. Melvin Turner and D.G. Bell (Secretary).

[1]Since the decision in *A-G of Canada* v. *CN Transportation Ltd.*, [1983] 2 S.C.R. 206, it appears that provincial attorneys-general exercise their prosecutorial discretion in *Criminal Code* offences only as agent for the federal attorney-general.

[2]The attorney-general's functions in the New Brunswick context are outlined in Journal of the House of Assembly for 1853, Appendix, at ccxxi-ii, and, more recently, in G.F. Gregory, "The Attorney General in Government," a paper read at the Forum on the Role of the Attorney-General, 17 October 1986, at the University of New Brunswick and printed in (1987) 36 UNB LJ 59.

is no compelling reason why a minister of justice should be a lawyer. Indeed there are several provinces where the corresponding office (with varying labels) has been held by a minister who is not a lawyer. In New Brunswick, however, the *Executive Council Act* requires that the "Attorney-General...shall also be Minister of Justice."[3] The Law Amendments Committee is now charged by the Legislature with inquiring into the advisability of amending that Act so as to bring about a separation of the combined offices.

During the last quarter century the combined departments have grown enormously. The deputy minister, Gordon F. Gregory, has told us that these departments now constitute the third largest unit of government, comprising approximately one-tenth of the provincial public service. It was the considered opinion of one former attorney-general whom we consulted that the combined departments are now too unwieldy to be administered effectively by a single minister. In particular, he feared that certain functions transferred from the former department of the provincial secretary can generally be given only limited attention from a minister who also must exercise the more pressing and conspicuous responsibilities of attorney-general. Accordingly, it may be that general considerations of efficiency suggest that some division be made of the dual portfolio.

It was not, however, the practical question of governmental efficiency that prompted the legislative resolution now before your Committee. Rather it was a serious concern for the integrity of the administration of justice in New Brunswick. We concur with the view expressed in the following words by Deputy Attorney-General Gregory in a paper presented on 17 October 1986:

> My second basic proposition is that public confidence in the integrity of the Attorney General and his decisions is a fundamental necessity; that a higher standard must be met then is demanded of the Minister of Justice. The aspect of the Attorney General's role that is most sensitive is undoubtedly found in the prosecutions field, but his role as legal adviser and counsel to government in non-criminal and legislative matters can also affect public confidence if not carried out properly. I suggest that this role is the more sensitive, in part because his powers and discretions are considerable, but also because he alone is responsible to carry them out. The exercise of his discretionary powers cannot be directed by government colleagues; he is not subject to majority cabinet rule or cabinet solidarity. Sole power then, in the exercise of his discretionary powers, engenders a requirement of public confidence in the propriety of those decisions.[4]

The Problem Defined

The peculiar duties and prerogatives associated with the office of attorney-general, which come to us as part of our unwritten constitution, may not be widely understood.

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[3]R.S.N.B. 1973, c. 12, s. 2.

[4]Gregory, *supra* note 2 at 62.

In general, our inherited British constitutional principles are now either being given statutory form (as in the *Charter of Rights and Freedoms*) or their continuing existence is sometimes being denied (as, for example, with the royal prerogative of refusing dissolution of parliament).[5] Since even well-informed citizens are not in touch with the unwritten portion of our constitution, we believe that the unique constitutional position of the attorney-general is neither much appreciated nor understood in contemporary New Brunswick.

In general it may be said that the attorney-general has an absolute discretion as to whether a public criminal prosecution should be instituted, and as to whether the continuance of a private criminal prosecution should be permitted. His/her exercise of prosecutorial discretion is unreviewable either by the courts or by the cabinet.[6] In deciding whether to institute such a proceeding an attorney-general may properly take into account not only the technical merits of the case but also broadly public (and in that sense "political") factors such as whether a prosecution would cause industrial unrest, market instability, ethnic tensions or international embarrassment, or might bring the administration of justice into disrepute. Hence, it would be constitutionally acceptable for an attorney-general to decline to institute criminal proceedings against a notorious abortionist if, in his conscientious judgment, it would be against the public interest to do so. On the other hand, when exercising his prosecutorial prerogative it would clearly be wrong for an attorney-general to be influenced by either private or partisan considerations. Hence, in deciding whether to lay a charge, he cannot properly take into account potential harm to a political party or embarrassment to family or friends.

Moreover, since in exercising the prerogatives of office an attorney-general is not answerable to either the courts or the government of the day, there could, constitutionally, be no such thing as a "government" decision to prosecute or not to prosecute in a particular case. Attorneys-general may have prosecution policies but cabinets may not. Indeed, it might well be unconstitutional for the Executive Council even to discuss such matters.[7] It would be equally irresponsible for an Opposition party to attack the cabinet over the attorney-general's decision to prosecute or not to prosecute since the decision is not the government's to make. An attorney-general is, of course, free to solicit and to take into account various views concerning the institution of criminal proceedings, including those of individual cabinet colleagues; but, in the end, our unwritten constitution dictates that the decision shall be the attorney-general's alone.

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[5]This tendency is cogently discussed in the concluding chapter of Paul Romney, Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899 (Toronto: Univ. of Toronto Press, 1986). We regret the absence of historical treatments of the office of attorney-general in the New Brunswick context.

[6]This proposition must be read subject to the federal/provincial dividion of powers and, presumabley, to the Charter of Rights and Freedoms. Our discussion deals only with the attorney-general's prosecutorial function — by far the most sensitive of his roles. Concerning his non-prerogative exercises of descretion see Gregory supra, note 2 at 65 and John Edwards, Attorney General, Politics and the Public Interest)London: Sweet & Maxwell, 1984) 29.

[7]We are advised by one former attorney-general that in his five years in office no prosecutorial decision ever became a subject for discussion in the Executive Council.

An attorney-general's constitutional position is, therefore, unique among ministers of the Crown. Though a politician, he must in the exercise of his prosecutorial functions, divorce himself from partisan considerations. Though a member of the government, he makes his decisions outside the ambit of collective responsibility. Though elected and a member of the executive branch, his constitutional role as attorney-general is aptly described as "quasi-judicial."[8] "This unique office," writes Professor John Edwards, the leading authority on the subject, "stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent Bar and the public prosecutors, the State and the citizenry at large."[9] Furthermore, under New Brunswick's current institutional arrangement, this non-partisan attorney-general is simultaneously the minister of justice. As such he is constitutionally as free to be partisan as his colleagues, and as minister of justice his decisions are dictated by and represent government policy. The constitutional nuances which result when the separate functions of attorney-general and minister of justice are exercised by the same person are apt to cause confusion. The fact that a higher standard of performance is called for from the attorney-general than from a minister of justice presents the chief problem arising out of combining the two offices. Furthermore, the fact that a decision whether or not to launch a criminal prosecution is made by an attorney-general who is, simultaneously, responsible (as minister of justice) for the police investigation supporting the charge, must inevitably raise suspicion that the attorney-general might not have exercised that independence of judgement which his office requires. Hence, to the extent New Brunswickers are even aware of the distinct and inconsistent functions of attorney-general and minister of justice, they must wonder how those functions can be exercised with propriety by the same person. When the holder of the office of attorney-general is also the premier — and most of our premiers over the last century have also acted as attorney-general — these wonderments must be compounded.

Any solution for these problems must include an institutional rearrangement which would promote a heightened awareness among the public, the media and within the government of the unique and delicate constitutional position of the attorney-general. As far as practicable, it should separate the sensitive prosecutorial role of the attorney-general from the policing responsibilities of the minister of justice. The need for such an arrangement is not, of course, unique to New Brunswick. Whenever the problem has been considered in the Canadian context three sorts of institutional restructuring are typically suggested:

— excluding the attorney-general from the cabinet and severing his responsibilities from those of the minister of justice; or, more modestly,

— continuing the attorney-general in cabinet but appointing a separate minister of justice; or in default of these,

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[8]John Edwards, *Law Officers of the Crown* (London: Sweet & Maxwell, 1964) chs 10, 11.

[9]Edwards, *Attorney General, Politics and the Public Interest*, *supra*, note 6 at viii.

— strengthening the office of the director of public prosecutions.

We discuss each of these approaches in turn.

Removing the Attorney-General from Cabinet

If the New Brunswick political system were void and without shape and we were to create institutions of government for the first time, the notion that the person exercising chief prosecutorial authority should be outside the cabinet would be an attractive one. This might be accomplished in one of two ways: the attorney-general might be a minister of the Crown who simply did not sit in cabinet, or he might be a completely non-political appointee.

The concept of an attorney-general who is an elected politician holding ministerial rank but who is not a member of cabinet is that which has prevailed in England and Wales since 1928. Significantly, however, that arrangement has not been adopted in any other Commonwealth jurisdiction, nor would we advocate it for New Brunswick. The political system of the UK has evolved a well-established practice of a government consisting of ministers with cabinet rank and many ministers without cabinet rank. In Canada, however, this has never been done and it would, therefore, require a very great shift in our political thinking to make it a plausible practice for adoption in New Brunswick. Furthermore, given the comparatively small legislative assembly in this province, we think there would be a practical difficulty in finding on government benches among the small number of lawyers now being elected a well-qualified attorney-general who was not, at the same time, too politically useful to be excluded from cabinet. Accordingly, we think the English practice of having an elected attorney-general without cabinet rank is too radical and impractical to be adopted in New Brunswick.

It would require an even bolder departure from tradition to institutionalize an attorney-general who was a totally non-political figure, chosen from outside the membership of the Legislature. It is true that at the foundation of the province the idea of an attorney-general who was not a legislator was very seriously debated. Precedents for excluding the law officers of the Crown from the elected branch were found in pre-revolutionary New York, Pennsylvania and Nova Scotia.[10] Furthermore there were times in the early days of this province when the attorney-general did not sit in the Legislature. Ever since 1848, however, the attorney-general has been an elected member and, as we have noted, very often also the premier. Exclusion of so essential a public officer from the Legislature would, therefore, be a reversal of a long-standing practice.

A more serious difficulty in the suggestion of appointing a non-elected attorney-general arises out of the need for a mechanism whereby such an attorney-general

[10]D.G. Bell, *Early Loyalist Saint John: The Origins of New Brunswick Politics, 1783-1786* (Fredericton: New Ireland Press, 1983) 121-22.

would be publicly accountable. At present the attorney-general is, in theory, accountable directly to the Legislature for the exercise of his discretionary powers. How could a non-political, non-elected attorney-general be made accountable? There would seem to be only two ways. He might answer to the Legislature through a minister of the Crown; but if that minister were made responsible to the Legislature for the attorney-general's conduct, then it would really be the latter who was the attorney-general. An alternative suggestion might involve the appointment of a non-political attorney-general of that small class of public servants who are accountable personally to the Legislature. This is already the position of at least two public functionaries in this province: the auditor-general and the ombudsman. Presumably an attorney-general might also be appointed and removed by the Legislature and made answerable through a committee of the Legislature.

Appointing Separate Ministers

As an alternative to excluding the attorney-general from cabinet, one might emphasize institutionally the distinct nature of the attorney-general's role simply by amending the *Executive Council Act* to provide that the two offices be held separately. Thereby the minister responsible for policing would never be the same person as the minister responsible for prosecutions. Moreover, separating the departments would send an emphatic symbolic message to the public and the personnel of both departments that the functions of the two were quite distinct. In great measure this is the division of responsibilities that the government of Canada has already made between the departments of the attorney-general and the solicitor-general. The only evident disadvantage of such a step for a small province like New Brunswick would be the inefficiency resulting from probable bureaucratic empire-building within the separated departments.

But while dividing the departments might result in no serious disadvantages it would solve only part of the problem. The division would signal clearly to all concerned that the prosecutorial and policing functions were distinct and separate, but it would not respond to sometimes expressed concerns that prosecutorial decisions are in the hands of an elected politician — who has frequently also been the premier — and who is inevitably suspected of partisanship. Short of giving final prosecutorial authority to a non-elected, non-partisan attorney-general as discussed above, such concerns will always be with us. We think, however, that there is an institutional arrangement which would go far towards addressing these concerns, whether the departments were divided or left as one. That proposal is the strengthening of New Brunswick's existing office of the director of public prosecutions.

Strengthening the DPP

The office of director of public prosecutions is an English creation derived from the Scottish practice and established by the *Prosecution of Offences Act (U.K.)*, 1879, which provided that the DPP would conduct prosecutions under the "superintendence of the Attorney-General."[11] In practice, this has meant that the DPP, a permanent public servant, makes almost all prosecutorial decisions that need to be taken at a senior

level. Only in respect of the most serious offences (such as those involving national security, political scandal, etc.) does the DPP apprise the attorney-general of his decision to proceed or not to proceed with charges, thereby providing the attorney-general with an opportunity to overrule the director. In the words of a recent attorney-general for England and Wales:

> 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 with him 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. It is fair to say that the office of DPP in England and Wales has attained such acceptance by the public, the media and politicians as to avoid any suspicion that prosecutorial decisions are influenced by partisan considerations. At the same time the fact that the DPP can still be overruled by the attorney-general preserves an essential degree of political accountability.[12]

Although New Brunswick already has a DPP, the office, in contrast to its English counterpart, has no statutory basis. It is held by a non-unionized civil servant without security of tenure, who is subject to dismissal or transfer by the government at any time.[13] Moreover, within the civil service the office is not one at the highest level, being beneath that of an assistant deputy minister. We think that it would promote public confidence in the administration of justice if the office of DPP were made a special statutory creation, the holder of which might be appointed by the Legislature and be responsible only to the attorney-general. In order to raise the profile and prestige of the office, we suggest that the DPP be given fixed tenure and remuneration comparable to that of the ombudsman and the auditor-general. Such security of tenure would ensure that while the DPP's decisions could be overruled only by the attorney-general, the director himself could not be dismissed or transferred except by the Legislature.

This arrangement has worked well in England, and we think it worth serious consideration by your Committee for New Brunswick. It would signal clearly to both the public and the public service that nearly all prosecutorial decisions were being made by a non-political official of high rank, subject only to the attorney-general's oversight; and it is likely that an attorney-general who acted contrary to the recommendations of the DPP would require very weighty reasons to justify his action to the public. We think

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[11] 42 & 43 Vict., c. 22, s. 2.

[12] Sir Michael Havers, as quoted in Edwards, *Attorney General, Politics and the Public Interest*, *supra*, note 6 at 48-49. .

[13] At present the DPP is strictly an "employee" whose status is "governed by the ordinary rules of contract": Civil Service Act, R.S.N.B. 1973, c. C-5.1, s. 20.

the cost of enhancing the institutional status of the DPP would be small in comparison with the anticipated benefits. In particular, we think that the creation of an essentially independent DPP would greatly reduce the urgency for dividing the present combined departments. In support of our recommendation we would cite the recent statement made in this province by Professor John Edwards that he considered statutory establishment of the office of DPP "almost inevitable."[14] As well, one former New Brunswick attorney-general has told us that he considered strengthening the office of DPP to be "the key" to satisfying public concerns as to the integrity of the prosecutorial process.

Recommendations

We think that many concerns over the institutional integrity of the prosecutorial function in this province could be addressed by strengthening the independence of the office of DPP. This would be particularly desirable if the present dual portfolios were to continue to be held by the same minister. We do, however, suggest that this whole matter is of so sensitive a nature and so important that it deserves a more extensive examination than we have been able to give it or, probably, than any legislative committee is in a position to give it.

We regret that the proposed 1980 study by Professor John Edwards of the office of attorney-general in New Brunswick did not go forward. We think that this Legislative Committee would be doing a significant public service were it to express bipartisan support for a detailed inquiry into the office of the attorney-general in all of its institutional and historical aspects.

We desire to emphasize that these proposals imply no criticism of any individual within the departments. We make these suggestions in the hope of attaining institutional arrangements that will better promote public confidence in the administration of justice.

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[14]John Edwards, "The Charter, Government and the Machinery of Justice," a lecture given at the University of New Brunswick, 16 October 1986 and printed in (1987) UNB LJ 41 at 51.