

The Revision of the Criminal Code

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When the revised Criminal Code¹ comes into force on April 1st, 1955,² it will mark another forward step in the development of criminal law in Canada.

The present code³ has been in force since 1893. During that time it has not gone without criticism. It has, by some, been deprecated for its inconsistencies, ridiculed for its archaisms, disparaged for its verbosity and derided for its ambiguities. But the critics have rarely challenged the fundamental principle involved, namely, that the criminal law of Canada should be in the form of a code. At most, the recital of imperfections, real or supposed, has been an argument, not for a new kind of vehicle, but only for a newer model.

What, then, was the primary purpose of the revision? As disclosed by the terms of reference⁴ of the Royal Commissioners who were charged with the duty, the purpose was not to effect changes in the law but to remove those features that had aroused the most criticism. There is nevertheless a substantial amount of new law in the new code. This should not cause surprise, for a certain amount

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¹ Statutes of Canada, 1953-54, c. 51.

² Proclaimed to come into force on April 1st, 1955. See Canada Gazette Extra, Sept. 20th, 1954; also Canada Gazette, Oct. 2nd, 1954, Vol. 88, p. 3297.

³ R.S.C., 1927, c. 36.

⁴ "(a) revise ambiguous and unclear provisions;
(b) adopt uniform language throughout;
(c) eliminate inconsistencies, legal anomalies or defects;
(d) rearrange provisions and Parts;
(e) seek to simplify by omitting and combining provisions;
(f) with the approval of the Statute Revision Commission, omit provisions which should be transferred to other statutes;
(g) endeavour to make the Code exhaustive of the criminal law; and
(h) effect such procedural amendments as are deemed necessary for the speedy and fair enforcement of the criminal law." (Report of Royal Commission on the Revision of Criminal Code (Queen's Printer, Ottawa); also printed in Appendix, Senate Hansard, May 14th, 1952, p. 226)

of variation was the inevitable result of a conscientious effort on the part of the Royal Commissioners to carry out their instructions. Later, when the draft bill prepared by the Royal Commission was introduced in Parliament—which was, of course, not restricted by terms of reference—the tendency there was not only to seek to clarify the law but to improve it by making out and out changes in what had previously been the policy of the law.

The first criminal code for Canada was passed in 1892, but its story really begins with Sir James Fitzjames Stephen, the English jurist whose position in the field of the criminal common law is comparable to that of Blackstone in the common law generally. For a time early in his career Stephen was Secretary to the Council in India. During his term of service in that country, he was much impressed by the law reforms that had been accomplished under British rule. Upon his return to England in 1872 he was, by contrast, equally disturbed by the lack of system in the law of his own country.

Much might be said about Stephen's earlier efforts at law reform, but it is sufficient to mention here that in 1877 he published his *Digest of the Criminal Law of England*, a work well suited to form the basis for a penal code. His proposal that the criminal law could, with advantage, be codified was supported by the Attorney General, Sir John Holker, and in 1878 a criminal code drafted by Stephen was introduced in Parliament. The parliamentarians of the day must have found it dull stuff, for the brother and biographer of Stephen says that "the House of Commons could not spare from more exciting occupations the time necessary for its discussion".⁵ A reading of the debates leaves the impression that, although the Attorney General presented the bill vigorously and persuasively, it received no more than lukewarm support. Indeed, it might even be said that the discussion in the house suggests that the members were well acquainted with the anomalies in the English criminal law that might be removed by codification, but looked on them with such affectionate regard that they would not see them go.

Notwithstanding the lack of enthusiasm in Parliament for the measure, a royal commission was appointed to examine it. This body presented a revised draft bill in 1879, but too late in the year for it to be considered by Parliament. It was on this bill that the Lord Chief Justice, Sir Alexander Cockburn, wrote his well-known

⁵ Leslie Stephen, *Life of Sir James Fitzjames Stephen* (1895) p. 380.

criticism.⁶ "I do not know", says Leslie Stephen,⁷ "whether the fate of the measure was affected by Cockburn's opinion. In any case the change of Ministry in 1880 put an end to the prospects of the code for the time. In 1882, to finish the story, the part relating to procedure was announced as a Government measure in the Queen's speech. That, however, was its last sign of life. The measure vanished in the general vortex which swallows up such things, and with it vanished any hopes which Fitzjames might still entertain of actually codifying a part of English law."

Although Stephen's efforts did not come to fruition in England, the idea of a codification of the criminal law along the lines suggested by him took hold in Canada. It appealed especially to Sir John Thompson, the Minister of Justice of the day, and in 1891 he introduced in Parliament a measure to codify the criminal law. This draft bill, embodying many of the provisions in the Stephen code, was referred by the government to judges, lawyers and other persons from whom useful suggestions might be expected. With the changes that were made as a result of their advice, it was introduced again in Parliament in 1892. The drafting of the bill was done by Mr. Robert Sedgewick, at that time the Deputy Minister of Justice, who was appointed a judge of the Supreme Court of Canada in 1893, and by Mr. Justice G. W. Burbidge of the Exchequer Court of Canada, who had published an edition of Stephen's Digest adapted for Canadian use. It was, of course, the responsibility of the Minister of Justice to pilot the bill through the House of Commons, and Hopkins, his biographer, says that "so skilfully, ably and persistently did he stamp his views upon every page that, in point of fact, the Canadian Code of 1892 deserves to be called after its maker far more than did ever the famous Code Napoleon".⁸

⁶ "Not only is there much room for improvement as regards arrangement and classification, but the language used is not always perspicuous, or happily chosen, while the use of provisoes, an objectionable mode of legislation, is carried to an unusual excess, nor is the intention always clear; and, what is still more important, the law is, in many instances, left in doubt, and I am bound to say, in my opinion, not always correctly stated. As to this, however, I ought to add that I am often left in doubt whether particular passages are intended to be a statement of the existing law or a proposed alteration of it. With regard to the avowed alterations of the law, some of which are of a somewhat radical and daring character, I will say no more for the present than, while change may be desirable, in some instances the change proposed—I refer particularly to the admissibility of an accused person as a witness—would be, as I shall be prepared to show by-and-by, a grievous mistake." (Report of the Committee appointed by the Treasury to inquire into the system of conducting the legal business of the Government, 1888)

⁷ *Op. cit.*, p. 381.

⁸ J. Castell Hopkins, *Life and Work of Sir John Thompson* (1895) p. 382.

Mr. Hopkins says that "Sir John Thompson's work in this connection is indeed a lasting memorial to his wonderfully luminous legal intellect, and to his rank as a really great Minister", and he quotes a contemporary tribute (certainly fervid even if not completely accurate), which goes as follows: "It is as true as a proposition in Euclid, that the criminal law of Canada is above that of any nation or State on the face of the earth. It embodies most of the suggestions of Bentham, Becarri [*sic*], Livingston, Mackintosh and Romily [*sic*], and hundreds of others which never occurred to them, and is the first attempt on a national scale to make criminal law synonymous with justice, and substitute civilization and Christianity for barbarism."

Notwithstanding these complimentary views, amendments to the statute were introduced in Parliament almost immediately and have been introduced at almost every session since. Some of the results of this process of legislative patching are described in the words of the Minister of Justice in introducing the new Criminal Code bill in the House of Commons in 1953:⁹

By the year 1948, as one would expect, the Criminal Code required a thorough overhaul. As a result of many amendments that have been made during the course of some 56 years there was a lack of uniformity of language and many provisions were ambiguous and unclear. It contained inconsistencies and anomalies. It was sometimes difficult to find the law in connection with the particular matter because separate provisions relating to that matter had been placed in different parts of the code at different times during these years. What was even a graver offence was that as a result of these extensive amendments made over a long period of time there was a substantial amount of overlapping and repetition. This state of the criminal law constituted a very serious inconvenience to practising lawyers and to the administration of justice.

Provisions relating to matters of procedure which were quite appropriate in 1892 were not at all suitable in the light of the substantial increase in the work of the criminal courts resulting, among other reasons, from the very substantial increase in the population of Canada between 1892 and 1948.

The Minister then describes the steps taken by the government:

Accordingly the examination and study of the Criminal Code was authorized by order in council P.C. 527 on February 3, 1949, during my term of office; but the original recommendation for the adoption of this course had been made by my distinguished predecessor, Right Hon. J. L. Isley,¹⁰ as the then minister of justice early in 1948, almost, I would point out, six years ago.

⁹ Hon. Stuart S. Garson, House of Commons Hansard, Dec. 15th, 1953, p. 943.

¹⁰ Now Chief Justice of Nova Scotia.

The task of preparing the new consolidated code was assigned to a commission consisting of Hon. W. M. Martin, chief justice of Saskatchewan, chairman; Mr. Justice Fauteux and Mr. F. P. Varcoe, Q.C., deputy minister of justice.¹¹

In relation to the charge that is sometimes made that too many prosecutors have been engaged in the drafting of this code, I would like to point out that the counsel for this commission was a very able criminal defence lawyer of long experience, Mr. Arthur Slaght, Q.C. of Toronto.

The commission was to have the assistance of a committee comprising Mr. Robert Forsyth, Q.C., now Judge Forsyth, Toronto; Mr. Fernand Choquette, Q.C., now Justice Choquette, Quebec; H. J. Wilson, Q.C., deputy attorney general of Alberta, and again two outstanding defence lawyers, Mr. J. J. Robinette, Q.C., Toronto, and Mr. Joseph Sedgewick, Q.C., Toronto. The personnel of the committee was subsequently increased and Mr. W. C. Dunlop, Q.C., Halifax, Mr. H. P. Carter, Q.C., St. John's, Newfoundland, and Mr. T. D. MacDonald, Q.C., Ottawa, became members of the committee.

Then, as some members of the commission and the committee found that their judicial duties or their law practices, made it impossible for them to devote the very large amount of time that was necessary to get their commission work completed, the committee was reorganized by an order in council on September 26, 1950. Again on May 10, 1951 by order in council a second commission consisting of Hon. W. M. Martin, chief justice of Saskatchewan, chairman; Hon. Mr. Justice Fernand Choquette, Quebec, His Honour Judge Robert Forsyth, Toronto, Mr. H. J. Wilson, Q.C., Edmonton, Mr. Joseph Sedgewick, Q.C., Toronto, and Mr. A. A. Moffat, Q.C., Ottawa, was set up and they proceeded with the work and largely finished it.

The earlier commission and committee had confined themselves largely to reaching decisions on legislative policy and the second commission continued and completed this work. By mid-summer of 1951 the work of drafting could begin. One member of the Commission, Mr. A. A. Moffat, Q.C., was able to work in Ottawa on behalf of his fellow commissioners on a full-time basis, and so was one of the writers of this article,¹² who had acted as research counsel to the earlier commission and continued to act in that capacity for the second commission. The other writer of this article¹³ was made available by the Department of Justice as draftsman. The drafting procedure was essentially the same as is followed for any bill prepared in the Department of Justice. That procedure has been described in an article¹⁴ in this Review as follows:

¹¹ See a brief account of the progress made before July 1949 in (1949), 27 Can. Bar Rev. 707.

¹² J. C. Martin, Q.C.

¹³ A. J. MacLeod.

¹⁴ E. A. Driedger, *The Preparation of Legislation* (1953), 31 Can. Bar Rev. 33, at p. 39.

The draftsman has now reached the point where he can begin to draft the bill. Working by himself, he prepares a first draft of the proposed bill or, in the case of a lengthy or complicated bill, a first draft of a portion of it. He cannot work with other people looking over his shoulder and offering comments. And no satisfactory draft can be prepared by a group of draftsmen acting as a drafting committee; they will all have different ideas about how the work should be done, there will be endless discussions over trivialities, and the end product will be at best only a compromise. Drafts can be discussed, criticized and tested in a discussion group, but the responsibility for setting up the draft or making any changes must devolve upon one person. Usually the draftsman goes over this first draft and prepares one or more revisions before discussing it with the sponsors. When the revision is submitted to the sponsors for consideration and comment, and after they have had an opportunity of considering and discussing it, a further conference with the draftsman takes place. All the defects and imperfections of the first draft, so far as they can be seen, are discussed and a fresh draft is prepared and submitted. The process continues until the sponsors and the draftsman are both satisfied with the form and content.

The Royal Commission made its report to the Minister of Justice on January 22nd, 1954. It was accompanied by the draft bill which, as amended by Parliament, constitutes the new Criminal Code. The bill was first introduced in the Senate on May 2nd, 1952, as Bill No. H-8.¹⁵ After second reading it was referred to the Senate Banking and Commerce Committee which appointed a subcommittee under the chairmanship of Senator Salter A. Hayden of Toronto.¹⁶ The subcommittee considered the bill in detail during the remainder of the session, but the time available did not permit it to make a final report to the main committee before Parliament adjourned.

During the summer of 1952 the bill was revised in the Department of Justice in the light of the discussions that had taken place in the Senate subcommittee and also in the light of representations received in the department from individuals and organizations. When Parliament reassembled, in November 1952, the measure was

¹⁵ "One of the quite important reasons why we in the Department of Justice and in the Government decided to avail ourselves of the services of your honourable chamber on this occasion was the magnificent work which you did for us in considering the Bankruptcy Bill of 1949, and which I, as the minister in charge of that bill in the House of Commons, am confident did much more than cut our task in that house in two; I should think it probably reduced it by about 90 per cent. When that bill came there with your *imprimatur* upon it, the impression we had was that that was about all that was required in our debate. I hope that the same confidence will be entertained with respect to your efforts on the bill now before us." (The Hon. Stuart S. Garson, Q.C., Senate Hansard, May 13th, 1952, p. 207)

¹⁶ The members of the subcommittee were: Senators Bouffard, Hayden, Farris, Hugessen, Fogo, Roebuck, Haig, Vien and Robertson.

introduced, again in the Senate, as Bill O and was again referred to the Banking and Commerce Committee. A subcommittee, consisting of the same senators who had dealt with the bill in the spring of 1952, was again set up to examine it. The Senate passed the bill, with amendments, on December 17th, 1952, immediately before the Christmas adjournment.

The bill went to the House of Commons in January 1953 as Bill No. 93. After second reading it was referred to a special committee of seventeen members, mostly lawyers.¹⁷ That committee, under the chairmanship of Mr. Don F. Brown, the member for Essex West, held thirty-seven meetings, during which it examined the bill clause by clause and, in addition, heard oral representations¹⁸ and studied briefs¹⁹ from a very large number of organizations. Of the proceedings of the committee, the Minister of Justice stated in the House of Commons:²⁰

I must say, Mr. Speaker, that the members of this committee certainly held and presented strong views, with great force and zeal; and sometimes their controversies became a bit heated. But they were always objective and, best of all, they were non-political.

The special committee tabled its report, with its recommendations for amendment, in May 1953. The time remaining before the prorogation of Parliament—early that year because of the approaching Coronation—was not however enough to enable the bill to be proceeded with and it died on the order paper.

A general election was held in the summer of 1953 and a new Parliament assembled in December. The Criminal Code bill was introduced immediately, this time in the Commons instead of in the Senate.²¹ There was no move, this time, to refer the bill to a special or standing committee. Instead, it received in the Committee of the Whole House a clause by clause examination that lasted from early January until almost mid-April.

¹⁷ The members were: Messrs. Browne (St. John's West), Cameron, Cannon, Churchill, Garson, Henderson, Laing, MacInnis, MacNaught, Macnaughton, Montgomery, Noseworthy, Pinard, Robichaud and Shaw.

¹⁸ For example, by representatives of the Canadian Congress of Labour, the Trades and Labour Congress, the Canadian Welfare Council, the Canadian Mental Health Association and the Association of Civil Liberties.

¹⁹ For example, from the National Council of Women, the Manitoba Bar Association, the Federation of Law Associations of Ontario, the Bar of the Province of Quebec, and the Executive Council of the Canadian Chamber of Commerce.

²⁰ The Hon. Stuart S. Garson, Q.C., House of Commons Hansard, Dec. 15th, 1953, p. 945.

²¹ It was, of course, sheer coincidence that this bill bore the number 7, the same number under which the 1892 Code had been passed by Parliament.

The bill, with the amendments made in the Commons, was in the Senate early in May and was referred to the Standing Committee on Banking and Commerce. There it was considered until early June, when it was reported and passed with something less than a dozen relatively minor amendments. One important service performed by the Senate at this stage, however, was to make twenty-six changes in the French text of the bill to ensure uniformity of interpretation in English and in French. When it was returned to the House of Commons on June 15th, 1954, the Senate amendments were accepted, and thus, almost five and one-half years after the revision had been authorized by the Governor in Council, the new code was finally passed by Parliament. Although it received royal assent on June 26th, 1954, the act itself provides that it is to come into force on proclamation.

The order in which material is arranged in the new code remains substantially the same as in the old. The new code has twenty-six parts, two more than its predecessor has had since 1950. A given subject matter is, of course, not necessarily to be found in a part bearing the same number as previously, but the code still opens with provisions of general application, proceeds to the creation of specific offences, then to procedure, and ends with forms. Part I contains provisions having general application, more particularly on the circumstances in which conduct, which otherwise would be an offence, is justified or excused. Parts II to XI create offences. Each of these parts covers a certain class or category of offences. For instance, Part II deals with offences against public order, Part IV, sexual offences, public morals and disorderly conduct, and Part X, offences relating to currency. Part XII contains the law on the jurisdiction of courts to try offences and Parts XIII and XIV cover arrest, search and seizure. Parts XV to XVII deal with preliminary inquiries and the trial of indictable offences with and without a jury. Part XVIII sets out the law on appeals in the case of indictable offences. Parts XIX to XXII deal with procuring the attendance of witnesses, general provisions on imposition of punishment, preventive detention for habitual criminals and criminal sexual psychopaths and the enforcement of recognizances. Part XXIII concerns the extraordinary remedies, *habeas corpus*, *certiorari*, *mandamus* and prohibition. Part XXIV, formerly Part XV, sets out the procedure to be followed for the disposition of summary conviction offences. Part XXV contains transitional provisions and makes appropriate amendments to

other acts of Parliament in which, under the present law, the Criminal Code is mentioned. The last part in the new code contains precedents for formal documents that are necessary in the administration of the criminal law.

The new code is substantially shorter than its predecessor. It has 753 sections, compared with more than 1,100 in the present code. The code filled 418 pages in the Revised Statutes of 1927, while in the annual statutes of 1953-54 it occupies only 289 pages of the same size. This shortening has been achieved largely by consolidation and the deletion of unnecessary provisions. The Royal Commissioners reported to the Minister of Justice as follows:

The work of consolidation is designed to do away with duplication and needless repetition, and provisions are drafted in a form that, where possible, eliminates particularization and reduces to a minimum the need for amendment. For example, the present Code contains provisions dealing with false entries in books of account. Section 413 makes it an offence for an officer of a corporation to make false entries. Section 414 makes it an offence for a clerk or servant to falsify books of account, etc. Section 418 makes it an offence to falsify books of account to defraud creditors. Sections 484 and 485 make it an offence to make false entries in books of account of a government or of a bank. In all these instances the gravamen of the offence is that it is done with an intent to defraud. In the consolidation of these provisions (clause 340) particularization is eliminated and it is made an offence *with intent to defraud* to falsify books of account, etc.

Another instance of consolidation to which attention is directed and which is intended to meet existing and future conditions, is to be found in Part X which deals with counterfeiting. The object of this Part is the protection of the currency. By a comprehensive definition of currency and the consolidation of provisions which dealt separately with the various kinds of coin and with paper money, a simple and complete code relating to this subject has been evolved.

Consolidation has also been carried out in matters of procedure. One instance of this is the creation of a separate Part (Part XIX) dealing with the calling of witnesses and the taking of evidence on commission. At present these matters are dealt with in the several procedural Parts. This has resulted in the enactment of a great number of provisions, each group designed to cover the subject for the purposes of the proceedings dealt with by the Part in which they appear.

Your Commissioners have therefore consolidated in one Part (Part XIX) all provisions relating to compelling the attendance of witnesses and the taking of evidence on commission.

It has been found that many sections of the Code relating to particular offences may be omitted because the offences are capable of being dealt with in one general provision. For example, sections 358-388 create many separate offences for different kinds of theft. These sections are dropped and only one offence of theft is created for which appropriate punishment is provided. It is pointed out that this is in

conformity with the policy of Parliament as a similar step was recently taken in respect of the offence of forgery.

As this extract from the report points out, many particular descriptions of offences are omitted from the new code because they can be covered by general provisions. The offence of theft is an outstanding illustration. The present code describes certain offences of theft by reference to the occupation of the person who does the prohibited act. Section 359, for example, makes it an offence for a person who, "being a clerk or servant . . . steals anything belonging to or in the possession of his master or employer"; or "being a cashier, assistant cashier, manager, officer, clerk or servant of any bank or savings bank steals any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects of such bank, or lodged or deposited with any such bank"; or "being employed in the service of His Majesty . . . steals anything in his possession by virtue of his employment". Section 360 relates to theft committed by a tenant or a lodger. Elsewhere there is a different approach, and the offence is defined by reference to the thing that is stolen. Section 366 provides that "every one is guilty of an indictable offence and liable to five years' imprisonment who steals any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter, other than a post letter, sent by mail". Other provisions authorize imprisonment for two years for stealing railway tickets, fourteen years imprisonment for stealing cattle, two years imprisonment for stealing a dog, seven years imprisonment for stealing oysters, six months imprisonment for stealing a plant growing in a greenhouse or conservatory, and so on. In the new code the offence of theft is created by section 280,²² and a host of different *descriptions* of that offence is, very properly, permitted to drop into legislative limbo.

Assault is another example of the use of one general provision in substitution for a number of particular provisions. Section 296 of the present code provides, in paragraph (e), that a person is guilty of an offence who "on any day whereon any poll for an election,

²² "280. Except where otherwise prescribed by law, every one who commits theft is guilty of an indictable offence and is liable

(a) to imprisonment for ten years, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds fifty dollars, or

(b) to imprisonment for two years, where the value of what is stolen does not exceed fifty dollars."

parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person". Similarly, section 292 (c) provides that every one is guilty of an indictable offence who "assaults and beats his wife or any other female and thereby occasions her actual bodily harm". Both these provisions have been dropped from the new code, for the reason that it is not necessary to define the offence by reference to particular times, places or persons, but is sufficient merely to say that a person who commits an assault commits an offence.

The Royal Commission recommended also the deletion of a number of provisions because the same ground is covered in other acts of Parliament. The manufacture, importation and sale of living bacteria is dealt with, for example, in section 222A of the present code and also by the Pest Control Products Act.²³ Section 224 of the present code makes it an offence for a person to expose for sale articles that he knows are unfit to be used as human food; the same ground is covered by the Food and Drugs Act.²⁴ Section 504A relates to the activities of money lenders; they are already dealt with, in identical terms, by the Small Loans Act.²⁵ To take a final example, section 506 relates to offences in respect of copyright, a matter that is dealt with adequately in the Copyright Act.²⁶

Later in this issue will be found a discussion of some changes in the law recommended by the Royal Commission and adopted by Parliament. But at least two changes proposed by the Commissioners were not approved in principle by the government and were not in the bill as introduced in Parliament. Take first the definition of "seditious intention". Just when the actual drafting of the new code was beginning, the Supreme Court of Canada handed down judgment in *Boucher v. The King*.²⁷ The main point in that case was the question whether, in all cases, "seditious intention" included an intention to incite to acts of violence or public disorder. The Commissioners apparently thought that the law defining "seditious intention" should be codified for, although they did not say so in their report, the draft bill accompanying it contained a definition that seems clearly to be based on the *Boucher* decision. That definition²⁸ provided, in effect, that a seditious intention means an

²³ R.S.C., 1952, c. 209.

²⁴ R.S.C., 1952, c. 123.

²⁵ R.S.C., 1952, c. 251.

²⁶ R.S.C., 1952, c. 55.

²⁷ [1951] S.C.R. 265. See Brewin, Comment (1951), 29 Can. Bar Rev. 193.

²⁸ "60. (4) For the purposes of this section 'seditious intention' means an intention

intention to bring into hatred or contempt or to cause disaffection against the administration of justice in Canada or, where the administration of justice is not involved, an intention to incite persons to engage in violence or in public disturbance or disorder. The result is that "seditious intention" remains undefined under the new code to the same extent as under the old.²⁹

The other proposal that, as a matter of policy, did not find favour with the government was the abolition of minimum punishments for the offences of driving while intoxicated, driving with ability impaired and theft from the mails. The Commission reported to the Minister of Justice:

Your Commissioners consider that all minimum punishments should be abolished and none are continued in the draft Bill.

In 1878 Sir John Holker, then Attorney General of England, in introducing the original Draft Code in the House of Commons, said:

'Minimum punishments were a great evil, and I am happy to say that these punishments have been to a very considerable extent set aside by recent legislation; and now a very large discretion is confided to judges, and they are enabled, upon their view of the circumstances, to mitigate the punishment almost to any extent. I think that is right.'

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- (a) to bring into hatred or contempt or to cause disaffection against the administration of justice in Canada, or
 - (b) to incite persons to engage in violence or in public disturbance or disorder
 - (i) by bringing into hatred or contempt or causing disaffection against
 - (A) Her Majesty, or
 - (B) the government or constitution of Canada or a province,
 - (ii) by causing discontent or disaffection among, or promoting feelings of ill-will or hostility between, different classes of persons in Canada, or
 - (iii) by advocating or teaching the use, without the authority of law, of force as a means of accomplishing a change of government or of the institutions of Canada;
 - but no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,
 - (c) to show that Her Majesty has been misled or mistaken in her measures,
 - (d) to point out errors or defects in
 - (i) the government or constitution of Canada or a province,
 - (ii) the Parliament of Canada or the legislature of a province,
 - or
 - (iii) the administration of justice in Canada,
 - (e) to procure, by lawful means, the alteration of any matter of government in Canada, or
 - (f) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada."

²⁹ The English draft code also proposed to define sedition. Its definition, with necessary changes, was included in the Canadian Criminal Code Bill in 1892, but was struck out in Parliament to leave the definition to the common law.

Chief Justice McRuer in Vol. 27 of the Canadian Bar Review (1949), p. 1003, writes in part as follows:

'It is much easier to justify a fixed punishment for murder, with all the safeguards of review that have been thrown around the execution of the sentence, than a minimum sentence for theft of a motor vehicle. An arbitrary law of the latter character tends to corrupt the administration of justice by creating a will to circumvent it. Even parliament itself has shown such a disposition by the enactment of section 285 (c) of the Criminal Code which, although appearing to create a separate crime, defies the legal mind to distinguish it from theft properly defined.'

When the bill was introduced in Parliament the Minister of Justice referred to the Commission's views and also to the fact that minimum punishments for these three offences had been restored.³⁰ They remained in the bill as finally passed.

There were also some recommendations made by the Royal Commissioners that did not find acceptance in Parliament. Some instances are given elsewhere in this issue, namely, the proposal that the trial *de novo* on summary conviction appeals should be abolished, that such offences as sedition, bribery of judicial officers, rape and causing death by criminal negligence should not be required to be tried by jury, and that an appeal procedure should be provided where habeas corpus is involved. Two other illustrations should not be overlooked however. The first of these was a section designed to meet the situation created by a conflict in decisions³¹ on the question whether the Crown or the court should determine how an offence will be dealt with when it is punishable either by indictment or on summary conviction. The Commission proposed that "where an offence is punishable by indictment or on summary conviction the prosecutor is entitled to elect whether the proceedings shall be by indictment or on summary conviction". A clause in the bill, in this form, was rejected by the special committee of the House of Commons.

A second proposal that failed to find favour, this time in the Senate, was a clause in the Commission's draft bill to provide that, where an accused is charged with theft of anything and it is established that he obtained it by false pretences, he may be convicted of obtaining by false pretences, and where he is charged with obtaining

³⁰ The Minister said: "In the bill now before this chamber minimum punishments have been restored in respect of offences relating to the Post Office and in respect of drunken driving or driving while ability is impaired. Upon a purely pragmatic basis we think it is better, in relation to these specific kinds of offences, to maintain the minimum penalties." (Hon. Stuart S. Garson, Q.C., Senate Hansard, May 13th, 1952, p. 210)

³¹ *R. v. West* (1915), 25 C.C.C. 145 (Ont.); *R. v. McNabb* (1919), 32 C.C.C. 166 (Alta.); *R. v. Belmont* (1914), 23 C.C.C. 89 (Que.).

anything by false pretences and it is established that he stole it, he may be convicted of theft. This was an adaptation from the Indictments Act of the United Kingdom. It was clearly designed to cover the case where an indictment contained only one count, say theft, but the evidence at the trial proved the accused guilty only of obtaining by false pretences. It would have relieved the Crown from the necessity of including both counts in an indictment where it was not perfectly clear that the offence committed was one or the other. The clause was deleted on the ground that it was unnecessary.³²

The enactment of the new code in 1954 and its coming into force in 1955 do not mean that the work of criminal code revision is at an end. The present law on such matters as the defence of insanity in criminal cases, capital punishment, corporal punishment and lotteries continues unchanged in the new code, although there was no lack of enthusiasm in Parliament for amendment. The special committee of the House of Commons, in its third and final report,³³ said:

At various times during the course of its work, the following matters pertaining to the Criminal Law were directed to the attention of your Committee; namely:

- (a) The Defence of Insanity.
- (b) Capital Punishment.
- (c) Corporal Punishment.
- (d) Lotteries.

Although these matters are well within the scope of the Terms of Reference, your Committee is of opinion that these questions are of such paramount importance that they could and should not be dealt with merely as incidentals to the consolidation or revision of the present Criminal Code embodied in Bill 93.

The Committee upon the material before it was not prepared to recommend a change in the present law respecting the defence of insanity, lotteries and the imposition of punishment by whipping and by sentence of death, but unanimously has come to the conclusion, and so recommends, that the Governor General in Council give consideration to the appointment of a Royal Commission, or to the submission to Parliament of a proposal to set up a Joint Parliamentary Committee of the Senate and the House of Commons, which said Royal Commission or Joint Parliamentary Committee shall consider further and report upon the substance, and principles of these provisions of the law aforesaid, and shall recommend whether any of those provisions should be amen-

³² Proceedings of the Standing Committee on Banking and Commerce of the Senate, Tuesday, December 16th, 1952, p. 75.

³³ Minutes of Proceedings and Evidence of Special Committee on Bill No. 93, No. 7, p. 297.

ded and, if so, shall recommend the nature of the amendments to be made.

When the Minister of Justice was introducing the Criminal Code bill in the House of Commons in December 1953 he referred to this recommendation as follows:³⁴

We therefore are of the view that the proper course for us to recommend to this house is the appointment of a joint committee of both houses of parliament to inquire into and to report upon the question of whether the criminal law of Canada relating to (a) capital punishment; (b) corporal punishment or (c) lotteries should be amended in any respect and, if so, in what manner and to what extent.

After careful consideration however, we reached the opinion that the defence of insanity to a charge involving criminal responsibility, as laid down by the law and applied by the courts, is a question involving expert legal and psychiatric knowledge in respect of which it seemed to us that it would be at least difficult in the first instance for a committee of laymen to reach a dependable opinion which would inspire confidence.

To us therefore it seemed preferable that the question of the defence of insanity on a charge involving criminal responsibility should be studied by a royal commission made up of recognized experts in the fields of law and psychiatry. Then if it were considered helpful or appropriate the report of such a royal commission could be made available to the parliamentary committee in connection with its consideration of the subject of capital punishment.

Accordingly, a parliamentary committee was appointed under the joint chairmanship of Senator Salter A. Hayden, Toronto, and Mr. Don F. Brown, Member of Parliament for Essex West. It heard evidence from February until June 1954. The printed report of its proceedings runs to more than 800 pages, but even with that volume of evidence it finally reported to the house that "it will not be able to complete at the current session of this Parliament its inquiries into the matters referred to it for report and, accordingly, recommends: 1. That a corresponding Committee be established and appointed early in the next session of this Parliament to resume the studies and continue the inquiries initiated by this Committee. . .".³⁵

Two royal commissions were appointed in March 1954 to inquire into the law of insanity as a defence in criminal cases and the state of the law on criminal sexual psychopaths. Both are under the chairmanship of the Honourable J. C. McRuer, Chief Justice of the High Court of Justice for Ontario. The terms of reference of the

³⁴ The Hon. Stuart S. Garson, Q.C., House of Commons Hansard, Dec. 15th, 1953, p. 941.

³⁵ Minutes of Proceedings and Evidence, Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries, No. 18, Tuesday, June 15th, 1954, p. 749.

first are:³⁶ "To inquire into and report upon the question whether the criminal law of Canada relating to the defence of insanity should be amended in any respect and, if so, in what manner and to what extent". The terms of reference of the second are:³⁷ "To inquire into and report upon the question whether the criminal law of Canada relating to criminal sexual psychopaths should be amended in any respect and, if so, in what manner and to what extent". At the time of writing neither of the royal commissions has reported to the government, but both have held hearings in the Maritimes and in Western Canada.

Another indication of increased activity in the field of criminal law was the appointment by the Minister of Justice, late in 1953, of a committee to inquire into and report upon the policies and practices followed in the Remission Service of the Department of Justice and to make recommendations for improvement. This committee is under the chairmanship of Mr. Justice Fauteux of the Supreme Court of Canada.³⁸ The Remission Service of the Department of Justice is the branch of government that, under the direction of the Solicitor General, the Honourable W. Ross Macdonald, Q.C., administers the Ticket of Leave Act and advises on the exercise of the royal prerogative of mercy. The Ticket of Leave Act provides a procedure whereby a person undergoing imprisonment upon conviction for an offence under an act of Parliament may be released on parole before the expiration of his sentence. The committee visited institutions and held discussions with officials in the United Kingdom and a number of continental countries in the summer of 1954. At present they are visiting Canadian institutions.

The history of the rewriting of the Criminal Code, from the time the Royal Commission commenced its work until the new act finally received the royal assent, indicates that there was not always unanimity. The Commissioners themselves reported that "as to some

³⁶ The other members are: Dr. Gustave Desrochers, Assistant Superintendent of St. Michel Hospital at the City of Quebec; Her Honour Judge Helen Kinnear, County Court Judge for the County of Haldimand, Ontario; Dr. Robert O. Jones, Professor of Psychiatry at Dalhousie University, Halifax, Nova Scotia; and Joseph Harris, Esquire, of Winnipeg, Manitoba.

³⁷ The other members are: Dr. Gustave Desrochers, Assistant Superintendent of St. Michel Hospital at the City of Quebec, and Her Honour Judge Helen Kinnear, County Court Judge for the County of Haldimand, Ontario.

³⁸ The other members are: W. B. Common, Q.C., Director of Public Prosecutions for the Province of Ontario, J. Alex. Edmison, Q.C., Assistant to the Principal of Queen's University, Kingston, and Joseph McCulley, Warden of Hart House, University of Toronto.

of the provisions of the draft Bill there was a difference of opinion. While the draft Bill presented reflects in some respects the view of the majority only, no useful purpose can be served by indicating specifically the matters in which differences of opinion were not fully resolved."³⁹

In Parliament, the discussion of particular provisions was frequently long and usually searching. Amendments followed no discernible pattern—they ranged from the insignificant to the fundamental. Some were exculpatory, others were punitive. Some were prompted by motives of magnanimity, others resulted from compromise. Nevertheless, whether in the Commission or in Parliament, two considerations were at all times paramount. These are illustrated by two extracts from the record.

The Minister of Justice, toward the end of his statement in the Senate when the bill was introduced in Parliament for the first time, said:⁴⁰

In closing, there is one general observation I would like to make. In opening I pointed out that the revision was not undertaken for the purpose of effecting changes in broad principles. Our system of criminal jurisprudence embodying as it does the high principles of the British system provides as fair and just a system as it is possible to devise to ensure that justice will be accorded to all. I am sure that those who have studied the Bill will agree that the Commission in its work, and this bill now before you, Sir, have maintained those principles.

Seven months later the bill was again in the Senate. While it was being considered by the Banking and Commerce Committee, Senator A. W. Roebuck referred to a conversation between himself and the Minister of Justice:⁴¹

Last session I was having a discussion with him—I may repeat this story in the house, because I think it is good—and he said something about government policy. I replied 'I don't care a hoot for government policy; I want a good Code.' And the Minister's answer was 'A good Code is the government's policy.'

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³⁹ Report of Royal Commission on the Revision of the Criminal Code (Queen's Printer, Ottawa, 1954); also printed in Appendix, Senate Hansard, May 14th, 1952, p. 236.

⁴⁰ The Hon. Stuart S. Garson, Q.C., Senate Hansard, May 13th, 1952, p. 214.

⁴¹ Proceedings of the Standing Committee on Banking and Commerce of the Senate, Dec. 15th, 1952, p. 29.