CRIMINAL LAW

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I. INTRODUCTION

A general survey of the court decisions in criminal cases over the last year would add little to the encyclopedic information available in the digests and annotations of the Criminal Code. These decisions are, however, germaine to any discussion of recent developments in the criminal law field primarily as indicators of the direction in which Canadian courts have been moving. No endeavour will be made here to analyse all of the important cases but an attempt will be made to gain some impression of current directions reflected by recent cases, legislative proposals and new developments in the criminal-law field.

II. THE ACCUSED'S PROTECTIONS AND POLICE INVESTIGATION

Despite provisions in the Canadian Bill of Rights, the criminal process has been viewed, in Canada, solely as a truth-seeking device. Social values such as fairness and the rights and dignity of the individual are usually secondary considerations which, if abused, will not affect the admissibility of evidence even if that evidence has been gained by illegal acts on the part of the police.[1] The recent cases which have dealt with the right of an accused to be represented by counsel before trial illustrate the continuing disparity between the reality of the criminal process and the ideals subscribed to by our federal legislature in the Bill of Rights.[2] Particularly in the light of the *Gideon v. Wainwright*,[3] *Escobedo v. Illinois*[4] and *Miranda v. Arizona*[5] cases in the United States, the restrictive interpretation of "right to counsel" given by the Supreme Court of Canada in *O'Connor v. The Queen*[6] seems somewhat anachronistic. The same values which impelled the Supreme Court

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[1] Kuruma Son of Kaniu v. Reginam, [1955] A.C. 197, [1955] 1 All E.R. 236 (P.C.); Rex v. St. Lawrence, [1949] Ont. 215 (High Ct.); Attorney-General for Quebec v. Begin, [1955] Sup. Ct. 593, 112 Can. Crim. Cas. Ann. 209, [1955] 5 D.L.R. 394; R. v. Senat, [1968] CRIM. L. REV. 269 (C.A.).

[2] Can. Stat. 1960 c. 44.

[3] 372 U.S. 335 (1963).

[4] 378 U.S. 478 (1964).

[5] 86 S. Ct. 1602 (1966).

[6] [1966] Sup. Ct. 619, [1966] 4 Can. Crim. Cas. Ann. (n.s.) 342, 57 D.L.R.2d 123, *affg* [1965] 2 Ont. 773.

of the United States to act vigorously to protect individual rights and the ideals of civilized investigatory conduct are not unknown in Canada. Yet certain fictions continue to characterize the Canadian court's concept of fair trial, right to counsel and equality before the law that isolate the theory of our criminal trial from the realities of the day to day criminal processes.

Some recognition that there should be an "appearance" of fairness even before the trial itself takes place was exhibited by the Ontario Court of Appeal recently in the case of *Regina v. Steinberg.* [7] The court held that the installation of wiretapping was not an infringement of the accused's right to enjoyment of his property under section 1(*a*) of the Canadian Bill of Rights and that he had not been compelled to give evidence contrary to section 2(*d*) of the Bill of Rights which is designed to protect against self-incrimination. The evidence was accordingly ruled admissible. However, the accused's *sentence* was reduced by the Ontario Court of Appeal because the court was "not satisfied that that which occurred has the appearance of justice." [8] This twinge of conscience, although not sufficient as yet to reverse a conviction, eventually may develop into a new sense of pre-trial standards that will reverse the prevailing Canadian restrictive interpretation of an accused's rights prior to trial.

In *Regina v. Logue* [9] the Ontario Court of Appeal considered police misconduct relating to an accused on one charge in one jurisdiction as relevant to whether a statement, made subsequently at another police station outside the jurisdiction on another charge, was voluntary. In addition, whether or not the advice of counsel was available to the accused before he made a statement was considered cogent evidence of the voluntary nature of the statement. In *Regina v. Martel* [10] an accused, who had been arrested and detained on an impaired driving charge, was refused permission to telephone his wife. A district court judge in Alberta held that such a refusal was a denial of the accused's right to retain counsel without delay contrary to section 2(*c*)(ii) of the Canadian Bill of Rights. The judge referred to *O'Connor v. The Queen* [11] and suggested that the case did not stand for any "incommunicado concept." [12]

In the case of *Regina v. Ballegeer* [13] the accused sought, after conviction, to change his plea from guilty to not guilty. The major ground on which he sought leave to change his plea and request a new trial was that he was denied the right to retain and instruct counsel without delay. [14] After the

[7] [1967] 3 Can. Crim. Cas. Ann. (n.s.) 48 (Ont.).

[8] *Id.* at 51. For a discussion of recent developments in the area of wire-tapping see Beck, *Electronic Surveillance and the Administration of Criminal Justice*, 46 CAN. B. REV. 643 (1968).

[9] [1968] Ont. 671.

[10] 64 W.W.R. (n.s.) 152 (Alta. Dist. Ct. 1968).

[11] [1966] Sup. Ct. 619.

[12] Regina v. Martel, 64 W.W.R. (n.s.) at 156.

[13] 1 D.L.R.3d 74 (Man. 1968).

[14] *Compare with* Brosseau v. Reginam, 65 W.W.R. (n.s.) 751 (Sup. Ct. 1968).

accused had been informed of the charge against him, he asked if he could contact his lawyer. His request was refused by the police officer in charge of the investigation. At one point the accused did contact his lawyer but the police officer intercepted the call and informed the lawyer that he could not talk to his client as "he wanted to get a statement first . . . ." [15] Mr. Justice Freedman, speaking for the court said "the right, on being arrested or detained, to retain and instruct counsel without delay . . . [i]s a right enshrined in English common law . . . and clearly and unmistakably affirmed in the *Canadian Bill of Rights*." [16] The Canadian courts, in a somewhat disorderly way, seem to be moving toward establishing the right of those individuals who are accused of a crime to retain and instruct counsel without delay. [17]

Such steps permit early legal advice to those who are financially able to afford it; for those others without funds, legal advice may not be available. Whether advice is available or not will depend on the state of the evolution of legal aid programmes in each of the provinces.[18] Accordingly a *right* to counsel prior to trial does not exist in Canada. At most, the courts suggest that those able to afford counsel prior to trial should not be obstructed by the police from obtaining legal advice. At the same time, there is no duty upon the police to inform the accused that he has a right to contact counsel. [19]

Present bail requirements discriminate against those accused persons without financial resources. Excessive bail is relative and must be related to the accused's financial station. Pre-trial incarceration in Canada is primarily a phenomenon of the poor. Although considerations taken into account in granting bail have been in the past primarily related to the likelihood of the accused showing up for his trial, [20] the recent case of *Regina v. Black* [21] has added a further consideration. Where there is a risk that the accused will intimidate Crown witnesses, bail should be refused. At a time when the accused, although charged with a crime, is presumed innocent, it seems that the court should not speculate about what he *might* do if he is otherwise suitable for release on bail. If, of course, the accused does in fact interfere with witnesses, his bail may be revoked by the court. A complete reassessment by the federal government of the concept of bail and of the criteria on which it is based is long overdue. [22]

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[15] Regina v. Ballegeer, 1 D.L.R.3d at 77.

[16] *Id.* at 76.

[17] *See also Re* Vinarao, 63 W.W.R. (n.s.) 93 (B.C. 1968), where the meaning of "Counsel" for purposes of a hearing under the Immigration Act, CAN. REV. STAT. c. 325 (1952), is discussed, and *see generally* Grosman, *The Right to Counsel in Canada*, 10 CAN. B.J. 189 (1967).

[18] *See* Ontario Legal Aid Act, Ont. Stat. 1966 c. 80.

[19] DeClercq v. The Queen, [1966] 1 Ont. 674 *aff'd*, [1968] Sup. Ct. 902, 70 D.L.R.2d 530.

[20] *Re* Johnson's Bail Application, 26 W.W.R. (n.s.) 296, 122 Can. Crim. Cas. Ann. 144 (Sask. Q.B. 1958).

[21] 65 W.W.R. (n.s.) 247 (B.C. Sup. Ct. 1968).

[22] *See* M. FRIEDLAND, DETENTION BEFORE TRIAL (1965). And see Williams, *The Toronto Bail Project*, 6 OSGOODE HALL L.J. 316 (1968).

In the light of the foregoing, a citizen may well ask the question—am I treated differently because I stand before the court a poor rather than a rich man? As long as the quality of justice available to the poor does not approximate that available to the rich, a strong strain of hypocrisy will continue to characterize the criminal process. Extensions of the criteria for refusing bail seem retrograde when the realities of its differential application are patent. [23]

III. CONFESSIONS

Fundamental questions must be asked about the criteria upon which confessions are deemed admissible. Once again a comparison between the American and Canadian approach is enlightening. The federal courts in the United States exercise strong judicial control over the admissibility of confessions. If certain guidelines enunciated by the court are ignored by the police, the confession becomes inadmissible whether or not it is shown to be otherwise voluntary. [24] These decisions are aimed at restraining the police from participating in unlawful practices by excluding the "fruits" of their efforts from the courtroom. Canadian courts look to the voluntariness of the confession and consider the "surrounding circumstances" in which it was given. [25]

In *Attorney-General for Alberta v. Bagshaw* [26] the court held that the fact that a magistrate during the course of the *voir dire* hears evidence, the admissibility of which has not yet been determined, does not result in a mistrial on the ground that he would be prejudiced against the accused as a result of having heard such evidence, if it is later found to be inadmissible. It is interesting to compare the decision in *Attorney-General for Alberta v. Bagshaw* with *Magee v. Cookson & Board of Police Commissioners.* [27] In the latter case the court held that the police chief could not sit on a police disciplinary tribunal because of likelihood of bias even if there was no evidence of actual bias.

The limited scope of the *voir dire*, to determine the voluntariness of an inculpatory statement, was substantially extended by the Supreme Court of Canada in *Declercq* v. The Queen. [28] The Court held that the question whether the confession is true may be put on cross-examination of the accused during the *voir dire* as it may assist the judge in assessing the credibility of

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[23] *See generally* POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1963).

[24] Miranda v. Arizona, 86 S. Ct. 1602 (1966).

[25] Boudreau v. The King, [1949] Sup. Ct. 261, 94 Can. Crim. Cas. Ann. 1, Regina v. Beaulieu, [1968] 1 Can. Crim. Cas. Ann (n.s.) 143 (Alta. Sup. Ct. 1967), where the principle enunciated in *Boudreau v. The King* was applied.

[26] 65 W.W.R. (n.s.) 303 (Alta. Sup. Ct. 1968).

[27] 65 W.W.R. (n.s.) 321 (Sask. Q.B. 1968).

[28] [1968] Sup. Ct. 902, 70 D.L.R.2d 530.

the evidence given by the accused. It is within the judge's discretion whether to permit the prosecution to put the question.[29] An accused person who decides to testify on the *voir dire* as to the voluntary nature of his confession may be asked: "Is the confession true," which is, as Mr. Justice Hall suggests, tantamount to asking him, "[a]re you guilty of the offence?"[30] This is, of course, what the accused cannot be asked unless he testifies at trial.[31]

If an accused cannot testify on the *voir dire* without being liable to be asked questions bearing directly on his guilt or innocence, he is put in a position where he cannot give evidence on the *voir dire* on the crucial question of the voluntariness of his statement without being deprived of the benefit of the rule against compulsory self-incrimination. Once the judge has acquired knowledge at the *voir dire* that the statement is true, the trial has effectively been determined if it continues to be heard before that judge alone. Since evidence given at a *voir dire* is not evidence at trial, the judge would have gained knowledge of the accused's guilt by evidence outside that admissible at trial. This extension of the purpose of the *voir dire* will limit an accused's participation at trial and seriously weaken the rule against compulsory self-incrimination.

IV. Evidenciary Problems

It has been said that mere opportunity does not amount to corroboration.[32] But the Supreme Court of Canada in *The Queen v. Parish*[33] held that evidence may be corroborative even if it is merely circumstantial evidence that the accused was connected with the crime to the extent that he was present when the crime was allegedly committed. Mr. Justice Ritchie, who delivered the judgment of the Court, said that the charge of having sexual intercourse with a female under the age of fourteen years, contrary to section 138(1) of the code, could be corroborated by the testimony of a couple who were in one bed of a motel room and saw accused with the complainant in the other bed. The accused admitted necking on the bed but denied that sexual intercourse took place. It seems the Court extended the rule enunciated in *The King v. Baskerville*[34] that such corroborative evidence must be of a material particular, implicating the accused in the crime charged. It was stated that it is sufficient if the evidence is merely circumstantial evidence of the accused's connection with the alleged crime.

The nature of statutory burdens of proof has been considered recently

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[29] R. v. LaPlante, [1958] Ont. W.N. 80 *followed.*

[30] [1968] Sup. Ct. at 922, 70 D.L.R.2d at 547.

[31] *See* Batary v. Attorney-General for Saskatchewan, [1965] Sup. Ct. 465, 51 W.W.R. (n.s.) 449, [1966] 3 Can. Crim. Cas. Ann. (n.s.) 152, 52 D.L.R.2d 125.

[32] Dawson v. M'Kenzie, [1908] Sess Cas. 648 (Ct. of Session).

[33] [1968] Sup. Ct. 466.

[34] [1916] 2 K.B. 658, 12 Crim. App. 81.

in the application of sections 221(3) [35] and 295(1) [36] of the code. *Regina v. Pace*, [37] a Nova Scotia County Court decision, followed the earlier ruling by the Supreme Court of Nova Scotia in *Regina v. Edwards* [38] that the provisions of section 221(3) shift the onus to the accused to prove, on a balance of probabilities, his lack of intent. A noticeable shift of the "onus" to the accused to "rebut" the prosecution's prima facie case may have unnecessarily extended the statutory exception away from the "golden thread . . . that it is the duty of the prosecution to prove the prisoner's guilt." [39] The provisions of section 221(3) [40] of the code should not be utilized by the court to force the accused to "establish" his defence, "discharge the burden" or to "disprove the presumption." An explanation which raises doubt as to the validity of the presumption should, in the light of the wording of section 221(3), be sufficient without need for any further digression from the Crown's burden than is made necessary by the statutory exception.

Inadvertent negligence is not sufficient to support a conviction of dangerous driving [41] under section 221(4) [42] and yet the Ontario Court of Appeal in deciding *Regina v. Peda* said that the section is so unambiguous that the judge need not direct the jury that there is a requirement of advertent, as distinguished from inadvertent, negligence. [43] The trial judge need only read to the jury section 221(4) of the code as it is self-explanatory. The accused, on the other hand, contended that an objective standard of culpability is too strict a standard and there must be some element of subjective foresight to make him guilty of dangerous driving. Mr. Justice Laskin, who dissented, said that the trial judge's charge was insufficient and did not meet the test set out in *Binus v. The Queen.* [44] He went on to say that: "If advertent

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[35] CRIM. CODE § 221(3): "In proceedings under subsection (2), evidence that an accused failed to stop his vehicle, offer assistance where any person has been injured and give his name and address is *prima facie* evidence of an intent to escape civil and criminal liability."

[36] CRIM. CODE § 295(1): "Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years."

[37] [1968] 3 Can. Crim. Cas. Ann. (n.s.) 194 (N.S. County Ct.).

[38] [1965] 2 Can. Crim. Cas. Ann. (n.s.) 30 (N.S. Sup. Ct.); *compare with* Regina v. Chitty, 124 Can. Crim. Cas. Ann. 45 (N.B.).

[39] Woolmington v. D.P.P., [1935] A.C. 426, at 481.

[40] CRIM. CODE § 221(3) *quoted supra* note 35.

[41] Binus v. The Queen, [1967] Sup. Ct. 594.

[42] CRIM. CODE § 221(4):

> "Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of
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> (a) an indictable offence and is liable to imprisonment for two years, or
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> (b) an offence punishable on summary conviction."

[43] Regina v. Peda, [1969] 1 Ont. 90.

[44] [1967] Sup. Ct. 594.

negligence is the test I do not see how it can suffice to direct the jury merely in the words of the statute without additional elaboration." [45]

Generally, the burden of proof throughout a criminal case is clearly upon the prosecution to prove every ingredient of the offence charged beyond a reasonable doubt. An important and well-known exception to the rule is found in section 295(1). [46] The nature of the exception was considered recently in *Regina v. Inglehart.* [47] The accused was charged on separate counts of possession of the same tools for purposes of house-breaking and for safe-breaking. Once the accused has given a prima facie lawful excuse to one offence, it may create a reasonable doubt relating to both offences. Accordingly, the court held the accused could not be convicted of one offence and acquitted of the other when they both related to the same tools unless the prosecution, upon whom the burden now rested, could offer further proof of the guilt of the accused beyond a reasonable doubt. In *Tupper* v. *The Queen* [48] the defence alleged that the prosecution must offer some evidence of intention of unlawful use of the tools before the burden will shift to be accused to show, on a balance of probabilities, a lawful excuse for their possession. The Supreme Court of Canada and the Ontario Court of Appeal rejected that submission and found that once the Crown, on a charge under section 295(1) of the code, shows possession of an instrument *capable* of being used for house-breaking, even though it may also be capable of being used for ordinary purposes, the burden shifts to the accused to show that there was a lawful excuse for its possession.

The Supreme Court of Canada considered section 295 in *Zanini v. The Queen* [49] where three men were charged with possession of house-breaking instruments and with breaking and entering. [50] Two of the accused pleaded guilty to the latter charge and the former charge was withdrawn against them. The third accused man was acquitted on the charge of breaking and entering but by the application of section 21(2) of the code [51] was convicted of possession. This man was convicted as a party to the offence of possession even though no offence of possession had in law been committeed by the principals.

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[45] Regina v. Peda, [1969] 1 Ont. at 101. *Compare* Regina v. Schmare, [1968] 2 Can. Crim. Cas. Ann. (n.s.) 190 (n.s.) *and* Regina v. Northam, [1968] 4 Can. Crim. Cas. Ann. (n.s.) 321 (Alta.).

[46] CRIM. CODE § 295(1) *quoted supra* note 36.

[47] [1968] 1 Can. Crim. Cas. Ann. (n.s.) 211 (B.C. 1967).

[48] [1967] Sup. Ct. 589, [1968] 1 Can. Crim. Cas. Ann. (n.s.) 253 (1967).

[49] [1967] Sup. Ct. 715, [1968] 2 Can. Crim. Cas. Ann. (n.s.) 1.

[50] CRIM. CODE § 292.

[51] CRIM. CODE § 21(2): "Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

V. MENS REA

The British Columbia Court of Appeal, following its own decision in *Regina v. Boucher*, [52] further entrenched the abstract distinction made between specific and general intent when it decided *Regina v. Resener*. [53] The court held that indecent assault, like rape, is not one of those crimes requiring specific intent. [54] It found that it is no defence to a charge of indecent assault that the accused was so drunk as to be incapable of forming an intent to commit an indecent assault. [55]

Evaluation of the limits of mens rea from the perspective of the subject-matter of the charge has some justification in regulatory offences where monetary sanctions usually apply, and the offence probably could not be prevented otherwise. [56] But in *Regina v. McAuslane* [57] a prison term was imposed when the appellant was convicted under section 150 of the code because he had in his possession obscene written matter for the purpose of publication, distribution or circulation even though the defence was raised that he did not know that the books seized contained obscene material. The court refused to apply *Beaver v. The Queen* [58] and accordingly ignorance or lack of mens rea is not a defence to a prosecution under section 150. [59]

VI. SEXUAL OFFENCES

Protection from prosecution, if not yet available to those adults who engage in consensual homosexual acts in private, is available to those engaging, in private, in consensual heterosexual activity. The Manitoba Court of Appeal in *Regina v. P.* [60] decided that Parliament did not intend, by section 149 [61] of the code, that police should enter "the portals of the home and to require the courts to sit in judgment upon what passes in private between consenting adult spouses or persons living together, whether married, or, for that matter, upon any heterosexual act . . . done in private between consenting

[52] 40 W.W.R. (n.s.) 663, [1963] 2 Can. Crim. Cas. Ann. (n.s.) 241 (B.C. 1962).

[53] [1968] 4 Can. Crim. Cas. Ann (n.s.) 129 (B.C.).

[54] Regina v. Vandervoort, [1961] Ont. W.N. 141, 130 Can. Crim. Cas. Ann. 158, *not followed.*

[55] Regina v. George, [1960] Sup. Ct. 871, 128 Can. Crim. Cas. Ann. 289 *applied, see* Regina v. Ward, [1968] 3 Can. Crim. Cas. Ann. (n.s.) 103 (B.C.) and see also the discussion by Beck & Parker, *The Intoxicated Offender—A problem of Responsibility*, 44 CAN. B. REV. 563 (1966).

[56] *See* Regina v. Teperman & Sons Ltd., [1968] 4 Can. Crim. Cas. Ann. (n.s.) 67 (Ont.).

[57] [1968] 1 Ont. 209 (1967).

[58] [1957] Sup. Ct. 531.

[59] Note, 10 CRIM. L.Q. 373 (1968). *Compare* the recent decision of the House of Lords in Sweet v. Parsley, [1969] 1 All E.R. 347.

[60] 63 W.W.R. (n.s.) 222 (Man. 1968).

[61] CRIM. CODE § 149: "Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years."

adults." [62] A different attitude had been taken by the same court to heterosexual acts performed in an automobile in a public place. [63] These cases raise the larger issue of the limits of criminal sanctions in the attempt to enforce conformity to standards of "public morality and decency."

VII. The Juvenile Delinquents Act

The federal Juvenile Delinquents Act [64] was recently challenged before the Supreme Court of Canada in *Attorney-General for British Columbia v. Smith.* [65] A sixteen-year old was tried for speeding under the Motor-Vehicle Act of British Columbia [66] and was convicted pursuant to the provincial Summary Convictions Act. [67] It was argued that since the accused was a juvenile he should have been dealt with in accordance with the federal Juvenile Delinquents Act. The question was raised whether the act could be supported constitutionally as a valid exercise of the criminal-law power under section 91(27) of the British North America Act. [68] The Supreme Court of Canada, in an unanimous judgment, held the federal act to be intra vires. Although there is no doubt that particular elements of the act would normally fall within provincial jurisdiction, the act as a whole was characterized as criminal law even through the legislation itself seems to disavow the intention to deal with the juveniles as "criminals" in the accepted sense of that word. [69]

VIII. Sentencing

The courts have lately considered the purpose and principles of sentencing: whether the length of term imposed by the court should be affected by the policy of the parole board [70] and whether "retribution" is a relevant consideration when sentencing. [71] In *Regina v. Hudson* [72] the court treated with leniency a youthful offender convicted of trafficking in marijuana. The

[62] 63 W.W.R. (n.s.) at p. 239.

[63] Regina v. Le Francois, [1965] 4 Can. Crim. Cas. Ann. (n.s.) 255 (Man.), and Note, 10 Crim. L.Q. 376 (1967-68).

[64] Can. Rev. Stat. c. 160 (1952).

[65] [1967] Sup. Ct. 702, 61 W.W.R. (n.s.) 236.

[66] B.C. Rev. Stat. c. 253, § 140 (1960).

[67] B.C. Rev. Stat. c. 373 (1960).

[68] B.N.A. Act.

[69] For a discussion of the merits of the decision see Note, 46 Can. B. Rev. 473 (1968). *Compare* the recent case of Regina v. Simpson, 63 W.W.R. (n.s.) 606 (B.C. Sup. Ct. in Chambers 1968) where a provincial statute which forbids the possession of L.S.D. was upheld as valid provincial legislation regulating health. *See also* Regina v. Board of Cinema Censors of Quebec, [1968] 4 Can. Crim. Cas. Ann. (n.s.) 96 (Qué. C.S. 1967).

[70] Regina v. Wilmott, [1966] 2 Ont. 654, [1967] 1 Can. Crim. Cas. Ann. (n.s.) 171, 58 D.L.R.2d 33.

[71] Regina v. Hinch, [1968] 3 Can. Crim. Cas. Ann. (n.s.) 39 (B.C. 1967)—*see also* Regina v. Sadowski, [1968] 2 Ont. 133.

[72] [1967] 2 Ont. 501, [1968] 2 Can. Crim. Cas. Ann. (n.s.) 43.

magistrate suspended the two-year sentence and imposed numerous terms and conditions such as: the accused was to return to live with his parents, to observe a ten p.m. curfew, to return to school and to continue to receive psychiatric treatment. This sentence was confirmed by the Ontario Court of Appeal. Six months later in *Regina v. Simpson*[73] another eighteen-year old, convicted of trafficking in marijuana under similar circumstances, was sentenced to nine months definite and six months indefinite. This sentence was confirmed by the same Ontario Court of Appeal. In *Regina v. Lehrmann*[74] the Alberta Court of Appeal reviewed the principles governing sentencing in narcotics cases. An associate professor of psychology at the University of Alberta was convicted of possession of marijuana. He was sentenced to one-month imprisonment. The factor emphasized by the British Columbia Court of Appeal in *Regina v. Hartley*,[75] was the deterrent effect the sentence would have on others contemplating or engaged in "possession" of marijuana. Chief Justice Davey, who delivered judgment for the court, said: "Keeping in mind the good character of these two persons and that a jail sentence is not needed for their rehabilitation as they have learned their lesson, I still think that the public in this province must understand that those who use marijuana and are apprehended are going to be punished severely. I would impose a sentence of six months on each of the appellants McCallum and Hartley."[76] In *Regina v. Adelman*[77] the British Columbia Court of Appeal, in a case where the accused had been convicted of "possession" and the sentence suspended, substituted six-months imprisonment. The latter judgment dealt with the lesser offence of "possession" and not with "trafficking" yet the courts treated the offence seriously. As Mr. Justice Minnin said in *Regina v. McNicol*[78] "the learned Magistrate seemed much too concerned with the possible rehabilitation of this young offender and by the fact that a long term of incarceration would deny him access to the University this fall. In doing so he completely disregarded the interests of the community." The sentence was increased to one year in prison. The courts have become more severe when sentencing those charged with narcotics offences and are routinely imposing prison sentences at a time when the federal government is reported contemplating legislative changes which may reverse this trend.

IX. Dangerous Sexual Offenders and Habitual Criminals

Klippert v. The Queen[79] raised the thorny issue of the criteria upon

[73] [1968] 2 Ont. 271, [1969] 1 Can. Crim. Cas. Ann. (n.s.) 93.
[74] 61 W.W.R. (n.s.) 625, [1968] 2 Can. Cas. Ann. (n.s.) 198 (Alta.).
[75] 63 W.W.R. (n.s.) 174, [1968] 2 Can. Crim. Cas. Ann. (n.s.) 183 (B.C. 1967).
[76] *Id.* at 179, [1968] 2 Can. Crim. Cas. Ann. (n.s.) at 189.
[77] 63 W.W.R. (n.s.) 294, [1968] 3 Can. Crim. Cas. Ann. (n.s.) 311 (B.C.).
[78] 1 D.L.R.3d 328, at 336 (Man. 1968).
[79] [1967] Sup. Ct. 822, [1968] 2 Can. Crim. Cas. Ann. (n.s.) 129, 65 D.L.R.2d 698.

which a determination that a man is a dangerous sexual offender pursuant to section 661 of the code is to be based. [80] It was understood, prior to the *Klippert* case, that the determination was based on the likelihood of these men continuing to be a danger to society and that only under circumstances of "dangerousness" was such a severe deprivation of liberty to be imposed. In the *Klippert* case the likelihood of the commission of a further sexual offence was considered an alternative element to that of the danger of injury to others. It is pointed out by Mr. Justice Fauteux that the Court realized that the offences were committed between consenting adults. Such acts no longer constitute an offence in England. [81] A finding that Klippert was "a dangerous sexual offender" was made on the basis of his homosexual acts and an indeterminate sentence was imposed.

The habitual criminal and dangerous sexual offender legislation was developed in order to deal with those persons who pose a serious and dangerous threat to society. Only under those circumstances is an absolutely indeterminate sentence, which rules out eventual discharge, in any sense justifiable. Such severe sanctions are unjustifiable if they are applied to those who constitute a nuisance or who may be mentally disturbed.

The Supreme Court of Canada in *Poole v. The Queen* [82] considered the question whether or not it was expedient to sentence Poole to preventive detention even though he was found to be an "habitual criminal." The Court distinguished the two determinations that must be made in these cases, and even though the British Columbia Court of Appeal had found the prisoner to be an "habitual criminal," the Supreme Court of Canada found that it was not expedient to sentence him to preventive detention. In *Hadden v. The Queen* [83] the Supreme Court of Canada examined a sentence of preventive detention and ruled on the meaning of the words "leading persistently a criminal life." [84] The majority held that the time at which the prosecution must show that an accused is leading persistently a criminal life is the time of the commission of the substantive offence.

Some protection against the indiscriminate application of this legislation is provided by the stringent procedural prerequisites to be followed before an application can be successfully commenced or established. [85] At the same time, the differential enforcement of these provisions often means

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[80] *See* CRIM. CODE § 659(*b*). *See also* An Act to amend the Criminal Code, the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff and the National Defence Act, Bill C-150 (1968-69) [hereinafter referred to as Bill C-150], and see explanatory notes relating to amended § 659(*b*) set out in the proposed Bill C-150.

[81] *See* Sexual Offences Act 1967, c. 60 and Bill C-150, § 149A.

[82] [1967] Sup. Ct. 554, [1968] 3 Can. Crim. Cas. Ann. (n.s.) 257.

[83] 67 D.L.R.2d 469 (Sup. Ct. 1968).

[84] CRIM. CODE § 660.

[85] *See* Regina v. Smith, [1967] 3 Can. Crim. Cas. Ann. (n.s.) 265 (B.C.) and Paton v. The Queen, [1968] 3 Can. Crim. Cas. Ann. (n.s.) 287 (Sup Ct.).

that where there is an opportunity to proceed against a prisoner under this legislation, application will be made by prosecutors in British Columbia and not made by the prosecuting authorities in the other provinces.

X. Legislative Reform

Somewhat more significant, in terms of the development of the criminal law, are the activities of federal and provincial authorities which will lead ultimately to legislative reform. The provincial governments of Ontario and Quebec have been particularly active in re-assessing the administration of criminal justice.

In Ontario, former Chief Justice McRuer was given a mandate:

> To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining how far there may be unjustified encroachment on those freedoms, rights and liberties by Government. . . . After due study and consideration to recommend such changes in the laws, procedures and processes as in the opinion of the commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringement by the State or any other body. [86]

The first three volumes of the report were submitted to the Lieutenant Governor of the Province of Ontario on February 7, 1968. Volume two of the report deals exclusively with the administration of civil and criminal justice in the province. Section four of volume two deals with the "machinery of justice and the individual."

Power of arrest without warrant under provincial statutes such as the Highway Traffic Act, [87] the Liquor Control Act [88] and the Game and Fish Act [89] have been conferred, in the opinion of the commissioner, "without regard for historic principles, necessity or elementary safeguards of civil rights or human dignity." [90] Power to arrest without warrant under provincial statutes must be strictly limited and under all circumstances a warrant should not be issued unless it is demonstrated that a summons would not, under the circumstances, be effective. Bail procedures are described as "discriminatory" [91] and encourage the activities of the professional bondsman, "a polluting influence in the administration of justice." [92] It is recommended in the report that police officers be authorized to release arrested persons upon

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[86] Ontario Royal Comm'n Inquiry into Civil Rights, Reports No. 1 viii (1968).

[87] Ont. Rev. Stat. c. 172 (1960).

[88] Ont. Rev. Stat. c. 217 (1960).

[89] Ont. Stat. 1961-62 c. 48.

[90] Ontario Royal Comm'n Inquiry into Civil Rights, Report No. 1 728-29 (1968).

[91] *Id.* at 749.

[92] *Id.*

service upon them of a notice to appear, and in most cases that persons be released on their own recognizance, unless it can be shown that they will not likely show up for trial or it is demonstrated that they will, if released, injure others. A complete re-organization of present bail procedures is suggested. The commissioner also recommends changes affecting the publication of proceedings before trial,[93] also with regard to the conduct of preliminary inquiries and committal for trial,[94] in appeals from convictions for offences against provincial laws[95] and in the functions of court reporters.[96] The commission report also proposed the institution of reimbursement to innocent persons suffering wrongful convictions[97] and that there be instituted a programme for the compensation of victims of crime.[98] The role of the provincial attorney-general[99] and financial responsibility for the machinery of justice in the province is thoroughly re-appraised.[100] The commissioner is less concerned with the fundamental philosophy, or lack of it, within the system than he is with answering, with practical recommendations, particular problems.

In contrast to the pragmatic and somewhat insular approach of the Ontario inquiry into civil rights, the Quebec Royal Commission of Inquiry into the Administration of Criminal Justice in its first report, published on December 20, 1968,[101] probed and articulated the fundamental principles which guide the administration of criminal justice. The commission, under the chairmanship of Yves Prévost, clearly recognized that some consensus about the ends of criminal justice must be developed before an attempt is made to amend the means—the processes of criminal law. The commission in an imaginative report which draws upon North American and European experience reaches a firm conclusion that reform must be tied to ultimate values and that the fundamental objectives must be the maintenance of equality before the law and respect for the individual and his liberty. This first report articulates the philosophy that will characterize the more specific recommendations which will appear later this year.

The Canadian Committee on Corrections under the chairmanship of Mr. Justice Roger Ouimet was established in June, 1965 to study 'the broad field of corrections, in the widest sense." The committee was formed to examine federal responsibility in the field of corrections, including the broad area of the administration of justice from arrest to parole and to recommend

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[93] *Id.* at 769.
[94] *Id.* at 780-81.
[95] *Id.* at 793-94.
[96] *Id.* at 811-12.
[97] *Id.* at 844.
[98] *Id.* at 854.
[99] *Id.* at 955.
[100] *Id.* at 920.
[101] COMMISSION ROYALE D'ENQUÊTE SUR L'ADMINISTRATION DE LA JUSTICE EN MATIÈRE CRIMINELLE ET PENALE, LA SOCIÉTÉ FACE AU CRIME, PRINCIPES FONDAMENTAUX D'UNE NOUVELLE ACTION SOCIALE (1968) Government of Quebec.

changes. The committee has travelled widely and has entertained briefs from a variety of interested parties and organizations. Its report is expected shortly.

Any study of the field of crime and corrections must take cognizance of the report by the President's Commission on Law Enforcement and Administration of Justice and the accompanying Task Force Reports [102] which were published in 1967 in the United States. This report represents the most comprehensive analysis of the crime problem attempted in the United States, and its studies constitute basic reading matter for all those interested in criminal-law reform and the crime phenomena.

One of the most significant legislative innovations in the field of criminal justice is the Ontario Legal Aid Act [103] which came into force in April, 1967. It is too early to assess the full impact of the act which provides that applicants who are accepted under the plan may retain and instruct counsel of their choice. [104] The plan avoids the paternalistic welfare taint of most legal aid programmes and provides fees to lawyers in accordance with a realistic fee schedule subject to a twenty-five per cent reduction. [105] The Law Society of Upper Canada administers the operation of the plan which is financed by the Ontario provincial government. It is to be hoped that the successful implementation of the legal aid plan in Ontario will provide useful guidelines and incentives to those provinces where rudimentary or totally inadequate arrangements for legal aid exist.

Federal legislative proposals to amend the Criminal Code, the Parole Act, the Penitentiary Act and the Prisons and Reformatories Act are contained in an "omnibus bill" first presented to the House of Commons as Bill C-195 and subsequently given first reading in a more complete form in December, 1968, as Bill C-150—The Criminal Law Amendment Act. [106] The proposed amendments strengthen controls over weapons; [107] change the gambling provisions to provide for federal and provincial as well as religious and charitable lotteries; [108] eliminate the offence of driving while intoxicated and substitute the offence of driving when the alcohol level in the blood

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[102] See THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE U.S. Gov't. See also Task Force Reports on the Courts, Science and Technology, Organized Crime, Drunkeness, The Police, Corrections, Juvenile Delinquency and Youth Crime, Narcotics and Drugs, Assessment of Crime, Research Studies, and Selected Consultants' Papers.

[103] Ont. Stat. 1966, c. 80, *as amended by*, An Act to amend the legal Aid Act, Bill 124. It received Royal assent June 27, 1969. *Also* Regulation made under the Legal Aid Act, Ont. Reg. 257/69 (1969).

[104] See PROVINCE OF ONTARIO REPORT OF THE JOINT COMM. ON LEGAL AID (1965) and see also ANNUAL REPORT OF THE INSPECTOR OF LEGAL OFFICES (Ontario, 1967).

[105] Thomas, *Settling Accounts Under the Ontario Legal Aid Plan*, 2 THE LAW SOC'Y GAZETTE 15 (1968).

[106] Bill C-150, 1968.

[107] CRIM. CODE §§ 82-98.

[108] Bill C-150, §§ 178-79A.

exceeds eighty milligrams per one-hundred millilitres of blood. [109] Section 147 and 149 of the code are no longer to apply to any act committed in private by any two consenting adults. [110]

The proposed amendments relating to the controversial subject of abortion merely confirm the principle enunciated in the case of *R. v. Bourne* [111] decided in England in 1938. Certain anomalies are created between the provision relating to death caused in the act of birth [112] and pregnancy that is terminated prior to the act of birth. [113] The amendments further complicate the life of the doctor and leave untouched the problem of the "worn-out mother" who does not want another child, the unwed mother, or the victim of rape. [114]

Provision is made, on application by the accused, for the granting of an order that evidence taken prior to and at the preliminary hearing not be published until the accused is discharged or the trial ended. [115] Procedures relating to the defence of insanity are clarified [116] and a provincial board is to be appointed to review the cases of persons held in custody under sections 526 or 527(1)(2) of the code. [117] Advice would in this way be made available to the Lieutenant Governor to assist in his exercise of discretion. The defence and the prosecution will gain the right to appeal from a verdict of "unfit to stand trial" or of "insanity." [118] Greater control over the custody of material witnesses is made available. [119] Consecutive prison sentences that amount, in aggregate, to two years or more are to be served in a federal penitentiary. [120] Provisions relating to probation and pre-sentence reports are codified [121] even though, in most provinces, facilities and personnel to implement these proposals are sadly lacking.

As a result of the decision in *Klippert v. The Queen*, [122] section 659 of the code, which defines a "dangerous sexual offender," is amended by the deletion of the words "or is likely to commit a further sexual offence."

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[109] *Id.* §§ 222-25. Breath samples must be given as refusal results in a conviction.

[110] *Id.* 149A. § 147 of the Criminal Code reads: "Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years." § 149 reads as follows: "Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years."

[111] [1938] 3 All E.R. 615 (Central Crim. Ct.). *See also* R. v. Newton, [1958] CRIM. L. REV. 469 (Central Crim. Ct.).

[112] Bill C-150, § 209.

[113] *Id.* § 237.

[114] *Compare* Abortion Act, 1967, c. 87 (U.K.).

[115] Bill C-150, § 452A.

[116] *Id.* §§ 524(1b) & (2)(*a*)(5), (6).

[117] *Id.* § 527A.

[118] *Id.* §§ 583, 584, 586.

[119] *Id.* § 611A.

[120] *Id.* § 634.

[121] *Id.* §§ 637-40B.

[122] [1967] Sup. Ct. 822, [1968] 2 Can. Crim. Cas. Ann. (n.s.) 129, 65 D.L.R.2d 698.

This change of wording represents mere tampering when the dangerous sexual offender, habitual criminal and preventive detention concepts embodied in the Criminal Code are in need of complete reappraisal. [123] The same may be said of the concept of parole and the amendments relating thereto. [124] However, it is in the proposed amendments of the Prison and Reformatories Act, that the penchant for patchwork rather than complete revision is most glaring.

Generally, the proposed Criminal Law Amendment Act represents an honest attempt to remedy a variety of maladies which have plagued criminal law enforcement for some time. It is to be regretted however, that the opportunity was not taken to conduct a thorough re-assessment of the Criminal Code and the nineteenth-century penal philosophy upon which it is based. [125] Each part of the criminal justice system must be assessed, not as a detached part or as a separate jurisdiction with its own value system of which the other parts take cognizance but little interest, but as interrelated phenomena operating within a total systemic context. New standards and goals cannot be enunciated in one part of the system while old standards and a variety of goals prevail in others. [126] The total process must be seen as a continuum and no part of it can be reformed without the others if a truly consistent policy is to be followed.

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[123] See Grosman, *The Treatment of Habitual Criminals in Canada*, 9 CRIM. L.Q. 95 (1966-67). *See also* Mewett, *The Habitual Criminal Legislation under the Criminal Code* 39 CAN. B. REV. 43 (1961).

[124] Bill C-150 which amends, the Parole Act, §§ 94-101, §§ 11-20.

[125] See Mewett, *The Criminal Law, 1867-1967*, 45 CAN. B. REV. 726 (1967).

[126] See Wechsler, *Codification of Criminal Law In the United States; The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968) for a statement of basic policy and other considerations that arise in a legislative attempt to restructure a system of criminal law.