# RECENT AMENDMENTS TO THE CRIMINAL CODE

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One of the few respects in which we appear to be returning to normal conditions is in the matter of amendments to The Criminal Code.[1] After a period during the war (and lasting into 1946), in which the time and attention of Parliament was presumably otherwise engaged, and very little was done by way of amending the Code, we had in 1947 an amending statute[2] of 34 sections, and by 1948, c. 39, very substantial amendments are made, some of which are of great importance. The purpose of this article is merely to give a very brief outline of the principal amendments made in 1948, all of which (with the exception of the new Part XVI) came into force on November 1st.

The article will not deal with the annual amendment to section 235(2), respecting the operation of the pari-mutuel system at race meetings, which has been done by a separate statute in each year.[3] Nor will any attempt be made to summarize the sections that merely make changes in wording, to correct errors or omissions in existing sections, or those that make slight changes in procedure. It may, however, be convenient to list these sections. They are the following:

| 1948 SECTION | ORIGINAL SECTION AMENDED | |
|---|---|---|
| 2 | 2(21) and 2(33) | — definitions of "military law" and "public officer" |
| 3 | 8 | — inapplicability of Code to armed forces |
| 4 | 229(1) | — right of members of armed forces to carry weapons |
| 9 | 285(3) | — unlawfully taking motor vehicle |
| 18 | 698(1) | — bail after committal |
| 19 | 716(2) | — commission to take evidence outside Canada |
| 24 | 725 | — information not objectionable for duplicity or uncertainty |
| 27 | 746(1) | — commitment when party in prison |
| 28 | 747(2) | — payment to keeper when party in prison |
| 37 | 826(2) | — notifying prosecuting officer of desire to elect. |

[1] R.S.C., 1927, c. 36.
[2] 1947 (Dom.), c. 55.
[3] 1947, c. 31; 1948, c. 40.

*Disorderly Houses*

Until 1947, subsection 1 of section 229 provided that: "Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming house, or common betting-house, as hereinbefore defined." By section 4 of the amending Act (c. 55) of that year, section 229 was repealed, and a new section was substituted, which provided a penalty of one year for keeping a common gaming-house or common betting-house, and, by subsection 2, a penalty of three years for keeping a common bawdy-house. An unfortunate and, one suspects, an unexpected result of this amendment was that there was thereafter no definition of the term "disorderly house", although the term was used in several other parts of the Code and, indeed, in subsequent subsections of the new section 229.

This situation has now been rectified by sections 2 and 17 of the 1948 amending Act, the first of which adds a definition of the term "disorderly house" as part of section 2, the general definition section, and the second of which eliminates, in section 641 (providing for the making of orders to search), the words "as defined by section two hundred and twenty-nine" after the words "disorderly house".

*Non-support*

The special provision in section 242(4) (*c*) as to *prima facie* evidence of non-support has been reworded by section 5 of the 1948 Act. As amended, the paragraph reads:

"evidence that a man has left his wife, and has failed, for a period of any one month subsequent to the date of his so leaving, to make provision for her maintenance or for the maintenance of any child of his under the age of sixteen years, shall be *prima facie* evidence that he has omitted or neglected or refused without lawful excuse to provide necessaries."

"The purposes of this amendment", reads the explanatory note on the bill as introduced, "are twofold. First, to provide that if there is evidence of desertion and failure to provide necessaries, the onus is then on the defendant to establish that he acted with lawful excuse. Secondly, to provide that proof of failure to provide for any month is sufficient."

*Infanticide*

Sections 6, 7 and 8 of the 1948 Act provide for a third form of culpable homicide, in addition to murder and man-

slaughter. This is the crime of "infanticide", which is defined in the new section 262(2) as follows:

"A woman who by wilful act or omission causes the death of her newly-born child shall be deemed not to have committed murder or manslaughter if at the time of the act or omission she had not fully recovered from the effect of giving birth to such child and by reason thereof the balance of her mind was then disturbed, but shall be deemed to have committed an indictable offence, namely, infanticide."

With these sections should be read section 41 of the 1948 Act, which, by a rewording of section 951(2), permits a conviction of infanticide, as well as one of manslaughter, on an indictment for murder. It is also still possible, under section 952, for the jury, on an indictment for murder, to convict of concealment of birth.

This legislation appears to be based upon the English Infanticide Act, 1922,[4] although that statute differs in that, instead of prescribing a penalty for infanticide, it provides that the person convicted "may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child". The English statute, however, was revised in 1938, and a new Act[5] was passed, which appears to be superior in at least two respects both to the earlier English Act and to the new Canadian legislation. In the first place, it eliminates the vague term "newly-born child", which may be expected to lead to much judicial discussion, and substitutes "a child under the age of twelve months", which can lead to no argument. In the second place, the newer English legislation provides for derangement of the mother's mind not only "from the effect of giving birth to the child" but also "by reason of the effect of lactation consequent upon the birth of the child".

*Theft from the Mails*

For many years the minimum penalty for stealing from the mails, under sections 364 and 365, was three years' imprisonment. By 1944–45, c. 35, ss. 1 and 2, the sections were re-enacted so as to eliminate any minimum. By sections 10 and 11 of this year's amending Act, a minimum penalty is again provided for, but it is now one year instead of three. Throughout these changes the maximum penalty (life imprisonment under section 364 and seven years' imprisonment under section 365) has remained unchanged.

[4] 12–13 Geo. 5, c. 18.
[5] 1 & 2 Geo. 6, c. 36.

*False Statements by Company Officers*

Under section 414 it is an indictable offence for any promoter, director, officer or manager of a company to make, circulate or publish, or concur in making, circulating or publishing "any prospectus, statement or account which he knows to be false in any material particular" with a prescribed intent. In *Rex* v. *Morgan, Dempsey and Dempsey*,[6] it was held (applying and approving a dictum in the earlier case of *Rex* v. *Anderson*[7]) that this section applied only to written statements, and that if the statement in question was an oral one there was no offence under the section. Hope J.A., in his reasons for judgment, said:[8] "It may well be that it is necessary that some amendment or addition may be required to s. 414 . . . which would make it an offence to issue, either in writing or orally, any false information with intent", etc. This amendment has now been made by section 12 of the 1948 Act, which adds the words "whether written or oral" immediately after the word "account" in the phrase quoted above.

*Defrauding the Public — Stock Manipulations*

By section 13 of the 1948 Act an amendment is made to section 444 of the Code which may have very far-reaching effects, quite different from those intended by the framers of the amendment. The section, before the amendment, was the one that created the offence commonly referred to as "conspiracy to defraud", and the amendment merely strikes out the words "conspires with any other person", and changes the verbs accordingly. It also reduces the penalty from seven years' imprisonment to five.

The explanatory note to this section reads: "The purpose of this amendment is to remove the necessity of establishing conspiracy in connection with any fraudulent scheme operated through the machinery of the stock market." In this respect the section is complemented by the new section 444A, enacted by section 14 of the 1948 Act, the marginal heading of which is "Fraudulent manipulations of stock exchange", and which bears a strong resemblance to a section of the United States Security Exchange Act of 1934.

It is clear, however, that the legislation goes far beyond stock market transactions, notwithstanding the explanatory note. It has, it is submitted, at least two further consequences:

[6] [1948] O.R. 805.
[7] (1924), 55 O.L.R. 586.
[8] [1948] O.R. at p. 818.

(1) There is now no section in the Code providing for conspiracy to defraud. This is probably not of great importance, since section 573 would undoubtedly apply to a conspiracy to commit the offence provided for in section 444 in its present form, and the penalty under section 573 is the same as that under the former section 444, *viz.*, seven years.

(2) Of much greater importance, however, is the fact that this new form of the section, whether intentionally or not, creates an entirely new offence and one which, it is submitted, will be exceedingly difficult to define. By leaving out the references to "the public market price of stocks", etc., we find that the section provides that:

"Every one is guilty of an indictable offence and liable to five years' imprisonment who, by deceit or falsehood or other fraudulent means, defrauds the public or any person, ascertained or unascertained . . . whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined."

It is difficult to think of any circumstances in which the well-established offence of obtaining money, goods or credit by false pretences would not be included in the wording of the new section 444, and section 405 would appear to be entirely obsolete. It is interesting in this connection to note that the penalty under section 405 is only three years, while that under section 444 is five. But while section 444 appears to include everything dealt with in section 405, it goes far beyond that section, in two respects, first, by the express provision that the "deceit or falsehood or other fraudulent means" need not amount to a false pretence as defined in section 404, and secondly by the use of the term "*defrauds* any person, ascertained or unascertained".

### *Intimidation*

Paragraph (*b*) of section 501, one of the paragraphs of the section dealing with intimidation, is considerably enlarged in its scope by section 15 of the 1948 Act. The paragraph formerly read: "intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property." In its new form it reads: "intimidates or attempts to intimidate such other person or the wife, child, parent or other relation of such other person by threats that, in Canada or elsewhere, violence or other injury will be done

to, or punishment inflicted upon him, her, or any of them, or that the property of any of them will be damaged."

The explanatory note to this section reads: "The purpose of this amendment is to make it an offence to intimidate any person by threats of injury to any relation of that person either in Canada or elsewhere." Interesting questions of construction might arise on this section, in its new as well as in its old form, but there can be no doubt that the amendment, in its primary purpose, is highly desirable, particularly in present circumstances, when there are many persons in Canada with relatives in other parts of the world, and a threat of injury to person or property outside Canada may be a very real one.

*Fighting Cocks*

By an amendment to section 543(2), made by section 16 of the 1948 Act, it is now provided that cocks found in cock-pits, instead of being sold "for the benefit of the municipality in which such cock-pit is situated", shall be ordered to be destroyed.

*Summary Conviction Procedure*

Section 718, dealing with a justice's right to proceed *ex parte* if the accused does not appear in answer to a summons, is amended by section 20 merely to provide that he may proceed "as if the defendant had personally appeared in obedience to such summons *and had pleaded 'not guilty'* ". The words italicized are those which have been added by the amendment.

By an amendment (s. 21) to section 720(1), the justice is given a right to require the personal appearance of the accused, adjourning the hearing and issuing his warrant for the purpose. This subsection deals with the procedure where both parties appear "either personally or by their respective counsel, solicitors or agents", and the amendment takes away the right of an accused person, charged with an offence punishable on summary conviction, to send a solicitor to represent him, without himself attending. The matter is apparently left to the discretion of the justice, who may either proceed without the personal appearance of the accused, accepting the representative, or refuse to do so. No explanation of the reason for this amendment is given in the bill.

Section 721A[9] is reworded by section 22 so as to clarify the procedure where a previous conviction is charged, and also

[9] Enacted by 1943–44, c. 23, s. 15.

to provide, by a new subsection, that the justice shall have the same power to inquire into previous convictions (if charged) where he proceeds *ex parte*.

Adjournments, under section 722(1), as amended by section 23, may now be for more than eight days, if both parties consent. This applies, apparently, even if the accused is in custody, since no amendment is made to the later subsections of section 722.

The service of a minute of the justice's order, under section 731(1), as amended by section 25, may now be made not only on the defendant but, as an alternative, on "his counsel, solicitor, or agent".

The giving of a certificate of dismissal, on "the hearing of any case of assault or battery", under section 733, as amended by section 26, is now necessary only if it is requested.

Section 748(2), providing for the giving of sureties to keep the peace, is now (by s. 29) extended to anticipated damage to the property of the complainant, as well as anticipated personal injury. The explanatory note to this section in the bill has an amusing side. It reads: "The purpose of this amendment is to empower a justice to bind over the complainant as well as the person charged." The amendment, of course, does nothing of the sort, but on looking at the bill as originally introduced, and as printed after first reading, one finds that there was also a proposed amendment, to that effect, to subsection 1 of section 748. Apparently that amendment disappeared during the passage of the bill through the house, but the explanatory note was not changed.

Section 750(*c*), requiring the giving of a recognizance or the making of a deposit as a preliminary to an appeal under Part XV, is re-enacted to include the case of an appeal from a conviction or order under which sentence has been suspended under section 1081.

*Appeal under Part XV to the Court of Appeal*

In 1947 provision was made for the first time for appeals to the provincial Court of Appeal on questions of law, after the disposition of an appeal to a County or District Court Judge. This year the right of appeal is extended to proceedings by way of stated case, by a new section, 769A, enacted by section 34 of the 1948 Act. At the same time amendments are made to section 752 (by s. 31) and section 765 (by s. 33), to make them consistent with the right of further appeal. The old section

752A, having been replaced by section 769A, is repealed by section 32 of the 1948 Act.

*Summary Trials of Indictable Offences*

By what is unquestionably the most important section of the 1948 Act, section 35, the whole of Part XVI is repealed, and a new and greatly simplified Part is enacted in its stead. Space will not permit detailed comment on the new Part XVI, but its outstanding features are the following:

(1) The definition of the word "magistrate", as used in the Part, is entirely changed. Instead of the former very confusing definitions, varying according to Provinces and also according to the size of the municipality in question, we now have a new section 771, which provides that the word "means any person who under the laws of the province in which he exercises jurisdiction is designated and has the power and authority ordinarily exercised by a police, stipendiary or other magistrate".

(2) The absolute jurisdiction of magistrates is swept away, and an election is now necessary in all cases under Part XVI.

(3) The limitation on the punishment which may be imposed on a summary trial is also abolished, and the penalty which may be imposed is now in all cases the same as that which might be imposed if the offence were tried on indictment.

The new Part XVI does not come into force until October 1st, 1949. It has already aroused considerable opposition, based principally upon the increased cost if accused persons do not elect for summary trial.

*Part XVII Repealed*

Part XVII of the Code, dealing with the "Trial of Juvenile Offenders for Indictable Offences", is repealed by section 36 of the 1948 Act. This Part has been very infrequently used (the writer is not aware of a single reported decision under its provisions), and is superseded in nearly all jurisdictions by The Juvenile Delinquents Act. It was therefore considered useless, and was removed from the Code.

*Conspiracy to Publish Newspaper Libel*

The special provisions of section 888, requiring that charges of "newspaper libel" must be tried in the Province in which the accused resides, have been extended, by section 38 of the

1948 Act, to charges of "conspiracy to publish in a newspaper any defamatory libel". This amendment obviously arises out of a case early in 1948, where certain persons were taken to Alberta to be tried on charges of conspiring to publish a libel in a periodical printed in Ontario.

### *Incapacity of Jurors*

A very important new section, 929A, enacted by section 39 of the 1948 Act, eliminates the necessity for starting afresh in the event of the death or incapacity of a juror during a trial. The section reads as follows:

"Where in the course of a trial any member of a jury is, in the opinion of the judge, through illness or other cause, unable to continue to act, the judge may discharge him and in such case or where a member of the jury dies the jury shall, subject to consent being given in writing by or on behalf of both the Crown and the accused, and so long as the number of jurors is not reduced below ten, or in the province of Alberta five, be considered as remaining for all the purposes of the trial properly constituted and the trial shall proceed and a verdict may be given accordingly."

If it is objected to this legislation that an accused person is thereby deprived of his right to demand the unanimous verdict of twelve men (or six in Alberta) before he can be convicted, it should be pointed out that the section is wholly permissive. Its provisions can be invoked only if both sides consent in writing, and even where there is such agreement the judge's discretionary power to discharge the whole jury and order a *venire de novo* is presumably unaffected.

### *Separation of Jury*

An amendment to section 945(4), by section 40 of the 1948 Act, dispenses with the necessity for keeping the jury together during a trial for rape. Rape is so seldom thought of as a capital offence that it is said that jurors have greatly resented a direction that they shall be kept together in such a trial.

### *Appeals to Supreme Court of Canada*

The possible range of appeals to the Supreme Court of Canada has been greatly extended by the new section 1025(1), enacted by section 42 of the 1948 statute. Formerly, as is well known, there was an appeal to the Supreme Court only (1)

where there was dissent in the provincial Court of Appeal, or (2) by leave of a judge of the Supreme Court if it could be shown that the judgment attacked conflicted with the judgment of another Canadian Court of Appeal. The new subsection permits an appeal, either by the Attorney General or by the person convicted "on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada". The requirement as to conflict is thus entirely eliminated. At the same time the right to appeal without leave on a question of law on which there has been dissent in the court below, under subsections 1 and 2 of section 1023, is not affected.

By the same amendment a gap which previously existed has been filled, and the right to appeal with leave is extended to a judgment dismissing an appeal from an acquittal. Formerly, although section 1023 permitted an appeal against such a judgment where there had been dissent, it was not included in section 1025.

*Sexual Psychopaths*

By section 43 of the amending Act a new section, 1054A, is added to the Code, providing for the indefinite imprisonment of a "criminal sexual psychopath", which term is defined, in subsection 8, as meaning "a person who by a course of misconduct in sexual matters has evidenced a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person". The section is applicable only after a conviction for indecent assault, sodomy, rape, attempted rape, carnal knowledge, and attempted carnal knowledge. It is provided that evidence as to whether the offender is a criminal sexual psychopath is to be given by at least two psychiatrists, one of whom must have been nominated by the Minister of Justice, after seven days' notice to the offender, and that if he is so found he may be sentenced to a term of not less than two years and an indeterminate period thereafter. His case is to be reviewed at least once in every three years by the Minister of Justice.