The Organizational Structure of the Department of Justice in Relation to the Office of Attorney-General in New Brunswick*

Recent years have witnessed a growing concern with New Brunswick's institutional arrangements for the administration of justice. In response to these concerns the Law Amendments Committee has been directed to consider whether the proper and efficient administration of justice is best achieved by concentration within a single ministry of all the functions associated with the administration of justice or whether goals of fairness, independence and impartiality, administrative harmonization and optimal allocation of resources would be better promoted by a governmental reorganization.

Such an inquiry demands an identification of the matters comprised within the administration of justice and a determination of the appropriate situs of political responsibility in relation thereto. In general terms the field of administration of justice consists of seven distinct but inter-related areas:

— policing and law enforcement;
— initiation and conduct of prosecutions;
— courts, including judicial appointments and the legal profession;
— representation of the government and the state before courts and tribunals;
— the penal system;
— legal advice to government and governmental agencies;
— legislative draughting and law reform.

Currently in New Brunswick the discharge of the duties subsumed within these seven categories of responsibility is performed by a single ministry in which is combined, but not fused, the Departments of the Attorney-General and of Justice, headed by a single minister. The effect of the internal institutional division of authority

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between the two distinct offices of attorney- general and minister of justice is to entrust to the minister in his capacity as attorney-general responsibility for legal services, public prosecutions, law reform and legal aid and to assign to the same individual in his capacity as minister of justice responsibility for policing and correctional services, the offices of the sheriff and coroner and the court system. Although at present the administration of the provincial judicial system is carried out by the Attorney-General's branch, it will soon be assigned to the Justice Services division. In addition, the minister of justice is assigned a number of miscellaneous duties in relation to consumer and corporate affairs, the registry system, the insurance industry, the administration of the *Expropriation Act*, research and planning and implementation of the department's Official Languages programme. Accretion of responsibilities to the department has been the evolutionary product of a number of influences: tradition, custom, executive act and legislative assignment.

This combination of functions within a single ministry can generate tensions. Although the attorney-general was originally and is still regarded as the chief law officer of the Crown, he/she is also ministerial head of a single executive department which encompasses both lawyering and bureaucratic functions. While the department serves as the principal law office for government and is, in this respect, responsible for the prosecution of crime, for the representation of government in litigation and for the provision of advice to cabinet and to individual ministers, it is also the administrative home for a number of diverse agencies and services which, while associated with the administration of justice, bear only limited affinities with the attorney-general's traditional advocacy and advisory role.

Assessing the merits of amalgamation of legal and bureaucratic functions within a single ministry, particularly in the field of the administration of criminal justice, entails a reconsideration of both political and constitutional principles and the claims of practical expediency supporting or militating against maintenance of the present institutional arrangements. This submission attempts to identify the advantages and disadvantages of the present system by describing the structure of New Brunswick's present Department of Justice in comparison with English, American and other Canadian organizational models and in light of the historical and current demands of the administration of justice.

CURRENT STRUCTURE OF THE DEPARTMENT OF JUSTICE

The functions and responsibilities of the attorney-general of New Brunswick have never received detailed legislative expression. Section 64 of the *Constitution Act, 1867* provided simply that:

> the Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

Pursuant to section 92 of the *Constitution Act, 1867* (authorizing provincial legislatures to enact laws in relation to provincial constitutions) the Legislative

Assembly of New Brunswick in 1903 enacted the *Executive Council Act* providing for the constitution of the provincial executive council and allowing the lieutenant-governor to appoint the attorney-general as a member of the executive council.[1] In 1927 an amendment to the Act designated the attorney-general as head of a department without delineating the functions of that department.[2] A further amendment in 1944 enabled the lieutenant-governor "by order-in-council, from time to time, [to] prescribe the duties of the ministers and of the several Departments over which they preside, and of the officers and clerks thereof."[3] In 1967 the title of the minister was altered from that of attorney-general by a statute which provided that:

> All rights, powers, duties, functions, responsibilities or authorities vested in or imposed on the Attorney General by or under any Act of the Legislature of or the Parliament of Canada are vested in and imposed on the Minister of Justice.

In 1979, however, the *Executive Council Act* was further amended so as to revert to the original description of the officeholder as "Attorney General who shall also be Minister of Justice." At the same time the departmental responsibilities of the office-holder were increased by legislative reassignment consequent on the abolition of the office of provincial secretary.

The concept of attorney-general, as it presently exists in New Brunswick, has both an individual and a collective dimension. In the former respect, the attorney-general is an elected member of the legislature who participates in the executive branch of government as a member of Cabinet and serves as the Crown's chief law officer. In this capacity the duties of the attorney-general comprise four distinct classes of responsibilities: giving legal advice to cabinet ministers and governmental departments; legal representation of government; representation of the public interest in litigation; initiation and conduct of the prosecutorial process. These functions are those derived from the historical evolution of the office of the English attorney-general. In this role as chief law officer the attorney-general must, despite political affiliation and cabinet membership, conduct himself according to a standard of impartiality and independence "completely divorced from party political considerations and from any kind of political control."[4] In the latter, collective sense, however, the concept of attorney-general also denotes an executive ministry charged with supervision of a department of government which, through the operation of executive act and legislative assignment, is responsible for the discharge of a variety of functions, some of which are associated with the traditional role of law officer, others of which represent recent accretions of jurisdiction.

The effect of the present institutional arrangement of the Department of the Attorney-General/Minister of Justice in New Brunswick is to integrate jurisdiction

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[1]C.S.N.B. 1903, c. 10, s. 2.

[2]R.S.N.B. 1927, c. 8, s. 2.

[3]S.N.B. 1944, c. 10, s. 1.

[4]Sir Hartley Shawcross, "The Office of the Attorney General," quoted in J.LI.J. Edwards, *Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 53.

over all aspects of the administration of justice. Some sense of the range of responsibilities attaching to the department is conveyed by the fact that the department, which numerically is the third largest in government, employs ten percent of the civil service and ten percent of the legal profession, and is responsible for the administration of 146 of the 384 public statutes. While the department is under the supervision of a single individual who is by statute both attorney-general and minister of justice, the internal administration of the department is divided into three branches: Attorney-General; Law Enforcement; Justice Services.[5]

This account of the activities of the current Department of the Attorney-General/ Minister of Justice demonstrates that the department, and by implication the responsible minister, embraces two generically distinct classes of functions. First, it exercises those "lawyering" duties associated with the traditional office of attorney-general — representation of government in civil litigation, prosecution of crime, and provision of legal advice to government. Additionally, however, the department encompasses a number of functions and supervises a number of programmes, all of which bear some relationship to law and the administration of justice but which represent a relatively recent and radical departure from the role of an attorney-general as conventionally understood. Internal coherence and symmetry is provided by a principle of division of authority which segregates the traditional and non-traditional functions of the minister by allocating authority to three distinct assistant deputy ministers who are accountable to a single individual at the primary and secondary levels of departmental responsibility — the minister and the deputy minister.

The English Model Compared

The model of departmental integration characterizing New Brunswick's system of administration of justice contrasts sharply with that of England, where jurisdiction is distributed among three distinct bodies: the Lord Chancellor's Department; the Home Office; the Law Officer's Department. Although the precise demarcation among these three bodies is complex, a broad outline will be presented for comparative purposes.

In general terms the Home Office "is concerned with the criminal law, preventing offences, catching offenders, part of the process of trying them, and virtually the whole of the treatment of offenders."[6] More specifically, the Home Office bears direct responsibility for the metropolitan police and general authority for regional policing services. In addition the Home Secretary appoints (but does not supervise) the director of public prosecutions and exercises various powers in relation to criminal procedure, costs in criminal matters, organization of magistrates' courts, prisons and custodial institutions, probation and pardons. While its principal area of concern is the administration of particular aspects of the field of criminal justice, the Home Office also oversees matrimonial law, race relations and immigration matters. In the widest sense the Home Office is responsible for the development of general penal policy, including

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[5]For a detailed account of the organizational structure of the combined department see the tables in G.F. Gregory, "The Attorney-General in Government" (1987), 36 *UNB LJ* 59 at 71-77.

[6]R. Jackson, *The Machinery of Justice in England* 7th ed., (Cambridge: Cambridge Univ. Press, 1977) at 569.

the introduction of new legislation and amendment of existing laws. In this regard, legal research on behalf of the Home Office is conducted by the Criminal Law Revision Committee and the Home Office Research Institute.

The office of the Lord Chancellor represents a fusion of the executive, legislative and judicial branches of government. Consistent with the tripartite nature of his position, the responsibilities imposed on the Lord Chancellor are many and diverse. He exerts extensive authority over the judiciary by presiding over the Judicial Committees of the House of Lords and Privy Council. He exercises an advisory role in judicial appointments and is responsible for the administration of the court system. His functions include the constitution and operation of administrative tribunals. He is also charged with certain duties in connection with Land Registry, the Office of the Public Trustee, and the mentally incompetent. Finally, the Lord Chancellor enjoys a wide degree of responsibility for law reform and supervises a number of agencies including the Law Reform Committee,the Law Commission and the Standing Committee on Private International Law.

The attorney-general and his deputy, the solicitor-general, are the law officers of the Crown. The activities of the law officers are devoted exclusively to the discharge of a legal function which consists of three distinct duties: giving of legal advice to cabinet; representation of the Crown in matters of public interest; supervision of important public prosecutions. In contemporary terms, "the outstanding function and the main duty of the Attorney General" is as the legal advisor of cabinet as a whole and of the various cabinet committees, a duty also performed by the Solicitor-General. While the Lord Chancellor also "expresses his opinion about legal matters which come before the Cabinet [and] sometimes advises the Prime Minister on a problem of particular difficulty or weight, it is not his role to advise government departments."[7] The primary theoretical responsibility for provision of advice to government has devolved on the law officers, although in practice discharged by Treasury solicitors.

In order to ensure effective discharge of this duty, both law officers are members of the government and have, since 1700, held seats in the House of Commons. Neither, however, is a member of the cabinet. Although for a brief period the attorney-general was included within cabinet, this practice was discontinued in 1928. As explained by the Sir Elwyn Jones:

> There is no rule of law which prevents his being a member of Cabinet. But it has been considered more appropriate, in recent times at any rate, that the independence and detachment of his office should not be blurred by his inclusion in a political body which may have to make policy decisions upon the basis of the legal advice the law officers have given.[8]

The advice rendered by the attorney-general is addressed to both cabinet and cabinet committees and, in this capacity, may include consideration of the legality of proposed legislation.

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[7] Sir Elwyn Jones, "The Office of the Attorney General" (1969) *Camb. L.J.* 43 at 46.

[8] *Ibid.* at 47.

In addition to his advisory functions, the attorney-general is responsible for the performance of a supervisory role in relation to criminal prosecutions. Historically the principal role performed by the attorney-general was in the context of the criminal process. The paramount position occupied by the attorney-general was identified by Chief Justice Wilmot in *R.* v. *Wilkes*:

> By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community for the presenting and punishing of all offences which affect the community; and for that reason, all proceedings *ad vindicatum et poenam* are called in law the pleas or suits of the Crown....As indictments and informations granted by the King's Bench, are the King's suits,and under his control informations filed by his Attorney General are most emphatically his suits, because they are the immediate emanations of his will and pleasure.[9]

Historically, the prerogative powers exercised by the attorney- general in relation to criminal proceedings included among the most significant:

> the power to stay proceedings on indictment; the power to consent to prosecutions which has been described as a discretionary right...serving as a curb on the almost untramelled right of private individuals to lay informations; prefer indictments and prosecute; the right to lay *ex officio* informations; the right to stipulate mode and venue of trial and the power to issue writs of error.[10]

In effect, until the establishment of the office of director of public prosecutions in 1879, the attorney-general was the sole public officer with responsibility in criminal matters.

While currently prosecutions are carried out under the auspices of a director of public prosecutions, it has been clear since the creation of the office that the director is ultimately accountable to the attorney-general, who continues to retain theoretical supremacy in relation to criminal prosecutions. Thus, the *Prosecution of Offences Act, 1879* provided:

> It shall be the duty of the Director of Public Prosecutions under the superintendence of the Attorney General to institute, undertake or carry on such criminal proceedings...as may be for the time being prescribed by regulations under this Act or may be directed in a special case by the Attorney General.

This supervisory function in relation to criminal prosecutions has persisted to the present, notwithstanding the creation of a national prosecutorial service pursuant to the *Prosecution of Offences Act, 1985*, which conferred on each crown prosecutor the powers of the director of public prosecutions in relation to the institution and conduct

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[9](1768) Wilm. 322 at 326.

[10]*R.* v. *Hauser* [1979] 1 S.C.R. 984 at 1028, Dickson J.

of criminal proceedings. Although the 1985 Act expressly provides that such powers should be exercised "under the direction of the Director," one commentator has asserted that "whilst delegating the maximum degree of *de facto* authority and independence to the Director of Public Prosecutions the residual and final word rests constitutionally in the hands of the Attorney General."[11]

The precise scope of the relationship between the attorney-general and the director of public prosecutions was described in 1979 by Sir Michael Havers:

> 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.[12]

In addition to his responsibilities in relation to the initiation and conduct of criminal proceedings, the attorney- general exerts a strong degree of control over the course of prosecutions through his power to enter a *nolle prosequi*, a power which is apparently beyond the scope of judicial review. The *Criminal Justice Act, 1972* also permits the attorney-general to refer to the Court of Appeal (Criminal Division) a point of law for the court's opinion following an acquittal on indictment.

The attorney-general's responsibilities for the administration of justice are not limited to the criminal justice forum. The attorney-general also serves as the guardian of public rights, either *ex officio* or under the relator procedure. Hence, for example, the attorney-general *ex officio* may seek an injunction or restrain the commission of a criminal offence. There are, however, two exceptions to the general role of attorney-general as representative of the public interest. First, a private individual can sue in respect of a public wrong which either prejudices the enjoyment of a private right or constitutes an interference with a public right causing special damage to an individual. Second, there are certain limited statutory exceptions to the principle that only the attorney-general may enforce public rights. For example, section 222 of the *Local Government Act, 1972* enables a local authority to seek an injunction in its own name to protect public rights in the locality. Finally, the attorney-general has certain responsibilities in relation to the administration of charitable trusts.

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[11] J.L.I.J. Edwards, "The Charter, Government and the Administration of Justice" (1987) 36 *UNB LJ* 41 at 53.

[12] Quoted in J.L.I.J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 48-49.

The American Model Compared

Although the institutional characteristics and responsibilities of the office of the New Brunswick attorney-general parallel those exercised by the English attorney-general, unlike his English counterpart the New Brunswick officer is also the minister responsible for the administration of a government department which in internal composition and structure closely resembles the institutional arrangements of the United States Department of Justice.

While the office of the United States attorney-general was created by the 1789 *Judiciary Act*, the Department of Justice was not established until 1870. According to section 8 of the *Department of Justice Act* of that year, the attorney-general was authorized "to make all necessary rules and regulations for the government of the said Department of Justice and for the management and distribution of its business." The effect of the Act was to retain the traditional legal functions of the attorney- general (as that office had developed in England) while at the same time introducing certain bureaucratic and administrative duties.

Since the establishment of the department there has been an increasing degree of specialization resulting in an internal development of bureaus and divisions. However, the various services provided by the Department of Justice can be classified as relating either to:

> (1) the lawyering functions, embracing the original and long-standing responsibilities of the Attorney General for handling government litigation, civil and criminal, and for giving legal advice to the President and the cabinet; or
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> (2) the non-lawyering functions, embracing all of the Justice Department activities, agencies, and services which are not part of the offices and divisions through which the lawyering role is performed.[13]

While the attorney-general is ultimately responsible for all the activities of the department, statute has delegated a great deal of authority to the deputy attorney-general, responsible for the administration of the criminal justice field and the associate attorney-general, who supervises civil litigation, the internal administration of the department and employment.

Summary

This brief discussion of the English and American systems of organization illustrates the extent to which New Brunswick has assimilated the concept of an elective law officer entrusted with legal and advisory functions to that of departmental head. While the New Brunswick model has retained the position of attorney-general in its original English sense, qualified only by inclusion of the law officer in cabinet, it has

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[13] D.J. Meador, *The President, the Attorney General, and the Department of Justice* (Charlottesville: University of Virginia, 1980) at 13.

incorporated the centralizing characteristics of the American model of the federal department of justice, while perhaps achieving greater clarity and coherence in the internal organization of that department.

The transformation of attorney-general from the English model of chief law officer to that of departmental head (analogous to the US Department of Justice) with associated administrative and law enforcement responsibilities suggests that precise inter-jurisdictional comparisons are difficult to draw. For example, although New Brunswick has implemented the office of attorney-general, and has, as well, instituted the position of director of public prosecutions, the range of authority enjoyed by these individuals in relation to criminal prosecutions contrasts sharply with the more limited role performed by their English counterparts. Although the New Brunswick office of the attorney-general has been derived from that of the English, a simple equation of the New Brunswick and English institutions may be fundamentally distorted, due to historically differing conceptions of the prosecutorial function. Notwithstanding the traditional depiction of the attorney-general as the law officer principally concerned with prosecution of crime, in fact in England until 1985 prosecutions were primarily private, conducted by the police or their agents. Intervention by the attorney-general or director of public prosecutions in the criminal process was a relatively exceptional phenomenon (occurring, according to a 1979 survey, in approximately 20% of prosecutions). Although certain prosecutions (prior to 1985) could be conducted only with the consent of the attorney-general, with respect to the majority of criminal offences the role of the director of public prosecutions was defined by a series of regulations promulgated pursuant to the *Prosecution of Offenses Acts (1879-1979)*. The effect of these regulations was to restrict prosecutorial intervention by the director to two categories:

> — a category of offences requiring mandatory notification by the police if there were a *prima facie* case for proceeding. Included in this mandatory reporting category were offences punishable by death, homicide, abortion, treason, sedition and offences under the extradition acts or the *Fugitive Offenders Act, 1967*;
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> — a category of offences of "importance or difficulty" which require the intervention of the director in the public interest.

The cumulative effect of the pre-1985 Regulations was thus to limit the intervention of the attorney-general and the director of public prosecutions to cases of real importance or difficulty with national significance. This pragmatic restriction of the prosecutorial role of the attorney-general, and by implication of the director, has been effected by consolidation of authority in the Home Office.

Differences in Canadian and English views as to the circumstances requiring the active participation of the attorney-general or director of public prosecutions may also be explicable by reference to the traditional emphasis placed on the vehicle of private prosecutions by the latter jurisdiction. This emphasis has persisted until the proclamation of the *Prosecution of Offences Act, 1985*, which created a national prosecutorial

system, displacing police prosecutorial authority. This system, authorizing the director or his agents "to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force," closely resembles that currently employed in New Brunswick, and will perhaps provide a valuable basis for future inter-jurisdictional comparisons. However, as the preceding description of the prosecutorial roles of the attorney-general and director of public prosecutions in England prior to 1985 demonstrates, distinctions between the New Brunswick and English models outweigh any apparent similarities. Parenthetically, it is also noteworthy that the governmental advisory role of the English attorney-general has come to assume a largely symbolic dimension, the major share of this responsibility being discharged by Treasury solicitors, in contrast to the active role performed by the provincial attorney-general. A closer counterpart to current New Brunswick institutional arrangements is provided by the model of the Home Office, integrating, as it does, authority over policing, prosecutions, corrections, law reform and judicial appointments at certain levels. In this respect it is instructive to observe that a high degree of centralization characterizes the English system of the administration of justice, notwithstanding the appearance of division and separation of functions.

Origin and Evolution of the Canadian Attorney-General

The office of the Canadian attorney-general is inherited from England. Originally the English structure of the administration of justice was decentralized. Courts were organized at the local level and legal representation of the Crown was conducted by a number of attorneys who "held various titles, acted independently of each other, and were appointed to handle certain types of cases or to practice in certain courts."[14] However, with consolidation of the royal courts there developed by the middle of the fifteenth century the settled practice of appointing a "King's Attorney" to act on behalf of royal interests before the courts. By 1604 this officer was entitled the attorney-general, whose sole function consisted in representation of the Crown. The responsibilities of the English attorney-general gradually expanded to include ministerial duties. In 1673 Attorney-General Francis North assumed membership in the House of Commons and, with the institutionalization of cabinet government, the office became an integral part of the government and was thereby thrust into the realm of politics. In the exercise of his legal duties the attorney-general was assisted by the solicitor-general, who served as his agent. Their relationship was discussed by Chief Justice Wilmot in *Wilkes* v. *The King*:

> as the courts take notice judicially of the Attorney General when there is one, they take notice of the Solicitor General as standing in his place, when there is none. He is a known and sworn officer of the Crown, as much as the Attorney; and in the vacancy of that office, does every act and executes every branch of it.[15]

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[14] *Ibid.* at 4.

[15] *Supra* at note 9.

Hence, prior to colonization of British North America, the functions of the English attorney-general as both a legal officer and political participant, and his deputy, the solicitor-general, had crystallized. In the historical account of Sir William Anson:

> The King cannot appear in his own courts in person to plead his cause where his interests are concerned. So from very early times he used the service of an attorney or agent to appear on his behalf. The list of Attorneys-General begins early in the reign of Edward I. The Solicitor-General, whose title and date of appearance suggest that he represented the King in matters arising in Chancery, appears first in the reign of Edward IV. These law officers are not only the legal advisors and representatives of the Sovereign; they are at the service of the state where offences against the good order of the community are dealt with, not by private prosecution but by the government of the day.
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> The government may call for their advice and so may each department of government; are expected to defend in the House of Commons the legality of ministerial action if called in question. As Councillors of the Crown they receive a writ of attendance, together with the Judges, to the House of Lords at the commencement of every Parliament.
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> The law officers of the Crown play a various part. They are the legal advisors of the Crown, the Ministry and the departments of government; they are members of the ministry, though never of the cabinet, and come and go with the change of party majorities; they are members of the House of Commons, and responsible to Parliament for the advice given to the Crown and its servants; they are the chiefs of the legal profession in their respective counties and represent the Bar when the Bar takes collective action.[16]

As observed by Anson, the legal functions of the attorney-general (and by implication, of the solicitor-general) comprised three distinct sorts of responsibilities: ministerial; prosecutorial; public interest representation.

The extension of English legal institutions into British North America included the implementation of governmental structures developed in relation to the administration of justice. Hence, a unitary court system modelled on that of England was established in each of the original confederating colonies. Most of the colonies appointed both an attorney-general and a solicitor-general who, in additional to their legal duties, served as members of the executive council. These were prerogative appointments. The office of the colonial attorney-general was based on the English prototype. Although the perimeters of the position were not defined by statute, available historical evidence indicates that in all material respects the functions of the colonial attorney-general paralleled the English model. According to Professor Edwards:

> The essential feature to note is the context within which the powers and duties of the Law Officers were executed in the distant colonies. Direct rule prevailed and both the Attorney General and the Solicitor General...owed

[16] W. Anson, *Law and Custom of the Constitution*, 2nd ed., (1896) at 201-02.

> their appointments to...the Governor and often...the Secretary of State for the colonies himself. Resistance to outside interventions began to exhibit itself with the emergence of Canadian born lawyers trained in Canada rather than in the English Inns of Court....Throughout those years and later the Attorney General and Solicitor General of the day sought to pattern their approach to the prerogative powers associated with their offices on the example set by the Attorney General and Solicitor General of England.[17]

It was the discharge of the prosecutorial function which necessitated the initial appointment of an attorney-general (and solicitor-general) and it was the performance of this obligation which constituted the principal activity of the office during the pre-Confederation period. Although political responsibilities were attached to the offices of both the attorney-general and the solicitor-general as a consequence of participation in the colonial executive councils, such ministerial duties were considered subordinate to the performance of their lawyering duties. According to an 1846 report of a committee of the Executive Council of Canada, the primary functions of the attorney-general and solicitor-general were:

> First — To conduct the Crown business before the courts, so far as it might be in their power to do so. Second — To advise the Department of the Executive Government on points of law, whenever so commanded by the Governor, and to prepare drafts of, or issue fiats for, or examine and countersign, as the case may be, certain descriptions of public instruments; to perform certain other ministerial functions in connection with such instruments; always also at the command of the Governor.

The institutional similarities between the English and colonial attorneys-general is further reflected in pre-Confederation legislation stipulating emoluments. For example, an 1853 enactment of the legislature of Prince Edward Island commuted the fees and allowances of the attorney-general to the sum of £200 in return for his services "on account of crown prosecutions, or for opinions, or for any other miscellaneous services performed by him in his official capacity." In an 1868 statute, in which the functions of the attorney-general were delineated with greater precision, salaries were declared to be full payment:

> on account of crown prosecutions, or for opinions, or for putting marginal notes to the statutes, or any other miscellaneous services performed by them...for the government, for any public officer of the government in their or his professional capacity as barrister, proctor, attorney, advocate, conveyancer, or notary public.

A comparison of pre-Confederation colonial and English views of the responsibilities of the office demonstrates, therefore, that "there can be no doubt, in the case of the provinces entering confederation in 1867 that the attorney-general and the solicitor-general were performing the functions of the Law Officers of the Crown in England."[18]

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[17] J.Ll.J. Edwards, *Ministerial Responsibility for National Security* (Hull: Supply & Services Canada, 1980) at 15.

[18] *Ibid.*

Accordingly, the transformation of the attorney-general from individual representative of and advisor to government in legal matters to ministerial head of a department responsible for the administration of justice is a phenomenon whose origin must be discovered in the post-Confederation period, characterized by the shift from local and regional to centralized provision of law enforcement services.

The Constitution Act, 1867

There is nothing in the express terms of the *Constitution Act, 1867* to suggest that pre-Confederation structures related to the administration of justice were to be altered consequent on union. Subject to the assignment of legislative jurisdiction respecting various aspects of the administration of justice contained in sections 91 and 92, the few relevant constitutional provisions are couched in confirmatory language and appear designed to ensure the preservation of pre-Confederation institutions, while allowing to both Parliament and the provincial legislatures a high degree of latitude in internal governmental organization.

The original *Constitution Act, 1867* did not explicitly direct the adoption of existing British institutions for the administration of justice. Such references as exist relate solely to the position of the law officers of the Crown. By section 9, federal executive power is declared "to continue and be vested in the Queen" and by section 11, provision was made for the appointment by the Governor General of an executive council "to aid and advise in the Government of Canada." Although section 11 did not enumerate the portfolios which would comprise the Executive Council, the extension of pre-Confederation conventions of responsible government implied by the Act's preamble ensured "a system of cabinet government whereby the Governor General would choose as members of the council those who could command the confidence of Parliament and in general would exercise executive authority only in accordance with the advice of those members of the council." Accordingly, "there can be no doubt that, following the pattern established since the advent of British rule in Canada, it was envisaged that the Attorney General would be included."[19]

A parallel conclusion can be drawn in the case of the provincial attorney-general. The *Constitution Act 1867* makes specific reference to the status of the traditional law officers in those provisions detailing the structure of provincial executive power. According to section 63, the executive councils of Ontario and Quebec were declared to consist of such persons as might be designated by the lieutenant-governor, including the attorney-general and, in the case of Quebec, the solicitor-general. Additionally, with respect to Ontario and Quebec the exercise of the prerogative powers of the attorney-general and the solicitor-general was confirmed by sections 134 and 135, the latter stipulating:

> Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities...vested in or imposed on the Attorney General, Solicitor General...by any Law, Statute, or

[19] *Ibid at 5.*

> Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them.

The position of the law officers in the Maritime provinces was afforded a similar constitutional protection. Section 64, which provided that:

> the Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act

was effective to continue in existence the executive councils of the two named provinces whose members, including the attorney-general, were to be appointed in accordance with the principles of responsible government. Additional support for this proposition may be discovered in section 88, which provides:

> The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

Analogous provisions were included in each of the instruments admitting British Columbia, Prince Edward Island and Newfoundland to the union. The executive authorities for Manitoba, Alberta and Saskatchewan were established by the statutes creating the provinces.

Finally, section 129 indicates an intention to preserve the traditional positions of the law officers and related institutions entrusted with obligations in respect of the administration of justice by stipulating that:

> Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made....

The effect of these and analogous constitutional provisions has been interpreted as incorporating into the governmental structures of the various provinces the traditional offices of attorney-general and solicitor-general, while enabling each level of legislature to effect alterations in the traditional roles of these law officers according to the jurisdictional division implemented by sections 91 and 92.

Contemporary Canadian Structures for the Administration of Justice

The Federal Model

The office of the federal attorney-general was created almost immediately after Confederation. The *Department of Justice Act, 1868* established a federal attorney-general who would act not only as a legal advisor to the executive but also in a supervisory capacity in relation to the enforcement of federal laws. The structure implemented by Parliament for the administration of justice represented a radical departure from that developed in England, where administration of justice functions were distributed among the Attorney General, the Home Secretary and the Lord Chancellor. Rather, full responsibility for the administration of justice was concentrated within one ministry — the Department of Justice — presided over by a minister of justice "who shall *ex officio* be Her Majesty's Attorney General." Despite legislative reference to the two distinct offices of minister of justice and attorney-general, as Professor Edwards has remarked the familiar phraseology denoting the responsibility of the minister of justice for "the management and direction of the Department of Justice brooks no doubt as to which minister of the Crown Parliament must look for answers to questions relating to the activities of the Department. There exists only the one portfolio, that of the Minister of Justice...."[20] In 1878 a bill was passed through Commons authorizing establishment of a separate portfolio of the attorney-general, presiding jointly with the minister of justice over a law department, the proposal was vigorously resisted and Parliament was dissolved before the bill was enacted. Instead, in 1887 provision was made for the creation of the office of solicitor-general who would, as a member of the administration but not of cabinet, assist the minister of justice.

According to the original *Department of Justice Act*, the functions of the Minister were the following:

> he shall be the official legal advisor of the Governor and the legal member of her Majesty's Privy Council for Canada; it shall be his duty to see that the administration of public affairs is in accordance with law; he shall have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the Governments of the Provinces composing the same; he shall advise upon the Legislative Acts and proceedings of each of the Legislatures of the Provinces of Canada, and generally advise the Crown upon all matters of Law referred to him by the Crown; and he shall be charged generally with such other duties as may at any time be assigned by the Governor-in-Council.

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[20] *Ibid.*

In his separate and distinct role as attorney-general:

> He shall be entrusted with the powers and charged with the duties which belong to the Office of the Attorney General by law or usage as far as the same powers and duties are applicable to Canada and also with the powers and duties which by the laws of the several Provinces belonged to the Office of the Attorney General of each Province....He shall advise the Heads of the several Departments of the Government upon all matters of law connected with such Departments; He shall be charged with the settlement and approval of all instruments issued under the Great Seal of Canada; He shall have the superintendence of penitentiaries and the prison system of the Dominion; He shall have the regulation and conduct of all litigation for or against the Crown or any Public Department, in respect of any subjects within the authority or jurisdiction of the Dominion; and he shall be charged generally with such other duties as may at any time be assigned by the Governor-in-Council to the Attorney General of Canada.

As has been observed by Professor Edwards, the responsibilities of the federal minister of justice closely parallel those reposed in the English Lord Chancellor:

> The Lord Chancellor's responsibilities include the judiciary and the courts. As a senior member of the Cabinet, he is also the principal legal advisor of the Government, and presides over the House of Lords as well as acting, from time to time, as government spokesman in the Upper House. His role as Speaker of the House of Lords apart, it is fair to state that the Lord Chancellor and the Minister of Justice of Canada have many duties in common and that the unifying elements outnumber the differences between these two offices.[21]

Similarly, his duties as attorney-general resemble those performed by the English attorney-general, particularly in relation to the conduct of all litigation for or against the Crown or any public department. However, in imposing on the federal attorney-general responsibilities related to the "superintendence of penitentiaries and the prison system of the Dominion" a feature alien to the traditional conception of the office of the attorney-general was introduced, such responsibilities in England being associated with the Home Secretary.

The *Department of Justice Act* did not assign jurisdiction over policing and ancillary functions to either the minister of justice or the attorney-general due to the assumption by Sir John A. Macdonald himself — in his capacity as prime minister — of responsibility for the reorganization of the North West Mounted Police. This body and its successors were by statute "subject to control, orders and authority of such person or persons as may, from time to time, be named by the Governor-in-Council for that purpose." However, as a practical matter, constitutional responsibility was located in the Department of Justice, as reflected in the *North West Mounted Police Act, 1873* and

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[21] *Ibid.*

its successors, which provided that "The Department of Justice shall have the control and management of the Police and all matters connected therewith...."

The relationship of the Department of Justice with the federal police force persisted until 1966, when responsibility was transferred to the solicitor-general through the *Government Organization Act*. In addition to vesting in the new Department of the Solicitor General jurisdiction over the Royal Canadian Mounted Police, the Act also transferred responsibilities (formerly attached to the Department of Justice) in relation to reformatories, prisons and penitentiaries, parole and remissions. The effect of this Act was, in the words of one commentator, "to ascribe to the office of Solicitor General all functions and responsibilities which were completely foreign to the traditional conception of the office."[22]

The decision to remove jurisdiction over policing and corrections from the Department of Justice and to locate such authority in the Department of the Solicitor General was, apparently, prompted less by principled arguments in support of governmental reorganization than by political reaction to the findings of a 1964 public inquiry (Dorion Inquiry) into allegations concerning the activities of the executive assistant and special assistant to the minister of justice and the Parliamentary secretary to the prime minister. Specifically, it had been asserted that these officials exerted improper political pressure on counsel representing the US government in extradition proceedings. The Dorion Inquiry was directed to investigate these allegations and to examine the conduct of the Minister of Justice, Guy Favreau, in relation to the issue of criminal liability of the government officials involved. While acknowledging that Favreau, as attorney-general, possessed full discretion in relation to the question of prosecution, the Inquiry concluded that in exercising this discretion in favour of non-prosecution, the attorney-general had attached undue weight to the opinions of the commissioner of the RCMP and ought to have relied instead on the counsel of the legal advisors of the Department of Justice:

> the very circumstances of this case should have led him to refrain from expressing any view at all, since his decision was to be of a quasi-judicial nature....The Minister of Justice, before reaching a decision, should have submitted the case to the legal advisers within his Department with instructions to complete the search for facts if necessary and secured their views upon the possible perpetration of a criminal offence by one or several of the persons involved.

However, the failure of the attorney-general properly to discharge his responsibilities in relation to the independent exercise of his prosecutorial discretion cannot be attributed simply to the existing fusion of authority in relation to investigations and prosecutions characteristic of the Department of Justice prior to 1966 but to his personal failure "to comprehend that he had certain functions to perform, *qua* Minister of Justice, with respect to the RCMP's investigation of the allegations, and an entirely distinct role to play as Attorney General of Canada when the decision was whether or

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[22]P. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986) at 98.

not to authorize criminal prosecutions."[23] Misconceptions entertained by Favreau were not confined simply to the relationship between the distinct offices of attorney-general and minister of justice but also extended to the role of cabinet in the prosecutorial decision-making process. It was apparently assumed by the government of the day that the exercise of prosecutorial discretion, at least in highly sensitive cases, was the responsibility of cabinet and not of the attorney-general. For example, in 1965 in response to questions concerning authority for prosecution of two Canadians allegedly involved in espionage activities, Prime Minister Pearson stated that "in this situation, it will be the responsibility of the Government on the advice of the Minister of Justice." Underlying such statements:

> is the uncritical assumption that some prosecution decisions will naturally assume a high political profile because of the position which the accused enjoys in society, the circumstances that give rise to possible criminal charges or the political consequences that will flow from the outcome of the trial....[At this time]...most ministers of the Crown would have viewed their involvement in the disposition of such prosecutorial questions in Cabinet as a natural application of the principle of collective responsibility for unpalatable political decisions.[24]

While this point will be considered more fully below, it should be observed that the institutional separation of authority over prosecutions and investigation effected by the Federal government in 1966 was a reaction to a particular set of sensitive political circumstances, suggesting that its value as precedent for any subsequent provincial departmental reorganization may be limited.

Manitoba

The first province to define statutorily ministerial responsibility for the administration of justice was Manitoba which in 1885 enacted *An Act Respecting the Department of the Attorney General*. The Act was virtually identical to the federal act, imposing all the functions enumerated in the federal legislation on the provincial attorney-general who was to be *ex officio* "Her Majesty's Attorney General in and for the Province of Manitoba" and, in addition, reposed on the provincial attorney-general all:

> the powers and...duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as the same powers and duties are applicable to the Province of Manitoba, and also with the powers and duties which by the laws of Canada and of the Province of Manitoba to be administered and carried into effect by the Government of the Province of Manitoba belong to the office of the Attorney-General and Solicitor General.

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[23]Quoted in *supra*, note 17 at 30.

[24]Edwards, *Attorney General, Politics and the Public Interest*, supra note 12 at 362.

The present scope of the attorney-general's functions remains largely unaltered, although in 1968 responsibility for the administration of the provincial legal aid scheme was vested in the attorney-general and in 1977 authority over correctional institutions was removed.

Quebec

In 1868 in the *Act respecting the Organization of the Civil Service* the department of the law officers of the crown as developed prior to Confederation was declared to be part of "the civil service of the province." In 1882 the attorney-general was statutorily included as a member of the Executive Council, and in 1885 the solicitor-general, also, was appointed to the Executive Council. In the same year the scope of the two offices received statutory exposition. Section 6 of the *Act concerning the Law Officers of the Crown* provided that:

> The rights, powers, duties, functions and privileges which belong to the offices of attorney general and solicitor general respectively, and which have been exercised by one or the other or both of them in the province of Canada up until the date of the passing of the *British North America Act, 1867*, and since that date, in the province of Quebec, are the rights, powers, duties, functions and privileges which formerly belonged to these respective offices, and which would have been possessed, exercised and fulfilled by the attorney general and the solicitor general or by either of these officers, to the extent that they have not been otherwise prescribed by, or by virtue of, this Act.

In 1886 Quebec adopted the Manitoba model of definition of the responsibilities of the law officers, a structure which continued largely unaltered until 1965. In that year, the attorney-general's department was abolished and replaced by a department of justice headed by a minister of justice who was to be "*ex officio* the Attorney General of Her Majesty in right of the Province." In conformity with the federal *Department of Justice Act*, the duties of the minister of justice and attorney-general were defined separately. The functions of the minister of justice, in addition to his role as legal advisor of the lieutenant-governor and member of the executive council, included oversight of the administration of public affairs and the administration of justice to ensure conformity with the law, advice on matters of law to government departments, management of judicial administration and the registry offices, superintendence over judicial officers and registrars as well as any additional duties assigned by the lieutenant governor. The attorney-general was made responsible for the conduct of all litigation involving the Crown or any department of the province and the administration of laws affecting the police. With respect to the latter, in 1979 duties concerning policing, crime prevention and the maintenance of statistics of crime and law enforcement were added to the responsibilities of the attorney-general.

Although the solicitor-general originally functioned as a law officer and was expressly referred to in the *Constitution Act, 1867*, the office was abolished in 1887. In 1950, however, it was recreated. Currently the functions of the solicitor-general are identical to those exercised by the federal solicitor-general.

Newfoundland

In 1898 legislation was enacted establishing a department of justice headed by a minister of Justice who was to be *ex officio* attorney-general. The statute assigned the minister responsibility "for the superintendence of all matters connected with the administration of Justice" and entrusted to the attorney-general "the powers and...the duties which belong to the office of the Attorney General of England, by law or usage, so far as the same powers and duties are applicable to Newfoundland."

The definition of the respective functions of the minister of justice and the attorney-general continued until 1949 when the department of justice was replaced by the department of the attorney-general, under the direction of a minister who would exercise all "the rights, powers, duties, liabilities and functions" formerly possessed by the minister of justice and who would, additionally, fulfill all the duties associated with the office of the attorney-general in the Manitoba and federal enactments. In 1966 the designation of the department reverted to that of the Department of Justice, headed by a minister of justice who was to be *ex officio* attorney-general and who would, in his capacity as minister of justice, be responsible for all matters connected with the administration of justice in the province and who, as attorney-general, would possess the "powers, functions and duties" traditionally vested in the attorney-general.

A certain role in the administration of justice was also performed by the solicitor-general, an office established in the mid-19th century. Although the office had ceased by the beginning of the present century to perform any significant functions, it received legislative recognition in 1929 in an amendment to the *Department of Justice Act:*

> 6(a) The duties of the Solicitor General of Newfoundland shall be as follows: He shall be entrusted with the powers and charged with the duties which belong to the Office of Solicitor General of England by law or usage, so far as the said powers and duties are applicable to Newfoundland and consistent with the provisions of the Statutes thereof.
>
> (b) In addition to the foregoing it shall be his duty to act as Crown Prosecutor upon all indictments for felony or misdemeanour before the Supreme Court in Saint John's or on circuit...and upon all enquiries and other proceedings before magistrates or otherwise preliminary to such indictments;...
>
> (c) During the temporary absence or disability of the Solicitor General the Deputy Minister of Justice may on the instruction of the Governor-in-Council perform the duties and exercise the powers of the Solicitor General; and during the temporary absence or disability of the Deputy Minister of Justice the Solicitor General may on the instruction of the Governor-in-Council perform the duties and exercise the powers of such Deputy Minister.

The definition of the duties of solicitor-general received more recent exposition in the 1953 *Solicitor General's Act* which stated:

> 2. The Lieutenant-Governor in Council may appoint by commission under the Great Seal an officer who shall be called the Solicitor General of Newfoundland who shall assist the Attorney General in the work of the Department of the Attorney General and shall be charged with such other duties as the Lieutenant-Governor in Council may assign to him.

Although this Act has not been repealed, the position has not been filled in recent years.

British Columbia

The *Attorney-General Act, 1899* defined the functions of the provincial attorney-general in language substantially identical to that employed in the 1885 Manitoba Act and remains virtually unaltered.

Alberta and Saskatchewan

The Alberta and Saskatchewan *Attorney General Acts* of 1906 reproduced the 1885 Manitoba enactment subject to two exceptions. In the case of Alberta, responsibilities for correctional facilities were withdrawn from the competence of the attorney-general and placed directly under the control of the lieutenant-governor in council while thirteen additional functions were specifically assigned.

Responsibilities for the administration of justice are additionally borne by the Department of the Solicitor General, created in 1973. According to the *Department of the Solicitor General Act* the solicitor-general:

> (a) shall exercise the powers and is charged with duties attached to the office of the Solicitor-General of England by law or usage insofar as those powers and duties are applicable to Alberta and are not assigned to any other Minister, and
>
> (b) is charged generally with such duties as may at any time be assigned to the Solicitor General by law or by the Lieutenant Governor-in-Council.

The solicitor-general is additionally, by statute, responsible for the administration of the provincial policing statutes and for correctional facilities and services. In this respect, the role performed by the Alberta solicitor-general is analogous to that discharged by the federal solicitor-general, particularly in relation to policing and corrections.

The legislative definition of the responsibilities of the attorney-general of Saskatchewan conformed to the Manitoba precedent until 1983 when the attorney-general's department was reconstituted as the department of justice, headed by a minister of justice who was *ex officio* attorney-general exercising responsibilities (as minister of justice) in relation to "all matters connected with the administration of justice" and confiding the traditional functions of the English law officers in the provincial attorney-general.

Ontario

Until 1969 there existed no statutory definition of the functions of the attorney-general, the sole reference to the office being that contained in sections 134 and 135 of the *Constitution Act, 1867*. In that year, in conformity with the federal precedent, the title of attorney-general was changed to that of minister of justice and attorney-general and the description of the ministry to the "Department of Justice." Concurrent with this reorganization, a legislative definition of the minister's responsibilities was enacted. While the formula employed to describe the duties of the law officer resembled in substantial terms that noted in relation to the Manitoba and federal enactments, the technique employed assigning the responsibilities differed in that the various specified functions were not distributed between the two offices — those of minister of justice and attorney-general — but were all assigned to a single officer whose title was that of "Minister of Justice and Attorney General." In 1973, government reorganization effected a reversion to the traditional designation of the department and its head as the ministry of the attorney-general and attorney-general; the duties of the law officer remained unchanged. At the same time a "Provincial Secretariat for Justice" was established and charged with responsibility for the development and co-ordination of justice policy. The Justice Secretariat, comprised of the ministries of Attorney General, Solicitor General, Corrections and Consumer and Commercial Relations, is headed by the "Provincial Secretary for Justice." While his functions "with respect to the four ministries within his 'policy field' are not in any sense directive...and he thus has no direct prosecutorial authority as such,...he is entitled to proffer advice as to the policies which should be adopted and pursued by the Attorney General in this regard and, to the extent that he is able, co-ordinate these policies with those of the other three ministries within his general responsibility."[25] While not in a technical sense a government ministry, the Provincial Secretary for Justice is a member of the executive council according to section 2 of the *Executive Council Act*.

In 1973, as well, the office of the solicitor-general (abandoned by the end of the 1850s) was revived and the minister assigned responsibility for certain provincial statutes respecting public safety including policing.

Nova Scotia

The *Public Service Act* of 1900 contained the first statutory definition of the functions of the attorney-general. The duties assigned included all but two of the nine functions assigned to the attorney-general in the Manitoba Act. The attorney-general was not given responsibility for advising on legislative acts and the proceedings of the legislature or for correctional facilities within the province. This description is currently in effect, although the responsibilities of the attorney-general in relation to corrections has been greatly enhanced in recent years.

Although the solicitor-general originally was included among provincial law officers, the office was discontinued by 1884 due to the practice of appointing local counsel to conduct criminal prosecutions.

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[25] *Ibid.* at 86.

Prince Edward Island

In contrast to the majority of provinces, the duties of the attorney-general have not been the object of extensive legislative definition, the *Public Departments Act* of 1939 simply providing:

> 5. There shall be a minister of the Crown styled Attorney General, who shall have control of the Administration of Justice in the Province, and who shall be a Barrister of the Supreme Court. The Attorney General may be a member of His Majesty's Executive Council.

Since that date, legislative amendments have been addressed simply to the title of the office, and in 1980 the statutory description of the minister became that of "Minister of Justice and Attorney General." In addition to the attorney-general, legal functions were also discharged by a solicitor-general until that office was abolished by statute in 1867.

Summary

What conclusions may be drawn concerning the various federal and provincial structures applied to discharge the various functions encompassed within the concept of the administration of justice? In the first place, it is apparent that the constitution does not mandate any particular institutional arrangements. Section 45 of the *Constitution Act, 1982* allows the legislature of each province to "exclusively make laws amending the constitution of the province." Section 44 analogously empowers Parliament to "exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada." The absence of any express constitutional objection to institutional reorganization in this respect contrasts sharply with the limitations imposed by the constitutions of other jurisdictions. For example, the requirement that the United States attorney-general be an appointed rather than elected official, who is exclusively a member of the executive branch, is one imposed by the constitutional doctrine of separation of powers. Thus, implementation of any particular structure for the discharge of responsibilities in relation to the administration of justice must proceed from considerations of policy rather than from legal compulsion.

Second, it is apparent that Canadian legislators have engaged in extensive experimentation with institutional arrangements and have, in varying degrees, departed from the English prototype. Although all eleven jurisdictions have retained the office of attorney-general (albeit with minor differences in designation) and have continued to vest this official with the traditional functions of the English attorney-general in relation to supervision of the prosecutorial process and advice to and representation of government, both provincial and federal arrangements for the administration of justice have, at various periods, implemented a bureaucratic model in which a single ministry is charged with authority over the diverse functions of policing, prosecutions, corrections and adjudication. Although since 1966 federal responsibility for policing and corrections has been removed from the Department of Justice and located in the Department of the Solicitor General and a growing trend towards decentralization may

be detected at the provincial level, in general terms departmental unification and concentration of authority has characterized Canadian governmental arrangements since Confederation.

In electing consolidation rather than decentralization as the preferred departmental model, Canadian jurisdictions have established structures which approximate that of the United States Department of Justice rather than those which have developed in England. Relative uniformity in adoption would therefore suggest that centralization possesses advantages which cannot be achieved by decentralization of authority.

Advantages of the Present System

The concentration of responsibility for the administration of justice within a single ministry has been a common feature of Canadian governmental structure, at both the federal and provincial levels, since Confederation. While recent reforms in Alberta, Ontario and Quebec illustrate a growing advocacy of the principle of separation, a history of adherence to an institutional model of unification is, in itself, a forceful rationale justifying retention of the present structure. However, arguments supporting the continued existence of the New Brunswick's present Department of the Attorney-General need not rely simply on claims of tradition. Over a century of experience with the present method of organization reveals that the consolidation of investigatory, prosecutorial, advisory and law reform functions in a single ministry compares favourably with the British system of division, which has "justly been criticized for its imperfections when dealing with the administration of the courts, law reform the conduct of legislation and the guidance of the executive in legal questions."[26] The advantages produced by the present departmental structure are numerous and maybe classified in the following way:

— public perception;
— administrative effectiveness;
— inter-governmental relations;
— implementation of federal laws;
— law reform.

Each benefit is discussed in turn.

Public Perception

One of the most visible problems inherent in the British structure of organization for the administration of justice relates to public access to governmental departments and, as a consequence, to public perception of political accountability. As described by Alec Samuels:

> If the man in the street is troubled with a problem affecting health or housing or social security he and those advising him can usually hit upon the

[26] A. Samuels, "Do We Need a Ministry of Justice?" (1971) 121 *New L.J* at 111.

> appropriate department without much difficulty. But if he is concerned with a problem of justice the proper body to which a complaint should be addressed is not so clear. The Lord Chancellor's Department is no doubt elite and influential but hardly accessible to the citizen, a tiny department...hidden away as it is in the interstices of the Palace of Westminster. The Attorney General has no department at all to speak of. The Home Office, a great department of state, is not noted for prompt and energetic attention to justice, because it has an enormous multiplicity of problems to deal with and is necessarily preoccupied with law and order and the police. The Parliamentary Commissioner has no departmental responsibility, he merely investigates complaints, and his terms of reference confine him to maladministration and generally debar him from passing upon the merits of a matter.[27]

The settled New Brunswick practice of functional integration in a single ministry possesses a demonstrable superiority in this respect. While the lines of demarcation within the Department of the Attorney-General between the functions assigned to the minister in his capacity as minister of justice and those which he discharges as attorney-general may not be clearly perceived or understood by the private citizen, the physical and conceptual location of ultimate authority for all aspects of the administration of justice in a single ministry under the direction of a single minister guarantees political accountability and promotes, on the part of the public, a perception of order and symmetry in the administration of justice. Additionally, access by the public to the department is facilitated.

The political accountability achieved by the present system refers not only to the relationship between the public and department but also to the relationship of the ministry with other governmental bodies. The English experience in this regard is instructive:

> It has often been said that a division of duties between the Home Secretary and the Lord Chancellor leads to difficulties, and that this can be seen if we consider the position of a member of Parliament who wishes to raise matters by asking questions in Parliament. If a question relates to some matter clearly within the scope of some department, then the minister for that department can be questioned. But if a question relates to...criminal or civil procedure it is by no means clear to whom the question should be addressed. In the Commons the Home Secretary may well say that it is not his business. The Attorney General will probably say that it is not his business, perhaps adding that he will communicate with the Lord Chancellor. In the House of Lords the Lord Chancellor may intimate that it is not his responsibility but that the matter will be considered. The conclusion of this line of thought is to say that when nobody is responsible for a thing the usual result is that there is consistent neglect, and therefore there should be a single minister who is definitely responsible. In other countries such a minister is called the Minister of Justice.[28]

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[27] *Ibid.*

[28] *Ibid.*

Administrative Effectiveness

Concentration of authority and responsibility within a single ministry is obviously beneficial in contributing to the "efficiency and effectiveness...in developing programs and policies to confront important social and law enforcement problems."[29] Justifications advanced in support of the *status quo* draw strength from the clear advantages to be attained in relation to "the setting of priorities, the integration of sectional policies, the reconciliation of conflicts, and the allocation of resources" which permit "a more effective context in which to achieve solutions."[30]

Concentration in a single ministry reflects in functional terms the reality that many social problems implicate different facets of the administration of justice which are best accommodated within a unitary structure competent to respond to the problem in an integrated, comprehensive and global manner. Concentration of authority produces departmental harmony. Conversely, distribution of power among various governmental ministries creates the possibility of interdepartmental conflict, resulting in the formulation of incompatible, inconsistent and even contradictory objectives and solutions.

An excellent illustration of the benefits inherent in the present structure is provided by the field of family violence. It has been recognized that the phenomenon of family violence generates distinct legal and social issues. Under current institutional arrangements, vesting plenary authority in the Department of the Attorney General promotes development of a co-ordinated, effective approach to the reporting, investigation, prosecution and management of family violence cases. The institutional relationship between the department and the judiciary also permits evaluation of the judicial response to both victims and perpetrators of family violence and the responsibilities of the department in relation to law reform and legislative review permits a comprehensive consideration of the issues of family violence, including the development of legal options and solutions, which are "free of the accustomed difficulties of ministerial and departmental contests over roles."[31] Further guarantees of coherence and consistency in the elaboration of justice policy in relation to family violence and related aspects of family law are provided by the existence of an internal departmental committee composed of senior management personnel and chaired by the Assistant Deputy Attorney General which has been directed to consider a broad spectrum of issues including spousal assault, child abuse, pornography and child abduction.

The values fostered by departmental integration were noted by the Ontario Committee on Government Productivity (1971). While the committee did not recommend departmental amalgamation as a method of achieving efficiency and governmental responsiveness, electing instead in favour of the implementation of "policy fields" (integrating several ministries), the rationalia advanced in support of unification at

[29]G.F. Gregory, "The Attorney General in Government," a paper read at the Forum on the Role of the Attorney-General, 17 October 1986, 24.

[30]United Kingdom. Home Affairs Select Committee, *Fourth Report* (1980).

[31]Gregory, *supra*, note 29 at 24.

even this minimal level apply even more strongly to the case of the current New Brunswick structure. The Ontario Committee recommended establishment of a Justice Policy Field (containing the ministries of the Attorney General, Correctional Services and Financial and Commercial Affairs) which would:

> focus on the traditional responsibilities of the government in regard to the established legal system and the administration of the courts, as well as the protection of the basic rights of the citizens of the province. It would also undertake those activities which ensure a commitment by government to help those who have contravened the law to live within the law.

Creation of the justice policy field would, according to the Committee, ensure consideration of the following factors:

- legal policies in regard to all programs ofgovernment;
- co-ordination and integration of policy decisions relating to legal and quasi-judicial issues;
- areas of conflict which may arise from differing philosophical approaches, for instance, between law enforcement and corrections;
- basic rights of individuals within society;
- basic rights of the public which collectively forms society;
- trends in social justice;
- human behaviour and the findings of the social sciences, as these relate to law and justice.

It would appear that the objectives identified by the committee as supporting the organization of policy fields may be achieved through the governmental structure currently obtaining in this province. The present conjunction of minister of justice and attorney-general functions within a single department is conducive not only to the articulation of rational, consistent and coherent policy but also ensures effective implementation and administration of that policy by stimulating sectional co-operation rather than competition.

Integration at the departmental level also reflects the underlying unity of the various fields comprised within the administration of justice. In contrast, under the English system "there is a curious but inevitable division of responsibility, often quite artificial, between the Lord Chancellor's Department and the Home Office."[32] Department unification enables a more logical and appropriate assignment of functions within the ministry itself. These benefits are particularly apposite in the case of a small jurisdiction such as New Brunswick which "enjoy[s] the complete range of provincial government powers but must attempt to exercise them with a population and tax base equivalent to a city of moderate size."[33]

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[32]Samuels, *supra*, note 26 at 112.

[33]Gregory, *supra*, note 29 at 3.

Facilitation of Inter-Governmental Relations

The benefits observed in the preceding section — those of administrative efficiency, reduction in sectional conflicts, facilitation of long-term planning, integration of governmental objectives and efficient allocation of limited resources — are clearly advantageous in terms of the internal administration of the department itself. However, the values promoted by functional integration possess an extra-departmental dimension. Location of authority over all facets of the administration of justice — policing, prosecutions, courts, corrections and law reform — promotes effectiveness at the inter-jurisdictional level. The political fact of federal organization dictates the necessity for a high degree of co-operation with the federal government and between the various provinces. A centralized justice structure allows New Brunswick to present, in inter-governmental relations, a unified and consistent position.

Effective Implementation of Federal Laws

Although Canada is a federal state, the structure of division of constitutional authority is such as to permit a high degree of provincial involvement in the administration and enforcement of federal laws. This phenomenon is particularly apparent in the field of criminal justice. Although section 91(27) of the *Constitution Act, 1867* allocates jurisdiction over the criminal law and criminal procedure to Parliament, according to section 92(14) the provinces bear primary responsibility for the administration of justice. In this respect, authority in relation to the administration of justice includes authority over the investigation and prosecution of federally-defined criminal offences. Fusion of the distinct responsibilities in relation to policing and prosecutions within a single department promotes the effective enforcement of federal laws in a number of ways.

Centralization of justice functions enables the provincial department of justice to undertake initiatives which reinforce and complement existing federal law with respect to specific social problems. An illustration is provided by current federal and provincial responses to the problems posed by the impaired driver. At present, section 238(2) of the *Criminal Code* provides that a police officer who has reasonable and probable grounds to believe that a person is driving or has care and control of a motor vehicle while his ability to do so is impaired, may demand that the individual submit to a breathalyzer test. The legal limit of blood alcohol, according to federal law, is 80 milligrams of alcohol per 100 milliliters of blood. However, federal law does not adequately address those situations in which ability to drive may be impaired although the blood alcohol level of the driver does not exceed 0.08. In response to this deficiency, in 1985 amendments to the provincial *Motor Vehicle Act* were introduced providing for a twenty-four hour roadside suspension by police officers of driving privileges of persons whose ability to drive is impaired, although below the standard proscribed by the *Criminal Code*. The conjunction of federal and provincial legislative initiatives in this area is reinforced by the location of enforcement authority in the hands of a single minister. Consequently, "not only will the police community be more responsive to

increased emphasis on this type of offence, but also, fewer bureaucratic impediments can arise if the policy can be implemented by one minister responsible for policing, prosecutions, courts and corrections."[34]

Promotion of Law Reform

Finally, centralization is favourable to creation of a departmental climate sympathetic to systematic and considered law reform exertions. The advantages of a unitary justice structure in this regard are best illustrated by way of contrast. In England, where responsibilities for the administration of justice are presently distributed among three departments, arguments in support of consolidation have, since 1874, emphasized the beneficial impact upon law reform, due to the perception that the current tripartite structure contributes to "the difficulty of getting the attention of the Government to law reform and...the total inadequacy of the organization which controls the general administrative side of the legal system."[35] To remedy this deficiency, it has consistently been recommended that a department of justice be created under the supervision of a minister of justice who

> would sit in the House of Commons and be accessible to those who have suggestions to make. Besides his administration of the staffs of the various Courts in England, his Department should contain experts charged with the duty of watching over the necessities of law reform, and of studying the development of the subject at home and abroad.[36]

The present location of a permanent law reform division within the department of justice creates an atmosphere which should be conducive to systematic law reform.

Disadvantages of the Present System

While the present New Brunswick system of unification and concentration of authority within a single department is coherent, reflects the integrated nature of the justice system and appears the structure best suited to achieve an efficient use of resources and promote clarity in policy-making, certain problems engendered by the combination of minister of justice and attorney-general in a single individual must be noted.

Securing Independence in the Prosecutorial Process

It has often been argued that present arrangements for the administration of justice fail to completely protect the attorney-general, in the exercise of his prosecutorial role, from political pressure. As chief law officer of the Crown and as an elected member of government and of Cabinet, the attorney-general occupies a position distinct from that of any other minister. He is a political officer charged with legal duties. Hence:

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[34]*Ibid.* at 17.

[35]Jackson, *supra*, note 6 at 581.

[36]Samuels, *supra*, note 26 at 112.

> In addition to carrying a vast array of administrative responsibilities, he must also perform as a lawyer. No other cabinet officer fills such a dual role, with the special professional obligations which attach to the lawyer, as an officer of the courts, as a member of the bar, and as a representative of a client.[37]

The conjunction of political affiliation and legal duties within the position of the attorney-general may, on occasion, produce tensions. Such tensions exist in both the civil[38] and criminal fields. They are, perhaps, more acute in the area of criminal prosecutions, in which it is relatively easy to discern difficulties in "drawing acceptable boundaries between those political considerations to which it is proper for an Attorney General, a Director of Public Prosecutions or any Crown Prosecutor, to have due regard and, on the other hand, those kinds of political considerations which should never be countenanced."[39] Thus, in the exercise of his prosecutorial discretion, the attorney-general must "acquaint himself with all relevant facts, including, for instance, the effect which the prosecution would have upon public morale and order, and with any other consideration affecting public policy." However, what is forbidden is the interjection of partisan political concerns. Responsibility for the decision to commence or stay prosecutions is borne by the attorney-general alone. While the attorney-general "may seek, and frequently would be seriously at fault in failing to do so, advice from whatever quarter, ministerial or otherwise, that may help to illuminate the decision confronting him," Cabinet's role is consultative and not directory.[40] For that reason, prosecutorial decisions cannot be identified with or viewed as the consequence of particular government policy. Although the attorney-general is an elected member of Cabinet and thus subject to principles of political accountability:

> it is quite erroneous to speak of "prosecution by the government": when an attorney-general decides whether or not to prosecute the decision in his, not that of the government, even though he is also a minister of that government. Thus, for example, if the person against whom criminal proceedings are contemplated happens to be a minister of the Crown or a deputy minister, or, for that matter, anyone in the executive branch of government, it is the duty of the attorney-general to reach his decision without regard to any embarrassment or prejudice that his decision to institute proceedings may cause.[41]

Insensitivity to or ignorance of the line of demarcation between legitimate political concerns and illegitimate political pressures which would undermine the independence and integrity of the prosecutorial process have prompted demands for institutional reforms which would insulate the office of the attorney- general from political

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[37]Meador, *supra*, note 13 at 3.

[38]For example, there is the possibility that the exercise of discretion to grant a *fiat* may be motivated by improper political considerations: see Gregory, *supra* at note 29.

[39]Edwards, *supra*, note 11 at 8.

[40]Edwards, *supra*, note 12 at 186, 360.

[41]McDonald Commission of Inquiry, *Third Report* (1981) 509.

influence and which are designed to ensure "not only the reality but also the appearance of complete detachment from party politics."[42]

Politicization of the office of the attorney-general is a serious problem. However, it is not one which can be resolved simply by an institutional separation of the portfolios of attorney-general and minister of justice. The lessons of comparative jurisprudence indicate that even in countries such as England, in which the administration of justice is conducted on decentralized lines, questions concerning independence of the prosecutorial process are frequently raised, notwithstanding the delegation of authority to the director of public prosecutions. The possibility of improper partisan pressures affecting the decision-making authority of the attorney-general exists not because of the relationship of the attorney-general to the minister of justice. Rather, such a possibility is inherent in the office itself, due to the dual status of the attorney-general as lawyer and politician.

Accordingly any efforts to secure independence and detachment in the prosecutorial decision-making process must be addressed to a consideration of the office of the attorney-general itself, and include examination of such matters as: the role of the director of public prosecutions; the relation of the director of public prosecution to the attorney-general, deputy and assistant deputy ministers and Crown prosecutors; the desirability of cabinet membership of the attorney-general. Reform proposals must also take into account the relative merits and weaknesses of structures developed in other jurisdictions to immunize the prosecutorial process from political pressure, and the extent to which such structures could be implemented within the existing constitutional framework. A certain measure of independence has already been attained by the introduction of published prosecutorial policies and guidelines. Such guidelines are currently in the hands of Crown prosecutors and will be made available to the legal community for comment within the next month.

Whether, however, a more radical transformation of the prosecutorial system ought to be undertaken — through, for example, the conversion of the office of director of public prosecutions into a quasi-judicial position exercising legislated powers and enjoying statutory guarantees of independence similar to the English model — raises critical questions requiring extensive consideration. Provincial competence to import directly prosecutorial systems developed in other jurisdictional contexts must acknowledge the restrains imposed by the *Constitution Act, 1982*, which enables the federal Parliament to exercise a high degree of authority in relation to the prosecutorial process through its power over criminal procedure. Proposals for reform must also consider the nature of the safeguards which would be implemented to oversee the workings of the prosecutorial system entailing an evaluation of the relative merits of political accountability for, and judicial reviewability of, the exercise of prosecutorial discretion. In short, alteration of the existing institutional arrangements should not be undertaken without thoughtful analysis of the historical development of the present provincial system.

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[42]Shawcross, *supra* at note 1

While any alteration in present prosecutorial arrangements which would increase public confidence and contribute to the maintenance of independence and impartiality in decision-making represents a welcome advance, reform of the existing system requires extensive and critical evaluation of factors which are only tangentially germane to the present inquiry. While certain aspects of departmental organization affect independence in the exercise of prosecutorial discretion and while the institution of new arrangements for criminal prosecutions would necessitate a re-examination of the relationship between minister of justice and attorney-general functions, a mere separation of the two portfolios would not resolve more generalized concerns. Departmental integration does, however, generate certain problems which are derived from and particular to the organizational structure. Among such problems may be noted the following; integration of investigatory and prosecutorial functions; relationship with the judiciary; time.

Integration of Investigatory and Prosecutorial Functions

The effect of the combination of the portfolios of attorney-general and minister of justice is to concentrate ultimate control in a single minister over the prosecutorial system and the activities of investigatory bodies such as police and coroners. The amalgamation of investigation and prosecution services has been viewed as undesirable by many due to the potential for conflict and for the exertion of improper pressure by one branch of law enforcement on another. A former attorney-general of Ontario has observed:

> It is a contradiction, an incongruity to have a Minister of Justice charged with the administration of justice, who is expected to rule or act with an even, impartial attitude and to let no other attitude than impartiality, objectivity, play a part, and to have him also with the other hand directing the investigatory forces and the enforcement side which is necessary in the administration of justice.

Impairment of the traditional stance of detachment and impartiality characterizing the office of the attorney-general in the exercise of prosecutorial discretion may, in theory, result from departmental integration due to "the temptation to tolerate an increasing degree of familiarity between prosecutors and police investigating officers that flows from working daily in close association, and a weakening of that essential regard for objectivity and independence which so often accompanies not only a separation of function but also the maintaining of a healthy distance on the ground between the active participants and the final decision-maker."[43]

This rationale had been advanced in support of the creating of the federal Department of the Solicitor General in 1966, although it is not clear that it was compelling. At the committee stage of the "Government Organization Bill," the then solicitor-general stated:

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[43]J.L.J. Edwards, ""The Integrity of Criminal Prosecutions," P.R. Glazebrook, ed., *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (London: Stevens, 1978).

> Under the new bill there will not be a separation of the investigative functions of the police from the process of prosecution in the courts. It seems to me that to vest the authority for the investigative functions of the government in the same person who is going to conduct the criminal process is foreign to the spirit of justice. Under the proposals...the R.C.M.P. will carry out its investigations under the authority of the Solicitor General. But...the decision whether or not the facts disclosed by the investigation merit the commencement of a criminal prosecution will continue to be taken by the Minister of Justice in his capacity as Attorney General. Thus two sets of minds and two sets of responsibilities will be involved.

It is worth noting that the concern to insulate the prosecutorial process from the influence of the investigatory branch of the federal department of justice arose as a direct result from the circumstances preceding the Dorion Inquiry, and did not reflect any underlying philosophy as to the appropriate institutional relationship between policing and prosecutorial services. In fact, the Glassco Royal Commission on Government Organization (1962), while recommending integration of all federal legal services in the department of justice, had not perceived any structural tensions in the departmental amalgamation of attorney-general and minister of justice responsibilities. The justification for separation is thus one peculiar to the historical events of 1965 at the federal level and does not, in itself, constitute an adequate foundation for departmental reorganization in New Brunswick. While similar allegations of political interference have been made in this jurisdiction, as they have in virtually every province and in every institutional system, problems of a magnitude comparable to that experienced at the federal level have not occurred. Separation of the two portfolios would not, in itself, guarantee independence. As Professor Edwards observed at the 1977 meeting of Commonwealth law ministers:

> the experience of both the older and newer members of the Commonwealth confirms my deep seated conviction that, no matter how entrenched constitutional safeguards may be, in the final analysis it is the strength of character and personal integrity of the holder of the offices of Attorney General (or Solicitor General in some countries) and that of the Director of Public Prosecutions which is of paramount importance. Furthermore, such qualities are by no means associated exclusively with either the political or non-political nature of the office of the Attorney General. Instances of indefensible distortion of the Attorney General's powers can be documented in countries which have subscribed to the public servant model of that office, equally with the occupancy of the ministerial portfolios of Attorney General and Minister of Justice in other countries of the Commonwealth.

The combination of responsibilities for investigation and prosecution within a single ministry ensures co-operation and co-ordination of law enforcement activities, and thereby enhances the effective administration of justice. Moreover, the institutional relationship between investigative agencies and the prosecutorial system may discourage abuse of process and ensure a higher degree of compliance on the part of

investigating officers with legal requirements such as those imposed by the *Charter of Rights and Freedoms*.

Finally, while the demands of public confidence may dictate "the greatest degree of separation possible between these functions," this division is achieved in practice by the delineation of the appropriate duties of the minister in relation to police and prosecutors through the internal structure and policies of the department.[44]

Relationship to the Judiciary

Closely aligned to the preceding problem is one which occurs in the context of the departmental relationship to the judiciary. At present all courts in New Brunswick are constituted by provincial statute and administered by the Attorney General's division. Administration of the courts includes the provision of funding, personnel and physical facilities. The high degree of authority exercised by the department in relation to the provincial court system, when coupled with control over investigatory and prosecutorial services in the criminal sphere and with department representation of government in civil litigation, may contribute to a perception of erosion of the traditional independence of the judiciary, a value which now entrenched in section 11(d) of the *Charter of Rights and Freedoms* as a constitutional requirement. Although it has been argued that unitary departmental control of the judicial, prosecutorial and investigative functions inhibits the impartiality of judicial decision-making,[45] the Supreme Court of Canada has recently held in *R.* v. *Valente* that the administrative relationship of the judicial system and the department of the attorney-general does not violate constitutional norms.[46] Any appearance of functional dependence has been countered in the present department by the reassignment of responsibility from the Attorney General branch to the Justice Services division.

Time

A final problem which has been identified in the contest of other integrated departments (such as the United States Department of Justice) is the practical difficulty of allocation of time. It has been observed with reference to the United States Department of Justice that the onerous nature of the administrative and substantive duties placed on the responsible minister are such as to raise the possibility that:

> either he will not have adequate time to do the legal work well, or, if he does devote sufficient time to that work, he will almost surely neglect department-wide administrative problems. Devotion to one risks neglect of the other.[47]

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[44]See Gregory, *supra*, note 29 at 15-16.

[45]See, for example, the remark by Lord Hailsham, L.C. in (1981) 7 *Commonwealth L. Bull.* 1602: "Personally I regard myself as the Minister of Justice, but I would not desire to have either the prosecuting process or the penal treatment process under my responsibility because I think they are incompatible....If I were to prosecute you would have the same situation which I remember only too well obtained during the war when the Judge Advocate's Department prosecuted and also provided the Judge. That is an incompatible function."

[46](1985) 49 C.R. (3d) 97.

[47]Meador, *supra*, note XX at 44.

The need to alleviate the demands placed on the minister of justice was also cited in support of the creation of the federal Department of the Solicitor General in 1966. Referring to the numerous and weighty administrative burdens borne by the law officers and legal advisors, the prime minister observed that restructuring would allow "the Department of Justice and the Office of the Attorney General [to return] to the full time discharge of their traditional functions in the drafting of legislation and documents; the conduct of litigation and prosecutions." The then Minister of Justice agreed:

> in essence [the proposed changes] are designed to enable the Department of Justice to concentrate its full resources on those problems and tasks which, by the terms of the *Department of Justice Act, 1868*, were intended to fall in its purview. While the character of the department has not undergone any significant change since it came into being nearly a hundred years ago, the addition of other responsibilities — some closely related to its basic functions, others not so readily identifiable — has made it increasingly difficult for the Minister of Justice and Attorney General of Canada to perform his important duty as the principal law officer of the Crown.

A similar argument for separation was advanced (though rejected at the time) in a Quebec government white paper (1971), in which institutional reorganization was recommended "for practical reasons which are due to the extremely wide range of the Justice Department and the responsibilities of its incumbent."

It is doubtless pragmatic considerations of time and efficiency which have promoted decentralization in the three largest provincial jurisdictions: Ontario, Alberta and, most recently, Quebec. This practical problem does not, however, appear to be serious in terms of the New Brunswick department, since the delegation of authority to the deputy and assistant deputy ministers and the internal principle of administrative segregation alleviates the functional overburdening of the responsible minister while, at the same time, preserving ultimate political accountability.

Conclusion

New Brunswick's current departmental structure of amalgamation can be supported on a number of bases. Not only is such institutional integration the arrangement which affords the most effective use of limited resources, it is the system which has proved to be dominant in the history of Canadian legal institutions. A century of experience with departmental unification, both in New Brunswick and elsewhere in Canada, signals the need for caution in administrative modifications unless such reforms can be justified on a compelling basis. Tradition, however, does not constitute the sole rationale for preservation of the current system.

Combination of the offices of the attorney-general and minister of justice rests on considerations both of principle and policy. The assignment of responsibility for all facets of the administration of justice in a single minister reinforces responsiveness to the demands of public accountability and guarantees citizen access to the various branches of the justice system. Decentralization, in contrast, would appear to create a degree of public confusion in relation to departmental responsibilities. Division of

authority among several departments and ministers also dilutes political accountability within the legislature. Concentration of authority is, moreover, consistent with the underlying character of the justice system while distribution of authority over the administration of justice among several departments of government distorts the conceptual and functional interdependence of investigation, prosecutions, judicial administration, corrections and law reform. Unification also promotes governmental efficiency by permitting the development of comprehensive, coherent and co-ordinated policies, initiatives and programmes, and the authority of the minister (in his/her dual capacity) over all aspects of law enforcement ensures the successful implementation of such programmes and policies. This benefit is particularly apparent in the field of criminal law enforcement, in which the ability of one department to undertake initiatives complementing those devised by the federal government overcomes difficulties created by a divided constitutional jurisdiction. Finally, not only does unification enhance the intra-provincial administration of justice, it also enables this province in inter-jurisdictional relations to present unified and authoritative positions in respect of various aspects of the justice system.

Identification of such advantages does not deny the existence of certain problems, chief among which is that of avoiding politicization of the attorney-general's decision-making process while preserving the guarantee of political accountability. The validity of concerns as to the independence and impartiality of the law officer should not be discounted. Such issues are, however, less a product of current departmental structures than of the political character of the office itself. Thus, such issues fall to be resolved not by governmental reorganization but by the securing, in the responsible minister, "the personal qualities of integrity, and a proper understanding of the fundamental need to keep distinct the operation of the separate organs and [by ensuring] that those who fulfill these responsibilities are allowed to do their work free from any suggestions of improper influence from any quarter."[48] While aspects of independence and detachment are theoretically implicated by the departmental relationship between the investigative, prosecutorial and judicial phases of the administration of justice, functionally, internal organization minimizes conflicts and preserves the boundaries between these roles and contributes to a high degree of efficiency and co-operation. Hence, any potential disadvantages are offset by the positive and visible gains to be attained in the development of coherent, integrated and effective law enforcement policies permitted by the present institutional structure.

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[48] J.L.L.J. Edwards "Penal Reform and the Machinery of Criminal Justice in Canada" (1965-66), 8 *Crim. L.Q.* 408, 423.