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THE CANADIAN CRIMINAL CODE, 1892-1992

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The Criminal Code of Canada received royal assent on July 9, 1892, and came into force on July first, 1893. In the first part of this article, the author traces in broad outline the history of the Code over the last one hundred years. In the second part of the article, he considers in more detail the development of four specific areas: murder, sexual offences, obscenity and appeals. In conclusion he asks whether, in making any future changes in the Code, it will be necessary to include provisions on the general principles of criminal liability; or whether that is necessary given the decisions of the Supreme Court of Canada since the coming into force of the Canadian Charter of Rights and Freedoms. However that question be answered, Parliament is, of course, still the only body with the authority to create new offences, but even then its competence is now circumscribed by judicial interpretation of the Charter.

Le Code criminel du Canada a reçu la sanction royale le 9 juillet 1892 et est entré en vigueur le premier juillet 1893. Dans la première partie de cet article, l'auteur fait à grands traits l'histoire du code au cours des cent dernières années. Dans la seconde, il considère plus en détail le développement de quatre domaines particuliers: meurtre, infractions sexuelles, obscénité et appels. En conclusion, il se demande si, pour modifier le Code criminel à l'avenir, il sera nécessaire d'inclure des dispositions sur les principes généraux de la responsabilité criminelle ou si cette mesure sera inutile étant donné les décisions de la Cour suprême du Canada depuis la mise en vigueur de la Charte canadienne des droits et libertés. Quelle que soit la réponse à cette question, le Parlement reste naturellement la seule autorité ayant compétence pour créer de nouvelles infractions, quoique, là encore, sa compétence soit maintenant délimitée par l'interprétation judiciaire de la Charte.

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¹ S.C. 1892, c. 29. See now R.S.C. 1985, c.-46.

Introduction

On July 9, 1892 the Criminal Code of Canada received Royal Assent and it came into force on July 1, 1893. Passage of the Code through Parliament had been surprisingly swift and non controversial—some two months from the Bill's second reading to final approval.² This was, without doubt, the result of careful planning and strategy by the Minister of Justice, Sir John Thompson, ably guided and supported by his former Deputy, Mr. Justice George Burbidge of the Exchequer Court of Canada and his current Deputy Robert Sedgewick, later Mr. Justice Sedgewick of the Supreme Court of Canada. Nor was there, with one great exception, any serious opposition from the Bench and Bar, though several judges and barristers offered more or less helpful criticisms and suggestions. Probably this was because, as was made perfectly clear on several occasions, the new Code was more in the nature of a consolidation of existing law than any radical new departure.

The only serious opposition came from Mr. Justice Henri Taschereau of the Supreme Court. He was the author of the bestselling *Criminal Law Consolidation*,³ an annotated collection of Canadian criminal statutes, most of the annotations relying heavily on English precedents. He objected to the concept of a Code at all, largely on precisely the same grounds that had resulted in the defeat of the English attempts at codification a few years before, *viz.*, that a Code would hamper the judges in the creation of a developing and socially conscious criminal law, though his objections are a little difficult to square with his earlier offer (politely declined) to draft a Canadian Criminal Code. After the passage of the Code, his criticisms became more specific and in an open letter to the Attorney General he listed a number of these ranging from the trifling to the substantial. Within a year, however, his *Criminal Law Consolidation* had become, in its third edition, Taschereau's *Criminal Code of Canada*,⁴ also a best seller, and criticism gradually faded away, though not before several amendments had met most of his objections.

The hundred years from July 1, 1893 to the present are what I want to consider, from a new but hardly revolutionary Code to this post-Charter era. It is ninety years of steady but slow development and ten years of explosive re-evaluation. I propose, after briefly considering the course of the Criminal Code in general, to take one or two particular topics and

² For a detailed study of the events leading up to the introduction of the Code, see Graham Parker, *Origins of the Canadian Criminal Code*, in D.H. Flaherty (ed.), *Essays in the History of Canadian Law*, vol. I (1981), p. 249. Material may also be found in D. Brown: *The Genesis of the Canadian Criminal Code* (1989), and in M.L. Friedland, R.S. Wright's *Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law*, in M.L. Friedland, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (1984), p. 1.

³ (1888).

⁴ (1893).

trace their progress over the past century; and then, by way of conclusion to consider how the Code might develop in the future.

I. General Development

Little had actually changed when Canadians woke up on that July 1st, though this is not to denigrate the work of those involved in the drafting of the Code since it was essentially designed to be only a consolidating operation. But reforms *were* made. In substantive law, the offence of murder was redefined and clarified; larceny was replaced by the new offence of theft; bigamy was slightly altered; and provocation given a statutory definition. The classification of offences into felonies and misdemeanours was abolished, as was the distinction between principals and accessories. Procedurally, venue was abolished as a *sine qua non* for jurisdiction, writs of error were abolished and, arguably most important of all, a regular, if, to us, a somewhat primitive, system of appeals in criminal cases was established, which lasted in substance until the great changes of 1923 which are considered below. It was not surprising that Taschereau could so easily switch from an annotated Criminal Law Consolidation to an annotated Criminal Code.

The new Code contained ten "Titles" and 983 sections. The first Title contained the introductory provisions, definitions, matters of general defence and sections dealing with parties to offences and attempts. Title II dealt with treason and offences against public order and Title III with offences against the administration of justice. Title IV contained offences against religion, morals, and "public convenience" (largely nuisance, gambling and vagrancy). Title V was concerned with offences against the person, ranging from murder and assault to defamatory libel, while Title VI covered offences against property rights and contract and trade rights, including, in Part 40, the provisions relating to conspiracies and punishments for attempts and accessories. It was a straightforward and logical arrangement and comes as no surprise to anyone used to our present Code.

Procedural matters were in Title VII and, as might be expected, this was the largest in the Code, and covered the entire process of arrest, jurisdiction, trials and appeals. Title VIII dealt with proceedings after convictions, notably punishments, while the remaining two short Titles concerned actions against public officials and references to repealed statutes and the like.

Schedule Two listed all those Canadian statutes and provisions which were repealed consequent upon the coming into force of the Code, but the Appendix specifically listed all pre-Code statutes that remained in force. These included such Acts as Treason of 1867,⁵ Firearms of 1877,⁶ Prize

⁵ S.C. 1867, c. 29.

⁶ S.C. 1877, c. 30.

Fighting of 1881⁷ and Fraudulent Marks of 1888.⁸ Section 129 of the then British North America Act⁹ had preserved “all laws” in force in the newly created Provinces “as if the Union had not been made”, subject to being repealed, abolished or altered by the Parliament of Canada or by the Legislature of the respective Provinces. The Acts creating new member Provinces of Confederation did the same for them.

Section 5 of the new Code enacted:

No person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain or of the United Kingdom of Great Britain and Northern Ireland, unless such Act is, by the express terms thereof, or by some other Act of such Parliament, made applicable to Canada or some portion thereof as part of Her Majesty's dominions or possessions.

The combined effect of Schedule Two, the Appendix, section 5 of the Code and section 129 of the British North America Act was, therefore, to preserve liability for common law offences as they had been received and remained unaltered by the Provinces before Confederation¹⁰ or by the federal government after Confederation and for such pre-1893 federal criminal statutes listed in the Appendix, but to abolish liability for Imperial criminal statutes (unless made expressly applicable to Canada) and those Canadian statutes repealed and listed in the Schedule. Taschereau, after mentioning some specific inaccuracies, commented:¹¹

One section out of thirteen of 53 V. c. 37 left unrepealed by sched. 2 is not in the appendix. It was clearly erroneously left unrepealed, but this one error added to the other ones shows with what carelessness the whole work has been done.

It was a little unfair to condemn the whole Code because of some inaccuracies in the repealing and preserving sections, but, then, Taschereau was still yet not reconciled with the concept of the Code. It was, in any case, a difficult task to ensure that those statutes (or, worse, those parts of statutes) still in force were so listed and those that had been repealed were correctly denoted. One would have thought that something was almost bound to be left out.

⁷ S.C. 1881, c. 30.

⁸ S.C. 1888, c. 41.

⁹ Now the Constitution Act, 1867-1982.

¹⁰ Actually, a statute of Upper Canada of 1800 and one of British Columbia of 1867 enacted the preservation of the common law in respect of criminal law for those two provinces. There was nothing unusual in that, but in the 1906 Consolidation of the code, those two provisions specifically appeared as s. 10 and s. 11 respectively. This seems to have been done *ex abundantia cautelarum* since, in view of s. 129 of the British North America Act, the position would have been the same anyway. The Territories were subsequently added to those specifically mentioned in the Code, as was Manitoba. The corresponding provisions in respect of other Provinces are to be found either in their applicable Acts, or, in the case of Nova Scotia, New Brunswick and Prince Edward Island in the common law itself as part of the doctrine of acquisition by settlement.

¹¹ Criminal Code (3d ed., 1893), p. 982.

No attempt was, however, made to codify exhaustively the common law defences and section 7 provided:¹²

All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith.

As was said in the Report of the English Commission on a draft Code:¹³

We regard this as one of the most difficult as well as most important portions of the draft Code. We do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risks of a code being so framed as to deprive an accused person of a defence to which the common law entitles him, and that it might become the duty of the Judge to direct the jury that they must find him guilty, although the facts proved that he had a defence on the merits. . . . While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law, so far as it affords a defence, should be preserved in all cases not expressly provided for.

Between 1892 and 1899, several amendments were passed, mostly of a textual nature to meet some of Taschereau's criticism, though there were substantive provisions relating to gambling offences and combinations in restraint of trade. Major amendments were passed in 1900¹⁴ in two main areas, namely theft and other property offences and obscenity and various morals offences, and there were a few other amendments in subsequent years leading up to the first Consolidation of 1906.¹⁵ This Consolidation, apart from the amendments noticed, did not differ greatly from the original Code of 1892—various sections were repositioned, the amendments incorporated and the sections renumbered.

Between 1906 and the next Consolidation in 1927,¹⁶ there were almost annual amendments, a large part of them being procedural in nature, probably the most important being the new appeal procedures of 1923¹⁷ discussed below. Those that were concerned with substantive law were generally of a non-controversial tidying-up nature, 1919 for example, seeing the introduction of the offences of failing to stop after an accident and joy-riding added to the existing offence of "furious driving".¹⁸ To these, in 1921, was added the then new offence of intoxicated driving.¹⁹ But, all in all,

¹² The present s. 8(3) (R.S.C. 1985, c. 46) repeats this provision with some alteration. Taschereau objected to the section being limited to common law defences only to charges "under this Act". Section 8(3) now refers to "proceedings for an offence under this Act or any other Act of Parliament".

¹³ In reference to the proposed s. 19.

¹⁴ The Criminal Code Amendment Act, 1900, S.C. 1900, c. 46.

¹⁵ R.S.C. 1906, c. 146.

¹⁶ R.S.C. 1927, c. 36.

¹⁷ S.C. 1923, c. 41.

¹⁸ S.C. 1919, c. 46, s. 9.

¹⁹ S.C. 1921, c. 25, s. 3.

the 1927 Consolidation was not too different in either form or substance from the original Code of 1892 save that the cumbersome division into Titles was deleted in favour of the simple division into Parts, with which we are familiar today.

This piece-meal approach continued after 1927, with the Code getting steadily larger and more complicated as amendment followed amendment without any attempt being made to re-examine basic principles. In 1938, the offence of reckless driving was created and the offence of prohibited driving after suspension of a licence.²⁰ Perhaps the most controversial items in this period were the introduction, in 1947, of the preventive detention provisions for habitual criminals and criminal sexual psychopaths and the addition of paragraph (d) to the then section 260 dealing with murder during the commission of offences when the accused had a weapon on him.²¹

After several years of prodding (in the later stages, largely by John Diefenbaker and Davie Fulton) the Honourable Stuart Garson announced to the House of Commons on January 31, 1949, the establishment of a Royal Commission on the Revision of the Criminal Code, the Order being signed on February 3rd. The somewhat unwieldy body was subsequently reduced in numbers and the Commission reported on February 22, 1952.²²

The Terms of Reference were to:²³

- (a) revise ambiguous and unclear provisions;
- (b) adopt uniform language throughout;
- (c) eliminate inconsistencies, legal anomalies or defects;
- (d) rearrange provisions and Parts;
- (e) seek to simplify by omitting and combining provisions;
- (f) with the approval of the Statute Revision Commission, omit provisions which should be transferred to other statutes;
- (g) endeavour to make the Code exhaustive of the criminal law; and
- (h) effect such procedural amendments as are deemed necessary for the speedy and fair enforcement of the criminal law.

Whether the limited terms of reference amounted to what we would now call a revision of the Code may be doubted. Certainly, the Commission was not charged with the task of re-examining the basis of criminal liability, of defining principles of liability or of making major amendments to the substantive law.

The resulting proposed Bill (somewhat revised from that proposed by the Commission itself) was introduced in the Senate which passed it in December of 1952. After its second reading in the Commons, it was referred to a Special Committee which, after lengthy and sometimes acrimonious

²⁰ S.C. 1938, c. 44, s. 16.

²¹ S.C. 1947, c. 55, s. 7 (adding paragraph (d) to s. 260), s. 18 (habitual criminals).

²² Report of the Royal Commission on Revision of Criminal Code.

²³ *Ibid.*, p. 2.

discussion, tabled its Report in May, 1953,²⁴ but prorogation and a general election intervened.

The Criminal Code Bill was one of the first items on the agenda of the new Parliament and the Bill was presented in the Commons, rather than the Senate. It was considered in Committee by the whole House from January 1954, and passed in April of that year. It was returned after Senate consideration in June and received Royal Assent on June 26th.²⁵ It came into force on April 1st, 1955.

The Report of the Commission contained nine pages of discussion and some thirty pages listing the changes. The Commission did what it had been instructed to do, simply and efficiently, and it is unfair to criticise it for not doing what it had not been instructed to do, but one cannot help feeling that an opportunity had been lost to propose real reform.²⁶ Indeed, this became apparent both during the deliberations of the Special Committee of the House of Commons that originally examined the Bill and during debates in both Houses. It is, in fact, from this date that the impetus for substantive criminal law revision stems. In particular, calls were made for enquiries into the law relating to insanity,²⁷ corporal punishment, lotteries and, of course, capital punishment.²⁸

The 1955 revision itself was, therefore, something of a disappointment, although one cannot deny that a great deal of work went into tidying up and simplification, and the disappointment stemmed not so much from the efforts of the Commission as from its limited terms of reference. The new Code preserved, in what is now section 8(3), common law justifications and defences save in so far as they are not altered by or are inconsistent with express provisions. But one major revision was the repeal of liability for common law offences. The Commissioners agreed with the English Commissioners in their report of 1880:²⁹

²⁴ Report of Special Committee on Bill 93 (1953).

²⁵ Criminal Code, S.C. 1953-54, c. 51.

²⁶ At the time, there may have seemed to be no need for re-examination. The Minister of Justice stated, in the Senate, on May 13, 1952:

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

²⁷ Resulting, ultimately, in the establishment of the McRuer Commission.

²⁸ Resulting in a departmental committee investigation (*Capital Punishment: Material relating to its Purpose and Value*, Dept. of Justice, 1965).

²⁹ P. 10.

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 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 be left in the hands of Parliament. If it should turn out that we have overlooked some common law offence, we think it is better to incur the risk of giving 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.

Hence, section 8, now section 9, provided, for the first time:³⁰

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. . . .

There are, however, criminal law matters besides defences and offences such as procedure and evidence, and section 7(1), now section 8(2),³¹ provided:³²

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. . . .

It is now clear that since the 1955 Code, there is, in Canada, no liability for common law criminal offences, criminal offences under Imperial legislation, and criminal offences under pre-Confederation legislation. On the other hand, common law defences remain, save in so far as modified or altered by the Code or other statute. Furthermore, procedural and evidentiary matters are, except as altered by the code or other Act, governed by the criminal law of England in force in a province immediately before April 1, 1955.³³ Section 129 of the then British North America Act, it will be recalled, also preserved "all laws" then in force subject to any repeal, abolition or alteration by Parliament. The question, therefore, does arise as to whether there can be anything left of any pre-Confederation criminal law. It cannot be as to substantive criminal offences—that is clear. Defences are also subject to continuing development by virtue of section 8(3).³⁴ If

³⁰ With a provision preserving the powers of the courts to punish for contempt.

³¹ With slight change in wording.

³² This combined into one section various sections of the former code that dealt with individual provinces.

³³ In the revision the words "immediately before the coming into force of this Act" were changed to "immediately before April 1, 1955".

³⁴ R.S.C. 1985, c. C-46.

it exists at all, then, it would have to be in some procedural or evidentiary area that has not been repealed, abolished or altered by federal legislation.

Certainly, the procedural sections of the Code are far from being complete and contain little delimiting the inherent powers of superior courts. There is nothing on the actual process of challenging potential jurors for cause, nor is there very much on the substantive law relating to prerogative writs.³⁵ In *Martin, Simard and Desjardins v. The Queen*³⁶ the accused sought *habeas corpus* with *certiorari* in aid and argued that the Ontario Habeas Corpus Act of 1866 was still in force and applicable, and that it permitted the court to review the merits of a committal for trial. The Supreme Court had no doubt that the Ontario Act was still in force, but, holding that on the facts even the merits had been decided against the accused, did not discuss any of the broader issues that might have been raised.³⁷ It is at least possible that some criminal procedural or evidentiary matters that are governed by the pre-1955 common law of a province or pre-1867 statutory law of a province are still in force and would result in a particular law or rule applying, even in criminal law, in one province and not another, so that the criminal law in Canada may not be entirely uniform, but it is difficult to envisage this really arising in practice.

Another major step in the 1955 revision was the formulation of a definition of criminal negligence, though, as is now apparent, whether that formulation has been successful may be open to question. Until 1955, there had been no definition at all, the former section 247 reading:³⁸

Everyone who has in his charge or under his control any thing whatever, whether animate or inanimate, or who erects, makes or maintains any thing whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and to use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

In fact, the Canadian courts had, over the years, worked out their own definition of criminal negligence derived from the English cases of

³⁵ The proviso to s. 9, *ibid.*, expressly preserves the powers of courts to impose punishment for contempt of court that they had immediately before April 1, 1955—in other words, that they had at common law.

³⁶ [1978] 2 S.C.R. 511, (1978), 41 C.C.C. (2d) 342.

³⁷ In fact, were this issue to be raised again in circumstances where there is merit in the applicant's case, the Supreme Court is most likely to rule that the Ontario Habeas Corpus Act really did no more than codify the common law and that the superior court has the power to go behind the mere warrant itself in either case: *R. v. Gamble*, [1988] 2 S.C.R. 595, (1988), 45 C.C.C. (3d) 204. See R.J. Sharpe, *The Law of Habeas Corpus* (2d ed., 1989), pp. 51 *et seq.*

³⁸ R.S.C. 1927, c. 36, s. 247, first enacted S.C. 1892, c. 29, s. 213.

*R. v. Bateman*³⁹ and *Andrews v. D.P.P.*,⁴⁰ which resulted in the test of wanton or reckless misconduct,⁴¹ now put in statutory form.⁴²

In addition, sentences were put on a more rational basis and various procedural amendments resulted in considerable simplification. While the Commissioners themselves favoured the abolition of the Grand Jury, since in their view this was an integral part of the machinery of justice in each province, they refrained from recommending it in the Report. The impetus for substantive criminal law reform arising out of the debates on the 1955 revision was responsible for the fact that since 1960 or so, the criminal law, general principles of liability, specific problems, basic defences, have been the subject of more study and more proposals for reform and revision than for the whole of the preceding seventy odd years.⁴³ Between then and the Charter of Rights and Freedoms⁴⁴ of 1982, there was, in Canada, some significant criminal law reform—hate propaganda, wire-tapping, sexual offences, gun control, young offenders. Since 1982, the process has been not so much one of criminal law reform as of criminal law re-evaluation. Some substantive offences have remained pretty much as they were first enacted a hundred years ago, some have changed beyond all recognition, while many are new offences that could not have been imagined in 1892.

Procedurally, the Code itself has not changed all that much save in a few particular areas such as appeals and pre-trial release, but the Charter has grafted on to the provisions of the Code safeguards and requirements that are still new.

II. *Specific Developments*

A. *Murder*

As examples of specific developments, let me take one or two areas of change, beginning with murder. The 1892 provisions were not merely

³⁹ (1925), 19 Cr. App. R. 8, 94 L.J.K.B. 791 (C.C.A.).

⁴⁰ [1937] A.C. 576 (H.L.).

⁴¹ *The King v. Baker*, [1929] S.C.R. 354.

⁴² S.C. 1953-54, c. 51, s. 191. Another new offence was that of giving contradictory evidence, which, in its original form, concluded: "... unless [the accused] establishes that none of the evidence was given with intent to mislead". This was amended by the Committee to the form passed by Parliament (S.C. 1953-54, c. 51, s. 116(1)) and found in the present Code (R.S.C. 1985, c. 46, s. 124(1)) to read: "... but no person shall be convicted under this section unless the court ... is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead".

⁴³ Canada should not take too much credit for this. It is from this period that so many Commonwealth and common law Law Reform bodies of one sort or another stem. Nor should one underestimate the enormous influence that the publication of the Wolfenden Committee Report on Prostitution and Homosexual Offences and the ensuing so-called Hart/Devlin debates had.

⁴⁴ Constitution Act 1982, Part I (hereafter "The Charter").

an enactment of the common law as to murder, and in fact there was a significant departure from the common law even then. In England, the scope of the offence of murder had been under attack for some time. A commission on capital punishment, which reported in 1866, had commented on the unsatisfactory state of the law⁴⁵ and a committee of the House of Commons sat for some time on a Bill to amend the common law in 1874. The Commission on the draft English Code reiterated the objections there expressed: that the common law was vague, ill-defined and replete with fictions and presumptions. The basic requirement, that of "malice aforethought", was insufficient to give any precise assistance in specifying the actual requirements for the offence.⁴⁶

The 1892 Code, therefore, adopted, virtually intact, the recommendations of the English draft. It enacted the common law scheme, which we still have, of first defining homicide,⁴⁷ then culpable homicide, then defining which culpable homicides were murder, leaving manslaughter as that culpable homicide that was not murder.⁴⁸ Murder was defined in section 227⁴⁹ (in practically the same terms as now appear in section 229⁵⁰):

- (a) If the offender means to cause the death of the person killed;
- (b) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
- (c) If the offender means to cause death, or being so reckless as aforesaid, means to cause such bodily harm as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;
- (d) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

This was considered to be a more precise enactment of those murders that the common law would call murders with malice aforethought.

Constructive murder, defined in section 228 of the 1892 Code, was not, apart from the absence of paragraph (d),⁵¹ considered in a moment, different in principle from what used to be the law under section 202 of

⁴⁵ Royal Commission on Capital Punishment, appointed in 1864.

⁴⁶ Quoted in Martin's Criminal Code (1955), p. 384.

⁴⁷ Later sections excluded procuring death by false evidence, killing by influence of the mind alone, and enacted the common law requirement that death occur within a year and a day. There then followed three sections dealing with acceleration of death by some pre-existing disorder, death that might have been prevented by resorting to proper means and death resulting from medical treatment. All these remain to haunt us.

⁴⁸ Infanticide was not made an offence until 1948 (S.C. 1948, c. 39, s. 7), though England had had the offence since 1922: Infanticide Act, 1922, 12 & 13 Geo. 5, c. 18.

⁴⁹ S.C. 1892, c. 29.

⁵⁰ R.S.C. 1985, c. 46.

⁵¹ See the text, *supra*, at footnote 21; and the text, *infra*, commencing at footnote 54.

the 1955 Code. The list of underlying offences was somewhat narrower, being only piracy and piratical offences, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary and arson,⁵² but one difference was that under paragraph (a) of section 228 the accused must have meant to inflict *grievous* bodily injury. The word “grievous” remained in the Code until the 1955 revision, when it was removed without comment.⁵³

Paragraph (d) of what became section 202 of the 1955 revision was added amid great controversy in 1947.⁵⁴ In *Hughes v. The King*,⁵⁵ the Supreme Court had held that where only paragraph (a) applied, an accused, although armed, who did not intend to cause bodily harm, could not be convicted of murder under the then section 202(a), which seems a perfectly correct interpretation of the provision. Paragraph (d) was intended to plug what was perceived to be that loophole, and read as at present with the addition, at the end of the paragraph, of the words “of its use”, thus requiring the death to result from the use of the weapon. In *Rowe v. The King*,⁵⁶ the Supreme Court held that the amendment now made it murder if the

⁵² In fact, indecent assault was added to the list in 1947 (S.C. 1947, c. 55, 56), but since *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, (1987), 39 C.C.C. (3d) 118, and *R. v. Martineau*, [1990] 2 S.C.R. 633, (1990), 58 C.C.C. (3d) 353, have held the whole section to be of no force or effect, it is unnecessary to consider this further.

⁵³ “Grievous” was a difficult word to define, but if it meant an injury that was so serious as to be life-threatening, then it included bodily harm that the accused knew or ought to have known was likely to cause death, which was covered in s. 201(c) “for an unlawful object”. This would not have left much room for the independent operation of s. 202(a). The section references are to the 1955 revision.

⁵⁴ S.C. 1947, c. 55, s. 7. The section, then numbered 260, read as follows:

260. In the case of treason and the other offences against the King’s authority and the Persons mentioned in part II, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, indecent assault, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not death is likely to ensue,

- (a) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender from the commission or attempting the commission thereof and death ensues from such injury; or
- (b) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effect thereof; or
- (c) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from the stopping of the breath; or
- (d) 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 the section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

⁵⁵ [1942] S.C.R. 517, (1942), 78 C.C.C. 257.

⁵⁶ [1951] S.C.R. 713, (1951), 100 C.C.C. 97.

accused used the weapon even though death was accidental in the sense that the accused did not intend to kill or even cause bodily harm, so long as he "used" the weapon—in that case, holding it and the gun going off by accident, or so he alleged. The Commission proposed no change in the 1953 revision, but when the Bill went to the Senate,⁵⁷ it insisted, over considerable objections, on the words "of its use" being dropped, so as to make murder even an "accidental" death not resulting from "use" of the weapon, but merely from the fact that a weapon was present.

Even the pre-1955 version of paragraph (d) had been subject to some trenchant criticism, John Willis referring to it as a "savage" doctrine.⁵⁸ As Willis pointed out, paragraph (d), as it then read, was incoherent because, while the opening words only required an accused to use or have a weapon on him, he was only guilty of murder if death ensued as a consequence of its use. The 1955 version did not meet Willis' objection as to savagery, but it did meet the objection as to incoherence simply by deleting the words "of its use", imposing what could only be called the grossest form of absolute liability on anyone who had a weapon on his person during the commission of or flight from one of the listed offences if death ensued merely because of the presence of that weapon.⁵⁹

R. v. Vaillancourt,⁶⁰ it is no exaggeration to say, represents a complete reconsideration of the basic concept of the offence of murder, unfettered by the history of either the common law or the Canadian Criminal Code. Whether the reasoning in the case or in the cases that subsequently enlarged upon it⁶¹ is entirely satisfactory is somewhat doubtful. It is not all that persuasive to state that murder is the most serious offence in the Code⁶² and one that carries with it a special stigma, and then to jump to the conclusion that therefore nothing less than the subjective foreseeability of death will satisfy the mental element in murder. Murder is, after all, merely

⁵⁷ The Senate had also proved draconian in its consideration of the original paragraph (d). Originally, it had read: "... if he uses any weapon for the purpose of facilitating the commission of [any of the listed offences]" (or his flight therefrom). When it came back from the Senate it read: "... if he uses or *has upon his person* any weapon *during or at the time of* the commission ... by him of [any of the listed offences]" (or his flight therefrom).

⁵⁸ (1951), 39 Can. Bar Rev. 784, at p. 793.

⁵⁹ Of course, the causation was still required by virtue of the opening words of the section, so that if the death was not "caused" by the accused at all, there was not even a homicide while if the death was "caused" by the accused but not "caused" by the use or presence of the weapon, there was a culpable homicide but it was not murder.

⁶⁰ *Supra*, footnote 52.

⁶¹ *R. v. Martineau*, *supra*, footnote 52; *R. v. Rodney*, [1990] 2 S.C.R. 687, (1990), 58 C.C.C. (3d) 408; *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755, (1990), 59 C.C.C. (3d) 1; *R. v. Luxton*, [1990] 2 S.C.R. 711, (1990), 58 C.C.C. (3d) 449; *R. v. Arkell*, [1990] 2 S.C.R. 695, (1990), 59 C.C.C. (3d) 65. And, although on a totally different point of law, *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154, (1991), 8 C.R. (4th) 145.

⁶² Leaving aside treason and the like.

a label for a particular kind of culpable homicide and a more principled approach would be to decide first of all what separates culpable homicide from non-culpable homicide. Once that is done, it will be seen that there is a continuum in degrees of culpable homicide ranging from unintentionally causing a death that is just the wrong side of non-culpable homicide to the planned and deliberate killing of a police officer by means of slow poison. They could, in fact, all be called manslaughter, ranging from manslaughter in the first degree to manslaughter in the ninth or tenth degree, but we have adopted a clear distinction—one side of the line is what we term manslaughter and the other side is what we term murder. There is no rational distinction between the two, except in the mental element, since to rationalize the distinction on the basis of blameworthiness merely begs the entire question, and talk about a stigma is merely an *ex post facto* labelling.

That being so, one ought to conclude that *only* the intending to cause death should suffice to label a culpable homicide murder—intending meaning not “desiring” but knowing that one’s action will, in the ordinary course of human events, lead to death. Perhaps the Supreme Court will so conclude. It is, after all, a little difficult to deny that murder under section 229(a)(ii) is somewhat, even if only marginally, less culpable than murder under section 229(a)(i).⁶³ Or perhaps the time has now come to abolish the offences of murder and manslaughter and have the one substantive offence of culpable homicide graded into a number of degrees, culpable homicide in the first degree being something like what we now call first degree murder, and ranging down to homicide that is just the wrong side of an accident. But that may only result in one label being substituted for another. In fact, *Vaillancourt* had rendered imperative an examination of the basic principles involved in the offence of murder and, incidentally, the offence of manslaughter as well.⁶⁴

B. Sexual Offences

In sexual offences, there have also been significant changes. Title IV of the 1892 Code was entitled “Offences against Religion, Morals and Public Convenience”, while Title V was entitled “Offences against the Person and Reputation”. As a result, in Title IV were offences such as indecent acts,

⁶³ R.S.C. 1985, c. C-46, s. 229:

Culpable homicide is murder

(a) when a person causes the death of a human being
(i) means to cause his death or
(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not. . . .

⁶⁴ Actually, a great deal of the work has already been done by the Law Reform Commission of Canada ranging from its basic Report in 1976, *Our Criminal Law*, to its Working Papers on Homicide in 1984, culminating in its Report on Recodifying the Criminal Law in 1986 and revised in 1987.

gross indecency, sodomy as well as the provisions against publication of obscene matters. Included in that Title were also the offences of seduction and procuring. Indecent assaults, rape and abduction, on the other hand, were included in Title V. We preserve the same distinction in our present Code so that while Part V is labelled "sexual offences", it does not contain those that are of an assaultive nature.

As might be expected, the 1892 Code and the amendments thereto over the next decade or two reflect the mores of the times. Sections 174 to 178 dealt with the offences of buggery, indecency and incest, and sections 181 to 190 with such offences as seduction of women, defilement and bawdy houses. These were characterized as offences of immorality. On the other hand, rape, sexual intercourse with under-age females and various abduction offences, including, in section 282, abduction of an heiress for motives of lucre,⁶⁵ were offences against the person, as was the offence of procuring a miscarriage, though the "person" was often the parent or guardian of the person abducted rather than that person herself. Most of these provisions remained in force, virtually intact, for the next ninety years or so, though there were some significant procedural changes enacted in 1975,⁶⁶ which came into force on April 26, 1976. These removed the caution requirement in the case of uncorroborated evidence of the complainant in rape and indecent assault cases and the like, and limited (with something less than complete success) cross-examination of the complainant on her previous sexual conduct with persons other than the accused and provided for other protections for the complainant.⁶⁷ Furthermore, in 1968,⁶⁸ following the recommendations of the Wolfenden Committee Report⁶⁹ in England, the elimination of the offences of buggery and gross indecency between consenting adults in private was enacted.

In 1982,⁷⁰ there was a complete revision which came into force on January 4, 1983. It is probably fair to say that it was not until then that we finally shed the last of the Victorian underpinnings of the Code of 1892. The offences of rape and indecent assault were replaced by the offence of sexual assault (with varying degrees of seriousness) applicable to both male and female victims and, in so far as was possible, neutral language was employed in the redefinition of a number of other offences such as those relating to prostitution and procuring, but the various seduction offences were retained as were, in general, sexual offences against an under-

⁶⁵ Not abolished until the 1955 revision.

⁶⁶ S.C. 1974-75-76, c. 93.

⁶⁷ Namely, the exclusion of the public and a ban on publicity.

⁶⁸ S.C. 1968-69, c. 38, s. 7.

⁶⁹ 1957, London, H.M.S.O.

⁷⁰ By S.C. 1980-81-82-83, c. 125.

age female, "whether or not . . . [the accused] believes she is fourteen years of age or more . . .".⁷¹ Consistent with the philosophy behind the substantive offence provisions, the legislation rephrased the provisions relating to consent obtained by fraud or threats and provided, in section 244(4) (now section 265):

Where an accused alleges that he believed the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

The new legislation provided that consent to the sexual activity was no defence where the complainant was under the age of fourteen years but added: "... unless the accused is less than three years older than the complainant".⁷²

The 1982 enactment was prompted by the new awareness of the need to reinforce sexual equality. It was followed in 1987⁷³ by legislation that addressed the concerns about protecting children from sexual exploitation and abuse—concerns that were only inadequately met by the existing legislation. The remaining offences of seduction were repealed⁷⁴ together with the specific offences of sexual intercourse with under-age females, and new offences of sexual interference and invitation to sexual touching, both in respect of young persons under the age of fourteen years, were created. Also created was the offence of sexual exploitation whereby a person in a position of trust sexually touches or invites to touch him any young person between the ages of fourteen and eighteen years.

The so-called consent provisions were also amended, partly to meet any Charter objections and partly, in any case, to bring them more in line with contemporary standards. Section 150.1⁷⁵ states that it is not a defence that the complainant consented where he or she is under the age of fourteen years in respect of the new sexual offences or of sexual assault, but by section 150.1 where the complainant is over twelve and the accused under sixteen and less than two years older than the complainant and is not in a position of trust or authority, such consent is a defence. Furthermore, under section 150.1(4) and (5), a belief that the complainant was over the required age is no defence either unless the accused "took all reasonable

⁷¹ See R.S.C. 1970, c.-34, s. 146(1); and see s. 146(2), where the age is sixteen.

⁷² S. 246(1)(2).

⁷³ S.C. 1987, c. 29.

⁷⁴ These were such offences as seduction of females between sixteen and eighteen, seduction under promise of marriage or seduction of female passengers aboard ship.

⁷⁵ R.S.C. 1985, c. 19 (3d Supp.).

steps to ascertain the age of the complainant".⁷⁶ This, presumably, lies between the former provision making the accused liable, whether or not he knows the complainant was under the age⁷⁷ and the striking down of such provision leaving mistake as to age in the same category as any other defence of mistake of fact.⁷⁸ Whether this new provision will survive a Charter attack remains to be seen. Before the 1985 legislation, section 246.1(2) (since repealed)⁷⁹ contained a similar provision specifically in respect of sexual assault on a person under the age of fourteen years, and the Charter validity of that provision was the subject of conflicting opinions.⁸⁰

Undoubtedly, sections 150.1(4) and (5) will come before the Supreme Court. In *R. v. Stevens*,⁸¹ in dissent, Wilson J. stated:

There can be no doubt that this provision infringes the accused's ... rights less than the section challenged in the present appeal. ...

She would have struck down the then section 146(1) which imposed absolute liability and pointed out that it could not be saved by recourse to section 1 of the Charter since Parliament had already demonstrated that there was a less obtrusive way of achieving any socially desirable objective, but, of course, she was not saying that she would be prepared to uphold section 150.1(4) or (5)—only that it was less obtrusive. Given what the Supreme Court had been enunciating in cases like *R. v. Holmes*⁸² and *R. v. Whyte*,⁸³ not to mention *R. v. Vaillancourt*,⁸⁴ one would probably have to conclude

⁷⁶ The new section 273.2 merely requires the accused to "take reasonable steps", the word "all" having been deleted from the Bill prior to its passage by the Commons, but s. 150.1 still requires "all" reasonable steps. If there were doubts about the constitutional validity of using the word "all" in s. 273.2, then presumably these doubts also apply to s. 150.1.

⁷⁷ See R.S.C. 1976, c. C-34, s. 146. This provision came before the Supreme Court in *R. v. Stevens*, [1988] 1 S.C.R. 1156, (1988), 41 C.C.C. (3d) 193, but the accused there had been charged with an offence committed before the Charter came into force, and the majority of the court held that to allow Stevens to argue on the basis of the Charter would be to give it retroactive effect.

⁷⁸ *R. v. Roche* (1985), 20 C.C.C. (3d) 524 (Ont. C.A.); *R. v. Brookes* (1989), 47 C.C.C. (3d) 276 (Alta. C.A.); see also *R. v. Nguyen*, [1990] 2 S.C.R. 906, (1990), 59 C.C.C. (3d) 161.

⁷⁹ Enacted S.C. 1980-81-82-83, c. 125, s. 19; repealed S.C. 1987, c. 24, s. 10.

⁸⁰ The majority view was in favour of the validity of the sections: *R. v. Le Gallant* (1986), 29 C.C.C. (3d) 291 (B.C.C.A.); *R. v. Halleran* (1989), 39 C.C.C. (3d) 177 (Nfld. C.A.) and a number of trial court decisions. In *R. v. M.(R.S.)* (1990), 57 C.C.C. (3d) 182 (P.E.I.S.C.) it was held that it infringed both s. 7 and s. 15 of the Charter, and in *R. v. Black* (1990), 11 W.C.B. (2d) 557, it was held that it was not a reasonable limit.

⁸¹ *Supra*, footnote 75, at pp. 1183 (S.C.R.), 214 (C.C.C.). Wilson J. was comparing s. 139(4), enacted in 1987 (S.C. 1987, c. 24, s. 1), which required that the accused take "reasonable steps" with the then s. 146(1) (R.S.C. 1976, c. 34, s. 146), which made the accused liable whether or not he knew the age.

⁸² [1988] 1 S.C.R. 914, (1988), 64 C.R. (3d) 97.

⁸³ [1988] 2 S.C.R. 3, (1988), 42 C.C.C. (3d) 97.

⁸⁴ *Supra*, footnote 52.

that the provision does violate the Charter, but that, given the objectives and the history of the attempts to resolve the difficulties of sexual exploitation of young persons, it is justifiable under section 1.

Most recently, Bill C-49 of 1992⁸⁵ was introduced in reaction to the growing concern over the perceived ease with which the defence of mistake as to consent may be raised in cases of sexual assault,⁸⁶ particularly those that would formerly have been classified as rapes. Section 273.2 has now been added to read:

It is not a defence to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness, or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at that time, to ascertain that the complainant was consenting.

The amendment is not easy to decipher and will undoubtedly raise difficult Charter issues, as well as basic problems of statutory interpretation. The respective roles of judge and jury will have to be defined and, more importantly, it is not clear from the wording to what extent any minimum requirement of *mens rea* has been affected or whether the guaranteed presumption of innocence has been violated or whether, in either case, the provisions may be saved by recourse to section 1 of the Charter.

Equally difficult will be the interpretation and application of section 273.1 which purports to define in more detail what is meant by "consent":

- (1) Subject to subsection (2) and subsection 265(3) [which negatives consent where there has been force, threats, fraud or the exercise of authority], "consent" means for the purposes of [sexual assault], the voluntary agreement of the complainant to engage in the sexual activity in question.
- (2) No consent is obtained, for the purpose of [sexual assault], where
 - (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in the sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

⁸⁵ Now S.C. 1992, c. 38.

⁸⁶ Though this concern is not expressed in the preamble: instead it talks, *inter alia*, about the fear of sexual assault affecting the lives of the people of Canada and the need to encourage the reporting of such offences.

Whether such verbal overkill will achieve the desired objective or will merely result in interpretive chaos remains to be seen, but it is a long way from the simple and elegant language of the original Code.

In the case of *R. v. Seaboyer*,⁸⁷ the Supreme Court in a 7:2 judgment struck down the then section 276⁸⁸ limiting the right of an accused to adduce evidence of the complainant's prior sexual activity in prosecutions for such offences to three specified instances on the ground that the limitation may render inadmissible evidence that might be essential to the accused's fair trial. In the view of the majority, relevancy was not something that could be specified beforehand in all cases and in all circumstances. The new section 276⁸⁹ now provides that evidence that the complainant has previously engaged in sexual activity whether with the accused or with some other person is not admissible unless it is determined that the evidence relates to specific instances of sexual activity, is relevant to an issue at trial and "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". Sub-section (3) requires the judge, in making this determination, to take into account a number of factors including the interests of justice, society's interest in encouraging the reporting of sexual offences, the need to remove from the fact-finding process any discriminatory belief or bias and the risk that the evidence may unduly raise sentiments of prejudice, sympathy or hostility in the jury. Whether the new provisions will pass Charter scrutiny is again an open question, but certainly there must be some concern at any provision that may have the effect of excluding any evidence that has "significant probative value" because of danger of prejudice to the proper administration of justice determined by factors that may adversely affect the accused's right to a fair trial.

C. Obscenity

Offences relating to the publication of obscene material have had, of course, an interesting career. In the 1892 Code, they appeared as section 179 and section 180, both of them being quite simple. Section 179 made it an offence to knowingly, without lawful justification or excuse, publicly sell or expose for public sale any obscene book or other printed or written matter, or any picture, *etc.*, tending to corrupt morals.⁹⁰ Section 179(2) enacted the defence of public good, if there was no excess beyond what the public good required. This, by section 179(3), was a mixed question of law and fact, the legal question being whether the sale was such as might

⁸⁷ [1991] 2 S.C.R. 577, (1991), 66 C.C.C. (3d) 321.

⁸⁸ R.S.C. 1985, c. C-46, amnd. R.S.C. 1985, c. 19 (3d Supp.).

⁸⁹ S.C. 1992, c. 38.

⁹⁰ Para (b) referred to publicly exhibiting any disgusting object or any indecent show while para. (c) was concerned with the selling or advertising of any drug represented as a means of preventing conception or causing abortion.

be for the public good and whether there was any evidence of excess, and the factual question being whether there was or was not such excess. Section 179(4) stated:

The motives of the seller, publisher or exhibitor shall in all cases be irrelevant.

The Commissioners adopted the view of the English Commissioners that this represented the then existing law and stated:⁹¹

We do not, however, think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself.

There were several developments after 1892 which have all the appearance of plugging loopholes. In 1900, the offence became more detailed and took on its modern exhaustive form of manufacturing, making, selling, exposing for sale, distributing or circulating and now included typewritten materials.⁹² In 1903, the legislation respecting immoral theatrical performances was enacted.⁹³ In 1913, in addition to drugs represented as means to prevent conception or causing abortion, drugs or articles for restoring sexual virility or curing venereal diseases were forbidden.⁹⁴ In 1913 the means of spreading obscene materials was even more exhaustively defined.⁹⁵ In 1949, crime comics were included in the offence⁹⁶ and in the 1955 revision phonograph records were added to the list.⁹⁷

It was not until 1959 that a statutory definition of what constitutes obscenity was provided. Until then, the courts had adopted the test laid down in *R. v. Hicklin*:⁹⁸

I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

The courts were quick to add that the matter is to be judged by the standards of the day and not by those of 1868.⁹⁹ As critics pointed out, however, the *Hicklin* test was analytically somewhat less than helpful and amounted to little more than a test of whether the material was likely to deprave and corrupt those whom it was likely to deprave and corrupt, and gave the courts no real guidance as to what did or did not amount to obscenity, though the Ontario Attorney General's Committee on Obscene

⁹¹ At p. 8.

⁹² S.C. 1900, c. 46.

⁹³ S.C. 1903, c. 13.

⁹⁴ S.C. 1913, c. 13.

⁹⁵ S.C. 1913, c. 13, s. 8.

⁹⁶ S.C. 1949, c. 13, s. 207.

⁹⁷ S.C. 1953-54, c. 51, s. 150(2)(a).

⁹⁸ (1868), 3 Q.B.D. 360, at p. 371, per Cockburn C.J.

⁹⁹ *R. v. National News Co. Ltd.*, [1953] O.R. 533, (1953), 106 C.C.C. 26 (Ont. C.A.); *R. v. Martin Secker and Warburg Ltd.*, [1954] 1 W.L.R. 1138, [1954] 2 All E.R. 683 (Cent. Cr. Ct.).

and Indecent Literature reported in 1958 that it observed no major concerns in that province with the *Hicklin* test and felt that the position was the same in the other provinces.¹⁰⁰ Nevertheless, in 1959 the Government introduced its definitional amendment, but, as the then Minister of Justice, the Hon. E. Davie Fulton, made quite clear, this was not intended to replace, but only to augment, the *Hicklin* test.¹⁰¹

The object of this clause is to make a statutory extension of the definition of obscenity so as to make it perfectly clear that the law of obscenity does apply to a certain type of objectionable material that now appears on the newsstands of Canada and is being sold to the young people of our country with impunity. . . .

We have deliberately stopped short of any attempt to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific merit. These works remain to be dealt with under the *Hicklin* definition which is not superseded by the new statutory definition.

The new definition now appears as section 163(8),¹⁰² but whatever the Government intended, it was not long before the courts had decided that the new definition did, indeed, supplant the *Hicklin* test and was now the sole definition of obscenity in Canada.¹⁰³ The definition has not been easy to apply but it is clear that the test is now based upon community tolerance,¹⁰⁴ a test that is not so vague that it violates any constitutional guarantee relating to the principles of fundamental justice.¹⁰⁵

D. Procedure

In matters of procedure, the most interesting developments over the past one hundred years have been in the area of appeals. Indeed, apart from that area, the procedure we have today is little different from that of the Code of 1892, save for various tidying-up changes.¹⁰⁶

The appeal provisions in the code of 1892¹⁰⁷ in the case of indictable offences were simple and short and based upon the English provisions of

¹⁰⁰ A clumsily named Senate Special Committee on the Sale and Distribution of Salacious and Indecent Literature had been appointed in 1952 but had reached no conclusion when the House was prorogued. It was not reappointed at the next session.

¹⁰¹ H.C. Debates, 1959, vol. 5, p. 5517.

¹⁰² R.S.C. 1985, c. C-46. The definition appears to have been based on that in Lord Campbell's Obscene Publications Act, 20 & 21 Vict., c. 83 (1857).

¹⁰³ *The Queen v. Brodie*, [1962] S.C.R. 681, (1962), 132 C.C.C. 161, though it was not until *Hawkshaw v. The Queen*, [1986] 1 S.C.R. 669, (1986), 26 C.C.C. (3d) 129 that the matter was finally and clearly settled beyond doubt.

¹⁰⁴ *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494, (1985), 18 C.C.C. (3d) 193.

¹⁰⁵ *R. v. Butler*, [1992] 1 S.C.R. 452, (1992), 70 C.C.C. (2d) 129.

¹⁰⁶ The gradual abolition of the grand jury may also be cited as a major change, which, indeed, it is, but the move to abolish that institution started several decades ago even though it has only recently been finally accomplished in all jurisdictions in Canada.

¹⁰⁷ S.C. 1892, c. 26, Part LII, ss. 742-751.

1848,¹⁰⁸ which, although since radically altered, are still responsible for some of the provisions we retain today. Whether the system was one that could properly be characterized as an appeal system may be doubted. The writ of error was abolished and the system of case reserved became the sole method of getting a case before the Court of Appeal. The trial judge could, on his own motion, reserve any question of law arising during or before or after a trial for the opinion of the Court of Appeal. Furthermore either the prosecutor or the accused could, during the trial, apply to the court to reserve any such question. If the court refused, it was required to take note of the objection and the party applying could then, with the leave of the Attorney General, apply to the Court of Appeal. If leave was granted, a case was stated in the same manner as a case reserved.

The Court of Appeal had the power to confirm the ruling made, direct a new trial if of the opinion that the ruling was erroneous, or direct an acquittal,¹⁰⁹ or make such other order as justice requires,¹¹⁰ These powers were subject to a general caveat:¹¹¹

Provided that no conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial. . . .

The Court of Appeal had no power to substitute a conviction for an acquittal on an appeal by the prosecution, only a power to order a new trial; nor was it given the power to pass sentence, only to remit the case back for sentencing.

There was, however, one entirely new provision in section 747 which provided that a convicted person could apply to the trial judge, after conviction, for leave to appeal to the Court of Appeal for a new trial on the ground that the verdict was against the weight of the evidence.¹¹²

Perhaps the most striking difference between the Canadian and the English legislation was that the Court of Criminal Appeal in England was given no power to order a new trial after a successful appeal against conviction, the Act¹¹³ merely providing that in such a case:

. . . the Court shall quash the conviction and direct a judgment and verdict of acquittal be entered.

¹⁰⁸ Crown Cases Act, 11 & 12 Vict., c. 78.

¹⁰⁹ It also had power to remit a case to the trial court for sentencing if "it considers the sentence erroneous".

¹¹⁰ As in the case of the writ of error, it was the applicant who had to show that the error had caused a substantial miscarriage of justice.

¹¹¹ S.C. 1892, c. 29, s. 746(f).

¹¹² One further provision which survives was that a convicted person could appeal to the Supreme Court of Canada only if one member of the Court of Appeal dissented.

¹¹³ Criminal Appeal Act, 1907, 7 Edw. VII, c. 23, s. 4(1).

This lack of power to order a new trial was roundly criticized in England at the time,¹¹⁴ and it is not surprising that it should have been included in the Canadian legislation, though whether it was ever contemplated that the exercise of this power should become the norm rather than the exception may be doubted.¹¹⁵

Appeals in summary conviction matters were, as might be expected, somewhat more complicated since the two routes of trial *de novo* or stated case were available. Section 879 provided that any person who "thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant" may appeal, usually to the Court of General Sessions of the Peace, or its equivalent. Section 881 provided:

... the court appealed to shall try and shall be the absolute judge, as well of the facts as of the law, in respect of such conviction or decision; and any of the parties to the appeal may call witnesses and adduce evidence. ...

An alternative mode of appeal was provided by section 900:

Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a justice under this part, on the ground that it is erroneous in point of law or is in excess of jurisdiction, may apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the justice declines to state the case, may apply to the court for an order requiring the case to be stated.

These provisions remained, virtually unaltered, until 1923, though in 1921 a significant addition was the right of a convicted person to appeal, with the leave of a judge of the Court of Appeal, his sentence and the power given to the Court of Appeal to entertain such appeals.¹¹⁶ In 1907, England had enacted the Criminal Appeal Act,¹¹⁷ and the amendments to the Code in 1923 were more or less a carbon copy of that Act. They, for the first time, established what may be called a regular appeal procedure giving a convicted person the right to appeal on a question of law, or, with leave, on a question of fact or mixed law and fact, or, with leave, on any other ground. Either a convicted person or the Attorney General or counsel for the Crown was given the right to appeal, with leave, against sentence, but, as with the English provisions, no right was given to appeal an *acquittal*.

An interesting provision was that in section 1013(5):

¹¹⁴ See, for example, N.W. Sibley, *Criminal Appeal and Evidence* (1908), p. 29.

¹¹⁵ Power to order a new trial was not given to the English Court of Criminal Appeal (transferred to the Court of Appeal in 1966) until 1964 by the Criminal Appeal Act 1964, c. 43, and then only in the exceptional case where fresh evidence has come to light that supports the guilt of the accused in spite of the error below. There is still no general power to order a new trial.

¹¹⁶ S.C. 1923, c. 41, adding s. 1013.

¹¹⁷ *Supra*, footnote 113.

Unless the Court of Appeal directs to the contrary in cases where, in the opinion of that Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court, the judgment of the Court shall be pronounced by the president of the Court or such other member of the Court hearing the case as the president of the Court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.

However, that provision did not last long. It did not sit well with the provision in section 1024 giving a right to appeal to the Supreme Court of Canada to a convicted person whose conviction had been affirmed by the Court of Appeal, "provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction". It was repealed in 1930¹¹⁸ and in 1931 the present provision requiring any dissenting judge of the Court of Appeal to specify the ground of law on which he dissents was enacted.¹¹⁹ Also in the 1930 legislation the Attorney General was given the right to appeal an acquittal on any question of law.¹²⁰

One other change enacted in 1923 which was noteworthy was that instead of the Court of Appeal having to find that some substantial wrong or miscarriage was occasioned on the trial, the Code now read:¹²¹

The Court may also dismiss the appeal if, notwithstanding that it is of the opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of the opinion that no substantial wrong or miscarriage of justice actually occurred.

One of the "grounds above mentioned" was that the court had to allow the appeal if "on any ground there was a miscarriage of justice", resulting in the absurdity that the court could dismiss the appeal notwithstanding that there was a miscarriage of justice when it was of the opinion that no miscarriage of justice actually occurred—an absurdity not rectified until the 1955 revision.¹²² But at least it was now clear that there was no burden on the appellant to show that a miscarriage of justice *had* occurred.

Conclusion

Whether, in the totality of things, the Criminal Code has changed all that much over a hundred years depends upon one's perception of the fundamentals of criminal law. Of course, many offences have gone—abuse of servants, abduction of heiresses, theft of a steamboat ticket, as well as somewhat less archaic ones such as spreading venereal disease, taking seditious oaths or vagrancy. On the other hand, the Code now contains

¹¹⁸ S.C. 1930, c. 11.

¹¹⁹ S.C. 1931, c. 28.

¹²⁰ S.C. 1930, c. 11.

¹²¹ S.C. 1923, c. 41, adding s. 1014(2).

¹²² When the word "actually" was also deleted, though this appears to have had no practical effect.

provisions that could not have been thought of a hundred years ago, offences like hostage taking and hijacking, drug-money laundering, theft of telecommunication services and data, spreading hate propaganda, refusal to blow into a breathalyser, or procedural matters such as the extension of jurisdiction over offences committed abroad, surveillance and wire-tapping, the dangerous offender provisions and appeal mechanisms. But the Code still contains offences relating to criminal libel, theft of cattle, blasphemy, cheating at play, practising witchcraft and prize-fighting. If that were all, one would be forced to conclude that the past one hundred years has seen lots of tinkering but not much of substance. The Code of 1992 is not so vastly different from the Code of 1892, which is not necessarily a bad thing, though few of us would still agree with the opinion of the Minister of Justice in 1952 that our system of criminal jurisprudence, embodying as it does the high principles of the British system, provides as fair and just a system as it is possible to devise to ensure that justice will be accorded to all.¹²³ I, for one, would have serious reservations about looking to the British system as exemplar.

That, however, is not all. To consider the Criminal Code without also putting into the balance the Charter, the decisions of the Supreme Court, the influence of the Law Reform Commission and the work of a number of the more recent Ministers of Justice paints a very incomplete picture. We still have the offence of murder but it is vastly different from that of 1892; procuring a miscarriage is no longer an offence, but not because of any change to the Code;¹²⁴ sexual offences would be unrecognizable by the Victorians; our insanity provisions have been brought up to date, at least slightly; any Code absolute liability offences probably do not exist any more; and few, if any, reverse onus provisions would be justifiable under the Code. Parliament has just begun its work of considering a new Criminal Code proposed by the Law Reform Commission.

It is not, therefore, inappropriate to take stock of where we stand after 100 years of the Criminal Code of Canada. The Code of 1892 may not have been perfect, but it has served us well even though we missed an opportunity for a major revision in the 1955 Code. It has been objected¹²⁵ that its major defects was the complete lack of any statement of general principles upon which criminal liability was based, but in 1892 one still thought in terms of the particular moving toward the general rather than the other way around—the typical common law approach upon which the

¹²³ *Supra*, footnote 26.

¹²⁴ That, of course, is not accurate. There have been changes to the Code provisions respecting abortions but the elimination of the offence would have come even without those changes.

¹²⁵ See, generally, the publications of the Law Reform Commission of Canada, in particular *Our Criminal Law* (1976), and *Recodifying Criminal Law* (1986), reviewed and enlarged in 1987.

Code was essentially based. If we are now comfortable with a Code, then, it is said, we must start with the statement of principle—a statement of culpability, of the meaning of *mens rea* (if we preserve that phrase, though it is difficult to see any valid reason for so doing) and a statement of exemptions from liability. It may well be that no one can really be content with our existing provisions as to mental disorder, in spite of the recent amendments; that the present, almost incoherent, provisions as to self-defence have really only been made tolerable by judicial gloss; that the defences arising out of intoxication cannot long wallow in the chaos created by conflicting judicial *dicta*; is it time to codify defences such as necessity or entrapment?

Yet the odd thing is—or is it so odd?—that the introduction of the Charter has rendered less urgent the need for any fundamentally restructured Criminal code. There is force in the criticisms directed at the present Code, and any one seeking to make sense of the Code provisions, in themselves, would run into ambiguities and confusion. But we also have the Charter. We also have, of course, judicial interpretation. What has been remarkable is how well a Code of this nature has, in spite of Taschereau's dire predictions, fitted into a common law jurisdiction with its common law traditions, though this, no doubt, was because it was a codification only in the sense of being a reduction of the already existing common law into a more or less comprehensive statute.

These factors must lead us to question whether now is the best time to be thinking of introducing any new radically different Criminal Code. When the Law Reform Commission of Canada began its work, there was no Charter and the thrust of its proposals was to bring the Criminal Code into conformity with today's values. Since the introduction of the Charter, a scant ten years ago, the Supreme Court has become both the most profound and the most effective law reform body we have ever had, or any jurisdiction has ever had for that matter. It has engrafted on to the bare words of the Code, substantive and procedural requirements that have moved, in a decade, our criminal law from the late nineteenth to the late twentieth century. But it would be folly to assume that its work is over when it is only just beginning. It is quite true that some of the judgments of the court may be criticized for going too far or for not going far enough, for being inconsistent or ambiguous, but on the whole it would be impossible to deny that what would have taken Parliament perhaps years to effect has been accomplished efficiently and rapidly to the great benefit of the criminal law of Canada. The criticisms of the Code lose much of their force when they are directed to the Code, plus the Charter, plus the role of the Supreme Court.

The one thing the Supreme Court cannot do—quite properly—is to create new criminal offences. That remains, subject to the Charter, within the exclusive sphere of Parliament. But one must still ask whether there

is any need, now, for a Code, in Canada, to set out general principles of liability, to revamp the defences of self-defence or provocation, to delimit further the offence of murder, to set out in more precise detail the liability of parties, and so on. One may go further and ask whether there is not danger in doing so—danger of stultifying the role of the Supreme Court. Perhaps the better strategy is to keep Stephen's Code and continue to amend it piecemeal, adding new offences here, removing old offences there, making the odd evidentiary change and tinkering with various procedural provisions.

In the area of the particular, the entire concept of recklessness and negligence must be clarified, and if the courts will not do it, or cannot do it, then Parliament must. The offence of murder, since *R. v. Vaillancourt*,¹²⁶ has been made more precise and has been brought up to date, but it has raised serious questions about manslaughter and offences that carry with them the stigma referred to in that case. Indeed, while *Vaillancourt* itself may be a welcome decision in the context of the Charter and its application to the Code, it leaves unanswered the policy question of whether there should not be some offence, greater than manslaughter, that covers the now discredited constructive murder situation. Just as there may be crimes that no longer deserve to be in a Criminal Code, there may be others, such as environmental crimes or consumer offences, that should be. These are matters with which Parliament, not the Supreme court, must deal, but it does not take a complete revision of the Code to deal with them.

There is, however, now one enormously important *caveat*. The role of Parliament in the criminal law sphere in 1892 was vastly different from its role in 1992. Then, Parliament was, subject to jurisdictional limitations, supreme. Its role was to enact whatever criminal law it felt best responded to the needs and values of the day. It enunciated policy and dictated the means whereby that policy was implemented. The Charter has not changed Parliament's role in enunciating policy. It is still for Parliament to decide what shall be criminal offences and what the maximum punishments shall be; it is still the policy maker of criminal law. But Parliament is no longer free arbitrarily to choose the means to achieve policy objectives. Absolute liability offences, onus-shifting provisions, weakened *mens rea* requirement, removal of otherwise valid defences are all means that might be chosen to achieve some policy objective that is worthy and beneficial. These, however, are now, unlike 100 years ago, only valid so long as they do not conflict with an individual's guaranteed rights and freedoms, or, if they do, are demonstrably justifiable. While this is ultimately for the courts to decide, Parliament must now choose only those means that are, or at least may reasonably be seen to be, consistent with those rights and freedoms. This has made its task considerably more difficult, but that is no bad thing. It is now not so easy to create criminal law.

¹²⁶ *Supra*, footnote 52.