THE CRIMINAL LAW, 1867-1967

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The Federal Parliament of Canada was quick to act on the criminal law powers ascribed to it under the British North America Act[1] and to begin the task of consolidating the overwhelming mass of previously existing colonial laws. These were made up basically of common law importations as applicable to colonial conditions, but there was also a substantial amount of legislation from colonial assemblies. In Upper Canada, for example, an Act of 1836 provided for the right to have defence counsel for persons accused of a felony;[2] in the Province of Canada, an Act of 1851 set out various appeal procedures and other reforms.[3] There were also enactments relating to speedy trials,[4] coinage offences,[5] accessories and abettors of indictable offences,[6] kidnapping[7] and the like. Furthermore, most of this legislation was paralleled in similar, but by no means identical enactments in the other Provinces of British North America.[8]

The year 1869 saw the real beginning of the campaign to consolidate the criminal law of Canada and one session produced Dominion legislation on a variety of substantive and procedural matters. These included Acts on forgery, larceny, malicious injury to property, offences against the person and coinage offences and, in the procedural field, on juvenile offenders, summary convictions, indictable offences and the significant Criminal Procedure Act which remains the basis of much of our present procedure.[9]

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[1] (1867), 30 & 31 Vict., c. 3, s. 91, para. 27, "the criminal law, including the procedure in criminal matters".
[2] (1836), 6 Will. 4, c. 48.
[3] (1851), 14 & 15 Vict., c. 13.
[4] (1857), 20 Vict. 27.
[5] (1857), 20 Vict. 30.
[6] (1864), 27-28 Vict. 19.
[7] (1865), 29 Vict. 14.
[8] For example, New Brunswick (1860), 23 Vict., c. 34 (false pretences), (1860), 23 Vict., c. 23 (criminal procedure), (1862), 25 Vict., c. 10 (offences against the person), Nova Scotia (1855), 18 Vict., c. 9 (evidence).
[9] These were consolidated in the Revised Statutes of 1886.

Between 1869 and 1892 a series of enactments continued this process[10] and by the latter date much of the bulk of the work of consolidation had been done. However, there still existed a large amount of pre-Confederation provincial criminal legislation which resulted in the Canadian criminal law presenting a more or less confused picture (depending upon whether the date was closer to 1869 or 1892) of such common law offences as were introduced into the Provinces[11] and remained unaltered, provincial legislation which had not been repealed by its assumption under Dominion authority[12] and the ever increasing body of Dominion statute law.

For a large part of the nineteenth century, the idea of codification of the criminal law had been mooted in England and elsewhere in the English-speaking world. In 1838 in England the first Criminal Law Commissioners were appointed to report on and draft such a code and in 1878, largely as a result of the work of Sir James Stephen, the English Draft Code, dealing with indictable offences, was formulated. Although this formed the basis of two Bills presented to the English Parliament, both attempts to introduce a comprehensive criminal code were abortive.

In Canada, the Bill Respecting Criminal Law of 1892 was expressed by Sir John Thompson to be founded on the Draft Code prepared by the Royal Commission in Great Britain in 1880, on Stephen's *Digest of the Criminal Law*, the edition of 1887, Burbidge's *Digest of the Canadian Criminal Law* of 1889 and the Canadian statutory law.[13] He quoted from the *Commission Report* to define the codification as follows:[14]

> It is a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities and other defects which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure, both as to indictable offences and as to summary convictions.

The proposed Code contained little in the way of change. In introducing the Bill on its second reading, the Attorney General stated:[15]

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[10] For example, Cruelty to Animals, 1880, Penitentiaries, 1883, Procedure, 1887.

[11] The dates, of course, vary. Quebec, 1763; Ontario, 1792; British Columbia, 1859; Manitoba, Saskatchewan, Alberta, and the Northwest Territories, and the Yukon, 1870; Nova Scotia, New Brunswick and Prince Edward Island, presumably from the date of their legislative independent existence in 1758.

[12] Authority to repeal such provincial legislation passed to the Dominion. *R.* v. *Halifax Electric Tramway Co.* (1898), 1 C.C.C. 424.

[13] Hansard, vol. 1 (1892), p. 1312. [14] *Ibid.* [15] *Ibid.*, p. 1313.

> Substantially it follows the existing law. It proposes, however, to abolish the distinction between principals and accessories. It aims at making punishments . . . more uniform. It discontinues the use of the word "malice" and the word "maliciously". . . . It defines murder and in cases of doubt settles what murder is. With that view it defines provocation . . . . It deals with the offence of bigamy . . . . It proposes to abolish the term "larceny" and to adopt the term "theft" instead . . . . With regard to the law of procedure, I propose to abolish the distinction between felonies and misdemeanours . . . . It is proposed likewise to abolish the provision of the existing law with regard to venue . . . . It abolishes writs of error and provides an appeal court.

The debate on the Bill did not prove particularly edifying. The Grand Jury, though threatened, was saved from abolition. There was some discussion on territorial jurisdiction, and an argument, which has surprisingly modern over-tones, on the wisdom and applicability of the McNaughton Rules. The House was unhappy about some of the powers of arrest which were to be given to peace officers and to private persons, and several of the proposed maximum penalties were changed without very much discussion. On June 28th, 1892, after the third reading, the Bill finally passed the House, received Royal Assent on July 9th, 1892, and came into force on July 1st 1893.[16]

A series of amendments resulted in the consolidations of 1906 and 1927, but neither of these could be called revisions. In 1947, a Royal Commission to Revise the Criminal Code was appointed, reported in 1952 and in 1953 the Revised Code was enacted.[17] This revision did not greatly alter the structure or substance of the original Code, no attempt being made to consider or redefine fundamental criminal law concepts. The system of punishments was rationalized, certain procedural reforms were introduced and a relatively small number of specific offences were either redefined or introduced.

One significant change was that enacted by section 8, stating:

> 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 . . . .

The original Code, while comprehensive, did not purport to reduce

[16] (1892), 55-56 Vict., c. 29. [17] S.C., 1952-54, c. 51.

all the Dominion criminal law into one statute. It preserved a number of previously enacted provisions, listed in the schedule, and while section 5 provided that no person shall be proceeded against for any offence against any Act of the Parliament of England, Great Britain or the United Kingdom unless made expressly applicable to Canada, it was silent as to the applicability of common law offences. The British North America Act had preserved the existing common law (insofar as received and not altered by statute) for the original provinces[18] and a series of Acts[19] provides the same for the other provinces and territories. It is thus not surprising to find that in the 1906 consolidation various sections appeared expressly preserving the criminal law of England in various provinces. Those not listed in the Code, had the criminal law preserved in other statutes.[20] Prior to the enactment of section 8 of the 1953 revision, prosecutions were successful for such common law offences as abuse of office in taking fees wrongfully,[21] public mischief,[22] champerty and maintenance[23] and perhaps barratry.[24]

It was thus not until 1953 that all common law offences were abolished throughout Canada. It is interesting to note that, in contrast, the first English Draft Code proposed the abolition of all common law offences not specifically enacted in the Code. It could not, however, be maintained that prosecution for common law offences was a very frequent occurrence in Canada after 1892, and the Revision Commissioners decided that there was no point in preserving them after 1953. Instead, all those thought applicable to Canada were specifically enacted, such as compounding indictable offences,[25] indemnification of bail,[26] public mischief[27] and common law conspiracy.[28] On the other hand, faced with the difficulty, if not impossibility of attempting to codify common law defences, the Commissioners merely recommended, and Parliament enacted, section 7 (2) providing:

> 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

[18] S. 129.
[19] *E.g.*, the Alberta Act, 1905, the Saskatchewan Act, 1905, *etc.*
[20] Criminal Code, s. 10 for Ontario; s. 11 for British Columbia; s. 12 for Manitoba.
[21] *R.* v. *Graham* (1910), 17 O.W.R. 660, 2 O.W.N. 326, 17 C.C.C 264.
[22] *R.* v. *Leffler* (1936), 67 C.C.C. 330.
[23] *R.* v. *Bordoff* (1938), 70 C.C.C. 35.
[24] *MacKenzie* v. *Goodfellow* (1908), 13 O.W.R. 30.
[25] Criminal Code, s. 121.
[26] Criminal Code, s. 119 (2) (d).
[27] Criminal Code, s. 120.
[28] Criminal Code, s. 408 (2).

> under this Act or any other Act of the Parliament of Canada, except insofar as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

The Criminal Code does not purport, of course, to contain all the criminal law of Canada. A surprisingly large number of federal statutes, such as the Extradition Act,[29] Official Secrets Act,[30] Penitentiary Act,[31] Customs Act,[32] Post Office Act[33] and the like contain important criminal provisions respecting various acts, but two in particular the Juvenile Delinquents Act[34] and the Narcotic Control Act[35] should be noted.

After some seventy-five years, it is possible to evaluate the impact of the Code on the criminal jurisprudence of Canada and to make some estimate of the trends which appear to be emerging. The Code, being a codification to a large extent of the existing common law is not a Code in the civil law sense of being the *fons et origo* of the law. Most of its substantive provisions have their counterpart in English and Commonwealth law, both statutory and common law. It is not surprising, therefore, that Canadian courts have, in the past, relied heavily upon precedents from England. Nevertheless, the codification entailed the development of a substantive amount of Canadian criminal jurisprudence. While it is true that the original Code of 1892 followed very closely the English Draft Code which, in turn, followed closely the existing common law, the considerable number of alterations, developments and amendments has led to an ever-increasing gap between Canadian and English criminal law. Indeed, in all the major areas, it is difficult to think of many sections of the Code in which interpretations by English courts would be, in themselves, of immediate relevance.

Offences against the person, particularly homicide, many sexual offences, most property offences, offences relating to the administration of justice, the law relating to parties to offences, the provision respecting habitual criminals and dangerous sexual offenders as well as practically the whole of the law of procedure bear no relation to existing criminal law of England.

The introduction of codal legislation necessarily reduces the scope of judicial law-making, but no Code of this character can be so precise as to reduce the judiciary's function to that of a mere administrator and the Criminal Code is less precise than

[29] R.S.C., 1952, c. 322, as am.
[30] R.S.C., 1952, c. 198.
[31] R.S.C., 1952, c. 206, as am.
[32] R.S.C., 1952, c. 58, as am.
[33] R.S.C., 1952, c. 212, as am.
[34] R.S.C., 1952, c. 160.
[35] S.C., 1961, c. 35.

many others. Furthermore, while section 7(2) preserves the common law defences, a number have been altered by the Code to the extent of requiring specifically Canadian interpretations, such as, for example insanity or compulsion. In addition, the peculiar provisions relating to homicide necessitate that even where English decisions are adopted or considered (such as *Bratty* v. *A.-G. Northern Ireland*[36] or *A.-G. Northern Ireland* v. *Gallacher*[37]) their application is by no means automatic.

The law relating to homicide, for example, illustrates the development of Canadian law by the judges even within the confines of fairly precise legislation. In the 1892 Code murder was defined along the lines set out in the English Draft Code presenting a more specific definition than "unlawful killing with malice aforethought" but not, probably, altering the existing common law. Murder in the commission of a felony was reduced in scope to those deaths caused to facilitate the commission of or flight from certain defined offences or doing certain other acts for the same purpose. Those offences were treason, piracy, escape from prison, resisting arrest, murder (of someone other than the victim), rape, forcible abduction, robbery, burglary and arson. To this list, the Canadian Criminal Code added, in 1947, indecent assault.[38] Also in 1947, paragraph (d) was added to section 202 as follows:

> or 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.

Interestingly, while the House of Commons wished to preserve some element of *mens rea*, following the Supreme Court decision in *R.* v. *Hughes*[39] by requiring the accused to *use* the weapon for a purpose, the Senate insisted that having a weapon upon his person should be sufficient, so long as there was a causal connection between possessing the weapon and the death. This view prevailed and in *Rowe* v. *The Queen*,[40] the Supreme Court agreed that this was the effect of the amendment.

In 1961,[41] the legislature adopted the distinction between capital and non-capital murder by retaining murder as a capital offence only where the death is planned and deliberate or where, in the circumstances, of the "constructive murder" situations the

[36] [1961] 3 All E.R. 523, 46 Cr. App. Rep. 1.
[37] [1961] 3 All E.R. 299.
[38] S.C., 1947, c. 55, s. 6.
[39] [1942] S.C.R. 517.
[40] (1951), 100 C.C.C. 97.
[41] S.C., 1960-61, c. 44, s. 1.

offender causes death by his own act, or where the deceased is a law enforcement officer. The phrase "planned and deliberate" is not a happy choice. Apart from the fact that the meaning is not clear, it is the sort of phrase upon which it is difficult adequately to instruct a jury.[42] But over the past six years the courts have succeeded in equating planning and deliberation with a rational choice to kill. In *More* v. *The Queen*,[43] the Supreme Court excluded an act committed on a sudden impulse and acts committed under the influence of alcohol or provocation have also been held not to be within the definition of capital murder.[44] From *Bleta* v. *The Queen*[45] it is also clear that a mental condition falling short of insanity within section 16 may nevertheless prevent a killing from being planned and deliberate. Although these interpretations have been criticized as introducing a concept of diminished responsibility, in fact they merely define more specifically the phrase "planned and deliberate". It is true that some difficulty is presented in instructing juries since on a charge of capital murder, drunkenness or provocation may operate as a defence to murder, thus reducing the offence to manslaughter or only as a defence to capital murder, thus reducing it to non-capital murder. With insanity defences, there may be the four verdicts of not guilty, not guilty by reason of insanity, guilty of capital murder or guilty of non-capital murder. Furthermore, the jury must be instructed[46] both on the Code definition of provocation or insanity and also on that type of provocation or insanity which may not be a defence but which would prevent a murder from being planned and deliberate.

The problem of driving offences also gives some clue to the trends in Canadian jurisprudence. Although the cases cause difficulty because of the constitutional questions, the solution has involved a thorough analysis of negligence and the concept of *mens rea*. Under the Code, section 221(1) provides for the offence of criminally negligent driving (criminal negligence being defined in section 191 as a wanton or reckless disregard for the lives or safety of other persons) and section 221 (4) provides for the offence of driving in a manner that is dangerous to the public. In addition, all Provinces have an offence of careless driving, driving without due care and attention or some such similar offence. The

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[42] See *R.* v. *Widdifield* (1962), 6 Crim. L.Q. 152 for a charge to the jury.
[43] [1963] 3 C.C.C. 289, 41 C.R. 98.
[44] *R.* v. *Mitchell*, [1965] 1 C.C.C. 155, 43 C.R. 391.
[45] [1965] 1 C.C.C. 1, 44 C.R. 193.
[46] See *R.* v. *Mitchell*, *supra*, footnote 44.

Supreme Court in *O'Grady* v. *Sparling*[47] was able to uphold the constitutional validity of the provincial legislation on the grounds that section 221 was concerned with criminal law and the provincial statute with the regulation and control of highway traffic. However, at that time section 221 (4) had not been enacted and the court was solely concerned with differentiating between negligent driving and careless driving, being able to hold that the former, being criminal, required advertent negligence, while the latter did not.

In *Mann* v. *The Queen*,[48] the court was again required to rule on the validity of the provincial legislation, but with the added complication of section 221(4), dealing with dangerous driving. Although the court upheld the validity of the impugned legislation, the *ratio decidendi* was far from clear. Certainly, *O'Grady* v. *Sparling* authoritatively decided that the provincial legislation was constitutionally *intra vires*, but if Parliament had occupied the field of "inadvertent negligent driving" then, it was argued that area had been pre-empted by the federal legislation in section 221(4). The court rejected this argument, holding that section 221(4) legislated against driving in a manner that was dangerous and did not affect provincial legislation dealing with careless driving. As might be expected, the courts were finally asked in *R.* v. *Binus*,[49] in effect, to explain the difference between the two provisions. It was held that *mens rea* was not required either under section 221(4) or under the provincial legislation, but that if careless driving contained the added element of dangerousness to the public, then it moved out of the provincial offence into the federal offence. Since this means that they are merely different degrees of the same act, one might ask whether the original ruling that the provincial legislation is *intra vires* (decided by *O'Grady* v. *Sparling* and accepted in *Mann* v. *The Queen*) should not have been queried, after the re-enactment of section 221(4).

However, whatever the constitutional difficulties, the Canadian courts have clearly accepted that *mens rea* can consist in "advertent negligence" and, although in other areas have reiterated the necessity of the requirement of *mens rea*,[50] have been forced to conclude

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[47] (1960), 128 C.C.C. 1, 33 C.R. 293.
[48] [1966] 2 C.C.C. 273, 47 C.R. 400.
[49] [1966] 4 C.C.C. 193, 48 C.R. 279, upheld by the Supreme Court.
[50] For example, *R.* v. *King* (1961), 129 C.C.C. 391, 34 C.R. 264 (driving under the influence of a drug); *Beaver* v. *R.* (1957), 118 C.C.C. 129, 26 C.R. 193 (possession of drugs).

that neither dangerous nor careless driving requires any subjective intent.

It is not, I think, unfair to characterize the basic approach of the Supreme Court to criminal matters as traditional. Looking at recent decisions, one has difficulty in seeing any outstanding landmarks in criminal jurisprudence, though this is not to say that there have not been a number of welcome judgments. The development of the decisions on capital murder has been encouraging, and the cases involving obscenity,[51] drunkenness,[52] *mens rea*,[53] automatism,[54] and conspiracy[55] have been helpful. Less encouraging have been the court's decisions on the restricted nature of the defence of coercion[56] or the circumstances of the admissibility of confessions.[57]

The law of evidence and the law of procedure have remained remarkably static over the past century, but this is due less to the courts than to the legislature. Within the relatively detailed federal and provincial Evidence Acts, the courts have had little chance to develop the law, though the Supreme Court has, as far as possible, preserved the right of the accused to choose not to testify, however much this right has been whittled away by provincial legislation.[58] Similarly, the procedural rules still stem very largely from the Criminal Procedure Act of 1869[59] with little judicial development.

In the penological area, some considerable progress has been made, though the situation is by no means one to induce complacency. The *Fauteux Committee Report* of 1956[60] is a significant document. Although much of it remains unimplemented, it is a statement of the essential interrelation between substantive criminal law, the administration of justice and the effective use of criminal sanctions. Many provincial Departments of Reform Institutions have embarked upon programmes of building and development

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[51] *R.* v. *Brodie* (1962), 132 C.C.C. 161, 37 C.R. 120; *Dominion News & Gifts (1962) Ltd.* v. *R.*, [1964] 3 C.C.C. 1, 42 C.R. 209; *R.* v. *Cameron*, [1966] 4 C.C.C. 273, 44 C.R. 49.

[52] *R.* v. *Mitchell, supra*, foonote 44; *R.* v. *Lachance*, [1963] 2 C.C.C. 14, 39 C.R. 127.

[53] See cases cited, supra, footnote 50.

[54] *Bleta* v. *R., supra*, footnote 45.

[55] *Wright, McDermott and Feeley* v. *R.*, [1964] 2 C.C.C. 207; *Kour* v. *R.*, [1964] 2 C.C.C. 97, 42 C.R. 210.

[56] *R.* v. *Carker (No. 2)*, [1967] 2 C.C.C. 190.

[57] *O'Connor* v. *R.*, [1966] 4 C.C.C. 352, 48 C.R. 271.

[58] See *Batary* v. *A.G. Sask.*, [1966] 3 C.C.C. 152, 46 C.R. 35.

[59] (1869), 32-33 Vict., c. 29.

[60] Report of a Committee to enquire into the principles and procedures followed in the remission service of the Department of Justice of Canada (1956).

to conform to more enlightened concepts of rehabilitation. The establishment of a system of parole under the National Parole Board has similarly constituted a step in the right direction.

This brief survey of the development of criminal law in Canada over the past one hundred years pinpoints several defects and it would be beneficial to see what lessons can be drawn.

Even the original Code of 1892 was not subject to the intense and sophisticated enquiry which one would have expected of such a major piece of legislation. Most of the preliminary work had been done by the English Commissioners and it is clear, from a reading of *Hansard*, that the movers of the Bill Respecting Criminal Law were content to present a combination of the English Draft Code and the Canadian statutory law, as explained by Burbidge's *Digest*. This is not to say that they were not aware that some of the English Draft Code was not applicable, nor that conditions in England were not necessarily duplicated in this country. It does mean, however, that there was no distinctly Canadian examination of any of the fundamental premises upon which the Bill was based. It was, essentially, a codification of existing law.

The numerous amendments present a shocking indictment of the process of criminal legislation. Maximum penalties have been fixed without the slightest regard for the objectives in mind;[61] major alterations have been based upon the panic induced by isolated criminal activities;[62] compromises between the Senate and the House have resulted in legislation supportable on no grounds;[63] and absurd formulas adopted which disguise real aims.[64] The only revision, that of 1953, should not be underestimated for the Commissioners did, indeed, remove anomalies, rationalize punishments and make procedural reforms. But their terms of reference were limited in the extreme and did not change the fundamental reflection of the Code. Thus, tampered with and tinkered with, it remains the monument of the eminent Victorian, Sir James Stephen.

Two striking object-lessons emerge. The first is that the process of criminal legislation must be removed from the petty political arena as quickly as possible, and the second is that criminal law can no longer be regarded in isolation from the other aspects of

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[61] See Hansard debates on the Draft Bill, vol. II (1892), pp. 2840, 2846, 2964, *et seq.*

[62] For example, Hansard, vol. VI (1947), pp. 5026-5037.

[63] *E.g.*, s. 202 (d).

[64] For example, the definition of obscenity, s. 150 (8); the capital murder provisions, s. 203 A.

the criminal process, the investigation, the trial and the disposition of the offender.

To take the second lesson first, it may not, at first sight, make very much difference whether one has a Criminal Code or a Penal Code, but a Criminal Code starts from a fundamental premise that the substantive and procedural "criminal law" can be neatly tied up in a package and presented as a comprehensive unit. It presupposes that one can talk in the abstract about "a crime", about, for example, the offence of abortion, or of selling obscene literature, or of murder. It presupposes, also, that the legislative problems can be solved as a literary exercise—the problem of adequately defining, for example, obscene literature, of delimiting the scope of capital murder or of establishing the criteria for finding a person a habitual criminal. In fact, what has become apparent in the last century is that the whole criminal process is not a series of compartmentalized topics. The substantive criminal law cannot be divorced from its social context, and criminal legislation is at least as much a matter of analysing the social problem, discussing alternatives, thinking of the investigative problems, deciding upon the sanction and weighing the consequences as it is of proper drafting. In my opinion, any Code has to reflect all of these issues and this is better done in the framework of a comprehensive Penal Code than in the framework of an isolated Criminal Code, for the former would, insofar as it is possible within the federal jurisdiction, provide for the conduct of investigation, the process of trial, the technique of sentencing and the disposition of the offender, as well as for "criminal law and procedure".

The difficulty in this country has been the lack of adequate machinery for reform. There have been Commissions and Committees which have had significance. The Fauteux Committee has already been mentioned, and the Archambault Commission[65] of 1938 presented a report which was forward-looking and useful. One must not overlook the worth of the reports of more recent departmental committees on capital punishment,[66] juvenile delinquency[67] and hate propaganda.[68] But such *ad hoc* enquiries are not at all the answer to the difficulty. There has never been any enquiry into the fundamental basis of the Code, as such, nor can

[65] Royal Commission to Investigate the Penal System of Canada (1938).
[66] Capital Punishment; material relating to its purpose and value, Department of Justice (1965).
[67] Department of Justice, Committee on Juvenile Delinquency (1965), Allen J. Macleod, Q.C., Chairman.
[68] Department of Justice Special Committee on Hate Propaganda in Canada (1966), Maxwell Cohen, Q.C., Chairman.

ad hoc recommendations ever take the place of such an enquiry There is no machinery for putting even those recommendations in their proper social and legislative context.

This leads to the second object lesson. All legislation in the Canadian system must be political in the sense of being an enactment of the Sovereign in Parliament. No one, presumably, would wish it otherwise. But both the House and Senate need, and are entitled to receive advice and the more aware one becomes of the real significance of criminal legislation, the more urgent becomes the need for advice. No one can give advice without the data which only research can bring forth, the statistics upon which assumptions are based, comparative studies, social and moral implications, how isolated proposals will fit into the general scheme and so on.

The most urgent need, it appears is for some sort of permanent criminal law reform machinery which will undertake these tasks and will tender advice to the appropriate Minister. What he does with it, is, of course, a political question which is for him and Parliament to decide. But the present hit-or-miss method of reform which is sparked by a newspaper story, by a private member's interest, by an influential agitator, has highlighted the most outstanding problem of Canadian criminal law, the simple problem of criminal legislation.

In the judicial area there have been problems of a different character. The Criminal Procedure Act of 1869 laid the foundation for the wide jurisdiction now exercised by magistrates and as a result the Canadian trial process is among the most expeditious in the world. Somewhere between eighty-five per cent and ninety per cent of all criminal cases are tried by magistrates in the first instance either on summary conviction or on speedy trials of indictable offences. Many involve pleas of guilty and in most of the others the only disputes are factual. Appeals to the Supreme Court are so restricted[69] that in the overwhelmingly large majority of cases, the final court of appeal, even on questions of law, is the provincial Court of Appeal. Apart, entirely, from the fact that in many instances local authorities have not realized the importance of the magistrate in the administration of criminal justice and still provide him with inadequate facilities and are satisfied with inadequate qualifications, there is no court to which the lower trial court can look for guidance on practice points or sentencing principles.

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[69] Criminal Code, ss. 597-600.

Allowances being made for the inadequacies and dangers of generalizations, provincial courts of appeal have not assumed the role of *assisting* magistrates, as has the Court of Criminal Appeal in England. They also exercise civil appellate jurisdiction, and do not, with any degree of regularity give reasons for sentence variations or issue generally applicable instruction on procedural and practice matters. One sees, therefore, not only variations from province to province, but also variations from jurisdiction to jurisdiction within the same province. Nor is there any court, apart from the Supreme Court of Canada, which can give an authoritative interpretation of Canadian criminal law, and, in view of its limited appellate jurisdiction, it is not unusual to find the same section being interpreted differently in different provinces.[70]

One may question whether the civil appellate system is necessarily the best method of dealing with criminal appeals. Is it possible that a Supreme Criminal Court of Canada would have the time to accept wider grounds of appeal, issue directions to lower courts, co-ordinate practice and procedure matters and so on? Perhaps some jurisdictions could already usefully adopt a provincial Court of Criminal Appeal. It is not possible, at this stage, to do any more than pose the questions, but rather than accept the present *status quo* without question, a fruitful line of enquiry and research may well lie into the whole question of the administration of criminal justice in this country. Not only might the appeal system be modernized, but the entire pre-trial process,—the preliminary hearing, the grand jury and so on—be reorganized.

At the time of writing, the *Report* of the Canadian Committee on Corrections, established in 1965 has not appeared. The Committee was appointed to "study the broad field of corrections from the initial investigation . . . through to the final discharge of a prisoner . . . but excluding consideration of specific offences except where such consideration bears directly upon" other matters within its terms of reference. The Committee has stated that it intends to study the investigation of offences, the procuring of the attendance of the suspect in court, representation of the suspect, conviction, sentence, and correctional services. The *Report* may constitute a major step forward in the field of corrections in Canada and criticisms of developments over the past hundred years may be pointless. However, the task of the Committee is enormous and it may be doubted whether it is feasible to expect

[70] Ss. 150, 149, 222, 223 are examples of provincial disagreements in interpretation.

significant concrete proposals in a limited period of time from a Committee with relatively limited resources. The entire problem of sentencing is obscured by lack of statistical information and of any definite philosophy or policy.[71] Random attempts to improve the situation such as judicial conferences and seminars should by no means be discouraged but are, at best, only partial answers to the problem.

In the correctional field itself, the divided jurisdiction between federal and provincial responsibilities makes it difficult to generalize without being unfair. By and large, advances in the provincial correctional services have far outstripped those in the federal. British Columbia, Saskatchewan and Ontario, while far behind other jurisdictions such as California, New York and Massachusetts in the field of probation, after-care services and rehabilitation techniques, are, nevertheless, many years in advance of other provinces. At the same time, federal training, education and treatment programmes remain inadequate and many of the institutions themselves are archaic and totally unsuited to modern concepts. The parole service lacks the necessary resources to ensure proper selection and meaningful supervision, though this is not to deny the progress it has already made. But behind these generalized criticisms lies the fact that advances have been and are being made, and it is perhaps impatience that they are not being made quickly or scientifically enough that generates the criticisms.

Whatever one may consider the function of the criminal law to be, it is apparent that the criminal process is a complex interaction of sociological, psychological and legal phenomena—and doubtless this is true of the whole legal process. Whereas in the year 1867 the criminal law was considered to be virtually the exclusive preserve of the criminal lawyer, today it is recognized that no adequate system can be devised without the help of other specialists. The function of the law is to resolve the problems of society, but the lawyer does not abdicate his responsibility by turning to others for assistance. The plain fact of the matter is that the lawyer can no longer himself answer the questions he must ask. The development of the law and the legal system must be the responsibility of the lawyer and must remain his responsibility, for he, alone, knows what questions to ask. He must also know of whom those questions should be asked.

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[71] Currently, two projects, one under Professor Hogarth for the Centre of Criminology and one under W. B. Common, Q.C., for the Canadian Bar Research Foundation, are being conducted into aspects of this problem.

Nowhere is this more apparent than in every area of the criminal process. It is not so much the techniques which need examining as the fundamental premises upon which the entire structure is based. One talks blandly about the rules of evidence without considering whether the conceptions of inference-finding and assumption of relevance and weight upon which they are based are valid. How can anyone tell what acts ought to be criminal in character without examining the function of the criminal law in society? Could not the sociologist and psychologist usefully analyse the effects and methods of police investigation and the role of the police in the community?

The sad conclusion is that the criminal law has not progressed in one hundred years nor can it progress beyond a slight re-shuffling within assumed boundaries so long as those boundaries are accepted as absolutes. There have, of course, been changes that, within the structure, have been beneficial and to that extent advances have been made. But it is not a cause for congratulation that Sir James Stephen would be quite at home with the Criminal Code of 1967.