# Offences and Punishments under the New Criminal Code

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The creation of a criminal offence involves the answers to two questions: Does the public interest demand that the conduct be prohibited? If so, what sanction is to be held over the transgressor? The main purpose of this article is to discuss briefly how, in the new Criminal Code, the first of these questions has been approached in some instances where the provisions of the present law have been changed in substance. Before doing so, however, it will be worthwhile to glance at the way in which the new code deals with punishment.

An offence under the criminal law of Canada is either an indictable offence or an offence punishable on summary conviction. The chief ground of distinction between the two kinds of offences lies in the procedure that is followed to determine the question of guilt or innocence of an accused person, but they are also distinguishable by the amount of punishment that is authorized to be imposed upon conviction. It is roughly accurate to say that indictable offences correspond with the class of offences known as "felonies" under the common law. They are offences that society regards as serious and, in the worst cases, deserving of substantial punishment. Because the maximum punishment upon conviction may be heavy, these are cases where the accused is, generally speaking, entitled to be tried by jury. A summary conviction offence, on the other hand, corresponds with a misdemeanour at common law. It is a less serious offence that does not merit heavy punishment, even in the worst case, and the policy of the law therefore is that the accused is not entitled to be tried by jury.

The Criminal Code Revision Commission recommended, and Parliament adopted, for all summary conviction offences in the

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code a uniform maximum punishment of imprisonment for six months or a fine of five hundred dollars, or both. Under the present code some summary conviction offences carry a greater maximum punishment than this, while for others the maximum is less. For example, the summary conviction offence of common assault is punishable by a fine not exceeding twenty dollars and costs or imprisonment for two months. Again, the offence of cruelty to animals is punishable by a fine of five hundred dollars or imprisonment for a term not exceeding one year. Under the new code these and all other disproportionate maximum punishments for summary conviction offences will be replaced by the uniform maximum punishment already referred to.

Concerning punishment for indictable offences, the Commissioners reported as follows:[1]

> The sentences provided in the present Code follow no apparent pattern or principle and in our view are frequently not consonant with the gravity of the offences to which they relate.
>
> Your Commissioners are of the opinion that there should be a few general divisions of punishment by imprisonment, each offence being assigned to one of the divisions. Accordingly, apart from the cases where the sentence of death may be imposed, maximum sentences of imprisonment are provided as follows: (a) Life, (b) 14 years, (c) 10 years, (d) 5 years, (e) 2 years.[2]

This effort by the Commission to produce some sort of order out of the present pot-pourri of punishments necessarily resulted in an increase in the maximum punishment for some offences and a decrease in the maximum punishment for others. For example, the present code authorizes imprisonment for three years upon conviction for cheating at play, while the new code reduces this maximum to two years. On the other hand, the present code provides a maximum punishment of seven years for preventing or impeding a shipwrecked person who is attempting to save his own life. The new code makes the offence applicable, not only to those who are shipwrecked, but to all persons who are attempting to save their own lives, and increases the maximum term of imprisonment to ten years. In the result, maximum punishments by way of impri-

[1] Report of the Royal Commission on the Revision of the Criminal Code (Queen's Printer, Ottawa, 1952); also printed in Appendix, Senate Hansard, May 14th, 1952, p. 226, at p. 233.

[2] The new code continues, in section 622, the provisions of section 1035 of the present code. These authorize the imposition of a fine in lieu of imprisonment where the offence is punishable with imprisonment for five years or less and the imposition of a fine in addition to, but not in lieu of, imprisonment where the offence is punishable with imprisonment for more than five years. No fine may be imposed in lieu of imprisonment where the offence is punishable with a minimum term of imprisonment.

sonment for indictable offences have been increased for 161 offences, reduced for 117 offences and left unchanged for 126. This serves, in part at least, to answer the criticism, occasionally made when the bill was in Parliament, that "we still have rather heavy increases in the punishments to be meted out".[3] It is significant that in each of the four cases where Parliament changed the maximum punishment recommended by the Commissioners the punishment was increased.[4]

The new act makes some changes in the law on the suspension of the passing of sentence. Section 1081 of the present code provides that, where a person is convicted of an offence and no previous conviction is proved against him, the court may suspend the passing of sentence but, where the offence is punishable with imprisonment for more than two years, the concurrence of counsel acting for the Crown is required. The Commissioners reported:

> It is the opinion of your Commissioners that the powers of the court to suspend the passing of sentence should not be subject to the consent of counsel for the Crown. It is a fundamental principle of the administration of justice that the law should be administered by a free and independent judiciary, and in determining whether a convicted person should be released on suspended sentence and thus be given an opportunity to rehabilitate himself, or should be sent to prison, the discretion of the judge should be unfettered.[5]

In the new code the concurrence of counsel for the Crown is not required in any case, but the Crown is given an appeal against an order suspending the passing of sentence.

Whipping will continue to be a form of punishment authorized by the new code for certain offences. The Commissioners recommended that this form of punishment should be dropped for assaults on the Sovereign, an assault causing actual bodily harm to a wife or other female, an attempt to have sexual intercourse with a female under the age of fourteen years and acts of gross indecency. The new code gives effect to the recommendation. Punishment by whipping will continue, however, to be authorized for the offence of rape and attempted rape, sexual intercourse with a female per-

[3] Mr. Stanley Knowles, M.P., House of Commons Hansard, Dec. 15th, 1953, p. 953.

[4] S. 250—publishing a defamatory libel known to be false; s. 252—extortion by libel; s. 339—salting a mine; s. 343—publishing a false prospectus.

[5] Appendix, Senate Hansard, May 14th, 1952, p. 226, at p. 233. An article in this Review in 1949 recommended that "all limitation on the power of the court to grant probation should be eliminated from the Criminal Code": Hon. J. C. McRuer, Sentences (1949), 27 Can. Bar Rev. 1001, at p. 1006.

son under the age of fourteen years, indecent assault on a female, being the male party to the offence of incest, indecent assault on a male person, choking a person or administering drugs to him for the purpose of committing an indictable offence, robbery and armed burglary. The entire question of corporal punishment is, as explained in the immediately preceding article, being considered be a special parliamentary committee.

Now let us turn our attention to offences.

### *Abolition of Common-law Offences*

The Royal Commissioners were directed to "endeavour to make the Code exhaustive of the criminal law". Their report shows how they carried out this instruction:

> Your Commissioners are of the opinion that the Code should be exhaustive in so far as criminal offences are concerned, but that the criminal law of England, as presently in force, should be continued in respect of all other matters. In order to give effect to this opinion, clauses 7 and 8 [6] have been placed in the draft Bill. . . .
>
> Under these provisions the criminal law of England in so far as it relates to procedure in criminal matters, common law defences and the powers of a court to punish for contempt of court are preserved.
>
> Your Commissioners recognize that the original Code was not intended to be a complete Code and that common law offences were still retained. However, we have come to the conclusion that by incorporating in the draft Bill all of the common law offences in respect of which charges are currently laid, all offences which should be adopted from

[6] As recommended by the Commission and passed by Parliament, these sections are:

"7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

"(2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada."

"8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(a) of an offence at common law,
(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the coming into force of this Act, to impose punishment for contempt of court."

the common law are included. The offences which have been incorporated are common law conspiracy (clause 408(d)),[7] public mischief (clause 120), indemnification of bail (clause 119(2)(d)) and compounding a felony (clause 121).[8] A specific punishment applies in respect of each offence. Certain common law offences are, in the opinion of your Commissioners, obsolete and archaic and are not retained, e.g., champerty and maintenance, barratry, refusing to serve in office and being a common scold.

The Commissioners thus came to the conclusion that was reached by the commissioners who considered the English draft code, that common-law offences should be codified, but that common-law rules and principles should not, except in certain cases. In effect, they agreed with this extract from the report of the English commissioners:[9]

If Parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct against which the moral feeling and good sense of the community are the best protection. Besides, there is every reason to believe that the criminal law is and for a considerable time has been sufficiently developed to provide all the protection for the

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[7] Section 408 (2) in the act as passed.

[8] Section 408 (2) provides:

"Every one who conspires with any one
(a) to effect an unlawful purpose, or
(b) to effect a lawful purpose by unlawful means,
is guilty of an indictable offence and is liable to imprisonment for two years."

Section 120 provides:

"Every one who, with intent to mislead, causes a peace officer to enter upon an investigation by
(a) making a false statement that accuses some other person of having committed an offence,
(b) doing anything that is intended to cause some other person to be suspected of having committed an offence that he has not committed, or to divert suspicion from himself, or
(c) reporting that an offence has been committed when it has not been committed,
is guilty of an indictable offence and is liable to imprisonment for five years."

Section 119 (1) makes it an offence wilfully to attempt in any manner to obstruct, pervert or defeat the course of justice. Subsection (2)(d) provides:

"Without restricting the generality of subsection (1), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,
(d) before or after being released from custody under recognizance, indemnifies or agrees to indemnify in any way, in whole or in part, his bondsman."

Section 121 provides:

"Every one who asks or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and is liable to imprisonment for two years."

[9] Report, Royal Commission, Criminal Code, 1880, p. 10.

public peace and for the property and persons of individuals, which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought in our opinion to be left in the hands of Parliament. If it should turn out that we have overlooked some common law offence, we think it better to incur the risk of giving a temporary immunity to the offender than to leave any one liable to a prosecution for an act or omission which is not declared to be an offence by the Draft Code itself or some other Act of Parliament.

On the question of defences the English report proceeded:

But whilst we exclude from the category of indictable offences any culpable act or omission not provided for by this or some other Act of Parliament, there is another branch of the unwritten law which introduces different considerations; namely, the principles which declare what circumstances amount to a justification or excuse for doing that which would be otherwise a crime, or at least would alter the quality of the crime. In the cases of ordinary occurrence, the decisions of the Courts and the opinions of great lawyers enable us to say how the principles of the law are to be applied. And so far the unwritten law may be digested without extreme difficulty and with practical advantage, and so far also it may be settled and rendered certain.

In our opinion the principles of the common law on such subjects, when rightly understood, are founded on sense and justice. There are a few points on which we venture to suggest alterations, which we shall afterwards state in detail. At present we desire to state that in our opinion it is, if not absolutely impossible, at least not practicable, to foresee all the various combinations of circumstances which may happen, but which are of so unfrequent occurrence that they have not hitherto been the subject of judicial consideration, although they might constitute a justification or excuse, and to use language at once so precise and clear and comprehensive as to include all cases that ought to be included, and not to include any case that ought to be excluded.

In addition to this codification of common-law offences, the Royal Commission recommended, and Parliament enacted, a "peeping Tom" section.[10] It serves, in part at any rate, to fill the gap in the law that was made clear by the judgment of the Supreme Court of Canada in *Frey* v. *Fedoruk*,[11] where it was held that a "peeping Tom" does not commit a criminal offence at common law. The section gives effect to the principle stated by Mr. Justice Cartwright:

I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the

[10] Section 162 provides:

"Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction."

[11] (1950), 97 C.C.C. 1.

> provisions of the Criminal Code, or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts.[12]

Mr. John Willis discussed the *Frey* case in a comment in this Review[13] and concluded that the judgment deprived the criminal law of Canada of the "elasticity" that the retention of common-law offences was intended to provide when the code was first enacted. He argued from the common-law principle that all such acts or attempts as tend to the prejudice of the community are indictable, and said that "the Supreme Court has closed what was meant to be an 'open-ended' code". His suggestion was that "there should be added to the Code (a) new sections prohibiting in express words those specific types of conduct which are now covered only by the common law of crimes but should continue to be punishable, and (b) a section declaring, as do many of the criminal codes in the United States, that all common law offences not embodied in some statute are repealed". That is what the new code does. Still, it should be noted that none of the new offences, based on the common law, is defined in terms so broad as to include "all such acts or attempts as tend to the prejudice of the community". This observation applies especially to the offence of public mischief, the common-law conception of which, as set out in *R.* v. *Manley*,[14] was once criticized as having in it "the seed of a New Judicial Despotism",[15] and again as opening up a field of possible criminal liability of unlimited extent—"a field the horizons of which no human eye can descry".[16]

In only one case did the Commissioners recommend the codification of a common-law principle that was not previously written into the statute. That was a recommendation for the codification of the special instruction to be given to the jury where the accused is charged with the offence of rape.[17] The course of compromise, that is, of codifying certain common-law offences, either

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[12] *Ibid.*, at p. 14.
[13] (1950), 28 Can. Bar Rev. 1023.
[14] [1933] 1 K.B. 529.
[15] A.W.G.K., Note on *Rex* v. *Manley* (1934), 5 Camb. L.J. 263.
[16] W. T. S. Stalleybrass, Public Mischief (1933), 49 L.Q. Rev. 183.
[17] Where the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, the judge shall instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

in whole or in part, and of leaving the common-law principles untouched—except in the one case referred to—may well find wide support. But undoubtedly there will be some to ask why the Commissioners did not go further and, at the very least, recommend the codification of a rule on the uncorroborated evidence of an accomplice, one that is very similar to the rule applying in the case of rape.

At all events the Commissioners were not without precedents for the codification of common-law rules, principles and defences. The present code contains, and the new code continues, many of them that have been considered to be sufficiently well settled to warrant codification. They include the defences of *autrefois acquit* and *autrefois convict*, the common-law rules on the defence of insanity, the definition of constructive murder and the principles relating to justification and excuse. On the other hand, a large number of well-known and important common-law rules will continue to be found only in the so-called unwritten law. Among them will be, not only the rule on the evidence of accomplices, but also the rules on the admissibility of evidence of similar acts and the admissibility of statements, confessions and dying declarations; the circumstances in which the prerogative writs are available; and the doctrine of recent possession—again to choose a few examples at random.

*Appeals from Conviction or Sentence for Contempt of Court*

Readers of this publication are familiar with proposals that a right of appeal should be available from summary judgment and sentence for criminal contempt of court. One recent discussion of the subject is an article by the Honourable J. C. McRuer, Chief Justice of the High Court of Justice for Ontario. After pointing out a number of examples of difficulties that might arise if an appeal procedure were provided, he said that:

> such examples ought not to deter those interested in the development of the administration of justice from working out some means of appeal so as to cover at least those cases where the contempt is not one committed in the face of the court. If such a right of appeal existed, I think the probable result would be a purification of the administration of justice and a stricter enforcement of the law to preserve the rights of the parties before the court.[18]

The report and draft bill presented to the Minister of Justice by the Commissioners contained no provision for appeal in cases of contempt of court. The omission may have been for the reason that

[18] Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual (1952), 30 Can. Bar Rev. 225, at p. 242.

such a provision would constitute new law outside the terms of reference of the Royal Commission. On the other hand, the Commissioners may have felt that to provide a right of appeal would not be in the best interests of the administration of criminal justice in Canada. On the issue whether a right of appeal should be provided there are arguments to support each of the opposing points of view. Those who favour the proposal might contend that it is an anomalous situation to provide no appeal procedure from the summary imposition of punishment; that such a remedy has been provided in jurisdictions outside Canada and that it has worked successfully; that judicial officers exercising arbitrary authority would tend less to go to extremes in the imposition of punishment if their judgments are subject to review. Those who oppose the provision of a right of appeal might say that it is indispensable to the proper administration of justice that the judicial officer should have power to take summary disciplinary action and that the review of his discretion would put him in an invidious position; that the real function of the contempt procedure is not primarily to protect the dignity of the court but rather to protect the interests of litigants before the court; that the trial would be delayed pending determination of the appeal and the administration of justice thereby prejudiced; and that it would be difficult to distinguish between cases where there should and should not be an appeal, because of the various ways in which contempt may be committed, for instance, newspaper reports of judicial proceedings, witnesses refusing to answer, jurors failing to attend, and so on.

The first proposal for an appeal procedure that was made during consideration of the Criminal Code bill in Parliament came in the Senate, where Senator A. W. Roebuck is reported as follows:

> I submit that it is time we gave an appeal against an arbitrary decision made by a judge under the heading of contempt of court. I appreciate that a judge must have control of his court while he is sitting there, and so I would not give appeals against conviction for contempt of court when the offence is committed in court in the presence of the judge, but I would give an appeal against his sentence and I would give an appeal against the conviction that he may register when the offence is not committed in his presence; for instance, a newspaper article that he claims is contempt of court. The judge at the present moment hails the offender before him and tells him he has convicted him and tells him what he is going to do with him, and that is the end of it. There is no appeal. Now, there should be. It would be salutary so far as the judge is concerned, and certainly it is salutary from the standpoint of the public when they are considering the acts of judges. I should like to amend that, then, in this way: To give an appeal to the

proper court of appeal in cases of conviction when the offence is not committed in court, and to give an appeal against sentence when the offence is committed in court or, otherwise, all offences.[19]

The bill was amended accordingly by the Senate.

When the bill came before the Special Committee of the House of Commons in 1953 the provision inserted by the Senate was amended to provide for an appeal against conviction and punishment, whether or not the contempt was committed in the face of the court, but only with leave of the court of appeal or a judge of that court. There is no report of the reasons that prompted this change, but it may reasonably be assumed that one reason was the hope that, if leave to appeal were required, frivolous appeals might be discouraged. There was also, of course, the example of those cases in which the Judicial Committee of the Privy Council had granted special leave to appeal the committal orders of colonial courts for criminal contempt.[20]

The section, in this form, passed the House of Commons, but when it came again before the Senate it was restored to the form in which it had been passed by the Senate in 1952.[21]

The Commons accepted the views of the Senate, but there was comment that the new provision is not definite enough. It was suggested that contempt of court should be defined, "that there is still reason to give consideration to the introduction of something that would offer a guide to the courts in determining what shall be contempt in the face of the court or from outside the court, and also some gauge as to what the penalty should be".[22]

### *Criminal Negligence*

The Commission reported that it had "considered the question as

[19] Minutes of Evidence of the Banking and Commerce Committee of the Senate, December 16th, 1952, p. 43.

[20] *E.g.*, *Ambord* v. *A. G. for Trinidad and Tobago*, [1936] A.C. 322.

[21] Section 9 provides:

"9.(1) Where a court, judge, justice or magistrate summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal against the punishment imposed.

"(2) Where a court or judge summarily convicts a person for a contempt of court not committed in the face of the court and punishment is imposed in respect thereof, that person may appeal

(a) from the conviction, or

(b) against the punishment imposed.

"(3) An appeal under this section lies to the court of appeal of the province in which the proceedings take place, and, for the purposes of this section, the provisions of Part XVIII apply, *mutatis mutandis*."

[22] Mr. George Drew, Q.C., M.P., Hansard, House of Commons, June 15th, 1954, p. 5974.

to the degree of negligence necessary to constitute a criminal offence". It pointed out that there had been much confusion, particularly in motor manslaughter cases, over the degree of negligence required to sustain a conviction,[23] and that much of the confusion was due to the standard of care set forth in section 247 of the present code.[24]

The Commission said that the definition set out in section 247 appears to impose criminal liability for what might be termed mere civil negligence, that is, breach of a duty for which a person might be found legally liable in civil proceedings. They observed that the authorities hold that wanton or reckless misconduct is required to support a charge involving criminal negligence, referring particularly to *Rex* v. *Bateman*, where Lord Hewart stated that, to support an indictment for manslaughter based on criminal negligence, the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss) and in addition must satisfy the court that the negligence alleged "went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".[25] The report mentioned other authorities to the same effect.[26]

The Commission appears to have felt that the Criminal Code should not contain what amounted to a definition of civil negligence, the legal effect of which could only be ascertained by reference to reported judgments, but rather that it should set forth the present state of the law on this subject in so far as it imposes *criminal* responsibility. Accordingly, the Commission proposed a new section designed to state the present law as interpreted by the judgments. This section, as amended in the Senate and passed by Parliament, takes the following form:

191. (1) Every one is criminally negligent who
(a) in doing anything, or
(b) in omitting to do anything that it is his duty to do,

[23] See in particular, *McCarthy* v. *R.* (1921), 35 C.C.C. 213.

[24] Section 247 provides:
"Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precaution against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

[25] (1925), 94 L.J.K.B. 791, at p. 794; 19 Cr. App. R. 8.

[26] *Andrews* v. *Director of Public Prosecutions*, [1937] A.C. 576; 106 L.J.K.B. 370; *R.* v. *Greisman* (1926), 46 C.C.C. 172; *The King* v. *Baker*, [1929] S C.R. 354.

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, 'duty' means a duty imposed by law.

In the Commission's draft bill, subsection (2) provided that "For the purposes of this section, 'duty' means (a) a duty imposed by law, or (b) a duty for the breach of which a person may be found liable in civil proceedings". The Commission considered it necessary to include paragraph (b) in order that the definition might be complete. The effect of the deletion of it by the Senate[27] must await judicial interpretation. The definition in section 191 is followed by sections 192 and 193, which provide that every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life and every one who by criminal negligence causes bodily injury to another person is guilty of an indictable offence and is liable to imprisonment for ten years. Section 247 of the present code is not, in terms, reproduced in the new code because section 191 covers the same ground and more.

The Commission noted that juries are reluctant to convict where motor manslaughter is charged. It was this circumstance, of course, that resulted in the enactment of section 951 (3) of the present code. That subsection gives to the jury the right to acquit the accused of a charge of manslaughter arising out of the operation of a motor vehicle but, alternatively, to find him guilty of reckless or dangerous driving under subsection (6) of section 285. Subsection (3) of section 951 has been dropped from the new code.

The result is that the offence commonly referred to as "motor manslaughter" will be charged under section 192, that is, causing the death of a person by criminal negligence in the operation of a motor vehicle, for which the maximum punishment is life imprisonment. It should be noted, in addition, that a charge of manslaughter, *per se*, may also be laid in such circumstances, since section 194(5) provides that a person commits culpable homicide

[27] The Senate comment on the Commission's definition was as follows: "Those tests present all sorts of difficulties, because there may be a civil proceeding pending, the judge is trying a criminal proceeding, and he is going to adjudicate in effect on the civil proceeding by telling the jury 'This man has committed an offence of which he may be found liable in civil proceedings'. That is an instruction he gives them before the civil case has ever been tried. We thought that was a very back-handed way of trying to define 'criminal negligence', so we have made the definition which I have quoted. This seems a direct and straightforward way of stating the offence, and if you compare the two you will realize how much more intelligible it is." (Senator Salter A. Hayden, Minutes of Evidence of the Banking and Commerce Committee of the Senate, June 11th, 1952, p. 24)

when he causes the death of a human being by criminal negligence. The maximum punishment upon conviction on this charge is also imprisonment for life.

In the same connection, it should be observed that subsections (1) and (6) of section 285 have also been dropped. The first of these makes it an offence to cause bodily harm to any person by wanton or reckless driving, racing or other wilful misconduct or neglect in the operation of a vehicle. This offence will now be covered by section 193 (causing bodily harm by criminal negligence). Subsection (6) of section 285, under the present code, creates the offence of reckless or dangerous driving, but injury to the person or damage to property is not a prerequisite to conviction. The subsection is replaced by section 221(1), which makes it an offence to be criminally negligent in the operation of a motor vehicle whether or not bodily injury or death is caused to a person or property is damaged. The maximum punishment authorized is imprisonment for five years.

### *Witness Giving Contradictory Evidence*

The new code contains a provision, not now in the law, to cover the case where a witness in judicial proceedings gives, under oath, contradictory evidence on a material matter of fact or knowledge, but it is not possible to show which one of the statements is false. If two contradictory statements are given, one must be false and both may be false. Where it is not possible to show which one of the statements is false, a charge of perjury cannot succeed. The problem that gives rise to the new provision is illustrated by the following extract from the charge to the jury in *R.* v. *Deacon*:[28]

> At the coroner's inquest she gave the evidence contained in the statement, but at the preliminary she changed her evidence. Then she has told us that at the first trial she gave the same evidence that she gave in the witness-box up to the time that she was declared adverse. At this trial she departed from the statement she had given and the evidence she gave at the inquest.
>
> May I draw your attention to the fact that either at the coroner's inquest, or the preliminary, or in this Court, she has committed perjury.
>
> Now I have warned you, and I warn you again, her evidence must be weighed carefully.

As recommended by the Royal Commission, and as introduced in Parliament, the section provided as follows:

> 116. (1) Every one who, being a witness in a judicial proceeding, gives

[28] (1948), 91 C.C.C. 1, at p. 7.

evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and is liable to imprisonment for fourteen years, whether or not the prior or the later evidence or either of them is true, unless he establishes that none of the evidence was given with intent to mislead.

(2) Notwithstanding paragraph (a) of section 99, 'evidence' for the purposes of this section, does not include evidence that is not material.

In this form the section was criticized by Mr. Edson L. Haines, Q.C.,[29] and defended by Mr. R. M. Willes Chitty, Q.C. Mr. Haines said, among other things, that "one of the most objectionable features of the proposed legislation is the shifting of the onus from the Crown to the accused". Mr. Chitty's comment on this observation was as follows:

> The new section does relieve the prosecution of the onus of showing the real truth of the matter and only requires it to show that the accused made two statements, which being contradictory, one at least must be untrue—and that is essentially perjury. It then gives the accused the opportunity of disproving an intention to mislead to exonerate himself from the offence that he has technically committed. That surely is to be regarded as a mercy and not an overweaning hardship.[30]

When the provision came before the special House of Commons committee, the Canadian Association for Civil Liberties contended that the new section was open to serious objection, and should be deleted, for these reasons:

> (1) The section fails to take into account that in a large number, if not most judicial proceedings, witnesses may honestly and without any intention to mislead give contradictory evidence. Indeed the very purpose of cross-examination is to elicit contradictory evidence from the witness.
>
> (2) The offence contemplates that once contradictory evidence of a material nature is given the onus of proof is shifted to the accused. This surely is contrary to our whole concept of justice that an accused shall be deemed innocent until proven guilty.
>
> (3) The use which could be made of this section in judicial proceedings might well thwart the course of justice.[31]

These arguments carried weight with the members of the committee. They amended the section to provide, not that the accused must establish that none of the evidence was given with intent to mislead, but rather that no person should be convicted unless the presiding judicial officer was satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial pro-

[29] (1953), 31 Can. Bar Rev. 200.
[30] (1953), 3 Chitty's Law Journal 105, at p. 107.
[31] Minutes of Proceedings and Evidence of Special Committee on Bill No. 93, March 10th, 1953, p. 162.

ceedings, intended to mislead. They added a further safeguard, namely, that no proceedings should be instituted under the section without the consent of the Attorney General. This was designed to forestall malicious prosecutions by disgruntled litigants. This amendment, however, aroused some misgivings in the mind of the Attorney General of Ontario, as appears from a letter written by him to the Minister of Justice, in part, as follows:[32]

> Section 116 deals with a crime quite different in its nature and seriousness from offences, for example, under the Lord's Day Act. I may remind you that as a result of the consent section in the Lord's Day Act there is a wide disparity in policy in the various provinces as to the laying of prosecutions. I understand that in the Province of Quebec, as a matter of consistent policy, the Attorney-General refuses to consent to any prosecution under the Act. In Ontario consents are given, except in certain special types of cases. Thus, in effect, a law which is intended to be national in scope is enforced according to what may be differences in provincial policy in different provinces.
>
> If the provision is to remain in 116 a similar result may follow. If an Attorney-General is doubtful as to the merits of this Section he may, as a matter of policy, refuse to consent in all cases. Thus, a law which deals with the indictable offence of perjury in a novel and drastic way, involving imprisonment for 14 years, may legally be enforced in some provinces and in others, not at all.

When finally the provision, in its amended form,[33] came before the Committee of the Whole House, it received some criticism. One objection was that its effect was to punish a witness as much for changing his evidence from false to true as for changing his evidence from true to false; another was that it would effectively prevent a witness who had committed perjury in an earlier proceeding from telling the truth later. The section was passed despite the objections.

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[32] Minutes of Proceedings and Evidence of Special Committee on Bill No. 93, April 10th-May 1st, 1953, p. 279.

[33] Section 116 provides:

"(1)Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and is liable to imprisonment for fourteen years, whether or not the prior or the later evidence or either of them is true, but no person shall be convicted under this section unless the court, judge or magistrate, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead.

"(2) Notwithstanding paragraph (a) of section 99, 'evidence', for the purposes of this section, does not include evidence that is not material.

"(3) No proceedings shall be instituted under this section without the consent of the Attorney General."

It may be a point for future consideration whether, as a result of the enactment of this new provision, section 5(2) of the Canada Evidence Act should be amended. Under that section, where a witness objects to answer upon the ground that his answer may tend to criminate him or to establish his liability in civil proceedings, he is nevertheless compelled to answer, but the answer given is not to be used or received in evidence in any criminal proceeding against him other than a prosecution for perjury. Possibly the words "or a prosecution for an offence under section 116 of the Criminal Code" should be added.

### *Constructive Murder*

Before 1947, section 260 of the Criminal Code provided that, in the case of certain enumerated offences,[34] culpable homicide was also murder whether the offender meant death to ensue or not, or knew or not that death was likely to ensue, if he meant to inflict grievous bodily injury in order to commit the offence or to effect his escape after committing it, or if he administered a drug for either of those purposes or if he wilfully stopped the breath of any person for either of the purposes.

In 1947, section 260 was amended by the addition of the now highly controversial paragraph (d), which provided that culpable homicide is also murder, whether the offender means or not death to ensue or knows or not that death is likely to ensue "if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use".

Mr. John Willis, in a comment in this Review,[35] referred to the underlying principle of the 1947 amendment as a "savage doctrine", and had the following to say in support of repeal:

> As passed by the House of Commons [in 1947] the new section 260(d) rendered the offender guilty of murder 'if he uses any weapon for the purpose of facilitating the commission of any of the offences in this section mentioned (for example, robbery) or the flight of the offender upon the commission or attempted commission thereof and death ensues as a consequence of such use'. This is of course a drastic section. It tells an armed robber that if he pulls his gun out to frighten his vic-

[34] Treason, piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary and arson.

[35] (1951), 29 Can. Bar Rev. 784, at pp. 793-794.

tim or a pursuing policeman into submission, and the gun accidentally goes off and kills someone, then he goes to the gallows. . . . But drastic as it is, it was not drastic enough for the Senate. As amended by the Senate and finally enacted into law, the section reads: 'if he uses *or has upon his person* any weapon *during or at the time of* the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use'. This is more than drastic; it is savage; and what is more it is incoherent. It is savage because it is solemnly proposing to hang an armed robber whose only connection with the death is that he pulled the gun out of his pocket and the gun happened to go off and kill someone while he was at the scene of the crime or departing from it; even if he pulled the gun out to make it safe by taking the bullets out of it, or to throw it away, and it went off and killed someone, that would still be murder under the present section 260 (d). It is incoherent because the words 'or has upon his person' are entirely without effect. They were, I do not doubt, added by the Senate to render guilty of murder the armed robber who carried the fatal gun in his pocket but did not 'use' it, that is, pull it out. But they are clearly ineffective to do so, for in order that the section may apply at all the death must ensue as 'a consequence of [the] *use*' of the gun. It is not enough that death ensues as a consequence of having the gun upon his person. The section as it now stands is preposterous. It came into being as an end of session compromise between a stubborn Senate, a reluctant Government and a bewildered House of Commons. It should, as a minimum programme, be repealed and be replaced by the previous version which passed the Commons but failed to pass the Senate.

Section 202[36] of the new code is the counterpart of section 260 of the present code. Paragraph (d) has been amended, but not at all along the lines proposed by Mr. Willis. An observation that may be expected, arising out of his comment, is that paragraph (d) is no longer "incoherent" but that it is even more "savage". For al-

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[36] Section 202 provides:

"Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit treason or an offence mentioned in section 52, piracy, escape or rescue from prison, or lawful custody, resisting lawful arrest, rape, indecent assault, forcible abduction, robbery, burglary or arson, whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

(a) he means to cause bodily harm for the purpose of
  (i) facilitating the commission of the offence, or
  (ii) facilitating his flight after committing or attempting to commit the offence,
and the death ensues from the bodily harm;

(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;

(c) he wilfully stops, by any means, the breath of a human being

though the words "of its use" at the end of the paragraph have been removed, so that they no longer cancel out the words "has upon his person" in the first line of the paragraph, the substantial result is that the offence is murder where death ensues, even if the accused merely has the weapon upon his person.

The new provision goes further than the principles propounded by the Attorney General of Great Britain when he introduced the draft code in 1878:

> It seems to me that murder by construction of law is a disgrace to the juridical system of the country, and should no longer be retained. A man who was found endeavouring to break into a house should be tried for the crime he intended to commit. So the fowl-stealer should be tried for that offence. And a man struggling with a policeman should be charged with resisting the police in the execution of their duty. To call those acts, which were done without the slightest intention to kill, murder, is monstrous. I would maintain that no one should be pronounced guilty of the atrocious crime of murder—a crime which, if it is brought home to a man, subjects him to the appalling punishment of an ignominious death—unless he has deliberately intended to take away life, or to inflict grievous bodily harm, or he has deliberately done an act likely in itself to cause death or grievous bodily harm, and has by such act caused death, having at the time a stolid indifference whether such result would follow the commission of his act or not.[37]

It appears, however, to be consistent with the common-law doctrine as laid down in *R.* v. *Jarmain*,[38] where Wrottesley J., delivering the judgment of the court, said:

> We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result even inadvertently in the death of the victim.[39]

### *Having in Possession*

When the new code comes into force, the offences of "receiving" and "retaining", as such, will disappear from the criminal law of

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for a purpose mentioned in paragraph (a), and the death ensues therefrom; or

(d) he uses a weapon or has it upon his person
(i) during or at the time he commits or attempts to commit the offence, or
(ii) during or at the time of his flight after committing or attempting to commit the offence,

and the death ensues as a consequence."

[37] Parliamentary Debates, 1878, Third Series, Vol. 239, col. 1946.
[38] *R.* v. *Jarmain*, [1946] 1 K.B. 74.
[39] *Ibid.*, p. 80.

Canada. Their passing will probably not be lamented by those who administer the criminal law.

Section 399 of the present code makes every one guilty of an offence "who *receives* or *retains in his possession* anything obtained by any offence punishable on indictment, or by any acts whereso-ever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained".

"Receiving" is an offence at common law, but the offence of "retaining" is wholly a statutory creation in Canada. Until the *Clay* case[40] was decided by the Supreme Court of Canada, the true basis of distinction between the two offences was always in doubt. That case finally established that, if an accused person acquired the "guilty knowledge" before or at the time he received the stolen property, he is guilty of the offence of receiving but not of retaining. If, on the other hand, he received the property and later acquired knowledge that the property was stolen and still continued to retain it, he is guilty of the offence of retaining but not of receiving.

The existence of the two offences in the present criminal law certainly must gratify the person who knowingly and dishonestly has possession of the fruits of crime, and must equally embarrass the authorities who seek to bring him to justice. For if receiving only were charged, but retaining alone established, acquittal must follow. Conversely, if retaining only were charged, but receiving proved, the accused is entitled to be absolved. In many cases, therefore, the Crown has to lay three charges on the basis of the same set of facts: theft, receiving and retaining. Upon these charges, of course, the accused may be convicted of only one. The necessity of following this method of procedure points up the fundamental defect in the present provision. It is completely artificial to distinguish between the offence of receiving and the offence of retaining simply by reference to the time at which guilty knowledge is acquired by the possessor. The dishonest possession of the article, at any time, should be the gravamen of the offence.

With these considerations in view, the new code substitutes a new offence for the offences of receiving and retaining. The new section, the result of a suggestion made by a committee of the Law Society of British Columbia, provides as follows:

> 296. Every one commits an offence who has anything in his possession knowing that it was obtained

[40] *Clay* v. *The King*, [1952] S.C.R. 170.

(a) by the commission in Canada of an offence punishable by indictment, or
(b) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

Under section 297 the offence is punishable by indictment.

The *Clay* case held, by a majority of five to four, that the common-law doctrine of recent possession applies to the offences of receiving and retaining. That doctrine, as stated by Pollock C.B. in his charge to the jury in *R.* v. *Exall*, is as follows:

> Property recently stolen, found in the possession of a person, is always presumptive evidence against that person, unless the possession can be accounted for and explained consistently with innocence.[41]

In view of the marked division of opinion in the Supreme Court of Canada in the *Clay* case, it will be interesting to see whether the doctrine of recent possession is held to apply to the new offence of having in possession.

### *Conclusion*

This article scarcely begins to cover the changes that the new code effects in the criminal law on substantive offences in Canada. Very briefly, some of the others are: the protection of the security of the state is made the prime purpose of the provisions on treasonable offences (section 46); acts in the nature of piracy, but not amounting to piracy, will be limited to acts in relation to, or done on board, Canadian ships (section 76); a new offence prohibits in terms the sale or possession of spring knives or switch knives (section 88); the offence of committing an act of gross indecency, which formerly applied only when committed between males, will apply to persons of either sex (section 149); the offence of being nude in a public place will be a summary conviction offence punishable with imprisonment for six months, at the most, instead of an indictable offence punishable with imprisonment for a maximum period of three years (section 159); the language of the section creating the offence of vagrancy has been substantially revised (section 164); a new provision makes it an offence, in terms, for a female person to live wholly or in part on the avails of prostitution of another female person (section 184); the offence of failing to collect fares is extended to include tolls and admissions of all kinds and a new subsection in the same section makes it an offence, by false pretences or fraud, to obtain transportation by land, water

[41] (1866), 4 F. & F. 922, at p. 923; 176 E.R. 850.

or air (section 336); the provisions on criminal breach of contract have been revised to make them more effective (section 365); a new offence is created to prevent the publication or printing for any purpose of anything in the likeness of a bank note (section 400); and, finally, all the provisions on attempts, conspiracies and accessories have been gathered together in Part XI and an effort made to provide a uniform system of punishments for them.

The new enactment contains more than three hundred and fifty sections that create offences and each one is changed in form, to a greater or lesser extent, from its counterpart in the present code. Many are deliberately changed in substance. It may be that in a few cases what is intended to be a mere change in form will be interpreted as a change in substance. Much of the case law that grew up around the old code during sixty years will continue to apply to offences under the new code, but the many changes in the law undoubtedly will raise new questions, which can only be answered conclusively by the courts. It is to be expected, therefore, that for some time after the new code comes into force there will be even more activity in the provincial courts of appeal and in the Supreme Court of Canada, so far as the criminal law is concerned, than has been the case in recent years.

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## The Imponderables of Life

Deterrence and reformation may result from the same sentence. But legal decisions have less value on the potential offenders at liberty if few offences are brought to the notice of the police. The public must assist in the prevention of crime by increasing the liability of the offender to arrest. Legal checks on law-breaking which are enforced from without may be less deterrent than the internal forces which are prompted from within as the result of upbringing, a high standard of religion, morals and citizenship. In some criminal, as in some psychiatric situations, improvement depends upon the sincerity of the expressed desire for rehabilitation. Many believe that there is little doubt that the present neglect of the imponderables of life is responsible for much crime today, and that our old-fashioned morality must be restored before we are in a position to solve some of our social problems, and among them the prevention of crime. Others have apparently forgotten the lines in which Kipling contrasted the follies of the Gods of the Market Place with the verities of the Gods of the Copy Book Headings. It might be instructive to know how many parents and children living in 'broken homes' could repeat the ten commandments. It is particularly sad that the amount of crime is so excessive at a time when social betterment is open to vast numbers from whom so much was previously denied. (Sir Norwood East, The Roots of Crime (1954) p. 9)