CRIMINAL LAW AND PROCEDURE

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III. Procedure

I. INTRODUCTION

This survey attempts to highlight and assess the major trends in legislation and reported case law during the period January 1975 to September 1977 inclusive. It is necessarily highly selective. The subject has increased in complexity and some one thousand cases were reported during the period under review. The stimulating and now numerous published studies of the Law Reform Commission of Canada raise issues too large to be considered here and are mentioned only incidentally. [1] Pending legislation such as that outlined in principle for juvenile delinquents [2] is also omitted. Bill C-83, the omnibus part of the Solicitor General's Peace and Security Program, [3] was introduced in the House of Commons during the 1st session of the 30th Parliament, 1976. After heated public debate and detailed consideration by the Standing Committee on Justice and Legal Affairs, it lapsed at the end of the session and was re-introduced in a modified form as Bill C-51. Many of its provisions, still controversial, are now in force. [4] Large segments of this mammoth legislation, such as the intricate gun control provisions, cannot be considered here. Finally, little reference is made to the newly established correctional law field, an especially complex subject which has recently been reviewed elsewhere. [5]

One trend to watch for, as the survey unfolds, is a deep and apparently irreconcilable split in the Supreme Court of Canada in criminal appeals, with Laskin C.J.C. whistling for the minority against powerful majority winds favouring conviction. [6] It is also worth noting several significant contributions of the Ontario Court of Appeal, particularly those of Martin J.A.

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[1] The Commission's Working Papers were the subject of comment in two special issues of this Review: 7 OTTAWA L. REV. (1975); 8 OTTAWA L. REV. (1976).

[2] SOLICITOR GENERAL (Can.), HIGHLIGHTS OF THE PROPOSED NEW LEGISLATION FOR YOUNG OFFENDERS (1977).

[3] The other feature of the Peace and Security Program was, of course, Bill C-84, which included provisions for the abolition of capital punishment. *See now* Criminal Law Amendment Act (No. 2), 1976, S.C. 1974-75-76 c. 105, s. 5.

[4] Criminal Law Amendment Act 1977, S.C. 1976-77 c. 53.

[5] Price, *Doing Justice to Corrections? Prisoners, Parolees and the Canadian Courts,* 3 QUEEN'S L.J. 214 (1977).

[6] This assertion may be supported by a rudimentary analysis of the twenty-nine Supreme Court of Canada decisions digested for the survey period. There was a dissent in 19 (66%) of the cases. The figures for dissents based on the number of cases on which the judges sat were: Laskin C.J.C.: 54%; Spence J.: 48%; Dickson J.: 36%; Beetz J.: 19%; Judson J.: 14%; de Grandpré J.: 11%; Ritchie J.: 7%; Martland J.: 7%; Pigeon J.: 0%. The figures for judgments against the accused, again based on the number of cases on which each judge sat, were: Ritchie J.: 89%; Martland J.: 86%; de Grandpré J.: 85%; Pigeon J.: 83%; Judson J.: 72%; Beetz J.: 62%; Dickson J.: 43%; Spence J.: 33%; Laskin C.J.C.: 25%.

II. Substantive Law

A. *Actus Reus*

1. *Voluntariness*

There is an ongoing controversy [7] as to whether the *actus reus* concept includes a mental element and hence whether "voluntariness" should be classified under *actus reus* or *mens rea*. Clearly the dispute is more than academic in the case of strict responsibility offences, where acquittal on the facts is possible only if voluntariness is a requirement of the *actus reus*.

Recent decisions in the area of impaired driving seem to support the latter view. In *Regina v. King*, [8] the Supreme Court of Canada confirmed that section 234 of the Criminal Code was a *mens rea* offence, but was clearly unprepared to impose the traditional rigour of the mental requirement. [9] Although the judgments in the case are notoriously confused, [10] the decision to acquit King of impaired driving where his intoxication resulted from an anaesthetic given to him by a dentist who did not explain its properties, is now being applied to permit a defence of involuntary intoxication — non-insane automatism — to a charge of impaired driving: *Regina v. Bray*. [11] However, the defence of involuntary intoxication will be dismissed where there is evidence that the accused, by becoming drunk, was acting negligently. This is consistent with case law on automatism generally. [12] In *Regina v. Saxon*, [13] the accused was convicted when the evidence showed that he was aware of the impairing qualities of the tranquilizers he was taking, but, nevertheless, exceeded the prescribed dosage and disobeyed instructions not to drink.

These cases confirm that the qualification in *Bratty v. Attorney General for Northern Ireland*, [14] to the effect that the defence of sane automatism is not available when the evidence points to the defence of drunkenness, must be taken to refer only to voluntary intoxication.

As to the distinction between sane and insane automatism, the murky waters were further muddied by *obiter* remarks of the Ontario Court of

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[7] *See, e.g.*, Regina v. Villeneuve, [1968] 1 C.C.C. 267, *sub nom.* Regina ex rel. Wittemore v. Villeneuve, 2 C.R.N.S. 301 (N.S. Cty. Ct. 1967).

[8] [1962] S.C.R. 746, 133 C.C.C. 1, 35 D.L.R. (2d) 386.

[9] Ritchie J. (Martland and Taschereau JJ. concurring) held that *mens rea* need not be present in relation to both the act of driving and the impaired state: *id.* at 764, 13 C.C.C. at 19, 35 D.L.R. (2d) at 401.

[10] *See* Weiler, *The Supreme Court of Canada and the Doctrine of Mens Rea*, 49 Can. B. Rev. 280, at 309-12 (1971).

[11] 24 C.C.C. (2d) 366 (Ont. Cty. Ct. 1975).

[12] *See, e.g.*, Rex v. Shaw, [1938] O.R. 269 (C.A.).

[13] 22 C.C.C. (2d) 370 (Alta. C.A. 1975).

[14] [1963] A.C. 386, 46 Cr. App. R. 1, [1961] 3 W.L.R. 965 (H.L.). *Bratty* has been applied in a number of Canadian decisions. *See, e.g.*, Regina v. Hartridge, 56 W.W.R. 385, [1967] 1 C.C.C. 346, 57 D.L.R. (2d) 332 (Sask. C.A. 1966); Regina v. O'Brien, [1966] 3 C.C.C. 288, 56 D.L.R. (2d) 65 (N.B.C.A. 1965); Parnerkar v. The Queen, [1974] S.C.R. 449, 21 C.R.N.S. 129, 33 D.L.R. (3d) 683 (1973); Regina v. Mulligan, 18 C.C.C. (2d) 270, 26 C.R.N.S. 179 (Ont. C.A. 1974), *aff'd* [1977] 1 S.C.R. 612, 28 C.C.C. (2d) 266 (1976).

Appeal in *Regina v. Sproule*.[15] Sane automatism was defined by the court as a "malfunction of the mind technically described as dissociation [t]hat . . . may be non-recurring, brought about by an externally originated cause, examples of which are a blow on the head . . . or hypoglycemia".[16] On the other hand, a "malfunction of the mind attributable to some pathological condition, organic or otherwise" is a "disease of the mind"[17] which might only ground the defence of insanity under section 16. The Ontario court cited with approval *Regina v. Parnerkar*,[18] where the Saskatchewan Court of Appeal unanimously held that a state of dissociation brought about by psychological shock is a disease of the mind and precludes a defence of sane automatism, and pointed out that this view was endorsed by Ritchie and Spence JJ. when *Parnerkar* came before the Supreme Court of Canada on appeal.[19]

At least two conundrums are left unresolved by these remarks. Must there always be an "externally originated cause"? As a practical matter, the defence of automatism is more likely to succeed where there has been a physical blow to the head; but what of the more problematic cases involving sleep-walking, strokes, or even pneumonia?[20] Secondly, has "psychological-blow-automatism" in fact been "dealt its death blow"?[21] Although there has been no definitive Supreme Court of Canada ruling,[22] the Ontario Court of Appeal decision in *Sproule*[23] casts a shadow over *Regina v. K.*,[24] where the accused was held to have killed his wife while in a state of automatism. The only evidence led was that he had suffered a severe psychological blow on being told that his wife was leaving him. Equally suspect now is the decision in *Regina v. Gottschalk*,[25] where the defendant was acquitted on charges of shoplifting and assaulting a store detective on the evidence of a neurologist, corroborated by that of a psychiatrist, that the accused was "preoccupied, that he did not fully realize what he was doing, and that his actions were reflex actions not intended or thought of".[26] Clearly the courts are sceptical of defences of automatism in general,[27] and in this area in particular.

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[15] 26 C.C.C. (2d) 92, 30 C.R.N.S. 56 (Ont. C.A. 1975).

[16] *Id.* at 98, 30 C.R.N.S. at 64.

[17] *Id.*

[18] [1972] 1 W.W.R. 161, 5 C.C.C. (2d) 11, 16 C.R.N.S. 347 (Sask. C.A. 1971).

[19] *Supra* note 14.

[20] *See* Regina v. Cullum, 14 C.C.C. (2d) 294, at 305 (Ont. Cty. Ct. 1973), where several such cases are listed.

[21] Bayne, *Automatism and Provocation in Canadian Case Law*, 31 C.R.N.S. 257, at 265 (1975).

[22] This has been overlooked by Bayne, *id.* at 266.

[23] *Supra* note 15.

[24] [1971] 2 O.R. 401, 3 C.C.C. (2d) 84 (H.C. 1970).

[25] 22 C.C.C. (2d) 415 (Ont. Prov. Ct. 1974).

[26] *Id.* at 422.

[27] *See, e.g.*, Schroeder J.A. in Regina v. Szymusiak, [1972] 3 O.R. 602, at 608, 8 C.C.C. (2d) 407, at 413, 19 C.R.N.S. 373, at 378 (C.A.), where he emphasizes that this defence may be the "last refuge of a scoundrel".

2. *Causation*

There are less compelling reasons in criminal law for adopting the tort rule that "you take your victim as you find him" as regards individual susceptibilities and frailties. There are surely fundamental policy differences between punishing an offender for unexpected consequences of an act and demanding that a tortfeasor compensate a peculiarly vulnerable victim. It is disappointing that the Supreme Court of Canada did not allude to this issue in *Smithers v. The Queen,* [28] in unanimously adopting the "thin skull rule" in a manslaughter case. A hockey player had punched and kicked in the stomach a member of the opposing team after the game. The medical evidence was that the victim had died as a result of inhaling his own vomit. For the full court, Dickson J. held that it sufficed that the kick was a contributing cause [29] of the death and that it was immaterial that a malfunctioning epiglottis may have been an additional cause. He even quoted with apparent approval the severe decision of the English Court of Appeal in *Regina v. Blaue* [30] to convict of manslaughter one who had stabbed a victim, a Jehovah's Witness, who refused a blood transfusion for religious reasons and died as a result.

B. *Mens Rea*

1. *Definition*

The courts have demonstrated a reluctance to provide the definitions omitted from the Criminal Code. Thus generalizations about *mens rea* in Canada are dangerous. It seems reasonably safe [31] though to assert that normally a *mens rea* offence will be assessed subjectively and, except for crimes requiring "specific intent", there is either an express [32] or implied extension of the concept to recklessness. What have recent decisions contributed?

No attempt has been made since *Regina v. George* [33] to define "specific intent". One can speculate that it means a premeditated and direct intent as to the future—that is, intent in its ordinary grammatical sense of purpose, objective or design. Several recent decisions illustrate the use by the courts of "specific intent" to achieve a pragmatic answer to the question whether the defence of voluntary intoxication will excuse, [34] but none of these decisions has grappled with the problem of definition.

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[28] 34 C.C.C. (2d) 427 (S.C.C. 1977).

[29] *See also* Regina v. Kitching, [1976] 6 W.W.R. 697, 32 C.C.C. (2d) 159 (Man. C.A.).

[30] [1975] 1 W.L.R. 1411 (C.A.).

[31] *See* Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence,* 15 CRIM. L.Q. 160 (1973).

[32] *I.e.,* some forms of murder under section 212(a)(ii) and (b), Part IX offences and criminal negligence under s. 202.

[33] [1960] S.C.R. 871, 128 C.C.C. 289, 34 C.R. 1.

[34] This problem is discussed in text *infra* between notes 271 and 293.

In *Leary v. The Queen,* [35] the Supreme Court of Canada finally decided, in a split decision, that rape is not a specific intent crime and hence voluntary intoxication is no defence to that charge. Pigeon J., for the majority, [36] was content to quote the *George* definitions, relying principally on Fauteux J.'s statement that:

> In considering the question of *mens rea,* a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act. [37]

Pigeon J. also quoted extensively from the House of Lords decision in *D.P.P. v. Majewski.* [38] But nowhere in the majority judgment are the ramifications and utility of the specific intent concept explored independently of its use as a device in determining the voluntary drunkenness defence. In contrast, Dickson J., in dissent, concluded that the specific/basic intent dichotomy should be abandoned as irrational, there being no legally adequate criteria for distinguishing specific intent crimes from other *mens rea* offences. He expressed doubt whether Lord Birkenhead in *D.P.P. v. Beard* [39] had ever intended the dichotomy.

To one who has always rejected the specific (premeditated) intent concept, it is disappointing that the majority in *Leary* would perpetuate the myth. It is impractical in the real world where people seldom weigh their acts in advance, not adaptable to crimes in which the circumstances rather than the consequences of an act are penalized, and, if honestly applied to the Code, would lead to such ludicrous results as murder *not* being a specific intent crime.

Regina v. Dugan [40] was an interesting decision in which the definition of specific intent might have been material. At his trial for a drug offence, Dugan attempted to drink sulphuric acid from a plastic bottle in a self-confessed and pre-announced effort to commit suicide in public. He was later charged under section 83 of the Criminal Code with possession of a weapon for a purpose dangerous to the public peace. The court first held that the sulphuric acid was indeed a weapon within the meaning of section 2(f) of the Code, which requires the use of, or the *intent* to use the object as a weapon. Surely, the intent must be directed against another? In any event, the interesting facet of this decision lies in the consideration of the further element of the offence, indicated by the phrase "for a purpose

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[35] 37 C.R.N.S. 60, 13 N.R. 592, 74 D.L.R. (3d) 103 (S.C.C. 1977).

[36] Pigeon, Martland, Judson, Ritchie, Beetz and de Grandpré JJ. In dissent were Dickson and Spence JJ. and Laskin C.J.C.

[37] *Supra* note 33, at 877, 128 C.C.C. at 301, 34 C.R. at 6-7.

[38] [1976] 2 All E.R. 142 (H.L.).

[39] [1920] A.C. 479, 14 Cr. App. R. 159, [1920] All E.R. Rep. 21 (H.L.).

[40] 21 C.C.C. (2d) 45 (Ont. Prov. Ct. 1974).

dangerous to the public peace". [41] In convicting Dugan, the judge held that:

> the accused ought to have realized and did in fact realize that the drama he intended to portray in Court was likely, in the circumstances, to provoke physical resistance to his proposed conduct and that, in the process, persons in the vicinity would be exposed to serious physical injury if and when an attempt was made to frustrate his bizarre plan by the police's endeavour of preventing him from drinking the acid and as he resisted. As a matter of fact, this is exactly what happened as disclosed by the evidence. [42]

Clearly there was no attempt to restrict "purpose" in this context to direct intent; it was in fact extended to include foresight of a likelihood or a "probability", as earlier expressed in the judgment. [43] Another slip was the invocation of the phrase "ought to have realized".

"Criminal negligence" is an example of an express extension of *mens rea* to include recklessness. [44] Since the Supreme Court of Canada's ruling in *O'Grady v. Sparling* [45] that criminally negligent driving requires something more than inadvertent negligence, one assumed a subjective test. In cases connected with driving, the problem is thus to distinguish the offence of criminally negligent driving under section 233(1) from the objectively worded provincial offences of careless driving [46] and the offence of dangerous driving under section 233(4) of the Criminal Code. [47] This latter section, re-introduced into the Code in 1961, was the subject of a notoriously unsuccessful attempt by the Supreme Court of Canada to reconcile the objective and subjective tests in *Peda v. The Queen.* [48] On the other hand, in non-driving cases, some provincial courts [49] have applied an objective test of negligence, apparently in total disregard of that decision.

One would have thought that the Supreme Court of Canada would have welcomed the opportunity to clarify the law. Yet when the chance arose in

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[41] S. 83.

[42] *Supra* note 40, at 52.

[43] *Id.* at 51. *See contra,* Regina v. Burkholder, 34 C.C.C. (2d) 214 (Alta. C.A. 1977).

[44] *See* section 202 of the CRIMINAL CODE: One is negligent where, *inter alia,* he shows "wanton or reckless disregard for the lives or safety of other persons".

[45] [1960] S.C.R. 804, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

[46] *See, e.g.,* Highway Traffic Act, R.S.O. 1970, c. 202, s. 83, which speaks of driving "without due care and attention or without reasonable consideration for other persons using the highway".

[47] Section 233(4) refers to driving "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".

[48] [1969] S.C.R. 90, [1969] 4 C.C.C. 245, 6 D.L.R. (3d) 177. For a comment on this case *see* Burns, *An Aspect of Criminal Negligence or How the Minotaur Survived Theseus Who Became Lost in the Labyrinth,* 48 CAN. B. REV. 47, at 55-56 (1970).

[49] *See, e.g.,* Regina v. Titchner, [1961] O.R. 606, 131 C.C.C. 64, 29 D.L.R. (2d) 1 (C.A.); Regina v. McCrea, 70 W.W.R. 663, 8 C.R.N.S. 179 (Sask. C.A. 1969); Regina v. Coleman, [1974] 3 W.W.R. 346 (Sask. Dist. Ct.); Regina v. Doubrough, 35 C.C.C. (2d) 46 (Ont. Cty. Ct. 1977). My colleague Professor Stuart Ryan suggests that judges look through section 202 as if it were a window with the glass out!

LeBlanc v. The Queen, [50] the Court was cavalier. The charge was criminal negligence causing death contrary to section 203 of the Criminal Code. The decision turned on the admissibility of similar fact evidence relevant to the *mens rea.* Dickson J., in dissent, cited a *dictum* in *Arthurs v. The Queen* that "subjective intent is not a necessary ingredient of criminal negligence," [51] a remark that clearly referred only to direct intent. He went on to say that it then follows that the *mens rea* of criminal negligence is to be tested by an *objective* standard: an amazing leap of logic! De Grandpré J., for the majority, quoted a similar remark from *Arthurs* [52] and a 1929 Supreme Court of Canada *dictum* defining criminal negligence in objective terms as "a want of ordinary care in circumstances in which persons of ordinary habits of mind would recognize that such a want of care is not unlikely to imperil human life". [53] But thereafter he reiterated the advertence ruling in *O'Grady* and classified the section 203 offense as one requiring *mens rea* for the purpose of the similar facts rule. While it is possible to eke out some support for the subjective test for criminal negligence from the majority judgment, it is appalling that the highest court was so unhelpful on the question of whether the test is subjective or objective. *LeBlanc* submerges negligent driving in the labyrinth [54] of dangerous driving. [55]

Turning to the implied extension of *mens rea* to recklessness, it is encouraging to note that the majority of the Ontario Court of Appeal rejected a purely objective approach in *Regina v. Currie.* [56] The accused was charged with uttering a forged cheque, which he had cashed as a favour for a stranger. Martin J.A. [57] directed an acquittal on the basis that:

> the trial Judge's reasons for judgment is not free from ambiguity and is reasonably open to the conclusion that the learned trial judge was of the view that the doctrine of wilful blindness applied because the accused should have been suspicious in all the circumstances of the forged endorsement on the cheque when he received it and should have made further inquiry. [58]

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[50] [1977] 1 S.C.R. 339, 29 C.C.C. (2d) 97, 68 D.L.R. (3d) 243 (1975). The accused, a bush pilot, had miscalculated a low dive intended to frighten two persons on the ground and had struck and killed one of them.

[51] [1974] S.C.R. 287, at 307, 7 C.C.C. (2d) 438, at 453, 28 D.L.R. (3d) 565, at 579 (1972), *cited by* Dickson J. in *LeBlanc, supra* note 50, at 346, 29 C.C.C. (2d) at 102-103, 68 D.L.R. (3d) at 249. Laskin C.J.C. and Beetz J. concurred.

[52] *Supra* note 50, at 356, 29 C.C.C. (2d) at 110-11, 68 D.L.R. (3d) at 256. Martland, Judson, Ritchie, Spence and Pigeon JJ. concurring.

[53] Rex v. Baker, [1929] S.C.R. 354, at 358, 51 C.C.C. 352, at 354-55, [1929] 2 D.L.R. 282, at 285.

[54] This is the word used by Burns, *supra* note 48, at 47.

[55] *Cf.* Laskin J.A.'s concern to distinguish the three driving offences in Regina v. Binus, [1966] 2 O.R. 324, [1966] 4 C.C.C. 193, 48 C.R. 279 (C.A.), *aff'd* but substituting a different test, [1967] S.C.R. 594, [1968] 1 C.C.C. 227, 2 C.R.N.S. 118. *See also* cases revealing the pragmatic approach to dangerous driving now adopted in Ontario: Regina v. Beaudoin, [1973] 3 O.R. 1, 12 C.C.C. (2d) 81 (C.A.); Regina v. Lowe, 6 O.R. (2d) 585, 21 C.C.C. (2d) 193 (C.A. 1974); Regina v. Mueller, 32 C.R.N.S. 188 (Ont. C.A. 1975).

[56] 24 C.C.C. (2d) 292 (Ont. C.A. 1975).

[57] Arnup J.A. concurring.

[58] *Supra* note 56, at 295.

It was further held that there was no room for the doctrine of "constructive knowledge" in criminal law. [59] A passage from Glanville Williams concerning the doctrine of wilful blindness was quoted with approval, but no reference was made to that author's double-barrelled concept of recklessness which requires not only subjective foresight of the risk, but also unjustified assumption or creation of it, a matter which must be determined objectively. [60] It would seem that this limited objective aspect is necessarily inherent in any otherwise subjective test of recklessness.

In *Leary,* [61] Dickson J. (the same judge who was rampant in *LeBlanc* [62]) in dissent seemed to apply his own version of the Glanville Williams' refinement. He held that:

> The mental state basic to criminal liability consists in most crimes in either (a) an intention to cause the *actus reus* of the crime, i.e., an intention to do the act which constitutes the crime in question, or (b) foresight or realization on the part of the person that his conduct will probably cause or may cause the *actus reus,* together with assumption of or indifference to a risk, which in all of the circumstances is substantial or unjustifiable. This latter mental element is sometimes characterized as recklessness. [63]

This author is pleased to see a judge of our highest court adopt such a test. But some ambiguity in Dickson J.'s formulation should be noted. Later in his judgment he applies a standard of foresight of a *possibility* [64] rather than of a probability, as required by the above remarks. It would also seem preferable to phrase the test as one of unjustifiable assumption or creation of risk, with the magnitude of the danger and the social value in running the risk as factors to be considered. A substantial risk may be justifiable, as where an ambulance runs a red light in an attempt to save a life.

Finally, one should note the adoption by Martin J.A. in *Regina v. Mulligan* [65] of an instructive *dictum* of Windeyer J. of the Australian High Court on the difference between the subjective aspect of the substantive requirement of *mens rea* and the objective element in evidential proof:

> A man's own intention is for him a subjective state, just as are his sensations of pleasure or of pain. But the state of another man's mind, or of his digestion, is an objective fact. When it has to be proved, it is to be proved in the same way as any other objective facts are proved. A jury must consider the whole of the evidence relevant to it as a fact in issue. If an accused gives evidence of what his intentions were, the jury must weigh his testimony along with whatever inference as to his intentions can be drawn from his conduct or from other relevant facts. References

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[59] *Id.* at 296.

[60] G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 58-64 (2d ed. 1961). *See also* Stuart, *supra* note 31.

[61] *Supra* note 35.

[62] *Supra* note 50.

[63] *Id.*

[64] *Id.*

[65] *Supra* note 14, at 274, 26 C.R.N.S. at 184.

> to a "subjective test" could lead to an idea that the evidence of an accused man as to his intent is more credible than his evidence of other matters. It is not: he may or may not be believed by the jury. Whatever he says, they may be able to conclude from the whole of the evidence that beyond doubt he had a guilty mind and a guilty purpose. But always the questions are what did *he*, in fact, know, foresee, expect, intend. [66]

2. *The Doctrine of "Transferred Malice"*

At a not-too-convivial party in Manitoba, a Mr. Deakin took a swing at a Mr. Pelletier but struck instead glass ornaments on a television set. The glass shattered and struck and injured Mrs. Pelletier. The Manitoba Court of Appeal held [67] that Deakin should have been convicted of assault causing bodily harm on the basis that his intention to strike Mr. Pelletier should be deemed to have been transferred to Mrs. Pelletier.

Significantly, this is the first Canadian decision to adopt the English common law doctrine of "transferred malice". The social policy issues behind the doctrine were not articulated. Matas J.A. was content to mechanically recite [68] the description by Glanville Williams of the alleged doctrine (and its restriction that the intent transferred may only be in respect of the same sort of crime) together with several nineteenth century English decisions and references to other English texts. [69] Using the terminology of *Regina v. George*, [70] he distinguished the two instances where the Code states that the victim can be other than that intended (namely, certain forms of aggravated assault under section 228 and certain types of murder under section 212(b)) on the basis that these are specific intent crimes, while the crime in question is one of general intent.

It is submitted that the doctrine of transferred malice should be rejected. It is a fundamental departure from the principle that *mens rea* is necessary in respect of the prohibited consequences or circumstances, and could well lead to other applications where one's sense of justice might be more affronted. For example, what if *A* aims a punch at *B*, and *C*, whose presence is unknown to *A*, runs into the target zone and is hit? The proper route in *Deakin* would have been to apply normal principles of *mens rea* to the wording of section 244(a), the general assault section. There seems little difficulty in concluding that this is *not* a specific intent offence and that there is an implied extension as far as recklessness. On the facts, although Mr. Deakin did not intend to harm Mrs. Pelletier, he might well have been found subjectively reckless towards her.

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[66] Vallance v. The Queen, 108 C.L.R. 56, at 83 (Aust. H.C. 1961).

[67] Regina v. Deakin, [1974] 3 W.W.R. 435, 16 C.C.C. (2d) 1, 26 C.R.N.S. 236 (Man. C.A.).

[68] *Id.* at 438-43, 16 C.C.C. (2d) at 4-8, 26 C.R.N.S. at 239-44.

[69] Early editions of RUSSELL ON CRIME and KENNY'S OUTLINES OF CRIMINAL LAW were cited, but there was no reference to the leading English text of J. C. SMITH & B. HOGAN, CRIMINAL LAW (3d ed. 1973).

[70] *Supra* note 33.

3. *Erosions of the Subjective Mens Rea Principle*

(a) *Mistake of fact*

There is a trend in some of the cases to require that a mistake of fact (which is simply a denial of *mens rea*) be both honest and reasonable, even when this is not expressly required by statute. [71] Since the decision in *Regina v. Tolson* [72] this tendency has been particularly marked in England. [73] Recently, however, the trend was reversed, at least for the crime of rape, by a three-to-two majority of the House of Lords in the extraordinary case of *D.P.P. v. Morgan.* [74] Morgan was convicted of aiding three fellow R.A.F. officers in the rape of his wife. He had invited them to have intercourse with her, saying that she was "kinky" and would pretend to struggle. The majority held that there could not have been a conviction if the accused had convinced the jury (which they did not) that they had had an honest belief, however unreasonable, that the victim consented. The dissenting speeches of Lords Edmund-Davies and Simon were based mainly on the reluctance to depart from precedent, but Lord Simon added:

> The policy of the law in this regard could well derive from its concern to hold a fair balance between the victim and the accused. It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him. [75]

This statement is particularly compelling in the context of a crime as serious as rape. But the better view seems to be that of the majority, clearly the law in Canada since *Regina v. Rees,* [76] that the reasonableness of the belief is merely relevant evidence as to whether the belief was honestly held. To determine that the belief is reasonable independent of the assessment of credibilty would be a substantial erosion of the subjective *mens rea* principle, which aims to punish an accused for *his* moral culpability. Notwithstanding the ruling in *Rees,* followed in *Beaver v. The Queen,* [77] there have been waverings in Canada [78] and it is therefore pleasing to see that Laskin C.J.C., the only judge who touched on this point in *Regina v. Kundeus,* [79] confirmed

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[71] As in the case of bigamy under section 254(2)(a).

[72] 23 Q.B.D. 169, 16 Cox. C.C. 629, [1886-90] All E.R. Rep. 26 (C.C.R. 1889).

[73] *See* SMITH & HOGAN, *supra* note 69, at 129-30.

[74] [1975] 2 All E.R. 347 (H.L.).

[75] *Id.* at 367.

[76] [1956] S.C.R. 640, 115 C.C.C. 1, 4 D.L.R. (2d) 406.

[77] [1957] S.C.R. 531, 118 C.C.C. 129, 26 C.R. 193.

[78] *See, e.g.,* Mackay J.A. in Regina v. McAuslane, [1968] 1 O.R. 209 (C.A. 1967); Ritchie J.A. in Regina v. King, *supra* note 8; Regina v. Finn, [1972] 3 O.R. 509, 8 C.C.C. (2d) 233 (C.A.).

[79] [1976] 2 S.C.R. 272, 32 C.R.N.S. 129, 61 D.L.R. (3d) 145. *See* the following views: Note, 8 OTTAWA L. REV. 91 (1976); Weiler, *Regina v. Kundeus: The Saga of Two Ships Passing in the Night,* 14 OSGOODE HALL L.J. 457 (1976).

the *Rees* position. [80]

The decision in *Kundeus* illustrates another way in which the law relating to defence of mistake of fact may result in an erosion of the subjective *mens rea* principle. The issue involved that aspect of the law of mistake which is to the effect that an honest mistake as to a non-essential element will not excuse, [81] amounting to strict liability to this extent. The charge was one of trafficking in a restricted drug (L.S.D.) contrary to the Food and Drugs Act, [82] and the question was whether the accused had made an essential mistake by thinking he was selling mescaline to an undercover agent when, in fact, he was selling L.S.D. The issue was, correctly it is submitted, further refined only in the strong dissenting judgment of Laskin C.J.C. [83] He pointed out that the Food and Drugs Act distinguishes between a controlled drug, a restricted drug such as L.S.D., and a drug such as mescaline which can be sold only by prescription, and that the penalties for selling L.S.D. are much higher than those for selling mescaline without a prescription. The issue, wider than the mental state required for drug offences, was "whether mistake of fact is shown on proof that, on the facts as the accused honestly believed them to be, he was innocent of the offence charged albeit guilty of another offence or whether he must show that he was innocent of any offence". [84] Having discussed the authorities, the Chief Justice expressed a preference for the former view and concluded:

> Where proof is made of an *actus reus* that, in a general sense, is common to a range or variety of offences which require *mens rea* but those offences differ as to gravity by reason of different classifications and different penalties, is a charge of a more serious offence established by proof only that the accused intended to commit and could have been found guilty of a less serious, a lesser offence? The matter, in terms of principle, depends on how strict an observance there should be of the requirement of *mens rea*. If there is to be a relaxation of the requirement, should it not come from Parliament, which could provide for a substitution of a conviction of the lesser offence, in the same way as provision now exists in our criminal law for entering a conviction on an included offence? [85]

Observing that the latter "sensible solution for a difficult problem" [86] was not open to the Court, Laskin C.J.C. held that the accused should have been acquitted, although he might well have been convicted if he had been charged with an offence of attempting to traffic in mescaline, as section 24 of the Code recognizes attempts to commit the impossible.

The majority judgment delivered by de Grandpré J., with six judges concurring, held that Kundeus should indeed have been convicted. The

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[80] *Supra* note 79, at 278-79, 32 C.R.N.S. at 144, 61 D.L.R. (3d) at 151, *citing Beaver, supra* note 77. Laskin C.J.C. dissented on a different point.

[81] *See, e.g.*, Regina v. Gowing, [1971] 1 W.W.R. 310 (Alta. C.A.).

[82] R.S.C. 1970, c. F-27.

[83] Spence J. concurring. The issues are analyzed in detail in Parker, Annot., 32 C.R.N.S. 150 (1976).

[84] *Supra* note 79, at 279, 32 C.R.N.S. at 144-45, 61 D.L.R. (3d) at 151.

[85] *Id.* at 283-84, 32 C.R.N.S. at 148-49, 61 D.L.R. (3d) at 155.

[86] *Id.* at 284, 32 C.R.N.S. at 149, 61 D.L.R. (3d) at 155.

judgment is disappointing both from the point of view of evidence and substantive law. The main objection [87] on evidentiary grounds is that de Grandpré J. resorted to the language of a "rebuttable presumption" of *mens rea* [88] and concluded that the accused's defence of mistake required him to tender independent evidence. The Court held that "[n]o evidence having been tendered by the accused, it is not possible to find that he had an honest belief amounting to a non-existence of *mens rea*". [89] Clearly Laskin C.J.C. was correct in suggesting [90] that at most the burden on the accused was only an evidentiary one and he was under no obligation to disprove *mens rea.* The majority opinion subverts the fundamental *Woolmington* principle. [91]

As to the substantive principles, it is difficult to determine what the majority judgment decided concerning *mens rea* for drug offences and impossible, since the majority, unlike Laskin C.J.C., made no effort to consider the wider issues, to work out its implications for *mens rea* generally. It is indeed possible to contend, on the basis of this omission, as did Friesen J. in *Regina v. Williams,* [92] that the ruling of the majority can be confined to its consideration of the unrebutted evidentiary presumption. Even if the wider implications of the judgment on *mens rea* are still undetermined in *Kundeus,* there at least has been some development of the definition of *mens rea* for drug offences. *Kundeus* represents a restatement of the rule in *Beaver v. The Queen* [93] that a person should be acquitted on a drug possession charge if he had no knowledge that the substance in his possession was a drug. There was reference to the ruling of the British Columbia Court of Appeal in *Regina v. Blondin,* [94] that it is not necessary, on a charge of importing a narcotic drug, to prove knowledge of the actual drug possessed as "[i]t would be sufficient to find, in relation to a narcotic, *mens rea* in its widest sense." [95] There is also the decision, at the very least *obiter,* to convict one who sold L.S.D. honestly thinking it was mescaline. The majority judgment carefully avoids passing on the specific ruling of the British Columbia Court of Appeal in *Blondin* that mere knowledge (in the extended sense) of illegality will not suffice to secure a conviction and that what is required is knowledge or wilful blindness of the fact that the substance is a narcotic.

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[87] There are others. *See* Parker, *supra* note 83, at 154-55.

[88] As stated in the discredited decision in Regina v. King, *supra* note 8, at 763, 133 C.C.C. at 18, 35 D.L.R. (2d) at 400.

[89] *Supra* note 79, at 290, 32 C.R.N.S. at 139, 61 D.L.R. (3d) at 160.

[90] *Id.* at 278, 32 C.R.N.S. at 144, 61 D.L.R. (3d) at 150.

[91] Woolmington v. D.P.P., [1935] A.C. 462, 25 Cr. App. R. 72, [1935] All E.R. Rep. 1 (H.L.), *approved* in the famous (or infamous) reverse onus decision in Regina v. Appleby, [1971] 4 W.W.R. 601, 16 C.R.N.S. 36, 21 D.L.R. (3d) 325 (S.C.C.). *See also* Parker, *supra* note 83, at 154-56.

[92] [1976] 3 W.W.R. 120, 29 C.C.C. (2d) 47 (B.C. Prov. Ct. 1975). *Kundeus* was also distinguished on the basis that the instant charge was possession for the purpose of trafficking.

[93] *Supra* note 77.

[94] [1971] 2 W.W.R. 1, 2 C.C.C. (2d) 118 (B.C.C.A. 1970), *aff'd without stated reasons* [1971] S.C.R. v, 4 C.C.C. (2d) 566n, [1972] 1 W.W.R. 479.

[95] *Id.* at 14, 2 C.C.C. (2d) at 131, *cited by* de Grandpré J. in Kundeus, *supra* note 79, at 289, 32 C.R.N.S. at 138, 61 D.L.R. (3d) at 159.

The significance of this is ambiguous since the ruling seems to be implicit in the approval of the cited passage from *Blondin*.

In conclusion it seems, on the basis of *Beaver, Blondin* and the majority judgment in *Kundeus,* that, in a drug prosecution under either the Narcotics Control Act [96] or the Food and Drugs Act, [97] the prosecutor must prove knowledge or wilful blindness in respect of the fact that the substance possessed was a prohibited drug and that it is immaterial under which statute the drug is proscribed or what the penalty might be. [98] It is arguable that a requirement of knowledge or wilful blindness as to the precise drug possessed might lead to too many acquittals, but perhaps the answer to this contention lies, as Laskin C.J.C. indicated, in legislation to provide for a conviction for the lesser offence. It is unfortunate that the majority in *Kundeus* did not explore the implications of their judgment for *mens rea* generally. Presumably the decision of the Ontario Court of Appeal in *Regina v. Santeramo,* [99] that on a charge of possession of counterfeit bills the Crown must prove knowledge of the character of the bills as counterfeit, will stand up.

(b) *Mistake of law*

It has been contended elsewhere [100] that if the subjective principle is to be applied seriously, mistake of law should excuse in the case of a *mens rea* offence. Of course, the Criminal Code expressly prevents this by stating that "ignorance of the law by a person who commits an offence is not an excuse for committing that offence". [101]

It is arguable [102] that section 19 of the Code does not apply to a charge under a provincial statute or even a federal regulation, but in respect of the Criminal Code or other federal statute it has always been difficult to avoid section 19 (except in offences such as theft which codify a colour of right defence). [103] However, in *Regina v. Maclean,* [104] O'Hearn J. thought of a way! An airport employee was charged with driving while disqualified under section 238(3) on a airport driveway. His licence had been automatically revoked when he had been previously convicted under section 235(2) for the offence of refusing to take a breathalyzer test. Notwithstanding section 19 the accused was acquitted on the basis of a Supreme Court

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[96] R.S.C. 1970, c. N-1.

[97] R.S.C. 1970, c. F-27.

[98] The same conclusion was reached in Regina v. Futa, [1976] 5 W.W.R. 173, 31 C.C.C. (2d) 568 (B.C.C.A. 1976) and Regina v. Couture, 33 C.C.C. (2d) 74 (Ont. C.A. 1976).

[99] 25 C.C.C. (2d) 493, 36 C.R.N.S. 1 (Ont. C.A. 1976).

[100] *See* Stuart, *supra* note 31.

[101] S. 19.

[102] *See* Stuart, *supra* note 31. *See also* Weiler, *supra* note 10, at 317.

[103] The recent tendency is to circumvent Regina v. Shymkowich, [1954] S.C.R. 606, 110 C.C.C. 97, 19 C.R. 401. *See, e.g.*, Regina v. DeMarco, 13 C.C.C. (2d) 369, 22 C.R.N.S. 258 (Ont. C.A. 1973).

[104] 17 C.C.C. (2d) 84, C.R.N.S. 31, 46 D.L.R. (3d) 567 (N.S. Cty. Ct. 1974). *See also* Ortego & Goode, *Recent Developments in Criminal Law in Nova Scotia,* 2 DALHOUSIE L.J. 744, at 776-90 (1975).

of Delaware ruling [105] that a mistake of law should excuse where a defendant has made a *bona fide,* diligent effort to ascertain and abide by the law through appropriate means. O'Hearn J. distinguished his earlier decision in *Regina v. Villeneuve,* [106] where the defendant was convicted of driving while disqualified though he was unaware that his driving licence had been automatically cancelled by operation of law following a conviction for leaving the scene of an accident. The law in question in the *Maclean* case was a relatively obscure federal regulation requiring that one possess a licence to drive on airport property. Furthermore Maclean had obtained the permission of his superiors and the R.C.M.P. and had been advised by the Motor Vehicle Department that permission from his employer would suffice. The result seems just, as does the more recent decision in *Regina v. MacPhee* [107] to acquit on a charge of unlawful possession of a restricted weapon contrary to section 94 of the Criminal Code, where the accused had no knowledge that the weapon fell into the "restrictive" Code category. MacPhee had in fact approached the police with the gun six years earlier. They not only advised him to register it (which he did) but also assured him that "if there was anything unusual about the gun, no doubt Ottawa would advise". [108] The court unconvincingly held that the case involved a mistake of fact and not of law. The *MacPhee* decision extends the *Maclean* logic to ignorance of the Code's provisions itself. [109] This does not offend this writer, but it may others!

(c) *Strict responsibility*

The decision of the Supreme Court of Canada in *Regina v. Pierce Fisheries Ltd.,* [110] in which the majority held that possession of undersized lobsters contrary to federal fishing regulations is a strict responsibility offence, is still the leading case on the difficult task of deciding whether an offence is one of *mens rea* or strict responsibility, particularly where there are no words suggesting *mens rea.* [111]

The *Pierce Fisheries* decision has been applied, for example, to achieve strict responsibility for misleading advertising under the Combines Investigation Act, [112] for delivering barley in excess of the quotas set by the Canadian Wheat Board Act [113] and for causing or permitting the discharge

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[105] Long v. State, 65 A.2d 489, 5 Terry 262 (Del. S.C. 1949).

[106] *Supra* note 7.

[107] 24 C.C.C. (2d) 229 (N.S. Mag. Ct. 1976).

[108] *Id.* at 231.

[109] *See also* Regina v. Finn, *supra* note 78, where the Ontario Court of Appeal characterized ignorance of the automatic suspension provision of s. 238(3) of the CRIMINAL CODE as a mistake of fact.

[110] [1971] S.C.R. 5, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591.

[111] For an excellent review of the law *see* J. Fortin, P.J. Fitzgerald & T. Elton, *Strict Liability in Law,* in STUDIES ON STRICT LIABILITY 155-85 (1974).

[112] R.S.C. 1970, c. C-12, s. 37(1)(a). *See now* S.C. 1974-75 c. 76, s. 36(1)(a). *See* Regina v. Lakaire Homes Ltd., 21 C.C.C. (2d) 53 (B.C. Cty. Ct. 1974).

[113] R.S.C. 1970, c. C-12, s. 17(1). *See* Attorney-General of Canada v. Brydon, [1975] 2 W.W.R. 705, *sub nom.* Regina v. Brydon, 21 C.C.C. (2d) 513, 55 D.L.R. (3d) 540 (Man. C.A. 1974).

of oil into a stream, contrary to the Ontario Water Resources Act. [114] On the other hand, in *Regina v. D'Entremont,* [115] possession of lobsters on an unlicensed ship contrary to federal regulations [116] was held—amazingly in view of the decision on the facts in *Pierce Fisheries*—to require *mens rea.*

The rough under-estimate by the Law Reform Commission of Canada [117] of the number of strict liability offences facing any individual at any one time is worth repeating:

Federal Statutes, excluding the Criminal Code	1,587	(44%)
Federal Regulations	18,820	(96%)
Provincial Statutes (Alberta)	3,640	(82%)
Provincial Regulations (Ontario)	13,920	(98%)
Total	37,967	

The trend to strict responsibility in provincial offences is evident in recent decisions [118] confirming that speeding is a strict responsibility offence. There is also the majority decision of the Supreme Court of Canada in *Hill v. The Queen* [119] holding that the Ontario provincial offence of failing to remain at the scene of an accident [120] is not a crime in the "true sense" but rather "part of a comprehensive code for the regulation and control of traffic on highways, enacted provincially in the interests of public safety". [121] However, in *Regina v. Racimore,* [122] Grange J. distinguished *Hill* on the basis that in that case the accused was aware of the contact between the vehicles but not the damage, while in *Racimore* there was not even an awareness of contact. [123] Grange J. concluded that the accused's "failure to remain was dictated by an ignorance of essential facts and was involuntary, and even though *mens rea* is not a part of the offence, he is not guilty". [124]

Admittedly, the wording of provincial offences seldom demands an interpretation of an objective test [125] and even more rarely subjective *mens*

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[114] R.S.O. 1970, c. 332, s. 32(1). *See* Regina v. Power Tank Lines Ltd., 23 C.C.C. (2d) 464 (Ont. Prov. Ct. 1975).

[115] 15 C.C.C. (2d) 395 (N.S. Mag. Ct. 1973).

[116] The accused was charged with violating s. 3(6) of the Lobster Fisheries Regulations passed pursuant to the Fisheries Act, R.S.C. 1970, c. F-14.

[117] Fitzgerald & Elton, *The Size of the Problem,* in STUDIES ON STRICT LIABILITY, *supra* note 111, at 56.

[118] Regina v. Gillis, 18 C.C.C. (2d) 190, 8 N.S.R. (2d) 550 (C.A. 1974); Regina v. Hickey, 13 O.R. (2d) 228, 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689 (C.A. 1976), *rev'g* 12 O.R. (2d) 578, 29 C.C.C. (2d) 23, 68 D.L.R. (2d) 88 (Div'l Ct. 1976).

[119] [1975] 2 S.C.R. 402, 24 C.R.N.S. 297, 43 D.L.R. (3d) 532 (1973).

[120] Highway Traffic Act, R.S.O. 1970, c. 202, s. 140(1)(a).

[121] *Supra* note 119, at 409, 24 C.R.N.S. at 302, 43 D.L.R. (3d) at 539 (Dickson J.).

[122] 25 C.C.C. (2d) 143 (Ont. H.C. 1975).

[123] *Id.* at 147.

[124] *Id.*

[125] Careless driving offences are the usual example. *See* Highway Traffic Act, R.S.O. 1970, c. 202, s. 83 which speaks of driving "without due care and attention or without reasonable consideration". This was interpreted as setting an objective standard as early as Regina v. Beauchamp, [1953] O.R. 422, 106 C.C.C. 6, 16 C.R. 270 (C.A.).

rea. [126] The Ontario Court of Appeal in *Regina v. City of Sault Ste. Marie* [127] held that the word "permits" in section 32(1) of the Ontario Water Resources Act does impel an interpretation of subjective *mens rea*; before the City could be convicted, there had to be knowledge or at least wilful blindness amounting to more than negligence in respect of the prohibited dumping.

In Australia, [128] New Zealand, [129] and England, [130] it is now recognized that the traditional choice between a requirement of *mens rea* and strict responsibility is unduly simplistic and that the better solution is to adopt a "half-way house" approach in some cases by resting liability on objective negligence, with the onus of proof on the accused. [131] The Law Reform Commission of Canada has gone further and suggested that there should only be a choice between real offences which always require subjective *mens rea* and regulatory offences for which lack of due diligence is the minimum basis for liability, the onus of proof being on the accused. [132] The Law Reform Commission's proposal is attractive [133] because it pins criminal responsibility on a form of fault, though admittedly an extended one, and recognizes that insistence on a subjective *mens rea* requirement is sometimes unworkable. One commentator [134] has recently criticized the decision in the now overruled *Power Tank Lines* case [135] (which imposed strict responsibility for a pollution offence) on the basis that it ignored a trend in lower court decisions to accept the negligence yardstick. The decision in the *Sault Ste. Marie* case, [136] which reverts back to a full requirement of *mens rea*, may go too far in the other direction. Responsibility based on objective

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[126] *See, e.g.,* Liquor Licence Act, S.O. 1975 c. 40, s. 45(1): "No person shall knowingly sell or supply liquor to a person under the age of eighteen years."

[127] 13 O.R. 113, 30 C.C.C. (2d) 257, 70 D.L.R. (3d) 430 (C.A. 1976). This decision implicitly overrules the *Power Tank Lines* case, *supra* note 114, although that case was not cited in the lengthy Court of Appeal decision.

[128] *See* Proudman v. Dayman, 67 C.L.R. 536 (Aust. H.C. 1941).

[129] *See* Regina v. Ewart, 25 N.Z.L.R. 709 (C.A. 1905).

[130] Sweet v. Parsley, 53 Cr. App. R. 221, [1969] 2 W.L.R. 470, [1969] 1 All E.R. 347 (H.L.).

[131] Lord Diplock prefers merely an evidential burden: *id.* at 248, [1969] 2 W.L.R. at 488, [1969] All E.R. at 363.

[132] THE LAW REFORM COMMISSION OF CANADA, OUR CRIMINAL LAW 22-23 (1976); THE LAW REFORM COMMISSION OF CANADA, THE MEANING OF GUILT, WORKING PAPER 2 (1974); THE LAW REFORM COMMISSION OF CANADA, STUDIES ON STRICT LIABILITY, supra note 111.

[133] *See* Stuart, Book Review, 23 CHITTY'S L.J. 69 (1975) and Stuart, *supra* note 31.

[134] Jobson, *Far From Clear,* 18 CRIM. L.Q. 294 (1976). *See* the cases discussed therein and *also* Regina v. LeBlanc, 21 C.C.C. (2d) 118 (Ont. Prov. Ct. 1974); Regina v. Cewe Ltd., 23 C.C.C. (2d) 237 (B.C. Cty. Ct. 1975); Regina v. Springbok Sand and Gravel Ltd., 25 C.C.C. (2d) 535 (Ont. Cty. Ct. 1975). The latter two cases recognized the defence of "act of God".

[135] *See supra* notes 114 and 127.

[136] *Supra* note 127.

negligence might be more attuned to social policy.[137] Even if the courts are not free to substitute a half-way house for all offences of strict responsibility (and it is submitted they are), high authorities such as the Supreme Court of Canada in *Pierce Fisheries*[138] and the Ontario Court of Appeal in *Hickey*[139] have been disappointingly cautious at best, and at worst, simply perverse in not fully considering this alternative. In *Hickey*, for example, a truck driver maintained that he honestly believed that he was not speeding and that he had no reason to suspect that his speedometer was not operating properly (as was subsequently proved to be the case). The defence was dismissed both at trial and on *de novo* appeal to the County Court, but it was accepted by a two-to-one majority of the Divisional Court after full argument. After this extensive litigation and difference of opinion, the Ontario Court of Appeal disposed of the defence in a few curt sentences. Expressly leaving open the question of whether there was in fact a half-way approach, the court simply pronounced, without further articulation, that speeding was a strict responsibility offence. Surely the issue deserved fuller and more conscientious treatment, especially in view of the much publicized work of the Law Reform Commission.

(d) *Constructive homicide*

The Criminal Code contains constructive homicide provisions[140] that not only drastically reduce or abandon the concept of *mens rea*, but also codify the unnecessary and severely criticized notion[141] that a lesser crime can be inflated to a much more serious crime such as murder or manslaughter if death results, however unexpectedly. Some of these sections fell to be interpreted by the Ontario Court of Appeal in *Regina v. Tennant*.[142]

Under the unduly complicated scheme in the Code, before a person can be convicted of murder, manslaughter or infanticide, his or her act must first come within the generic description of culpable homicide. Usually the prosecutor need look no further than section 205(5)(a) which speaks in terms of a killing "by means of an unlawful act". Interpreted literally, this

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[137] *See, e.g.*, Regina v. Action Tavern Ltd., 26 C.C.C. (2d) 127 (Ont. Prov. Ct. 1974), where an objective test was applied to a provincial offence of permitting persons apparently under eighteen years of age to remain on licenced premises contrary to the Liquor Licence Act, R.S.O. 1970, c. 250, s. 56(5), *as amended by* S.O. 1971 c. 98, s. 4, Schedule, para. 19.

[138] *Supra* note 110. This half-way option was raised by the Appellate Division of the Nova Scotia Supreme Court, but was not considered by the Supreme Court of Canada. *See* Regina v. Pierce Fisheries Ltd., [1969] 4 C.C.C. 163, 4 D.L.R. (3d) 80 (N.S.C.A.). *See also* Weiler, *supra* note 10, at 312-16. *See contra* Jobson, *supra* note 134, at 307-309.

[139] *Supra* note 118. *Cf.* Regina v. Lock, 18 C.C.C. (2d) 477 (Ont. C.A. 1974).

[140] Notably unlawful act culpable homicide: s. 205(5)(a); unlawful object murder: s. 212(c); and murder by killing in the commission of other crimes: s. 213. *See* Hooper, *Some Anomalies and Developments in the Law of Homicide*, 3 U.B.C.L. REV. 55 (1967-68) and Burns & Reid, *From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?* 55 CAN. B. REV. 75 (1977).

[141] SMITH & HOGAN, *supra* note 69, at 200-203.

[142] 7 O.R. (2d) 687, 23 C.C.C. (2d) 80, 31 C.R.N.S. 1 (C.A. 1975).

could mean any unlawful act, however trivial and harmless. The judgment in *Tennant* confirms that the Canadian courts have followed English decisions to restrict the meaning of "unlawful" to "such as any reasonable person would inevitably realize must subject another to the risk of, at least, some harm, albeit not serious harm." [143] The decision also makes it clear [144] that the defence of accident will not succeed where there is such an unlawful act. Since culpable homicide that is not murder is categorized as manslaughter, [145] this means that manslaughter could well be a strict responsibility offence. However, the court recognized that where there is no unlawful act and the prosecution is based on homicide by criminal negligence under section 205(5)(b), accident can be a complete defence, if it does not in itself amount to criminal negligence. [146]

The main ruling in *Tennant* concerns constructive murder as defined in section 212(c):

> [W]here a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes a death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

The Court of Appeal recognized "the anomaly" that the words "ought to know" impelled an objective test, [147] and indicated that the only subjective inquiry in which factors such as intoxication and stupidity could be relevant would be in respect of the required proof of an unlawful object and knowledge of the relevant facts which made the conduct likely to cause death. [148] The court went on to consider the meaning of doing "anything" for "an unlawful object" which results in death, and the view expressed by McKinnon J.A. in *Regina v. Blackmore* [149] that:

> [C]learly an assault, particularly a massive assault, cannot be the unlawful object intended in the wording of section [212(c)] for it would seem to be beyond the realm of probability for such a person to commit this assault and yet desire to cause no bodily harm. Under the terms of the section, the assault could be the means but not the unlawful object. [150]

The Ontario Court of Appeal accepted this view but added an important qualification:

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[143] *Id.* at 704, 23 C.C.C. (2d) at 96, 31 C.R.N.S. at 19. *See also* Regina v. Mark, 22 C.C.C. (2d) 257 (Alta. C.A. 1975); Regina v. Kitching, *supra* note 29.

[144] *Id. Cf.* Alec v. The Queen, 17 C.C.C. (2d) 529 (S.C.C. 1974); Charbonneau v. The Queen, 33 C.C.C. (2d) 469 (S.C.C. 1977). In neither decision was the defence of accident directly in issue.

[145] S. 217 (or infanticide: s. 216).

[146] *Supra* note 142, at 704, 23 C.C.C. (2d) at 96-97, 31 C.R.N.S. at 19.

[147] *Id.* at 698, 23 C.C.C. (2d) at 91, 31 C.R.N.S. at 14. *Cf.* Hooper, *supra* note 140, at 62-65.

[148] *Id.*

[149] [1965-69] 4 N.S.R. 509, 1 C.R.N.S. 286, 53 M.P.R. 141 (C.A. 1967).

[150] *Id.* at 517-18, 1 C.R.N.S. at 292, 53 M.P.R. at 147, *cited* in *Tennant, supra* note 142, at 700, 23 C.C.C. (2d) at 92-93, 31 C.R.N.S. at 15.

> We are in complete agreement . . . that section 212(c) cannot be invoked where death is caused by an assault unless such assault is committed in order to achieve some ulterior unlawful object. . . . We consider, however, that an assault may be the unlawful object to achieve which *another* [later they used the word separate] *act* causing death is committed. For example, the accused might assault A, a security guard, thereby causing his death without intending to do so or without intending to cause injury to A known to the accused to be likely to cause death, in order to achieve his further purpose of assaulting B, or assassinating B. [151]

While this qualification of *Blackmore* is unassailable, it is difficult to agree with the court's further ruling that Tennant fell within the ambit of section 212(c). The evidence revealed that, following considerable drinking at a raucous Christmas Eve party, Naccarato and Tennant had gone to the apartment of one Johnson. Johnson had been involved in a violent brawl at the party, and it was intimated that the two accused were paying a visit to remonstrate on behalf of a friend and to "settle the score". After an exchange of words, Johnson attacked the accused with a knife and a crutch. Naccarato fled to his home a short distance away and fetched his pistol. He returned, and shot and killed Johnson. The defence was accident. It was held that Naccarato's conduct in securing and using the pistol was sufficiently separated from the unlawful object, *i.e.*, the intent to assault, to constitute such a separate act done for a further unlawful purpose as required by section 212(c). This is difficult to accept. Surely the only unlawful *object* (as opposed to *act*) was the intent to assault.

A different panel of the Ontario Court of Appeal in *Regina v. DeWolfe* [152] deliberately restricted the section 212(c) ruling in *Tennant*. Zuber J.A., [153] noting that *Tennant* had led to a sharp increase in section 212(c) charges, held that "[w]hile personal injury of the victim may be the unlawful object required by the subsection, it must nevertheless be distinct from the immediate object of the very act which leads to death" [154] and further directed that section 212(c):

> should be put to the jury when there is plainly evidence of a further unlawful object, but the facts should not be subjected to a metaphysical examination to uncover further unlawful objects; a common sense view of the evidence should be taken. Cases such as *Tennant* . . . can well be regarded as high-water marks of the construction and application of this subsection and should not be construed as points of departure. [155]

The facts in *DeWolfe* were not unlike those in *Tennant*. The accused had intervened in an argument between neighbours. On the Crown's version of the facts, the deceased, who was armed, was attacked by several men, including the accused, who had gone home and obtained a gun. The prosecution sought to prove that this mob attack on the deceased had a further

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[151] *Id.* at 701, 23 C.C.C. (2d) at 93, 31 C.R.N.S. at 16.
[152] 13 O.R. (2d) 320, 31 C.C.C. (2d) 23, 70 D.L.R. (2d) 633 (C.A. 1976).
[153] Gale C.J. and MacKinnon J.A. concurring.
[154] *Supra* note 152, at 308, 31 C.C.C. (2d) at 29, 70 D.L.R. (3d) at 639.
[155] *Id.* at 308, 31 C.C.C. (2d) at 29, 70 D.L.R. (3d) at 639-40.

unlawful object. The defence maintained DeWolfe had acted alone, intending to shoot only in order to scare the deceased into "not playing with guns". [156] As such it was argued that there had been at most a single series of acts with one general purpose. [157] It was held [158] that the trial judge had seriously misdirected the jury by stating that the unlawful object was possessing a weapon for a purpose dangerous to the public peace contrary to section 83 of the Criminal Code. A new trial was ordered. The court indicated that only if the Crown's version was accepted would the case be covered under section 212(c).

A strict construction of section 212(c) is clearly preferable to one who believes that such dragnet constructive homicide provisions should be limited wherever possible. However, it is difficult to see why an assault objective shared by a mob should be ensnared by section 212(c). This ruling also seems impossible to reconcile with the ruling on the facts in *Tennant*. Zuber J.A. explained [159] *Tennant* as involving Naccarato's act of arming himself and returning with a further unlawful object, *i.e.*, a general assault, which went beyond merely discharging the gun. But was Naccarato's object in fact "distinct from the immediate object of the very act which leads to death"?

The resort to strained interpretations of section 212(c) is demonstrated by the decision of the Ontario Court of Appeal upholding a conviction in *Regina v. Quaranta.* [160] The accused had assisted in a plan to set fire to a supermarket. He used too much gasoline in setting the fire and a violent explosion occurred which resulted in the death of a cleaner in an adjacent law office, whose presence was unknown to the accused. It was held that Quaranta's actions came within the ambit of *Tennant*. Arson was not both the unlawful object and the act in pursuance of it: the unlawful object was the conspiracy to commit arson and setting the fire was the act in furtherance of that unlawful object. The reasoning seems unduly tortuous. Quaranta was clearly ensnared by section 212(c). Surely, his unlawful object was to commit arson and his act ("did anything") was setting a fire he ought to have known was likely to have fatal results.

In respect of murder by killing in the commission of other crimes under section 213, Martin J.A., speaking for the majority of the Ontario Court of Appeal in *Regina v. Govedarov,* [161] held, after a lengthy discussion of the complicated English history, that "burglary", then in section 213, was restricted to an offence committed in respect of a dwelling house and did not encompass the modern offence of "breaking and entering" any premises under section 306. This was confirmed on further appeal to the Supreme

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[156] *Id.* at 304, 31 C.C.C. (2d) at 25, 70 D.L.R. (3d) at 635.
[157] *Id.* at 308-309, 31 C.C.C. (2d) at 29-30, 70 D.L.R. (3d) at 640.
[158] *Id.* at 305, 31 C.C.C. (2d) at 26, 70 D.L.R. (3d) at 636-37.
[159] *Id.* at 307, 31 C.C.C. (2d) at 28, 70 D.L.R. (3d) at 639.
[160] 24 C.C.C. (2d) 109, 31 C.R.N.S. 185 (Ont. C.A. 1975).
[161] 3 O.R. (2d) 23, 25 C.R.N.S. 1 (C.A. 1974).

Court of Canada by a six-to-two majority, [162] but, in 1976 by Bill C-71, [163] the legislature removed this technicality by replacing the word "burglary" with a reference to section 306. It seems to be a vain hope that they will one day act to repeal these extraordinarily wide definitions of constructive murder.

C. *Inchoate Offences*

1. *Attempts*

In *Lajoie v. The Queen,* [164] the leading case on the *mens rea* of attempts, Martland J. held that section 24(1) which requires "an intent to commit an offence" means, in the context of murder, an intention to commit that offence in any of the ways provided for in the Code whether under section 212 or 213. [165] Such an approach has been questioned by commentators and judges [166] and, even for one who has elsewhere contended, in a common law context, that for policy reasons the mental element in an attempt should mirror that required for the completed crime, [167] the problem remains that section 24(1) does specify an "intent". It is difficult to see why this is not an express requirement of a specific (direct) intent for all types of attempts. While it could be argued that *Lajoie* is only direct authority in respect of reckless attempts to commit *mens rea* offences that are expressly extended to recklessness, the difficulty is that Martland J. by referring to section 213 expressly extended his remarks to constructive homicide.

Recently Rae J., of the British Columbia Supreme Court, in *Regina v. Sarginson* [168] characterized the *Lajoie* remarks concerning section 213 as *obiter* and refused to extend the logic of that decision to section 213(d). Reluctantly, the judge felt bound by unreported decisions of the British Columbia Court of Appeal [169] requiring that he charge the jury that the accused could be convicted of attempted murder even if he merely had the intent required by section 213(a), which is an intent to cause bodily harm. He added that it was easy to imagine facts in which such a direction would lead to a "patent absurdity". [170] However, he refused to charge the jury in respect of an attempted murder of the type impugned by section 213(d)

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[162] *Sub nom.* Regina v. Popovic, 32 C.R.N.S. 54 (S.C.C. 1975).

[163] *See now* Criminal Law Amendment Act, 1975, S.C. 1974-75-76 c. 93, s. 13.

[164] [1974] S.C.R. 399, 10 C.C.C. (2d) 313, 33 D.L.R. (3d) 618 (1973).

[165] *Id.* at 408, 10 C.C.C. (2d) at 319, 33 D.L.R. (3d) at 624 (using current section numbers in place of those referred to in the judgment, which were ss. 201 and 202 respectively).

[166] *See* Mewett, *Attempt to Murder Recklessly,* 15 CRIM. L.Q. 19 (1972) and the dissenting judgment of Taggart J.A. in Regina v. Lajoie, [1971] 5 W.W.R. 385, at 407-409, 4 C.C.C. (2d) 402, at 422-23, 16 C.R.N.S. 180, at 202-203 (B.C.C.A.).

[167] Stuart, *Mens Rea, Negligence and Attempts,* [1968] CRIM. L. REV. 647; *cf.* Marlin, *Attempts and the Criminal Law: Three Problems,* 8 OTTAWA L. REV. 518, at 524-30 (1976).

[168] 31 C.C.C. (2d) 492 (B.C.S.C. 1976).

[169] *Id.* at 493-94.

[170] *Id.* at 494.

because the result "might well shock the reason and the conscience of the law's average reasonable man". [171] It is easy to sympathize with this view. The problem lies not with the law of attempts but with the excessive width of the constructive murder provisions in section 213, and those in 212(c), which Rae J. did not mention. They are preposterously wide and become even more draconian when the law of attempts is used in combination.

2. *Conspiracy*

Most academics are now agreed that it is desirable to limit the ambit of the law of conspiracy to conspiracies for criminal purposes, [172] which in Canada means an intent to violate the Criminal Code or another federal statute. The urgent need to review our Code provisions in order to guarantee this result was emphasized by the decision in *Regina v. Jean Talon Fashion Centre Inc.,* [173] which was the first Canadian decision to recognize the possibility of a conspiracy to breach a municipal by-law (requiring a permit for the demolition of a building).

The decision of the Supreme Court of Canada in *Regina v. Sokoloski* [174] raises novel, important and highly intricate points in the law of conspiracy. Davis and Sokoloski had been charged with conspiracy to traffic in a controlled drug, methamphetamine, contrary to the Food and Drugs Act [175] read in conjunction with the conspiracy sections of the Criminal Code. One source of evidence was a police officer's telephone conversation with Sokoloski, who thought he was talking to Davis. Sokoloski asked, "Did that stuff finally come in?" The police officer told him that it had, and arranged a meeting to deliver the drugs. It was agreed that Sokoloski would bring a cheque for $1,100 and purchase one pound of the drug. Sokoloski attended the meeting and was arrested in possession of the cheque. Another police officer, sitting in the cell between Davis and Sokoloski, overheard Davis reporting that he had gone to Toronto to buy the drugs for Sokoloski. In view of the large quantities involved (the resale value of the drugs was $9,000) the trial judge was satisfied that there was an agreement by Sokoloski to buy the drugs for the purpose of resale. However, he was unable to find that the accused Davis had in fact agreed to such a resale of drugs, even though he may have known that in all probability that was the reason for the purchase. Both accused were therefore acquitted.

Martland J., for the majority of five judges, [176] did not consider whether the intent to agree can be extended to recklessness. The trial judge in the

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[171] *Id.*

[172] *See* THE LAW COMMISSION (England), REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM, WORKING PAPER 76; Stuart, *Conspiracy,* 8 OTTAWA L. REV. 107, at 123 (1976). *But see* M. GOODE, CRIMINAL CONSPIRACY IN CANADA 93-95 (1975) where common law conspiracies are criticized, but the need for a crime of conspiracy to commit provincial offences is advanced.

[173] 22 C.C.C. (2d) 224 (Que. C.S. 1975).

[174] 33 C.C.C. (2d) 496, 74 D.L.R. (3d) 126 (S.C.C. 1977).

[175] R.S.C. 1970, c. F-27, s. 34(1).

[176] Ritchie, Pigeon, Beetz and de Grandpré JJ. concurring.

passage quoted above apparently did not think it could. Martland J. agreed with the Ontario Court of Appeal finding that every essential element of a conspiracy between the two to traffic had in fact been proved. [177] It was an error in law to hold that in order to establish a conspiracy it was necessary to prove an agreement between the parties jointly to manufacture, sell, transport and deliver a large quantity of drugs which the purchaser intended to sell.

The dissenting judgment of Laskin C.J.C. [178] is dramatically different. He considered the vital point that it is not an offence either to buy or to be in possession of a controlled drug where there is no intention to resell. The only basis of an unlawful conspiracy in the circumstances would have been proof of an agreement between the seller, Davis, and the accused, Sokoloski, for the resale of the drug supplied by Davis. The trial judge had ruled definitively that he could not so find. To use the law of conspiracy to convict a buyer who could not be guilty of any substantive offence in carrying out the transaction on which the charge of conspiracy was based was "an abuse if not also a distortion of the concept of conspiracy in our law". [179] It is surprising that this persuasive argument was not directly adverted to in the majority judgment.

Finally, the *Sokoloski* case illustrates how difficult it can be to distinguish between a question of fact and a question of law. The Ontario Court of Appeal held that there had been a mistake raising a question of law, giving the Crown a right of appeal [180] because the trial judge had misdirected himself as to the legal effect of the facts found by him. In a similar case, *Regina v. Baker*, [181] which involved a charge of conspiracy to possess heroin for the purpose of trafficking, the British Columbia Court of Appeal characterized the Crown appeal as raising a non-appealable question of fact.

D. *Parties to a Crime*

1. *Aiders and Abettors*

The general section is, of course, section 21(1) which renders anyone liable to be charged as a party to a crime who

> (a) does or omits to do anything for the purpose of aiding any person to commit it, or
> (b) abets any person in committing it.

The courts have continued to stress that to establish "aiding" or "abetting" [182] it must be proved that there is a sufficient *actus reus* in the

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[177] Regina v. Davis, 14 C.C.C. (2d) 517 (Ont. C.A. 1973).

[178] Judson, Spence and Dickson JJ. concurring.

[179] *Supra* note 174, at 498, 74 D.L.R. (3d) at 128.

[180] S. 613(4).

[181] 21 C.C.C. (2d) 572 (B.C.C.A. 1974).

[182] An abettor is one who is personally or constructively present at the scene of the crime, while an aider need not necessarily be present so long as he facilitates the commission of the crime: Regina v. Roy, 3 C.C.C. 472 (Que. B.R. 1900). This issue will rarely arise in practice because it is not necessary to refer to section 21 in a charge: Regina v. Harder, [1956] S.C.R. 489, 114 C.C.C. 129, 4 D.L.R. (2d) 150.

form of encouragement to commit the crime. Mere passive acquiescence is not enough. [183] Decisions on the facts have been notoriously inconsistent, though the tendency noted [184] in some decisions to erode this principle seems to have been checked. Thus, there was an acquittal in *Regina v. Clow* [185] on a charge of mischief where it appeared that the accused had been present when shotguns were discharged at various roadsigns by some of his companions. He had not taken part in the shooting himself, but had done nothing to try to stop it. There has also been a decision in the area of rape, only slightly less startling than the unanimous decision to acquit in *Regina v. Salajko,* [186] where the accused who had been near the victim of a group rape with his pants down was found to have merely passively acquiesced. In *Regina v. Cosgrove,* [187] four men had taken the victim to a corn field where each had forcible intercourse with her. Cosgrove's defence was that he had not gone into the corn field but had been asleep in the car a short distance away. The Ontario Court of Appeal ordered a new trial on the basis, *inter alia,* that the trial judge had wrongly instructed the jury that if an accused *omitted* to do anything to assist the victim, then he was as guilty of the crime as the principals. This was held to be a serious misdirection in that it suggested that there was an "obligation on the appellant to do something to rescue, assist or help the complainant, and that failure to do so constituted a participation in the rape". [188]

It was also pointed out in *Cosgrove* that the words in section 21(1)(b), "for the purpose of aiding", had been wrongly omitted by the trial judge. It is clear too from other decisions that a failure to prove this specific intent will lead to an acquittal, [189] while sometimes an acquittal will be based on the other *mens rea* aspect, here extended to recklessness, which requires proof that the accused had knowledge of or was wilfully blind to the circumstances necessary to constitute the offence he is charged with aiding. [190] Fortunately the courts have not concerned themselves with the fact that the *mens rea* requirement is specifically mentioned in the case of section 21(1)(b) but not section 21(1)(c).

2. *The Doctrine of Common Intent*

Section 21(2) provides:

> Where two or more persons form an intention in common to carry out

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[183] *See* Murray, Annot., 10 C.R.N.S. 37 (1970).

[184] *Id.*

[185] 25 C.C.C. (2d) 97 (P.E.I. S.C. 1975).

[186] [1970] 1 O.R. 824, [1970] 1 C.C.C. 352, 9 C.R.N.S. 145 (C.A. 1969).

[187] 29 C.C.C. (2d) 169 (Ont. C.A. 1975).

[188] *Id.* at 172.

[189] *See, e.g.,* Regina v. F. W. Woolworth Ltd., 3 O.R. (2d) 629, at 640, 18 C.C.C. (2d) 23, at 34, 46 D.L.R. (3d) 345, at 356 (C.A. 1974); Regina v. Barr, 23 C.C.C. (2d) 116, at 120 (Ont. C.A. 1975).

[190] Regina v. F. W. Woolworth Ltd., *supra* note 189, at 639-40, 18 C.C.C. (2d) at 34, 46 D.L.R. (3d) at 355-56; Regina v. McDaid, 19 C.C.C. (2d) 572, at 574 (Ont. C.A. 1974).

> 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.

This provision can be used to make the constructive homicide sections such as the immensely wide section 213 even wider. In the leading case of *Regina v. Trinneer,* [191] it was held that where there is proof of an intention in common, an accused will be liable as an accessory if he knew or ought to have known that the commission of murder *as so defined* would be a probable consequence of carrying out the common purpose; there has to have been reasonable foresight of the probability of bodily harm rather than death.

In two recent cases, *Regina v. Riezebos* [192] and *Regina v. McLean* [193] the Ontario Court of Appeal has gone even further. *Trinneer* was held to be applicable only to what is now section 213(a). [194] On a charge combining sections 21(2) and 213(d), the probability of bodily harm was considered to be irrelevant. The test was held to be one of reasonable foresight, requiring that it be a probable consequence of carrying out the common purpose that the other party would, if necessary, use a weapon during the commission (or attempted commission) of a crime, or during his flight thereafter. The result of this construction, however correct literally, is most unfortunate when one is reminded that as a result a person may be convicted of what has been traditionally considered the most heinous offence.

Beleaguered defence counsel have relied on the phrase "in carrying out the common purpose" in section 21(2), arguing that further offences have been committed outside the scope of the common purpose. This defence was dismissed, however, in *Regina v. Puffer.* [195] The three accused were alleged to have planned to rob the deceased, who had invited one of them to his hotel room for homosexual activities. The victim was badly beaten but the actual cause of death was asphyxia. Freedman C.J., on behalf of the majority, [196] dismissed the argument that two of the accused should be acquitted on the basis that the use of a pillow to smother the deceased by one of their colleagues was beyond the scope of their plan. He held:

> In any event the present case is not one in which, either expressly or tacitly, the accused had agreed upon or defined just how far they would go or just what they would do. The enterprise was described merely as one to roll a fag. I find it completely unrealistic to say that blows to the face and body, the pinioning of hands, the tying of feet could be regarded as within the plan, but that the use of the pillow as the gag must be looked

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[191] [1970] S.C.R. 638, [1970] 3 C.C.C. 289, 10 D.L.R. (3d) 568.

[192] 26 C.C.C. (2d) 1 (Ont. C.A. 1975).

[193] 31 C.C.C. (2d) 140 (Ont. C.A. 1976).

[194] S. 202(d) (now s. 213(d)) was also considered by the Supreme Court in *Trinneer.*

[195] [1976] 6 W.W.R. 239, 31 C.C.C. (2d) 81 (Man. C.A.).

[196] Guy, Monnin and Matas JJ.A. concurring. O'Sullivan J.A. dissented.

> upon as falling outside the plan. Distinctions of this kind could lead to findings that a blow above the belt was within the scheme to rob, while a blow below the belt was not. The violence involved in the carrying out of a robbery ought not later to be measured or tested by Marquis of Queensbury rules or anything of that nature. [197]

The eloquence of Freedman C.J. must not lead us to forget that the facts in *Puffer* were not such as to engender sympathy for the accused. A defence of "outside the common purpose" might well be legitimate. [198] What if *A* and *B* agree to rob a bank and *A* agrees that *B* will carry a loaded gun but on condition that he will only use it if his life is threatened? What then if *B* goes into the bank, immediately pulls out his gun and shoots a teller dead, without having been threatened in any way? *A* should escape liability for murder even if he meets the test of reasonable foresight as extended by *McLean* [199] on the basis that *B*'s act was outside the scope of the common purpose.

The alternative defence of abandonment of the common purpose was narrowed by the Supreme Court of Canada in *Regina v. Miller.* [200] One Cockreill had pulled the trigger of the rifle resting on Miller's arms, discharging a bullet that killed a police officer. The abandonment defence advanced for Cockreill was clearly spurious in view of his actions and their prior design. Not surprisingly it was dismissed. It was held that for such a defence to succeed there must be a "timely communication" to the associate of the intent to abandon, amounting, where "practical and reasonable", to "unequivocal notice". [201] This ruling, wider than necessary on the facts, could create problems, as where parties to a common purpose flee upon an uncommunicated realization that they are suspected by the police. The decision in *Henderson v. The King* [202] that on such facts an abandonment defence is possible has probably been overruled. Whether this result is desirable is debatable.

3. *Accessory After the Fact*

Section 23 (1) defines an accessory after the fact as "one who, knowing that a person has been a party to an offence, receives, comforts or assists him for the purpose of enabling him to escape".

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[197] *Supra* note 195, at 251, 31 C.C.C. (2d) at 94.

[198] *See* Hartt, *Parties to the Offence of Murder*, 1 CRIM. L.Q. 60, 178, at 181 (1959). *See also* the English decisions referred to in the dissenting judgment of O'Sullivan J.A. in Regina v. Puffer, *supra* note 195, at 259-60, 31 C.C.C. (2d) at 102.

[199] *Supra* note 193.

[200] 31 C.C.C. (2d) 177, 70 D.L.R. (3d) 324 (S.C.C. 1976). This case primarily involved a ruling that the death penalty was not cruel and unusual punishment contrary to section 2(b) of the *Bill of Rights*. The substantive issue was only referred to in the minority judgment of Ritchie J., *id.* at 199, 70 D.L.R. (3d) at 347.

[201] *Id.* The Court cited with approval the judgment of Sloan J.A. in Rex v. Whitehouse, [1941] 1 W.W.R. 112, at 115-16, 75 C.C.C. 65, at 67-68, [1941] 1 D.L.R. 683, at 685-86 (1940) and Regina v. Becerra, December 16, 1975 (C.C.A.) (unreported).

[202] [1948] S.C.R. 226, 91 C.C.C. 97, [1949] 2 D.L.R. 121.

The Supreme Court of Canada considered this section in *Regina v. Vinette*.[203] The only substantive pronouncement appears in the majority judgment of Pigeon J.[204] He makes it clear that to be responsible as an accessory after the fact there must have been a principal offender. It follows that:

> Whereas in the case of several persons accused of the same offence, each may be tried before or after the others, plead guilty before or after any of the others, or be convicted regardless of the decision against any of the others, an accessory after the fact may not be tried or tender a valid plea of guilty until the principal is convicted, so that if the latter is acquitted the accessory must of necessity be discharged.[205]

E. *Capacity*

1. *Children*

The complex subject of the criminal responsibility of children and the current and proposed juvenile delinquency legislation[206] raise issues well beyond the scope of the present review and will not be considered here.

In passing it should be noted that there have been several recent attempts to impugn juvenile court hearings on the basis of various provisions of the Bill of Rights. As is usually the case in criminal trials, such arguments have proved largely futile,[207] but particular attention must be drawn to the decision by Stevenson J., of the District Court of Alberta, in *Regina v. MacKay* and *Regina v. Willington*.[208] A proclamation which set the age of juvenile delinquency for girls at eighteen and for boys at sixteen in that province was held to be inoperative as unjustified sex discrimination resulting in inequality before the law contrary to section 1(d) of the Canadian Bill of Rights. The judgment is lengthy and thoughtful, and repays careful consideration. The result, unusual for a Bill of Rights decision in criminal law, was the establishment of substantive defences to the charges of contributing to the delinquency of a child.[209] In the *Willington* case, an adult had aided and abetted a sixteen-year-old girl to consume liquor in a public place, while in *MacKay* the accused, aged sixteen, had had intercourse with a girl of the same age.

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[203] [1975] 2 S.C.R. 222, 19 C.C.C. (2d) 1, 50 D.L.R. (3d) 697 (1974).

[204] Judson and de Grandpré JJ. concurring. Laskin C.J.C. and Beetz J. dissented on a different point.

[205] *Supra* note 203, at 228-29, 19 C.C.C. (2d) at 5, 50 D.L.R. (3d) at 701.

[206] *See* SOLICITOR GENERAL (Can.), HIGHLIGHTS OF THE PROPOSED NEW LEGISLATION FOR YOUNG OFFENDERS, *supra* note 2.

[207] *See, e.g., Re* Proulx & The Queen, 27 C.C.C. (2d) 44 (Ont. Prov. Ct. 1975); *Re* Juvenile Delinquents Act. 13 O.R. (2d) 6, 29 C.C.C. (2d) 439 (Prov. Ct. 1975); *Re* Dubrule & The Queen, 31 C.C.C. (2d) 572 (N.W.T. C.A. 1976).

[208] 30 C.C.C. (2d) 349 (Alta. Dist. Ct. 1975). The cases were reported together.

[209] Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 33.

2. *Insanity*

(a) *Remands for observation*

Amendments in Bill C-71 to the various provisions [210] dealing with remands for observation on the basis of suspected mental illness provide that the prosecutor and the accused may consent to the evidence of the duly qualified medical practitioner being given in a written report. The danger of giving an uninformed consent appears clearly in *Regina v. Sweeney*. [211] The decision turned on the former wording of section 465(1)(c), which provided that a judge conducting a preliminary inquiry might remand for observation an accused who "in his opinion, supported by the evidence of at least one duly qualified medical practitioner" might be mentally ill. It was held that there need not be evidence other than that of a qualified medical practitioner but that, in the case in question, that evidence was useless. Cross-examination had revealed that the doctor's opinion was based on the fact that the accused had a past criminal record.

(b) *Fitness to stand trial*

There have been no recent decisions exploring afresh the vital and vexed [212] question of the criteria to be applied to the key phrase in section 543(1), "capable of conducting his defence". The courts [213] have been content to recite such hackneyed tests as inability to instruct counsel. [214] At least it was confirmed in one decision [215] that incapacity to act in the accused's best interests is *not* the proper test.

The decisions based on section 543 have been commendably strict as to procedure. It has been held [216] that the issue may be raised by the defence or by the prosecutor, or may simply "appear" to the court, that the court must assign counsel to the accused if he is unrepresented, [217] and that the issue of fitness to stand trial is independent of a defence of insanity and therefore, without the accused's consent, evidence as to the former is inadmissible as to the latter. [218]

In *Ex parte Sayle* [219] the defendant had been remanded for psychiatric assessment, transferred from jail to a mental hospital, and under an Order-

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[210] Ss. 465(1)(c), 465(2), 543(2), 543(2.1), 738(5) and 738(6).

[211] 28 C.C.C. (2d) 70 (Ont. Prov. Ct. 1975).

[212] *See* THE LAW REFORM COMMISSION OF CANADA, MENTAL DISORDER IN THE CRIMINAL PROCESS 32-33 (1976) and Lindsay, *Fitness to Stand Trial in Canada*, 19 CRIM. L.Q. 303 (1977).

[213] Reference *Re* Regina v. Gorecki (1), 32 C.C.C. (2d) 129 (Ont. C.A. 1976); Regina v. Budic, 35 C.C.C. (2d) 272 (Alta. C.A.).

[214] Regina v. Budic, *id.*

[215] Reference *Re* Regina v. Gorecki (1), *supra* note 213.

[216] Regina v. Roberts, [1975] 3 W.W.R. 742 (B.C.C.A. 1975). Leave to appeal was denied by the Supreme Court of Canada on March 26, 1975. *See also* Regina v. Budic, *supra* note 213.

[217] Regina v. MacNeil, 21 C.C.C. (2d) 383 (N.S.C.A. 1974).

[218] Regina v. Curran, 21 C.C.C. (2d) 23 (N.B.C.A. 1974).

[219] 18 C.C.C. (2d) 56 (B.C.S.C. 1975).

in-Council passed "pursuant to the Criminal Code" (section 546) ordered to be detained there indefinitely. Munroe J. held, granting the application for a writ of *habeas corpus* with *certiorari* in aid, that the "extraordinary power" conferred by section 546 had to be interpreted in the light of the Bill of Rights and Code provisions, such as section 543, which guarantees an accused the right to have his fitness to plead determined by a judge in the manner provided. Section 546 has since been amended and now applies only to those already *sentenced* to prison.

(c) *Section 16: The defence of insanity at trial*

i) *"Natural imbecility" or "disease of the mind"*

Once again there has been no reported decision of the antiquated phrase "natural imbecility". Presumably, it means subnormality of intelligence of a severe, but as yet unspecified degree.

If there is no proof of "natural imbecility", there must be, for the defence of insanity to succeed, proof of a "disease of the mind". It is now clear that this is usually a small hurdle. Two attempts at definition [220] are notable. Ritchie J.A. in *Regina v. O'Brien* stated:

> Disease of the mind should not be construed so as to distinguish between diseases which have a mental origin and diseases which have a physical origin. The primary thing to look for is a lack of, or abnormality in, the reasoning capacity of the mind. [221]

And Culliton C.J., in *Regina v. Hartridge,* [222] asserted:

> disease of the mind has generally been accepted as any pathological condition, organic or otherwise, which effectively prevents an accused from knowing the nature and quality of his acts. [223]

These "careful, cognitive non-definitions" [224] are couched in wide terms in order to avoid the courts' having to resolve any question of mental incapacity by psychiatric labels, rather than the test of legal responsibility indicated by section 16. Although this is understandable, [225] it seems unsatisfactory that such a vague and controversial label as "psychopath" has been held in

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[220] Both influenced by the judgment of Devlin J. in Regina v. Kemp, [1957] 1 Q.B. 399, 40 Cr. App. R. 1, [1956] 3 All E.R. 249.

[221] *Supra* note 14, at 305, 56 D.L.R. (2d) at 81.

[222] *Supra* note 14.

[223] *Id.* at 405, [1967] 1 C.C.C. at 366, 57 D.L.R. (2d) at 351. The definition was quoted in Regina v. Parnerkar, *supra* note 18, at 175, 5 C.C.C. (2d) at 24, 16 C.R.N.S. at 361, and *applied* in Regina v. James, 30 C.R.N.S. 65, at 71 (Ont. H.C. 1974).

[224] Bayne, *supra* note 21, at 259.

[225] *See* the criticism of the Durham test of "the product of mental disease, or mental defect" in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

several recent decisions [226] to pass the test without any searching analysis. The adverse effects of this approach on the defence of sane automatism have already been noted. [227]

ii) *"incapable of appreciating the nature and quality of an act or omission"*

The success of the defence of insanity at trial usually turns on the "appreciating" limb of section 16(2). Most judges now quote the McRuer Report [228] for its assessment of the reliance in section 16 on the concept of appreciation rather than the original *M'Naghten* [229] formulation requirement of knowledge. In a frequently cited passage, [230] McRuer states:

> mere knowledge of the nature and quality of the act ("Did the person know what he was doing?") is not the true test to be applied. The true test necessarily is, was the accused person at the very time of the offence—not before or after, but at the moment of the offence—by reason of disease of the mind, unable fully to appreciate not only the nature of the act but the natural consequences that would flow from it? In other words, was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act? [231]

It is possible that the McRuer Report makes too much of the difference between our notion of "appreciating" and the English one of "knowing". It is clear at least that in either case the accused will be held to have been insane if, on account of mental disease, he is unaware that he is acting or, if he does act *A* thinking it is act *B*, as in Kenny's [232] bizarre example of the madman who cuts a woman's throat under the delusion that he is cutting a loaf of bread.

Canadian courts have also had difficulty in applying the above passage from the McRuer Report to an offence which penalizes the circumstances of the act only, such as rape. Thus in *Regina v. Craig*, [233] McDonald J.

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[226] *See* Regina v. Craig, [1975] 2 W.W.R. 314, at 317, 22 C.C.C. (2d) 212, at 215 (Alta. S.C. 1974), where McDonald J. noted that it was "distinctly possible" that the presence of electroencephalogram abnormalities was immaterial; and Regina v. Leech, [1973] 1 W.W.R. 744, 10 C.C.C. (2d) 149, 21 C.R.N.S. 1 (Alta. S.C. 1972). *See also* Regina v. Borg, [1969] S.C.R. 551, [1969] 4 C.C.C. 262, 6 D.L.R. (3d) 1 and Chartrand v. The Queen, [1977] 1 S.C.R. 314, 26 C.C.C. (2d) 417 (1975). Note however that in all four cases the defence of insanity ultimately failed.

[227] *See* text *supra* between notes 15 and 27.

[228] REPORT OF THE ROYAL COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES (1955) [hereinafter cited as the MCRUER REPORT].

[229] 10 Cl. & Fin. 200, 8 E.R. 718, [1843-60] All E.R. Rep. 229, *sub nom.* McNaughton's Case, 4 State Tr. N.S. 847.

[230] *See, e.g.*, Regina v. Leech, *supra* note 226, at 754-55, 10 C.C.C. (2d) at 159, 21 C.R.N.S. at 11; Regina v. Craig, *supra* note 226, at 321, 22 C.C.C. (2d) at 219-20; Regina v. Haymour, 21 C.C.C. (2d) 30, at 43 (B.C. Prov. Ct. 1974); Regina v. Baltzer, 27 C.C.C. (2d) 118, at 135-36 (N.S.C.A. 1974); Regina v. Adamcik, 38 C.R.N.S. 102, at 105-107 (B.C. Cty. Ct. 1977).

[231] MCRUER REPORT, *supra* note 228, at 13.

[232] KENNY'S OUTLINES OF CRIMINAL LAW 83 (19th ed. J.W.C. Turner 1966).

[233] *Supra* note 226.

held that the distinction between the physical act of rape and its consequence is a distinction without a difference. [234] It was further held that where there was, for example, no delusion such as that the victim was an animal, "the natural consequences of an act of rape is the fact of rape—it is not necessary [in order that the defence fail] that the accused appreciate or be sensible beyond the fact that his action will result in the *actus reus*". [235] The court therefore rejected the view of the defence psychiatrist that the accused, whom he classified as a "psychopath", did not appreciate the nature and quality of the act, because he did not appreciate the emotional consequences to the victim.

Surely the courts should use a test capable of application to an offence which penalizes the circumstances rather than the consequences of an act. What should be required is an appreciation of the true significance of conduct either in relation to the actor or others. [236]

In *Schwartz v. The Queen*, [237] a majority of five judges of the Supreme Court of Canada held, on a literal construction of the section, that the "appreciating" limb of section 16(2) refers only to the physical character of the act and not to its moral aspects. [238]

iii) *"incapable . . . of knowing that an act or omission is wrong"*

The main ruling in *Schwartz* concerned a defence of insanity based on an incapacity to know that the act complained of was wrong, an alternative which must be considered separately from the "appreciating" limb. [239] Martland J., for the majority, [240] adopted the interpretation put forth by the English Court of Criminal Appeal in *Regina v. Windle* [241] of wrong as meaning contrary to law. [242] In fact, the majority specified criminal law. The four dissenting judges [243] would have adopted the opinion of the Australian High Court in *Stapleton v. The Queen* [244] that wrong means morally wrong.

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[234] *Id.* at 320, 22 C.C.C. (2d) at 218.

[235] *Id.* at 320-21, 22 C.C.C. (2d) at 218, quoting a *dictum* from Leech, *supra* note 226, at 755, 10 C.C.C. (2d) at 159, 21 C.R.N.S. at 11.

[236] Adopted from the language of Sir David Henderson, quoted earlier in the McRUER REPORT, *supra* note 228.

[237] [1977] 1 S.C.R. 673, 29 C.C.C. (2d) 1, 67 D.L.R. (3d) 716 (1976). The four minority judges did not touch on this point.

[238] The Court applied Rex v. Codere, 12 Cr. App. R. 21 (1916): *supra* note 237, at 696-97, 29 C.C.C. (2d) at 8-9, 67 D.L.R. (3d) at 723-24. *See contra* the *dictum* in Regina v. Baltzer, *supra* note 230, at 134: "The capacity to *appreciate* the nature and quality of the act committed clearly imports the requirement of a capacity to understand the moral significance of the act."

[239] Regina v. Craig, *supra* note 226, at 325, 22 C.C.C. (2d) at 222; Regina v. Baltzer, *supra* note 230, at 139.

[240] Judson, Ritchie, Pigeon and de Grandpré JJ. concurring. *Cf.* Mewett, *Section 16 and "Wrong"*, 18 CRIM. L.Q. 413, at 413-14 (1976).

[241] [1952] 2 Q.B. 826, 36 Cr. App. R. 85, [1952] 2 All E.R. 1 (C.C.A.).

[242] In view of the facts, this ruling is *obiter*.

[243] Dickson J. delivered the minority opinion with Laskin C.J.C., Spence and Beetz JJ. concurring.

[244] 86 C.L.R. 358 (Aust. H.C. 1952).

In practice the difference of opinion as to the proper meaning of the word "wrong" will almost invariably be immaterial. [245] It is indeed difficult to believe that the accused in the savage rape cases of *Leech* and *Craig* did not know that their acts were both legally and morally wrong, and similar knowledge would be possessed by most killers. [246]

In discussing which interpretation of the word "wrong" is correct, the Court preferred to dwell on precedent, with social policy considerations being less apparent. This is particularly true of the majority judgment of Martland J. However, he did consider some policy implications; he was unwilling to acquit an insane person who knew that his act was illegal but considered it morally justifiable, pointing out that this would not acquit a sane person. [247] It can be retorted that, even on the "knowledge of legal wrongness" test he adopts, there is a clear difference in the way that the law treats a sane and insane person; in the former case ignorance of the law is usually no excuse. Martland J. [248] was also of the view that the interpretation of morally wrong requires a subjective test of insanity which he would not accept. However, Dickson J., in dissent, seems correct in replying that " '[m]oral wrong' is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong". [249] Dickson J. reasoned that if wrong meant contrary to law, Parliament would have used the word "unlawful" as it has done elsewhere in the Code, [250] that the law in 1843 dealt with insanity in terms of rightness and wrongness [251] and that the McRuer Report [252] concluded that wrong means "something that would be condemned in the eyes of mankind". [253] He added, convincingly, that the view that a moral test favours the amoral offender overlooks the requirement that the incapacity be caused by a disease of the mind. [254]

Clearly the "morally wrong" test would not lead to the same certainty as the majority position. [255] On the other hand, it is curious that one limb of the defence of insanity is based on the perception of a madman of the law when that is not the touchstone for responsibility of a person who is sane!

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[245] Martland J., *supra* note 237, at 701, 29 C.C.C. (2d) at 11, 67 D.L.R. (3d) at 726. *See also* Dickson J., *id.* at 678, 29 C.C.C. (2d) at 13, 67 D.L.R. (3d) at 728.

[246] As in Regina v. Baltzer, *supra* note 230.

[247] *Supra* note 237, at 701, 29 C.C.C. (2d) at 11, 67 D.L.R. (3d) at 726-27.

[248] *Id.*

[249] *Id.* at 678, 29 C.C.C. (2d) at 13, 67 D.L.R. (3d) at 728.

[250] *Id.* at 680, 29 C.C.C. (2d) at 14-15, 67 D.L.R. (3d) at 730, *citing* as examples ss. 64, 65, 71, 258 and also s. 215(4) where the word "illegal" is used.

[251] *Id.* at 686, 29 C.C.C. (2d) at 19, 67 D.L.R. (3d) at 735.

[252] *Supra* note 228.

[253] *Supra* note 237, at 689, 29 C.C.C. (2d) at 22, 67 D.L.R. (3d) at 737.

[254] *Id.*

[255] *Cf.* Mewett's complicated explanation of his preferred test of "incapable of knowing that this act was something that be ought not to do": *supra* note 240, at 415-16.

One final comment about *Schwartz*. Dickson J. emphasized that, as section 16 is based expressly on the concept of incapacity in contrast to the original *M'Naghten* rules which refer to knowledge, it follows that "the thinking process of the accused, as opposed to his actual knowledge of wrongness" [256] is the proper focus of the inquiry. It is submitted that this is incorrect and that the concept of mental incapacity must require one to investigate the state of mind at the time in question rather than apply an abstract concept of absolute and irrebuttable incapacity, such as is the case of children under the age of seven. [257]

iv) *Social policy*

One cannot leave an analysis of decisions relating to the defence of insanity at trial without remarking that a strong suspicion remains that judges are particularly concerned with the end result—acquittal in the case of sane automatism, indeterminate detention in a mental institution in respect of a successful defense of insanity, and the possibility of a lengthy jail sentence in the event of a conviction—and consequently they resort to semantic acrobatics to achieve the desired result. [258]

Of course, defence counsel have [259] traditionally avoided the defence of insanity because, if it is successful, indeterminate confinement will result. The operations of Review Boards may be leading to less reluctance. In any event, with courts restricting the scope of the defence of sane automatism by defining insanity widely, defence counsel have had to look elsewhere for a total defence. They have recently found one.

(d) *Psychiatric evidence negativing mens rea*

In *More v. The Queen,* [260] the majority held that a depressive psychosis short of insanity under section 16 might negative the "planned and deliberate" requirement then in force for capital murder (and now found in the umbrella definition of first-degree murder). [261] It seems likely that the majority were bending over backwards to avoid the death sentence and that the ruling should not be applied to *mens rea* generally. However, this argument has succeeded in at least one unreported decision of non-capital murder: *Regina v. Charlebois.* [262] More importantly, it has been recognized as

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[256] *Supra* note 237, at 679, 29 C.C.C. (2d) at 14, 67 D.L.R. (3d) at 729. *See also* Mewett, *supra* note 240, at 416.

[257] S. 12.

[258] The clearest illustration is that in *Leech*, *supra* note 226, where the accused was given life imprisonment.

[259] *But see* Regina v. Haymour, *supra* note 230, where the right of the Crown to present evidence of insanity was confirmed.

[260] [1963] S.C.R. 522, [1963] 3 C.C.C. 289, 41 D.L.R. (2d) 380.

[261] S. 214.

[262] Referred to, along with several other cases, in Bayne, *supra* note 21, at 268-71. *See now* Regina v. Browning, 34 C.C.C. (2d) 200 (Ont. C.A. 1976); Regina v. Hilton, 34 C.C.C. (2d) 206 (Ont. C.A. 1977); Regina v. Meloche, 34 C.C.C. (2d) 184 (Que. C.A. 1975).

possible by the full bench of the Supreme Court of Canada in *MacDonald v. The Queen.* [263] In the latter case, where the charge was one of robbery before a Special General Court Martial, the defences of insanity and drunkenness were not raised, but psychiatric evidence was admitted to show mental disability short of legal insanity that would render the accused incapable of forming the requisite specific intent. [264] One psychiatrist testified that the accused had a marked "adjustment reaction of adolescence . . . manifested by low self esteem and marked dependency needs which are defended against by pseudo-independent behaviour and rebelliousness and a tendency toward serious suicide, low frustration tolerance with a tendency to act out antisocially". [265] All but Spence J. refused to overturn the conviction, even though no reasons for judgment had been provided by the trial judge, but the admissibility of the psychiatric evidence was not questioned.

There is no doubt that, despite judicial disavowal, [266] this case has introduced a notion of diminished responsibility into Canadian law which is not restricted to murder as it is in England. [267] This result seems sensible, but one can easily agree with Bayne [268] that the Canadian "escape route" from *M'Naghten* and restricted sane automatism "involves so much uncertainty and semantics" that there is a need for comprehensive legislation. [269]

3. *Intoxication*

Recent decisions confirming that a defence of automatism can be based on involuntary intoxication have already been discussed. [270]

Several decisions over the survey period reflect the continued use of the concept of "specific intent" to achieve a compromise in respect of the appropriate ambit of the defence of voluntary intoxication: it will only be a defence to a crime of "specific intent". [271] Thus it has been confirmed that manslaughter is not such a crime, [272] but that breaking and entry with intent [273] and theft and possession of stolen property [274] do require "specific

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[263] 29 C.C.C. (2d) 257 (S.C.C. 1976).

[264] *Id.* at 260. This issue was not argued in the earlier decisions of Chartrand v. The Queen, *supra* note 226, and Mulligan v. The Queen, *supra* note 14. *But see* the *obiter* remarks in the Ontario Court of Appeal decision in Mulligan, *supra* note 14, at 276, 26 C.R.N.S. at 186.

[265] *Supra* note 263, at 261.

[266] *E.g.,* MacDonald J.A. in Baltzer, *supra* note 230, at 140-41; de Grandpré J. in Chartrand, *supra* note 226, at 318, 26 C.C.C. (2d) at 420.

[267] Homicide Act, 1957, 6 Eliz. 2, c. 11, s. 2.

[268] *Supra* note 21, at 271.

[269] It is unfortunate that this subject was avoided in THE LAW REFORM COMMISSION OF CANADA, MENTAL DISORDER IN THE CRIMINAL PROCESS, *supra* note 212.

[270] *See* text *supra* between notes 11 and 15.

[271] This principle was introduced, of course, in the decision of D.P.P. v. Beard, *supra* note 39.

[272] Regina v. Mack, 22 C.C.C. (2d) 257, 29 C.R.N.S. 270 (Alta. C.A. 1975).

[273] Regina v. Johnnie, [1975] 3 W.W.R. 569, 23 C.C.C. (2d) 68, 30 C.R.N.S. 202 (B.C.C.A. 1975); Regina v. Bucci, 9 N.S.R. (2d) 32, 17 C.C.C. (2d) 512 (S.C. 1974); McLaughlan v. The Queen, 20 C.C.C. (2d) 59, 29 C.R.N.S. 265 (Ont. C.A. 1975).

[274] McLaughlan v. The Queen, *id.*

intent". One is often left with the impression that judges are reluctant to be pure in respect of their definitions, as evidenced by rulings that attempted murder [275] and murder itself [276] are "specific intent" crimes. In the former case, the Supreme Court of Canada has recognized reckless attempts to murder [277] and, in the latter, it is clear on statutory construction that by no means all types of murder require specific intent to kill. [278] By far the most important decision is *Leary v. The Queen* [279] where Pigeon J., for the majority of six judges, [280] held, accepting the British Columbia Court of Appeal decision in *Regina v. Boucher* [281] in preference to that of the Ontario Court of Appeal in *Regina v. Vandervoort*, [282] that rape is a crime of general intent and does not require the specific intention of having intercourse without the victim's consent.

The majority judgment in *Leary* is vitally important because it confirms that in Canada, as in England since *D.P.P. v. Majewski*, [283] we will still be ruled from the grave by the decision in *D.P.P. v. Beard* [284] and that the serious social problem of the drunken offender will continue to be resolved by reference to the sterile concept of "specific intent". [285] On the assumption that the defence of voluntary intoxication should continue to be solved by exclusive reference to this concept (and the majority judgment articulates no reason why we should depart from this basis), the decision in respect of rape is clearly correct. There should be little debate that *mens rea* should be read into the definition of rape in section 143 of the Criminal Code. Rape is an offence which penalizes not the consequences, but the circumstances of the act. Hence, there must be proof of knowledge extended to recklessness of all the material circumstances and, in particular, of non-consent. On these basic principles of *mens rea*, rape is not a "specific intent" crime. But is the assumption that this is the best way of resolving the problem of the drunken offender unassailable?

Of course not! All first-year law students are taught that there is another view, which the majority of the Supreme Court of Canada and the House of Lords in *Majewski* were delinquent in not considering. The drawbacks of the present approach were pungently expressed by Gold in an exhaustive and persuasive article [286] which was published after *Majewski* but before the decision of the Supreme Court of Canada in *Leary*. He writes:

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[275] Regina v. Kireychuck, [1974] 6 W.W.R. 556, 19 C.C.C. (2d) 253 (Alta. C.A.).
[276] Mulligan v. The Queen, *supra* note 14.
[277] Lajoie v. The Queen, *supra* note 164.
[278] *See* text *supra* between notes 140 and 160.
[279] *Supra* note 35.
[280] Martland, Judson, Ritchie, Beetz and de Grandpré JJ. concurring.
[281] 40 W.W.R. 663, [1963] 2 C.C.C. 241, 39 C.R. 242 (B.C.C.A. 1962).
[282] [1961] O.W.N. 141, 130 C.C.C. 158, 34 C.R. 380 (Ont. C.A.).
[283] *Supra* note 38.
[284] *Supra* note 39.
[285] *See* text *supra* between notes 33 and 42.
[286] Gold, *An Untrimmed 'Beard': The Law of Intoxication as a Defence to a Criminal Charge*, 19 CRIM. L.Q. 34 (1977).

> The effect of the present law of drunkenness is to impose strict and constructive liability. For offences that are *not* offences of "specific intent", an accused will be convicted upon proof of the *actus reus* whether or not the *mens rea* was present whenever he defends on the basis of drunkenness, in effect, imposing strict liability on an accused who lacked the requisite *mens rea* because of intoxication. For offences of "specific intent", the issue is "*could* the accused have formed the requisite intent", not "*did* he form it", and therefore liability is constructive: a form of *mens rea* less than that required by general principle is sufficient for culpability. [287]

The dissenting judgment [288] of Dickson J. in *Leary,* which does explore this view, is, in the opinion of this reviewer, superb. Even if it did not carry the day for the accused, it should be a source for close consideration by the Law Reform Commission and others concerned with examining the foundations of our present law. In brief, it was stated that the only possible justification for the retention of the concept of "specific intent" was an historical one and that it should no longer be determinative, especially in view of our increasing emphasis on the mental state as an element of criminal responsibility, our greater knowledge of the nature of intoxication and the huge problem of definition inherent in the concept. While drunkenness as such should not be a defence to a charge such as rape, evidence of drunkenness should be considered by the trier of fact, together with other relevant evidence, in determining whether the prosecution has proved beyond a reasonable doubt the *mens rea* required to constitute the crime in question. The concern should be with the mental state of the accused and not merely with his capacity to have the necessary mental state. [289] A return to fundamental principles would avoid the highly undesirable result under the present law:

> [E]ither: (a) the Crown, because the accused was intoxicated, is relieved of the burden of proving a requisite mental state which would have had to be proven if the accused had been sober . . . or (b) in the alternative, the jury is required to examine the mental state of the accused, notionally absent the alcohol, an impossible task and, in the case of a general intent crime and a very drunk man, to find a fictional non-existing mental state as an ingredient of guilt. [290]

Dickson J. faced up squarely to several other problems. He confirmed that even on his alternative approach, drunkenness would not be a defence if the accused drank in order to build up the courage to commit the crime. [291] The view that one who voluntarily ingests a substance which causes him to lose his restraints and inhibitions is necessarily acting recklessly enough to support a conviction on any criminal charge, was persuasively rejected:

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[287] *Id.* at 40-41.

[288] Laskin C.J.C. and Spence J. concurring.

[289] A similar view was expressed by O'Sullivan J.A. in Regina v. Ducharme, 28 C.C.C. (2d) 478, at 478-79 (Man. C.A. 1975).

[290] *Supra* note 35, at 82, 13 N.R. at 617, 74 D.L.R. (3d) at 121.

[291] Attorney-General for Northern Ireland v. Gallagher, [1963] A.C. 349, 45 Cr. App. R. 316, [1961] 3 All E.R. 299 (H.L. 1961).

> Recklessness in a legal sense imports foresight. Recklessness cannot exist in the air: it must have reference to the consequence of a particular act. In the circumstances of a particular case, the ingestion of alcohol may be sufficiently connected to the consequence as to constitute recklessness in a legal sense with respect to the occurrence of the prohibited act. But to say that everyone who gets drunk is thereby reckless and therefore accountable is to use the word "reckless" in a non-legal sense and, in effect, in the case of an intoxicated offender, to convert any crime into one of absolute or strict liability. [292]

Finally, Dickson J. suggested that, if further sanctions against drinking to excess were thought to be necessary (such as the creation of a crime of being drunk and dangerous), [293] these should be introduced specifically by a legislature and not by the judicial adoption of a legal fiction which cuts unevenly across fundamental principles.

F. *Justifications*

1. *Necessity*

When the celebrated abortion trial of Dr. Morgentaler reached the Supreme Court of Canada, [294] the substantive issues (in the final analysis far less important than the evidential and procedural issues which will be discussed later) were clear. The abortion in question was not in compliance with section 251, since the operation had not been approved by a recognized therapeutic abortion committee. The only realistic substantive defence to the charge was one of justification by virtue of (i) the common law defence of necessity, common law defences being permitted by section 7(3); and/or (ii) section 45 which reads:

> Every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if
>
> (a) the operation is performed with reasonable care and skill, and
>
> (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

The trial judge, Hugessen J., ruled that both versions of the defence were available in law and there was sufficient evidence of each to leave to the jury. Most readers will recall the sequence thereafter. The jury acquitted. On a Crown appeal, the Quebec Court of Appeal [295] substituted a conviction, ruling unanimously that there was no evidence of necessity to put to the jury and three-to-two that the section 45 defence was not available in law.

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[292] *Supra* note 35, at 86, 13 N.R. at 621, 74 D.L.R. (3d) at 124.

[293] Gold, *supra* note 286, at 80-85, prefers this alternative of the four he raises.

[294] [1976] 1 S.C.R. 616, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161 (1975). *See* the following excellent reviews: Dickens, *The Morgentaler Case: Criminal Process and Abortion Law*, 15 OSGOODE HALL L.J. 229 (1976); Note, 8 OTTAWA L. REV. 59 (1976); Maksymiuk, *The Abortion Law: A Study of R. v. Morgentaler*, 39 SASK. L. REV. 259 (1975).

[295] [1974] Que. C.A. 129, 17 C.C.C. (2d) 289, 47 D.L.R. (3d) 211.

On further appeal by Dr. Morgentaler to the Supreme Court of Canada, it was held on a six-to-three split that the majority of the Quebec Court of Appeal were correct.

As to the section 45 defence, the majority view, expressed in judgments by Pigeon and Dickson JJ., [296] was that such a defence would not be available in an abortion case. Pigeon J. observed that otherwise the explicit and elaborate machinery for obtaining a legalized abortion under section 251 would be meaningless. [297] Dickson J. added that if section 45 was allowed as a defence, an absurdity would result: the surgeon, but not the woman, would be protected. [298] In contrast, Laskin C.J.C., in a dissenting judgment, [299] favoured such a defence. He pointed out [300] that section 45 had been in the "General" section of the Code since its inception in 1892, had no parallel in English law, specified an objective test, and, above all, was socially desirable. It would not be difficult to envisage urgent circumstances where the procedure of going through a therapeutic abortion committee would be out of the question and where a competent surgeon should be allowed to act. The minority was also of the view that there was sufficient evidence in this case to put the matter to the jury. The difference between the majority and minority judgments on this point once again reflects the long-standing and seemingly insoluble debate surrounding the interpretation of statutes: should the court consider the literal meaning of a statute, or its purpose?

In respect of the common law defence of necessity, the Supreme Court was unanimous in holding that such a defence could be available in appropriate circumstances. But the Court was split on the questions of how to define the defence and whether there was evidence in this case to put to the jury. The majority judgments are particularly cautious. Dickson J., for example, [301] examined such famous authorities as *United States v. Holmes* [302] and *Regina v. Dudley & Stephens* [303] and concluded that:

> On the authorities it is manifestly difficult to be categorical and state that there is a law of necessity, paramount over other laws relieving obedience from the letter of the law. If it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible. No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value. [304]

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[296] Martland, Ritchie, Beetz and de Grandpré JJ. concurred with both judgments. Dickson and Pigeon JJ. concurred with each other.

[297] *Supra* note 294, at 660, 20 C.C.C. (2d) at 483, 53 D.L.R. (3d) at 195.

[298] *Id.* at 672-75, 20 C.C.C. (2d) at 495-96, 53 D.L.R. (3d) at 206-208.

[299] Judson and Spence JJ. concurring. The judgment of Laskin C.J.C. should also be consulted for his detailed dismissal of the constitutional and Bill of Rights attacks: *id.* at 627-37, 20 C.C.C. (2d) at 455-65, 53 D.L.R. (3d) at 167-77.

[300] *Id.* at 642-71, 20 C.C.C. (2d) at 469-76, 53 D.L.R. (3d) at 181-88.

[301] *Cf.* Pigeon J., *id.* at 659, 20 C.C.C. (2d) at 482, 53 D.L.R. (3d) at 194.

[302] 26 Fed. Cas. 36 (Penna. Cr. Ct. 1842).

[303] 14 Q.B.D. 273, 15 Cox. C.C. 624, [1881-85] All E.R. Rep. 61 (1884).

[304] *Supra* note 294, at 677, 20 C.C.C. (2d) at 497, 53 D.L.R. (3d) at 209.

In ruling that there was no evidence to put to the jury, he held that:

> A defence of necessity at the very least must rest upon evidence from which a jury could find (i) that the accused in good faith considered the situation so emergent that failure to terminate the pregnancy immediately could endanger life or health and (ii) that upon any reasonable view of the facts compliance with the law was impossible. [305]

In dissent, Laskin C.J.C. held [306] that this test of necessity would parallel the very limited defence recognized in respect of a homicide charge and was too strict. He did however recognize that: "the necessity must arise out of danger to life or health and not merely out of economic circumstances, although the latter may have an effect in producing the danger to life or health". [307] He felt there was some evidence to put to the jury [308] and that therefore the function of the jury should not have been usurped. It is this latter consideration which induces the reviewer to favour the minority position. The majority position on this point does in fact usurp the role of the jury.

The series of events that followed are familiar and may be briefly noted. In a second jury trial in respect of another abortion charge, Dr. Morgentaler was again acquitted, even though the judge had instructed the jury that the defence of necessity was not available in law. The jury's decision evinces a healthy disrespect for the views of Parliament and judges! On a further Crown appeal, the Quebec Court of Appeal [309] decided not to interfere with the jury acquittal (even though the defence of necessity should have been put to the jury) in view of the decision of the Supreme Court of Canada in the first case. The correction of this error would have favoured the accused but, as he had been acquitted anyhow, there was no need for a new trial. Leave to appeal to the Supreme Court of Canada was refused on March 15, 1976. However, in the meantime the Minister of Justice, exercising his powers under section 617(a) had, on January 22, 1976, ordered a re-trial of the first charge against Dr. Morgentaler in the interests of what was termed "simple justice", [310] and in view of an amendment which was being initiated by the government to abolish the power of a court of appeal to substitute a verdict of conviction for a jury trial acquittal. [311] At this third jury trial Dr. Morgentaler was again acquitted. What has been described by Mr. Diefenbaker [312] as an "orgy of prosecution" ended when a new Attorney General for Quebec stayed the eight other counts pending against Dr. Morgentaler.

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[305] *Id.* at 681, 20 C.C.C. (2d) at 500, 53 D.L.R. (3d) at 211-12.

[306] *Id.* at 654, 20 C.C.C. (2d) at 478, 53 D.L.R. (3d) at 190.

[307] *Id.*

[308] There was evidence that the pregnant patient would do something desperate unless the doctor immediately removed her condition and anxiety.

[309] 27 C.C.C. (2d) 81 (Que. C.A. 1976).

[310] The Globe and Mail (Toronto), January 23, 1976, at 1, Col. 9.

[311] *Id.*

[312] *Id.*

2. *Duress (Compulsion, Coercion)*

The defence of duress in Canada is codified in section 17 of the Criminal Code:

> A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believed that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson. [313]

Clearly this defence is limited in scope, particularly in view of the number of offences exempted. Other countries which have a Code [314] exempt the crime of murder and, in Queensland [315] and Western Australia, [316] the list does not include rape, abduction, robbery or arson. The Indian Code [317] permits the threat of death to excuse any crime except murder and offences against the state punishable by death. At common law, it has long been thought that the only exempted offences are murder and, possibly, treason. In by far the most important and well reasoned recent decision in the area, *D.P.P. v. Lynch,* [318] a majority [319] of the House of Lords decided that the defence was available to one who had aided and abetted a murder. In *Lynch,* the accused had driven a getaway car containing three members of the I.R.A. who had at one point left it to shoot and kill a police officer. Lynch was not a member of the terrorist organization and had acted out of fear of being shot himself.

In view of the Supreme Court of Canada ruling in *Regina v. Carker (2)* [320] that the common law defence of duress had been exhaustively codified in section 17, it would be expected that on a fact situation comparable to that in *Lynch* our Supreme Court would react differently. However, *Regina v. Paquette* [321] provided a pleasant surprise. Paquette had been forced at gunpoint to drive two acquaintances to a store which they intended to rob. In the course of the robbery, they shot and killed an innocent bystander. The robbers attempted unsuccessfully to get back into the appellant's car to escape, but Paquette, who had remained at the scene because of threats to his life should he leave, managed to drive off without them. Paquette was charged with murder on the basis of section 213(a) read in conjunction

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[313] This provision has existed largely unchanged since 1892. *But see* S.C. 1974-75-76 c. 105, s. 29.

[314] *See, e.g.,* N.Z. Crimes Act 1961, s. 24, and Tas. Criminal Code Act 1924, s. 20(1).

[315] Q. Criminal Code Act 1899, s. 31(4).

[316] W. Aust. Criminal Code Act 1902, s. 31(4).

[317] Ind. Penal Code, s. 94.

[318] [1975] A.C. 653 (H.L.).

[319] Lords Morris, Wilberforce and Edmund-Davies. Lords Simon and Kilbrandon dissented.

[320] [1967] S.C.R. 114, [1967] 2 C.C.C. 190, 2 C.R.N.S. 16 (1966).

[321] 30 C.C.C. (2d) 417, 70 D.L.R. (3d) 129 (S.C.C. 1976).

with section 21(2), the doctrine of common intent. On behalf of the full court, [322] Martland J. held that section 17 codifies the law of duress in respect of those who actually commit an offence but not in respect of a person who is merely a party to an offence under sections 21(1)(b), (c) and 21(2). The appellant was therefore entitled to rely on a common law defence by virtue of section 7(3) and the majority decision in *Lynch* was adopted.

In an age of terrorism, hostage-taking and the like, there is much to be said for allowing for the defence of duress on appropriate facts. Therefore, one can applaud the Supreme Court of Canada for resorting to a technicality to by-pass the exclusion of murder in section 17. As the South African judge, Rumpff J., stated in *State v. Goliath*:

> In the application of our criminal law, in the cases where the acts of an accused are judged by objective standards, the principle applies that one can never demand more from an accused than that which is reasonable, and reasonable in this context means, that which can be expected of the ordinary, average person in the particular circumstances. It is generally accepted, also by the ethicists, that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. [323]

It is, however, highly unlikely that any judge in Canada will feel free to allow the defence of duress in the case of the actual perpetrator of one of the listed offences. A recent attempt to invoke the defence of duress by an actual murderer was rejected in England by a majority of the Judicial Committee of the Privy Council in *Abbott v. The Queen*. [324] A case could be mounted, however, for abolishing the exclusionary list of offences in its entirety. [325]

One criticism of *Paquette* should be entered. Martland J. expressly reversed the decision in *Dunbar v. The King* [326] to the extent that it held that duress does not negate the common intent of the accused to carry out an unlawful purpose as the duress relates to motive for joining in the common purpose. The facts in *Dunbar* were similar to those in Paquette except that Dunbar did in fact share in the proceeds of the robbery. Surely the better view is that an act done under duress is an act of conscious choice, "done most unwillingly, but yet intentionally". [327] The defence of duress acts as a justification of an *actus reus* done with *mens rea*, or, in alternative phraseology, it is a post-proof defence. [328] *Dunbar* was right in considering duress as

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[322] Spence J. was absent.

[323] 1972 (3) S.A. 1, at 15 (A.D.).

[324] [1976] 3 All E.R. 140 (P.C.).

[325] Concerning duress as a defence to murder itself, *see* the critical review of *Abbott* in Beaumont, *Duress and the Principal Party to Murder*, 40 MOD. L. REV. 67 (1977).

[326] 67 C.C.C. 20, [1936] 4 D.L.R. 737 (S.C.C.).

[327] D.P.P. v. Lynch, *supra* note 318, at 670 (Lord Morris). *See also, id.* at 709-11 (Lord Edmund-Davies).

[328] This same confusion appears in the Court of Appeal decision in Regina v. Paquette, 5 O.R. (2d) 1, 19 C.C.C. (2d) 154 (1975).

a matter of motive not going to intent, but was wrong in not considering it as an overall justifying defence.

3. *Defence of Person or Property*

It seems obvious that the rules set forth in sections 34 to 42 are excessively complex and often obtuse. The Ontario Court of Appeal is to be commended for its recent glosses on some of the sections. First Martin J.A. in *Regina v. Baxter*[329] and then Howland J.A. in *Regina v. Bogue*[330] have rationalized section 34, the key section dealing with self-defence against an unprovoked assault. That section provides:

> (1). Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
> (2). Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
> (b) he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

A literal interpretation of the subsections would suggest that subsection 2 is exclusively applicable where death or grievous bodily harm has been caused. However, Martin J.A. in *Baxter*[331] held that sections 34(1) and (2) were not mutually exclusive. The words in section 34(2), "who causes death or grievous bodily harm," must mean "even though he intentionally causes death or grievous bodily harm". He pointed out the language of the former Code was clearer and that any other interpretation would leave unprotected one who, using no more force than was necessary to defend himself against an unprovoked assault, accidentally killed or caused grievous bodily harm to his attacker, but did not meet the requirements of section 34(2). Such an inventive interpretation achieves a desirable social result.

In *Bogue,*[332] the court emphasized that section 34(1) specifies that the force used be "no more than is necessary" for self-defence, whereas under section 34(2) there is no requirement that the repelling force be proportionate to the unlawful assault. In suggesting that this was an additional requirement in section 34(1) the trial judge had wrongly concentrated on the reasonableness of the force rather than on the reasonableness of the accused's belief. This interpretation seems to be dictated by the wording of the section, but it does lead to the ludicrous result that the reasonableness of the force used is relevant to an intentional minor assault in self-defence, but not to an intentional major one.

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[329] 27 C.C.C. (2d) 96, 33 C.R.N.S. 22 (Ont. C.A. 1975).
[330] 30 C.C.C. (2d) 403, 70 D.L.R. (3d) 603 (Ont. C.A. 1976).
[331] *Supra* note 329, at 109-10, 33 C.R.N.S. at 37-38, confirmed in *Bogue, supra* note 330, at 407-408, 70 D.L.R. (3d) at 607-608.
[332] *Id.* at 407-11, 70 D.L.R. (3d) at 607-12.

It was perhaps the realization that the subsections are inconsistent that led Martin J.A. in *Baxter* to interpret section 34(1) and both subsections 2(a) and (b) as being only partly objective, in each case allowing for a reasonable but mistaken belief to excuse. [333] Conceding that it is possible and perhaps desirable to read this into the words "no more than is necessary" in section 34(1), it is difficult to see how any subjectivity can be read into the words "reasonable apprehension" in subsection 34(2)(a). Indeed an entirely objective standard was set out in *Bogue*. [334] Such a test is, of course, demanded by section 34(2)(b). [335] It is clear in both judgments that under either section 34(1) or (2) the person defending himself will not be expected to weigh to a nicety the exact measure of necessary defence. [336]

As regards the defence of property, not the least of the many difficulties surrounding the interpretations of sections 38 to 42 is the use of the phrase "deemed to commit an assault without justification or provocation" which appears in three sections. [337] One such section fell to be interpreted in *Baxter*:

> 41(2). A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

Martin J.A. remarked that the "meaning of this subsection is not entirely clear" (which is an understatement) and went on to hold that:

> its effect is not to convert mere passive resistance into an assault but merely to provide that if any force is used by the wrong-doer in resisting an attempt to prevent his entry or to remove him, such force is unlawful, and hence an assault. [338]

This interpretation reflects the common law. The amount of force justified depends on the ordinary interpretation of section 34. Martin J.A.'s analysis is a commendably bold interpretation of an apparently irrebuttable presumption which, if literally construed, might lead to injustice.

4. *Provoked Murder*

The main provisions in respect of the partial defence of provocation to murder are set out in section 215:

> (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

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[333] *Supra* note 329, at 110, 33 C.R.N.S. at 38.

[334] *Supra* note 330, at 407, 70 D.L.R. (3d) at 608.

[335] *Id.*

[336] Baxter, *supra* note 329, at 111, 33 C.R.N.S. at 38-39; Bogue, *supra* note 330, at 407-408, 70 D.L.R. (3d) at 608.

[337] Ss. 38(2), 41(2) and 42(2). In the latter section the exact phrase is "the assault shall be deemed to be provoked by the person who is entering".

[338] *Supra* note 329, at 114-15, 33 C.R.N.S. at 42.

> (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acts upon it on the sudden and before there was time for his passion to cool.
> (3) For the purposes of this section the questions
> (a) whether a particular wrongful act or insult amounted to provocation, and
> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being. . . . .

The leading authority is still the decision of the Supreme Court of Canada in *Parnerkar v. The Queen.*[339] Fauteux C.J.C.,[340] in giving the majority judgment, called attention to the constituent elements of provocation as outlined in section 215(2), the definition section:

> [I]t is:
> (i) a wrongful act or insult,
> (ii) which must satisfy
> (a) the objective test and then be sufficient to deprive an ordinary person, not confronted with all the same circumstances of the accused, of the power of self-control, and
> (b) the subjective test, i.e., of having caused the accused himself to act actually upon it,
> (iii) on the sudden and before there was time for his passion to cool.[341]

He then made the crucial ruling[342] that notwithstanding that certain matters in subsection (3) were designated as questions of *fact* (he equated these with his paragraphs (ii)(a) and (b)) there was an overriding principle that the question of whether there is evidence for the jury was one of *law*. This latter interpretation is extraordinary because it renders the first part of section 215(3) meaningless.

The actual ruling on the facts was also remarkable. It was the unanimous opinion of the Saskatchewan Court of Appeal and all but two[343] of the judges of the Supreme Court of Canada that there was no evidence of provocation and that the trial judge had wrongly submitted this defence to the jury. The evidence indicated that the deceased had said to the accused, "I will not marry you because you are a black man,"[344] and had torn up one of his letters.

That the decision on a defence of provocation will often turn on judges' perceptions rather than those of the jury seems to be illustrated by

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339 *Supra* note 14.
340 Abbott, Martland, Judson and Pigeon JJ. concurring.
341 *Supra* note 14, at 453-54, 21 C.R.N.S. at 133-34, 33 D.L.R. (3d) at 686.
342 *Id.* at 454, 21 C.R.N.S. at 134, 33 D.L.R. (3d) at 686-87.
343 Hall and Laskin JJ.
344 *Supra* note 14, at 462, 21 C.R.N.S. at 141, 33 D.L.R. (3d) at 693.

Regina v. Squire.[345] The accused, an off-duty policeman, after a great deal of drinking, set out to pick a quarrel with persons he described as "creepies". At a bar, he asked a woman to dance; she refused his request, but later danced with the deceased. After the dance, the deceased asked the accused to go outside, which he did. On the sidewalk their verbal battle soon gave way to a physical fight and Squire was pushed to the ground. He then drew his gun and fired five shots into his attacker, killing him. At trial, the defence of provocation was not advanced, but both the Ontario Court of Appeal and the Supreme Court of Canada confirmed the familiar position that a trial judge is in any event required to leave with a jury any defence for which there is a foundation in the evidence. However, the Supreme Court further held that there was "simply nothing" [346] of provocation in the evidence to leave to the jury and reversed the decision of the Court of Appeal. The facts in *Squire* arouse less sympathy than those in *Parnerkar,* but in both cases there is much to be said for leaving this question to the jury.

As far as substantive principles are concerned, there have been some recent clarifications. Martin J.A. emphasized in *Squire* [347] that the extreme violence of the offender's conduct was not necessarily crucial. There is no room in section 215 for the now rejected English doctrine which requires a reasonable relationship between the mode of resentment and the provocation. In *Regina v. Haight* [348] Martin J.A. again confirmed that the words "legal right" in the proviso to section 215 mean "a right which is sanctioned by law, for example, the right to use lawful force and self-defence, as distinct from something that a person may do without incurring any legal liability. The law does not approve of everything which it does not forbid." [349] At Haight's trial for the murder of his estranged wife, it was held that the jury was entitled to consider the wife's refusal to tell her husband of the whereabouts of their daughter since she did so in an abusive manner, taunting the accused who had demonstrated a continuing emotional and financial interest in the child.

It is trite [350] to say that idiosyncrasies, drunkenness and other subjective factors are only relevant to the second branch of the inquiry mentioned in *Parnerkar,* but the real rigour of the purely objective first stage inquiry was emphasized in *Regina v. Clark,* [351] where the Alberta Court of Appeal held that expert opinion evidence of a psychiatrist as to whether a normal person

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[345] 10 O.R. (2d) 40, 26 C.C.C. (2d) 219, 31 C.R.N.S. 314 (C.A. 1975), *rev'd* 29 C.C.C. (2d) 497, 69 D.L.R. (3d) 312 (S.C.C. 1976).

[346] *Id.* at 504, 69 D.L.R. (3d) at 319-20.

[347] *Supra* note 345, at 55, 26 C.C.C. (2d) at 234, 31 C.R.N.S. at 329. This point was not considered by the Supreme Court of Canada.

[348] 30 C.C.C. (2d) 168 (Ont. C.A. 1976).

[349] *Id.* at 175.

[350] *Id.* at 173-74 *citing* Wright v. The Queen, [1969] S.C.R. 335, [1969] 3 C.C.C. 258, 2 D.L.R. (3d) 529.

[351] [1975] 2 W.W.R. 385, 22 C.C.C. (2d) 1 (Alta. C.A. 1974).

would have been provoked in the circumstances was inadmissible. [352]

There is one important ambiguity unresolved since the decision in *Parnerkar*. The majority judgment in that case seems to ignore subsection 215(1) which requires that the retaliation be "in the heat of passion caused by sudden provocation". Rand J. in *Regina v. Tripodi* [353] apparently relied on this passage in ruling that "suddenness must characterize both the insult and the act of retaliation". [354] "Sudden provocation" was taken by Rand J. to mean "that the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame". [355] In *Parnerkar,* only Ritchie J., with Spence J. concurring, referred to this passage, [356] although it had been applied by the majority in *Salamon v. The Queen.* [357] Presumably it was an oversight on the part of the majority in *Parnerkar,* but it should be clarified.

5. *Consent*

In recent years, charges against ice hockey players have escalated. [358] During the 1975-76 hockey season, the press reported that more than thirty players, coaches and spectators had been charged with a variety of offences, ranging from causing a disturbance, through using a weapon for a purpose dangerous to the public peace, to assault causing bodily harm. There were about ten convictions, but only one jail term was imposed. That case involved a seventeen-year-old coach who pleaded guilty to a reduced charge of common assault for attacking a sixteen-year-old referee in a playground game.

The usual defences raised in such trials are self-defence and consent. In *Regina v. Watson,* [359] Edmondson J. said:

> Hockey is a fast, vigorous, competitive game involving much bodily contact. Were the kind of bodily contact that routinely occurs in a hockey game to occur outside the playing area or on the street, it would, in most cases, constitute an assault, [to] which the sanctions of the criminal law would apply. Patently when one engages in a hockey game, one accepts that some assaults which would otherwise be criminal will occur and consents to such assaults. It is equally patent, however, that to engage in a game of hockey is not to enter a forum to which the criminal law does not extend. To hold otherwise would be to create the hockey arena a sanctuary for unbridled

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352 Clement J.A. (Sinclair J.A. concurring), *id.* at 401-402, 22 C.C.C. (2d) at 17. McDermid J.A. left the question open: *id.* at 398, 22 C.C.C. (2d) at 13. The majority decision was based on the discredited "ultimate issue" rule. For a criticism of this rule *see* THE LAW OF EVIDENCE PROJECT OF THE LAW REFORM COMMISSION OF CANADA, STUDY PAPER 7, OPINION AND EXPERT EVIDENCE 30-31 (1973). This rule will be abolished if the DRAFT EVIDENCE CODE, s. 69 is enacted.

353 [1955] S.C.R. 438, 112 C.C.C. 66, [1955] 4 D.L.R. 445.

354 *Id.* at 443, 112 C.C.C. at 68, [1955] 4 D.L.R. at 446.

355 *Id.*

356 *Supra* note 14, at 462, 21 C.R.N.S. at 140, 33 D.L.R. (3d) at 692.

357 [1959] S.C.R. 474, 123 C.C.C. 1, 17 D.L.R. (2d) 685.

358 *See* Hechter, *The Criminal Law and Violence in Sport,* 19 CRIM. L.Q. 425 (1977).

359 26 C.C.C. (2d) 150 (Ont. Prov. Ct. 1975).

> violence to which the law of Parliament and the Queen's justice could not apply. [360]

The judge then quoted the *dictum* of Carter J. in *Regina v. Maki* [361] to the effect that:

> all players, when they step onto a playing field or ice surface, assume risks and hazards of the sport, and in most cases the defence of consent . . . would be applicable. But . . . there is a question of degree involved, and no athlete should be presumed to accept malicious, unprovoked or overly violent attack. [362]

Watson was convicted by a judge when it appeared that he had retaliated in a violent manner one minute after having been high-sticked. In *Regina v. Maloney,* [363] a case concerning an incident seen by millions of television viewers, the jury were instructed as to the *dictum* on consent from *Watson* quoted above, but acquitted nevertheless. [364] In the *Maloney* case there was also a delay before the retaliation. The retaliatory measures involved, *inter alia,* the striking of the victim from behind and twice bouncing his head on the ice. The only distinction between the two cases seems to be that the latter involved professional hockey players, who presumably, consent to more violence. That scarcely seems satisfactory!

6. *Entrapment*

There are still occasional flickerings of the defence of entrapment in Canada. In *Regina v. Bonnar* [365] MacDonald J.A., of the Nova Scotia Supreme Court Appellate Division, sketched the Canadian reluctance to accept the American entrapment defence but went on to hold that there would be circumstances where he would stay a proceeding as an abuse of the criminal justice system on the basis of entrapment:

> I am of the opinion that proceedings should be stayed or the accused discharged if it is clear that the accused did not have a prior intention or predisposition to commit the offence with which he is charged but committed it only because of the conduct of the *agent provocateur* was (as Laskin, J.A. said in *Regina v. Ormond* [*sic*]): such calculating, inveigling and persistent importuning as went beyond ordinary solicitation. [366]

On the facts of the case, as so often occurs, the court was able to hold that the entrapment had not been of this type. The *agent provocateur,* in this case a private detective, had simply afforded the accused the opportunity to

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[360] *Id.* at 156.

[361] [1970] 3 O.R. 780, 1 C.C.C. (2d) 333, 14 D.L.R. (3d) 164 (Prov. Ct.).

[362] *Id.* at 783, 1 C.C.C. (2d) at 336, 14 D.L.R. (3d) at 167.

[363] 28 C.C.C. (2d) 323 (Ont. Cty. Ct. 1976).

[364] Judge LeSage instructed the jury that "[t]he difficult areas of the law are the elements of consent and bodily harm": *id.* at 326.

[365] 30 C.C.C. (2d) 55 (N.S.C.A. 1975). *See also* Regina v. Kirzner, 32 C.C.C. (2d) 76, 74 D.L.R. (3d) 351 (Ont. C.A. 1976).

[366] *Supra* note 365, at 64. The statement by Laskin J.A. appears in Regina v. Omerod, [1967] 2 O.R. 230, at 238, [1969] 4 C.C.C. 3, at 11, 6 C.R.N.S. 37, at 45 (C.A.).

commit the crime of warehouse theft. He had complained of the high price of certain locks and the accused then sold some to him at half price, but for cash. The court did not refer to the decision in *Regina v. MacDonald* [367] where it was held that entrapment of the type impugned by Laskin J.A. had occurred. There, the undercover agent had indicated that she was sick, in need of drugs and had burst into tears.

The denial by the majority of the Supreme Court of Canada in *Rourke v. The Queen* [368] of any general doctrine of stay of process as an abuse, has now stamped out any defence of entrapment resting on this basis. This is an example of the serious implications of a decision which will be discussed more fully later.

Apart from being a factor in mitigation of sentence, [369] one may also argue in entrapment cases that the entrapment agents are accomplices for the purpose of the corroboration warning rule. This approach led to an acquittal in the trafficking case of *Regina v. Litt.* [370]

III. PROCEDURE

A. *Pre-trial*

1. *Search Powers*

(a) *Search warrants* [371]

An issue which frequently arises in search warrant cases is the proper interpretation of that part of section 443(1) which declares that:

> A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place . . .
>
> (b) anything that there is reasonable ground to believe *will afford evidence* with respect to the commission of an offence against this Act . . . may at any time issue a [search] warrant . . . [this] may be in Form 5. [372]

In determining the responsibility of the justice, Forms 1 and 5 have been a source of much confusion. Both are unduly sparse and do not refer to any requirement that the informant or the justice have reasonable grounds to believe that the object to be seized "will afford evidence". This lack of detail allowed the majority in *Regina v. Worrall* [373] to conclude that a justice had acted properly, although the information and the search warrant contained

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[367] 15 C.R.N.S. 122 (B.C. Prov. Ct. 1971).

[368] *See infra* note 539.

[369] Regina v. Chernecki, [1971] 5 W.W.R. 469, 4 C.C.C. (2d) 556, 16 C.R.N.S. 230 (B.C.C.A.) (Bull J.A.).

[370] 24 C.C.C. (2d) 397 (Ont. C.A. 1975).

[371] *See generally* J. FONTANA, THE LAW OF SEARCH WARRANTS IN CANADA (1974).

[372] Emphasis added. The reference to Form 5 is found in s. 443(3).

[373] [1965] 1 O.R. 527, 44 C.R. 151, 48 D.L.R. (2d) 673 (C.A.).

the words "*may* afford evidence". These words were held to be mere surplusage. It is unfortunate at best that the Code forms have not been changed so as to clarify the scope of the discretion. The standard forms for informations and search warrants used in Toronto in fact now contain the words "will afford evidence".

The duty of a justice received brief consideration by both the Ontario and British Columbia Courts of Appeal in recent cases. In *B.X. Development Ltd. v. The Queen*,[374] the British Columbia Court of Appeal applied the trial judge's ruling that:

> It is not the duty of the justice to adjudicate upon the adequacy of that evidence as proof of the commission of the alleged offence. It is enough for him to be satisfied that there is a connection or link between the documents to be sought and the offence as alleged.[375]

The court unanimously rejected the view that the justice had "rubber-stamped" the warrants and had failed to consider judicially the issue of each warrant. McFarlane J.A. expressly indicated that he was influenced by the fact that the crimes alleged were conspiracies to defraud the Vancouver Stock Exchange, and involved complex evidence from across the country. This being so, the judge considered that the informations and warrants should not be examined "with meticulous care, looking to grammar and detail".[376]

On the other hand, Arnup J.A., in *Re Borden and Elliott*,[377] held:

> The issue of a search warrant is not a perfunctory matter. A Justice who issues it must be satisfied that there are reasonable grounds for believing that an offence has been committed and that the documents sought to be seized will afford evidence with respect to its commission. The information put before the Justice must contain certain details to enable him to be so satisfied.[378]

In that case a search warrant in respect of a lawyer's trust account ledger was sought on the grounds that there was evidence of a fraud committed by his client. The warrant was quashed because the information did not set out a factual link between the alleged fraud and the trust account.

The contrast between the above two judgments does not rest solely on the different fact patterns involved. The Ontario decision indicates a return to the dissenting view of Roach J.A. in *Worrall*, where he stated that section 443 confers "a grave and extraordinary power"[379] and therefore should be interpreted strictly.[380]

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[374] [1976] 4 W.W.R. 364, 31 C.C.C. (2d) 14 (B.C.C.A.).
[375] *Id.* at 370, 31 C.C.C. (2d) at 20.
[376] *Id.* at 371, 31 C.C.C. (2d) at 21.
[377] 13 O.R. (2d) 248, 30 C.C.C. (2d) 337 (C.A. 1975).
[378] *Id.* at 259, 30 C.C.C. (2d) at 347.
[379] *Supra* note 373, at 534, 44 C.R. at 157, 48 D.L.R. (2d) at 680.
[380] Recently, in Pacific Press Ltd. v. The Queen, 38 C.R.N.S. 295 (B.C.S.C.), Nemetz C.J. reverted to a strict approach in quashing search warrants issued against newspapers. It was held that the Justice in this case should have weighed the countervailing interest in the freedom of the press and that he did not have reasonable information about any alternative source with which he could exercise his discretion judicially.

In both cases the issue of the solicitor-client privilege was raised. The evidential nuances will not be considered here, but it is of general procedural interest that the issue is presently being raised at the pre-trial stage in the context of a motion to quash the search warrant. [381] In the *B.X. Development* case, [382] the British Columbia Court of Appeal referred to recent decisions [383] to the effect that a warrant in respect of documents which are plainly subject to the solicitor-client privilege can be quashed. However, the court's views were mere *obiter*. Although some of the documents had been taken from a solicitor, it was not shown that they were subject to the solicitor-client privilege. In *Borden,* the Ontario Court of Appeal expressly avoided [384] pronouncing on the trial judge's ruling that a justice has no jurisdiction to issue a warrant with respect to documents subject to that privilege. Being inadmissible evidence at trial, the justice could not believe that they would afford evidence of the offence. Arnup J.A. did add however that it was "abundantly apparent" [385] that there was a need for procedural legislation in this area similar to the provisions in the Income Tax Act: [386]

> The Criminal Code is silent as to at least two important procedural aspects of the issue and execution of a search warrant. It gives no direction to the Justice hearing the application as to whether he should put any limitation upon the type of document to be seized under it, having regard to possible claims of privilege as between a solicitor and his client. What particularity should he require in the information as to the nature of the documents? If particulars cannot be given, what limitations, if any, should be expressed in the warrant itself? Secondly, what procedure should be adopted by the solicitors whose premises are being searched, where they regard themselves as under a duty to raise their client's privilege? At the present time their remedies would appear to be limited to bringing a motion to quash the search warrant. If the Crown authorities are not as reasonable, the damage may have been done before the legal question can be resolved. In extreme cases, there may even be a breach of the peace. [387]

This view is powerful and illustrates the urgent need for legislation. It appears to be a step in the right direction, [388] towards the recognition of a pre-trial motion to suppress.

As to the issue of vaguely worded search warrants, the only recent decision is *B.X. Development.* [389] The actual ruling that the description of various objects in the warrant "pertaining to those persons or companies aforesaid" was not too general, but that it would have been without this

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[381] *See generally* Chasse, *The Solicitor-Client Privilege and Search Warrants,* 36 C.R.N.S. 349 (1977).

[382] *Supra* note 374.

[383] *E.g., Re* Director of Investigation and Research & Shell Canada, [1975] F.C. 184, 22 C.C.C. (2d) 70, 55 D.L.R. (3d) 713; *Re* Director of Investigation and Research & Canada Safeway Ltd., [1972] 3 W.W.R. 547, 26 D.L.R. (3d) 745 (B.C.S.C.).

[384] *Supra* note 377, at 259, 30 C.C.C. (2d) at 347.

[385] *Id.* at 260, 30 C.C.C. (2d) at 348.

[386] R.S.C. 1952, c. 148, *as amended by* S.C. 1970-71-72 c. 63, s. 232.

[387] *Supra* note 377, at 260, 30 C.C.C. (2d) at 348.

[388] *Cf.* Chasse, *supra* note 381; De Lisle, note 418 *infra.*

[389] *Supra* note 374.

limiting phrase, [390] seems to be correct. However, McFarlane J.A. [391] is surely wrong in suggesting that section 445 is a guide to the particularity of the description required in warrants. Section 445 authorizes a person executing a warrant to seize, in addition to the things specified, "anything that on reasonable ground he believes has been obtained by or has been used in the commission of an offence". [392] This section applies only where a justice, acting judicially, has already decided that there is enough evidence to sanction a fundamental invasion of privacy. [393]

(b) *Remedies for illegal searches*

In recent years, several decisions have touched on the right to recover an illegally seized possession. Until recently it was assumed that an applicant who obtained an order quashing a search warrant could get his property back at the time the search warrant was quashed, which usually resulted in greater difficulty in proving guilt at the subsequent criminal trial. This is despite the normal Canadian rule that evidence unlawfully obtained is admissible at the subsequent trial if relevant. Unfortunately, several decisions now indicate that the property cannot be recovered if there is the possibility that it will be used as evidence at a subsequent criminal trial. [394] However, it was confirmed in *Regina v. Black* [395] and *Re Steel & The Queen* [396] that a court has inherent power to order the return of property that has been unlawfully seized and which is not required as evidence in a subsequent criminal trial. Furthermore, in *Bergeron v. Deschamps* [397] the Supreme Court of Canada unanimously held that the decision as to what illegally seized property is needed as evidence must be made by the judge and not left to the police. For the court, Laskin C.J.C. reserved for a later occasion a decision on the power of a judge to order the retention of something unlawfully seized.

The commendably strict ruling in *Bergeron* casts doubt over other recent rulings. In the *Borden* decision, the Ontario Court of Appeal approved the trial judge's order to return the documents seized under a quashed search warrant subject to giving the Crown a week to obtain another search warrant! [398] Aikins J. in *Re Jensen* [399] went further and held that it is immaterial that no prosecution has been launched. A search warrant for the tapes of a statement by the complainant, which was in the possession of the defence was quashed, but it was held that he was not entitled to their return because the

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[390] *Id.* at 369, 31 C.C.C. (2d) at 19.
[391] *Id.* at 372, 31 C.C.C. (2d) at 22.
[392] *Id.* at 371, 31 C.C.C. (2d) at 21.
[393] Regina v. Worrall, *supra* note 373.
[394] *See, e.g.*, Regina v. MacKenzie, [1973] 2 W.W.R. 193, at 199, 10 C.C.C. (2d) 193, at 199 (Sask. Q.B.).
[395] [1973] 6 W.W.R. 371, 13 C.C.C. (2d) 446 (B.C.S.C.); criticized by Chasse, *supra* note 381, at 354-55.
[396] 6 O.R. (2d) 644, 29 C.R.N.S. 355, 21 C.C.C. (2d) 278 (Prov. Ct. 1974).
[397] 33 C.C.C. (2d) 461, 14 N.R. 83 (S.C.C. 1977).
[398] *Supra* note 377, at 259, 30 C.C.C. (2d) at 347.
[399] 36 C.R.N.S. 327 (B.C.S.C. 1976).

Crown indicated orally and by reference to a letter (though they did not adduce affidavit evidence), that they intended to proceed against him for obstruction of justice. The tapes had not been seized by the police but were being held by a judge, apparently pursuant to an agreement to by-pass the Code procedure until either the validity of the search warrant, or the question of solicitor-client privilege was determined. This resort to an illegal procedure is ample evidence of the need to enact a pre-trial procedure in cases of an alleged privilege. [400]

(c) *Common law power to search incident to a lawful arrest*

A highly controversial case in this area is *Reynen v. Antonenko.* [401] Acting on a tip, four police officers [402] were at the Edmonton International Airport when Reynen arrived, after having bought heroin in Vancouver. There was a scuffle on the tarmac of the airport, during which Reynen's mouth was searched and his lip cut, apparently by the wristband of the watch of a police officer. Later, in the R.C.M.P. quarters in the Air Terminal, he was thoroughly searched and grease was observed around his anal area. He was asked to remove the drugs himself and told that if he failed to comply he would be taken to the hospital. His reply was something to the effect of "Let's go to the hospital." At the hospital he refused to sign a consent form in respect of the suturing of his cut lip. Dr. Antonenko, on duty as resident physician, then conducted a rectal examination of Reynen including the insertion of a sigmoidoscope in his anal canal to a depth of six inches. Reynen remained silent, but positioned himself as requested. Two condoms containing twenty-five capsules of heroin were found. Reynen was convicted of possession for the purpose of trafficking and sentenced to three years imprisonment. The provincial court judge considered the police tactics a mitigating factor in the sentencing. On a Crown appeal of the sentence, the Appellate Division of the Supreme Court of Alberta increased the imprisonment to eight years, holding that any remedy for police tactics would have to be a civil one.

This report documents the failure of the civil action against the doctor and the four police officers for assault and battery, respecting the events that took place at the hospital. MacDonald J. dismissed the action with costs. The judgment does not clearly separate the issues of consent and justification and seems to rest largely on the latter.

The common law power of search sketched primarily from ancient English cases allowed a search incident to a lawful arrest. The court could also have relied on the power under section 10(1)(b) of the Narcotic Control Act [403] to search persons where there is a reasonable belief that they possess

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[400] *Supra* note 386.

[401] [1975] 5 W.W.R. 10, 30 C.R.N.S. 135, 54 D.L.R. (3d) 124, 20 C.C.C. (2d) 342 (Alta. S.C.).

[402] Two R.C.M.P. and two from the Edmonton Police Force. The report reads Edmonton Police *Court*—Freudian?!

[403] R.S.C. 1970, c. N-1.

narcotics. On either approach, the power to search did exist, but the question was whether its limits had been exceeded! Although cited in argument, the court chose to ignore *Laport v. Laganiere* [404] where a search warrant was quashed which purported to authorize an operation on a robbery suspect to remove from his shoulder a bullet required as evidence. It was stated in *obiter* that the common law power to search incident to a lawful arrest did not extend to surgical intrusions into the body made eighteen months later on an arrest in respect of another offence. It was not necessary to consider minor medical procedures such as blood tests or *x*-rays. MacDonald J. in *Reynen* did not even consider whether or not the surgery involved was sufficiently minor. He simply held that since the search had been done in a reasonable and proper manner and without unreasonable force or threats, it was justified by section 25(1) of the Code, which states that every police officer is, "if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose". The decision on the consent defence is extraordinary. The court noted that one police officer may have misinterpreted the statement of Reynen at the airport as constituting consent. It was also observed that Reynen did not give, nor was he asked to give, his written or explicit verbal consent to the doctor's examination. The court concluded from Reynen's own evidence at his discovery that he co-operated fully with the doctor in the rectal examination! Presumably (although it is not clear from the judgment), the court ruled that there was the necessary consent. On the above reasoning, it is impossible to support this conclusion.

In general the judgment is disappointing. The court seems to be straining to justify an almost unlimited police power to search for drugs. There are surely other interests to be weighed.

(d) *Writs of assistance*

The recent lament of Federal Court Judge Collier that he was "reluctantly and despairingly" granting twenty-nine applications for writs of assistance has prompted the Minister of Justice to promise a review of the power. [405] We have now been informed [406] that there are 935 writs held by the R.C.M.P., [407] which is to be contrasted with the announced figures of 2,047 in 1962 and 1,360 in 1970. [408] Some 258 R.C.M.P. drug squad officers hold writs of assistance under both the Narcotic Control Act and the Food and Drugs Act. In 1976, they conducted 3,529 searches, of which 326 produced no incriminating evidence. On the other hand, 224 R.C.M.P. officers hold writs under

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[404] 18 C.R.N.S. 357, 29 D.L.R. (3d) 651 (Que. Q.B. 1972).

[405] The Globe and Mail (Toronto), February 17, 1977, at 8, cols. 8-9. Earlier remarks to the same effect by Collier J. have only recently been reported: *Re* Writs of Assistance, 34 C.C.C. (2d) 62 (F.C. Trial D. 1975).

[406] *Id.*

[407] The Globe and Mail (Toronto), February 19, 1977, at 1, col. 3.

[408] *See* Faulkner, *Writs of Assistance in Canada*, 9 ALTA. L. REV. 386 (1971) for these figures and the best review of the topic.

the Customs Act and 195 under the Excise Act. Of the 683 searches conducted on these writs in 1976, 151 proved fruitless.

The most objectionable features of the unbridled power conferred by writs are that there is no requirement to justify the blanket search power on an individual case-by-case basis before an independent judicial officer, it is possessed by an individual writ holder until the police decide to revoke it and it includes the power to search a dwelling house or a person—the most sensitive areas in respect of any power to search. It is also intolerable that an application by the appropriate Minister to obtain a writ cannot be refused by the Federal Court and that in general there is virtually no judicial review possible of the powers exercised under a warrant. [409] The usual argument for maintaining writs is one of expedience of law enforcement, particularly in cases where speed is required and judicial officers are supposedly unavailable. [410] It would seem an unassailable answer that other countries in the British Commonwealth and also the United States manage without them.

(e) *Electronic surveillance*

The provisions of the Protection of Privacy Act, incorporated into the Code as Part IV.1, are extremely complex and have produced a flood of reported cases and legislative amendments in Bill C-51 (recently proclaimed). The case law interpreting these provisions shall be considered first, followed by an evaluation of the amendments.

The three new offences of intercepting a private communication by means of "an electromagnetic, acoustic, mechanical or other device" (section 178.11), unauthorized possession of a bugging device (section 178.18) and disclosure of information from a private communication unlawfully intercepted (section 178.2) have not however presented much difficulty. Thus it has been held that the interception must be by means of special equipment and not merely eavesdropping by a third party's human ear, [411] that the mere installation of a hook-up is not itself an interception, [412] and that the mere disclosure that there was an unlawful interception of a private communication is sufficient to convict a person of disclosure, it being irrelevant whether or not the voices on the tape were discernible. [413] Section 178.1 defines "private communication" as "any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it . . . ". This has been sensibly

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[409] *See, e.g.*, Levitz v. Ryan, [1972] 3 O.R. 783, 29 D.L.R. (3d) 519 (C.A.) dismissing several Bill of Rights' attacks on writs.

[410] *See* OUIMET REPORT, note 766 *infra*, at 65-67; LE DAIN COMMISSION, INTERIM REPORT 250 (1973).

[411] Regina v. Watson, 31 C.C.C. (2d) 245 (Ont. Cty. Ct. 1976) (Mossop J.); Regina v. McQueen, [1975] 6 W.W.R. 604, 25 C.C.C. (2d) 262 (Alta. C.A.) (Clement J.A.; the majority did not pronounce on this point.).

[412] Regina v. Gabourie, 31 C.C.C. (2d) 471 (Ont. Prov. Ct. 1976).

[413] Regina v. Simm, 31 C.C.C. (2d) 322 (Alta. S.C. 1976).

construed to embrace an obscene and threatening telephone call which was in fact overheard by a police officer. [414] But it does not cover a conversation between a police dispatcher and police cruisers intercepted by a radio tuned into the special police frequency [415] or a conversation between inmates in a cell block which contained no other inmates. [416]

Of course, the legislation provides several justifications, including the consent of the originator or the receiver of the private communication or, in the case of a peace officer or public officer specially designated in writing by the Solicitor General of Canada or the Attorney General of a province, the obtaining of authorization to bug from designated judges in the case of certain offences. [417] In Ontario, only a Supreme or County Court Judge can give such authorization. Whether or not a particular piece of evidence has been lawfully obtained by judicial authorization has become the subject of particularly heated dispute because of the qualified exclusionary rule, enacted after protracted debate in the House of Commons: [418]

> 178.16(1). A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.
>
> (2). Where in any proceedings the judge is of the opinion that any private communication or any other evidence that is inadmissible pursuant to subsection 1
>
> (a) is relevant, and
>
> (b) is inadmissible by reason only of a defect of form or the regularity of procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted or by means of which such evidence was obtained, or
>
> (c) that, in the case of evidence, other than private communication itself, to exclude it as evidence may result in justice not being done,
>
> he may, notwithstanding subsection (1) admit such private communication or evidence as evidence in such proceedings.

The vagueness in the drafting of this section is highlighted by an unresolved conflict in the cases. Some have held that the fundamental inclusionary clause "lawfully made" in subsection (a) refers to interceptions

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[414] Regina v. Dunn, 28 C.C.C. (2d) 538 (N.S. Cty. Ct. 1975); *see also* Regina v. Ho, 32 C.C.C. (2d) 339 (B.C. Cty. Ct. 1977).

[415] Regina v. Pitts, 29 C.C.C. (2d) 150 (Ont. Cty. Ct. 1975).

[416] Regina v. Watson, *supra* note 411.

[417] S. 178.12.

[418] *See* Delisle, *Evidentiary Implications of Bill C-176*, 16 CRIM. L.Q. 260 (1974) and Burns, *Electronic Eavesdropping and the Federal Response: Cloning a Hybrid*, 10 U.B.C. L. REV. 36 (1975).

by judicial authorization or by consent. [419] Others [420] hold that the phrase is limited to those interceptions made under judicial authorization. The latter interpretation applies, in effect, a stricter exclusionary rule, but it is doubtful whether this has been achieved by the wide word "lawfully".

It should be noted that the consent required for the inclusionary subsection (b) is express consent to the admission of the communication in evidence and not merely consent to the interception. It was held in *Regina v. Rosen* [421] that giving consent as a result of plea bargaining did not affect the validity of the consent.

The most significant and authoritative decision on judicial authorization thus far was that of the Ontario Court of Appeal in *Regina v. Welsh (No. 6).* [422] Zuber J.A. for the court described his dilemma as follows:

> The right to private communication cannot be diluted simply because unlawful interceptions are made by honest men whose motives are simply to detect crime. On the other hand, this legislation is not a legal briar patch calculated to frustrate the legitimate aims of the prosecution. [423]

He then made five specific rulings settling several points of dispute: [424]

1. Although section 178.16(4) requires that notice be given to the person surveilled that the Crown intends to introduce the communications into evidence, read literally the section imposes no requirement to specify a charge or send further notice in the event of additional or alternative charges.

This is the literal interpretation of a rare right being given to the defence to be forewarned of evidence.

2. A failure by the Attorney General of Canada to notify the accused pursuant to section 178.23(1) within ninety days following the period for which the authorization was given does not retrospectively render an otherwise lawful interception unlawful. The main reasons for this ruling were that this controversial notice provision was not specifically mentioned in section 178.16 and that such notice is redundant in view of the notice requirements set out in section 178.16(4). [425]

This seems to unduly dilute the effect of section 178.23(1). Surely, if an exclusionary rule is to have any meaning, it must be applied strictly. The court could have explored the broad curative provision under section 178.16(2)(b).

3. The grounds set out in section 178.13 for the granting of an authorization are alternative. Section 178.13(1) reads:

> An authorization may be given if the judge to whom the application is

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[419] Regina v. Dunn, *supra* note 414.

[420] Regina v. Coleman, (Ont. Prov. Ct., April 7, 1977), discussed in Regina v. Wernham, [1977] 1 W.W.R. 473, 32 C.C.C. (2d) 383 (Alta. Div'l Ct.); Regina v. Li, 33 C.C.C. (2d) 108 (B.C. Cty. Ct. 1976).

[421] 30 C.C.C. (2d) 565 (Ont. H.C. 1976).

[422] 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A. 1977).

[423] *Id.* at 7, 32 C.C.C. (2d) at 369, 74 D.L.R. (3d) at 754.

[424] *Id.* at 7-14, 32 C.C.C. (2d) at 369-75, 74 D.L.R. (3d) at 754-60.

[425] *See also* Regina v. Vierimaa, 33 C.C.C. (2d) 265 (Ont. Prov. Ct. 1976).

made is satisfied that it would be in the best interests of the administration of justice to do so and that

(a) other investigative procedures have been tried and have failed;
(b) other investigative procedures are unlikely to succeed; *and*
(c) the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Zuber J.A. pointed out that the version of the Act certified by the Clerk of Parliament contained the italicized "and" rather than the "or" appearing in the version published by the Queen's Printer.[426] The certified version was to be preferred. However, the Legislature plainly had alternatives in mind. "And" would have to mean "or" after all!

A different cumulative interpretation was reached by MacDonald J. in *Regina v. Donnelly*.[427] It is unfortunate, to say the least, that a printing error seems to have encouraged an interpretation in the Ontario Court of Appeal that considerably and unnecessarily weakens the provisions.

Zuber J.A. also ruled that it was not the function of the trial court to review the basis upon which the authorization was given.[428] Generally the trial court would be obliged to accept the authorization at face value; in rare instances a court could decline to accept the authorization, as, for example, where the authorization was defective on its face or was vitiated by reason of having been obtained by fraud. The approach of Anderson J. in *Regina v. Miller*[429] was adopted. It was there decided that an authorization cannot be reviewed by a judge other than the trial judge and that the defence cannot, without extrinsic evidence, bring an application to open the sealed package to ascertain if the proper procedure was followed.

This approach may be expedient, but one wonders if two trial court judges in Ontario[430] were not right in ruling to the contrary in order to ensure that defence counsel could obtain sufficient access to such information.

4. An interception under a valid authorization in respect of a stated offence (section 178.13(2) provides that an authorization shall "state the offence") which reveals evidence of other offences is not on this account inadmissible, nor does it affect the lawful character of the interception.

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[426] *Supra* note 422, at 9, 32 C.C.C. (2d) at 371, 74 D.L.R. (3d) at 756.

[427] 29 C.C.C. (2d) 58, [1976] W.W.D. 100 (Alta. S.C.).

[428] *Supra* note 422, at 9, 32 C.C.C. (2d) at 371, 74 D.L.R. (3d) at 756.

[429] [1976] 1 W.W.R. 97, 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679 (B.C.S.C.). *See also* Regina v. Donnelly, *supra* note 391, and Re Regina & Kozak, 32 C.C.C. (2d) 235 (B.C.S.C. 1977) applying Anderson J.'s views in the case of a Crown application. *See also* the conflict as to whether the judge granting an application for an authorization is acting as a *persona designata* and so cannot be reviewed: Regina v. Ho, *supra* note 414; Regina v. See Chun Chan, [1976] 4 W.W.R. 740, 34 C.R.N.S. 388 (B.C. Cty Ct.). *See contra*, Regina v. Turangan, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 (B.C.S.C.).

[430] *See* Regina v. Kalo, 28 C.C.C. (2d) 1 (Ont. Cty. Ct. 1975) (Borins J.) and *Re* Stewart & The Queen, 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 (Cty. Ct. 1975) (Fogarty J.). The latter was overruled in *Re* Stewart & The Queen, 30 C.C.C. (2d) 391 at 402 (Ont. H.C. 1976) (Krever J.).

A contrary interpretation [431] might well lead to absurdity and unduly hamper the police where evidence of other crimes is in fact uncovered.

5. Where the authorization, as in the present case, names individuals who are not those whose communications are tapped, the interception is unlawful and the intercepted communication inadmissible. Section 178.13 (2)(c)—the "basket clause"—declares that an authorization shall:

> state the identity of the persons, if known, whose private communications are to be intercepted and where the identity of such persons is not known, generally describe the place at which private communications may be intercepted, or if a general description of that place cannot be given, generally describe the manner of interception that may be used.

It was held that, if an authorization naming specific persons could be used to authorize the interception of the communications of others, there would be no end to the process, and judicial supervision of the legislation would be thwarted. It was, however, pointed out that the section allowed an authorization to be phrased vaguely. Thus the naming of "unknown persons" would probably have avoided the problem in the instant case. [432]

An unfortunate result of the latter part of the decision, which may indeed have been dictated by the words of the section, was to encourage the Crown to obtain the authorizations in the widest terms possible. A corrective was the subsequent decision of *Regina v. Badovinac*, [433] where the Ontario Court of Appeal outlawed an authorization naming, "other persons as yet unknown who may become identified within the time limit of this authorization", without providing a general description of the manner of interception. [434]

The ruling in *Welsh* [435] was applied by the same panel of the Ontario Court of Appeal in *Regina v. Douglas* [436] where certain intercepted communications were held to be inadmissible. It was also held that defence counsel could waive a failure to comply with section 178.17(4). Defence counsel argued unsuccessfully that the evidence tendered by the Crown was derivative and therefore should be excluded. The court noted the difficulty in defining derivative evidence, but even if the evidence was of this type, the trial court could have invoked the curative provisions of section 178.17(2)(c). But it shirked the invidious job of defining "justice". [437]

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[431] Such a ruling was made in Regina v. Commisso, 33 C.C.C. (2d) 1 (B.C. Prov. Ct. 1977).

[432] *Supra* note 422, at 13, 32 C.C.C. (2d) at 374, 74 D.L.R. (3d) at 760. *See also* Regina v. Stewart, 35 C.C.C. (2d) 227 (Ont. Cty. Ct. 1977).

[433] 34 C.C.C. (2d) 65 (Ont. C.A. 1977).

[434] An authorization including "all interceptions of any telecommunications to and from such persons as may communicate with the said named person" was upheld in Regina v. Viermaa, *supra* note 425.

[435] *Supra* note 422.

[436] 33 C.C.C. (2d) 395 (Ont. C.A. 1977).

[437] *See* Delisle, *supra* note 418. As to "substantive defect," *see*, Regina v. Ho, *supra* note 414; Regina v. Li, *supra* note 420; Regina v. Wong (No. 1), 33 C.C.C. (2d) 506 (B.C.S.C. 1976). *But cf.* Regina v. Cheng, 33 C.C.C. (2d) 441 (B.C. Cty. Ct. 1976); Regina v. Baker, 35 C.C.C. (2d) 314 (B.C.C.A. 1977).

The amendments achieved by the passage of Bill C-51 will clear up some but by no means all of the ambiguities noted above. In particular, section 178.13(1) has been re-drafted to rectify the clerical error made through the use of "and" instead of "or". This guarantees an interpretation more favourable to the Crown. New section 178.16(4) incorporates the ruling in *Welsh,* discussed above. These changes are relatively minor. Of far greater significance are the concessions made to arguments mainly by police groups that a widening of the wiretapping legislation was needed to combat "organized crime". [438] The list of specified offences in section 178.1 for which an authorization may be obtained has been expanded by some ten offences to fifty-seven, including such relatively minor offences as assault causing bodily harm. The "organized crime" provision has been re-drafted as follows:

> any other offence created by this Act for which an offender may be sentenced to imprisonment for five years or more or that is an offence mentioned in section 3 or 20 of the *Small Loans Act,* that there are reasonable and probable grounds to believe is part of a pattern of criminal activity planned and organized by a number of persons acting in concert.

The fairly inconsequential new limitation restricts indictable offences to those with a maximum penalty of five or more years imprisonment. The maximum time periods for authorizations and renewals are increased from thirty to sixty days. Former section 178.23 required written notice of the interception within ninety days after the termination of the authorization. This could only be delayed by a judge for a "determinate reasonable length" of time. This provision has now been lengthened to a maximum period of three years (it was five in the original bill) and there is even a mechanism for the Crown to seek this relief at the time of the original application. The severely qualified exclusionary rule in section 178.16 in respect of evidence obtained through illegal wiretapping has been re-drafted and attenuated:

> (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> (2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

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[438] SOLICITOR GENERAL, THE HIGHLIGHTS OF THE PEACE AND SECURITY PROGRAM (1976).

> (3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings
>
> (a) is relevant to a matter at issue in the proceedings, and
>
> (b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,
>
> he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

There is thus no change respecting the admissibility of an illegally obtained private communication itself: it will be governed by the same qualified exclusionary rule. But derivative evidence from an illegal wiretap will no longer be subject to an exclusionary rule. It will be admissible unless a judge decides that its admission "would bring the administration of justice into disrepute" (section 178.16(2)). The resort to a criterion of the minority judges in *Regina v. Wray* [439] is commendably bold, but it is unfortunate that the Legislature did not adopt the carefully drafted "factors to be considered" clause of the Draft Evidence Code of the Law Reform Commission of Canada. [440] It is also an improvement on the current ambiguous inclusionary yardstick of "justice" in section 178.17(2)(c). The change is unlikely to make much difference in practice. However, as a proponent of a qualified exclusionary rule as an effective tool to attempt to achieve certain high standards of policing, this reviewer laments that the less qualified exclusionary rule for the communication itself could not have been applied to derivative evidence as well.

It should be added that the only gains for civil liberty from the amendments will be the recognition in new section 178.13(1.1) that a judge must proceed with caution in authorizing the wiretapping of a lawyer's office. In addition, section 178.13(2)(c) provides that an application for an authorization must describe the place and manner of the interception whether or not the identity of the person to be surveilled is known.

A full debate of the Protection of Privacy Act cannot be attempted here. [441] This reviewer supports those [442] who suggest that it has legitimized and encouraged state snooping to an extent that the right to privacy has been unconscionably eroded. The latest, hasty amendments demonstrate a disquieting rejection of this view by the federal government.

2. *Information Before a Justice*

A preliminary step in the criminal justice process is the laying of an information before a justice, who may (i) issue either a summons or an arrest

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[439] [1971] S.C.R. 272, 4 C.C.C. 1, 11 D.L.R. (3d) 673 (1970).

[440] THE LAW REFORM COMMISSION OF CANADA, REPORT ON EVIDENCE, s. 15(2) (1975).

[441] *See, e.g.*, the recent debate between Manning and Branson, *Wiretapping: the morality of snooping*, CANADIAN LAWYER 24 (October, 1977).

[442] Such as Manning, *id.*, and PROTECTION OF PRIVACY ACT, L.S.U.C. 159-61 (1974).

warrant, or (ii) confirm an appearance notice, promise to appear or recognizance. It has now been held by Delisle J. in *Regina v. Jeffrey* [443] and August J. in *Regina v. Brown* [444] that in either case, in addition to the ministerial task of receiving an information, a justice has a separate judicial function. The words "shall hear and consider *ex parte* the allegations of the informant" [445] impose on him a mandatory duty not simply to read the information and question the informant as to its truth, but also to actually hear and consider the allegations. Both judges were clearly concerned with ensuring that this judicial officer, which Parliament had interposed between the police and the public, should not merely rubber-stamp the actions of the police. It is a healthy sign that some judges are not prepared to participate in a charade. Delisle J. [446] suggested, while indicating that the law should be enforced until changed, that the law might be reformed to make it possible to "trust the decision of a professional policeman and leave it to him alone to decide whether a person must attend in court". It would seem that we must either enact this reform or do as the two judges did: exact higher standards from our justices.

3. *Arrest*

The special power of a peace officer to arrest without warrant is found in section 450(1). He may arrest:

> (a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,
> (b) a person whom he finds committing a criminal offence, or
> (c) a person for whose arrest he has reasonable and probable ground to believe that a warrant is in force within the territorial jurisdiction in which the person is found.

There is still no considered Canadian decision on the significance of the key phrase "reasonable and probable". There has been no indication of how a court is to place the reasonable person in the position of the arresting police officer, or as to whether the words "and probable" demand more. A reasonable belief that the person arrested is "probably guilty" is a higher standard than the very limited requirement of "reasonable suspicion", which is nothing like a *prima facie* case for conviction. Yet *dicta* in early House of Lords decisions [447] setting both these standards were employed by Walsh J. of the Federal Court Trial Division in *Scott v. The Queen* [448] in

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[443] 34 C.R.N.S. 283 (Ont. Prov. Ct. 1976).
[444] 28 C.C.C. (2d) 398 (Ont. Prov. Ct. 1976).
[445] S. 455.3.
[446] *Supra* note 443, at 289. *See also* THE LAW REFORM COMMISSION OF CANADA, CRIMINAL PROCEDURE: CONTROL OF THE PROCESS, WORKING PAPER 15 (1975). The Commission, however, wanted to await data on J.P.'s.
[447] Dumbell v. Roberts, 13 L.J.K.B. 185, [1944] 1 All E.R. 326 (H.L.); Hicks v. Faulkner, 8 Q.B.D. 167, at 171, 51 L.J.Q.B. 268, at 271 (H.L. 1881).
[448] 20 C.C.C. (2d) 65, 52 D.L.R. (3d) 425 (F.C. Trial D. 1975).

searching for a test. It was held that the plaintiff's action for, *inter alia,* assault against narcotics squad officers should succeed. The mere fact that he had been seated at a table with known drug traffickers and users and had taken a gulp of beer in a sudden and jerky manner when the police had arrived did not constitute reasonable and probable grounds for applying a throat hold, pulling the plaintiff's pigtail, and then arresting him. The plaintiff was awarded a paltry $200 and costs. The defendant's appeal to the Federal Court of Appeal was dismissed by a majority, substituting different grounds, [449] as was the plaintiff's cross-appeal for an increase in damages. The Court of Appeal did not pronounce on the question of definition of "reasonable and probable", but Urie J. did comment [450] that on the evidence he would not have reached the same conclusion as the trial judge on this point. He would have been inclined to give more weight to the other circumstances: presumably that the bar was a notorious drug-trafficking establishment and one of the men with whom the plaintiff was sitting had earlier been checked in a car outside in the street and found to be high on tuinols.

The phrase "finds committing a criminal offence" in section 450(1)(b) fell to be interpreted by the Supreme Court of Canada in *Regina v. Biron.* [451] The issue was whether the appellant should be convicted of resisting a peace officer in the lawful execution of his duty, [452] based on his resistance to an arrest for the summary conviction offence of causing a disturbance by shouting. [453] An appeal court had subsequently acquitted him of the disturbance charge because there was no evidence of shouting. Speaking for the majority of five judges, [454] Martland J. ruled that there should be a conviction on the resisting charge. He pointed out that section 450(1)(b) must apply to a situation in which the peace officer himself finds a criminal offence being committed, and that the validity of the arrest under this section had to be determined in relation to the circumstances "apparent" to the police officer at the time. Otherwise it would be impossible for a police officer to rely on the section. [455] In contrast, Laskin C.J.C., in dissent with his frequent allies, [456] equated "apparent" with reasonable and probable grounds, which are specified only in respect of other powers of arrest. He also reasoned impressively that there were policy justifications that outweighed the law enforcement interests:

> We cannot go on a guessing expedition out of regret for an innocent mistake or a wrong-headed assessment. Far more important, however, is

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[449] 24 C.C.C. (2d) 261, 61 D.L.R. (3d) 130 (F.C. Trial D. 1975).

[450] *Id.* at 268, 61 D.L.R. (3d) at 136 (F.C. Trial D. 1975).

[451] [1976] 2 S.C.R. 56, 30 C.R.N.S. 109, 59 D.L.R. (3d) 409 (1975).

[452] S. 118(a).

[453] S. 171(a)(i).

[454] Judson, Ritchie, Pigeon and de Grandpré JJ. concurring.

[455] *Biron* was unconvincingly distinguished on the facts in Regina v. Stevens, 33 C.C.C. (2d) 429 (N.S.C.A. 1976). The issues and facts were identical except that the acquittal of the disturbance charge resulted from reasonable doubt whether the alleged offender went outside a dwelling house. The police officers were convinced he did.

[456] Spence and Dickson JJ.

> the social and legal, and indeed political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise. [457]

4. *Bail*

Over the survey period there have been no significant decisions on the principles to be applied in judicial interim release hearings. [458] Mention might briefly be made of the adoption by Furlong C.J. in *Regina v. Andrews*, [459] on a Crown application for forfeiture on a recognizance of two sureties of $75,000 each after the accused had absconded, of a *dictum* by Denning M.R. in *Regina v. Southampton Justices*: [460]

> By what principles are the justices to be guided? They ought, I think, to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance of the accused man, it might be proper to remit it entirely. [461]

The facts indicated that the sureties had been reckless in failing to exercise due vigilance over the comings and goings of the absconding defendant. As a result, they forfeited half of the principal sum.

The most significant development was the passage in 1976 of several amendments in the omnibus Bill C-71 which have considerably stiffened the Bail Reform Act. [461] In general, the main changes can be summarized as follows:

1. An arresting officer is given the power to release in most of the ways at present open to the officer-in-charge; [462]
2. If the prosecutor consents, cash bail is now a permissible release option wherever the accused resides; [463]
3. The onus of proof is shifted back to persons who have committed indictable or bail abuse offences while released on another indictable charge, or an indictable offence while not ordinarily resident in Canada, or a trafficking or conspiracy to traffic offence under the Narcotic Control Act; [464]
4. The words "involving serious harm" have been deleted from section 457(7) which now reads in part "having regard to all the circumstances including any substantial likelihood that the accused will,

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[457] *Supra* note 451, at 64, 30 C.R.N.S. at 123-24, 59 D.L.R. (3d) at 415.
[458] Recent cases may be found in J. SCOLLIN, PRE-TRIAL RELEASE (1977).
[459] 9 N. & P.E.I.R. 168, 34 C.R.N.S. 344 (Nfld. S.C. 1975).
[460] [1975] 2 All E.R. 1073, at 1077-78; [1975] 3 W.L.R. 277, at 282 (C.A.).
[461] S.C. 1970-71-72 c. 37, *as amended by* S.C. 1974-75-76, c. 93.
[462] Ss. 454(1)(d), 454(1.1).
[463] S. 457(2)(c.1).
[464] S. 457(5.1).

if he is released from custody, commit a criminal offence or an interference with the administration of justice";[465]

5. It is made express that the prosecutor may lead evidence of the circumstances of the offence particularly as to the probability of a conviction.[466]

It is difficult to comment dispassionately on these amendments, as it is the reviewer's belief that they were a purely political response to the public's perception that the Bail Reform Act was far too lenient.[467] Of the five major changes, the second and fifth are the most obnoxious. It is hoped that where there is resort to cash bail, as undoubtedly will often be the case, this bail will be requested and set in an amount which the accused can reasonably raise.[468] Otherwise, it will function as a tool of repression against the poor. A desire to avoid this was a major impetus for reform in the first place.[469]

A note should be made of a conflict concerning the Bill of Rights. Section 459 of the Code states that a review of detention is mandatory for one detained longer than ninety days in respect of proceedings on indictment, or thirty days for a person proceeded against by way of summary conviction. Where there has been detention beyond these periods, the majority of the British Columbia Court of Appeal in *Ex parte Mitchell*[470] held that there is a remedy by way of *habeas corpus* application notwithstanding that that remedy is expressly excluded by section 459.1. That section was held to be inoperative because it conflicted with section 2(c)(iii) of the Bill of Rights, which specifically guarantees the *habeas corpus* remedy for the determination of the validity of detention and for release if the detention is not lawful. The Alberta Supreme Court Appellate Division in *Ex parte Cordes*[471] however refused to follow *Mitchell* on the unconvincing ground that the remedy of *habeas corpus* was not available simply because of the breach of the prescribed time period and that there would have to be proof of an oppressive delay. In *Ex parte Gooden*[472] Van Camp J. held, on a *habeas corpus* application, that continued detention was justified under section 709, which, contrary to the decision of Bouck J. in *Ex parte Amos,*[473] was not itself inoperative as conflicting with the Bill of Rights. Section 709 provides in part that "Where proceeding . . . to have the legality of . . . imprisonment

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[465] S. 457(7)(b).

[466] S. 457.3(1)(c).

[467] *See,* however, the surprisingly favourable police views found by Koza and Doob, *Police Attitudes Toward the Bail Reform Act,* 19 CRIM. L.Q. 405 (1977).

[468] *See* Regina v. Cichanski, 25 C.C.C. (2d) 84 (Ont. H.C. 1976).

[469] M. FRIEDLAND, DETENTION BEFORE TRIAL (1965).

[470] 23 C.C.C. (2d) 473, 59 D.L.R. (3d) 425 (B.C.C.A. 1975).

[471] [1976] 5 W.W.R. 289, 31 C.C.C. (2d) 279 (Alta. C.A.), *overruling* Regina v. McDiarmid, 28 C.C.C. (2d) 209 (Alta. S.C. 1975).

[472] 27 C.C.C. (2d) 161 (Ont. H.C. 1975). Another method of sterilizing *Mitchell, supra* note 470, is to pronounce legal and immediate re-arrest, here on warrant: *Ex parte* Cheung, 26 C.C.C. (2d) 497 (B.C.C.A. 1975). *See also* Regina v. Strebot, 33 C.R.N.S. 73 (B.C.C.A. 1975).

[473] 24 C.C.C. (2d) 552 (B.C.S.C. 1976).

determined, the judge . . . may, without determining the question, make an order for the further detention of that person . . .". It was held that this section does not exclude *habeas corpus*, but rather provides a remedy for the court to employ on a *habeas corpus* application after it has weighed the public interest against any undue restriction of liberty. This seems to be playing with words. As interpreted in *Amos*, section 709 denies the accused an effective remedy by way of *habeas corpus* and should be struck down as inoperative.

5. *Right to Counsel*

At the trial stage an accused has a statutory right to counsel, [474] which the trial judge may enforce. A six-to-three majority decision of the Supreme Court of Canada in *Barrette v. The Queen* [475] has confirmed that a breach of this right to counsel is a sufficient ground for a new trial. The trial judge had refused to remand the case when the accused's counsel, through a police officer, requested an adjournment. Pigeon J. pointed out there was nothing in the record to indicate that the accused had connived in the absence of his counsel and thus he could not be visited with the sins of his lawyer. The accused had suffered prejudice by not having a lawyer and being unable to summon a witness. It is surprising that there was a dissent at all, but de Grandpré J. [476] was not convinced that the trial judge had made an error of principle. [477]

In *Re Ewing and Kearney* [478] it was held by a majority [479] of the British Columbia Court of Appeal that there is no absolute right in an indigent accused to have a counsel appointed. Two youths, aged eighteen, were charged with possession of marihuana. They could not afford a lawyer, and legal aid was refused because of a policy that such aid would only be granted if a conviction would likely result in imprisonment or loss of livelihood. Farris C.J. in dissent considered it "unrealistic in the extreme" to believe that the two accused could cope with the adversary system and the power and knowledge of the Crown. It was equally unrealistic to believe that the discretion of the trial judge would be an adequate substitute for counsel. The right of an accused to be defended by counsel was an existing right not reflected in the provisions of the Code or the Bill of Rights. To be assured a fair trial the accused required counsel and, if he could not afford one, the state had an obligation to so provide. On the other hand,

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[474] Under ss. 577(3), 611 and 731 of the CRIMINAL CODE and the *Bill of Rights*, s. 2(c)(ii).

[475] 29 C.C.C. (2d) 189 (S.C.C. 1976).

[476] *Id.* at 189 (Martland and Ritchie JJ. concurring).

[477] *Barrette* confirms the decision in Regina v. Johnson, [1973] 3 W.W.R. 513, 11 C.C.C. (2d) 101 (B.C.C.A.), but overrules the majority in *Re* Gilberg, [1975] 2 W.W.R. 171, 20 C.C.C. (2d) 356, 53 D.L.R. (3d) 441 (Alta. C.A.).

[478] [1974] 5 W.W.R. 232, 18 C.C.C. (2d) 356 (B.C.C.A.). It was thoughtfully reviewed by Black, *Right to Counsel at Trial*, 53 CAN. BAR REV. 56 (1975). *See also Re* White & The Queen, 1 Alta. L.R. (2d) 292, 32 C.C.C. (2d) 478 (S.C. 1976).

[479] Branca J.A. concurring.

Seaton J.A. held that section 2(c)(ii) of the Bill of Rights, which provides that no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay, could not be construed so as to bestow the right of counsel and thereby create a new right. But even Seaton J.A. suggested that it did not follow from his decision that "it is never necessary to appoint counsel". In essence, it was held that the present case was not sufficiently complex.

Although the dissenting judgment is welcome in that it attempts to provide real substance to the right to counsel in Canada and boldly steps into the political arena, the thesis would have been more powerful if the judgment had addressed the problem of creating a realistic limit on the absolute right of an indigent to have a counsel appointed. In the landmark American decision of *Argersinger v. Hamlin* [480] the United States Supreme Court drew the line at cases in which imprisonment is to be anticipated.

As to the right to counsel at the pre-trial stage, section 2(c)(ii) of the Bill of Rights contains the only statutory right. [481] Since the decision of the majority of the Supreme Court of Canada in *Hogan v. The Queen* [482] that evidence obtained contrary to the Bill of Rights will nevertheless be admitted at the subsequent trial, the issue has become less important. However, there is still much litigation in respect of the majority ruling in *Brownridge v. The Queen* [483] that a denial of the right to counsel might, in appropriate circumstances, constitute a reasonable excuse that will lead to an acquittal on a charge of failing to take a breathalyzer test under section 235(2). [484] It has been held that the *Brownridge* ruling has no application to a case where the accused has been unable to consult a lawyer through no fault of the police. [485] Relevant also are the *obiter* remarks of Freedman C.J. that: "The 'one phone call' rule is a fiction propagated by Hollywood. Reasonable conduct by the police is always required, and that may in the appropriate circumstances require that a plurality of telephone calls be permitted". [486]

In recent years several cases have held that the communication with a lawyer must be in private. [487] The cases are in conflict as to whether privacy

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[480] 407 U.S. 25 (U.S.S.C. 1972).

[481] S. COHEN, DUE PROCESS OF LAW, at 17-23 (1977) and Ortego and Goode, *supra* note 104, at 763-76.

[482] 9 N.S.R. (2d) 145, 26 C.R.N.S. 207, 2 N.R. 343 (S.C.C. 1974).

[483] [1972] S.C.R. 926, 18 C.R.N.S. 308, 28 D.L.R. (3d) 1.

[484] *Brownridge* was recently applied to the new s. 234.1 offence of refusing to provide a breath sample by roadside testing device, Regina v. Murphy, 35 C.C.C. (2d) 303 (Nfld. Prov. Ct. 1977). Harvey, *Roadside Screenings: A Peace Officer's Views*, 19 CRIM. L.Q. 415 (1977), anticipated such a decision and asserted that it would render the legislation "practically useless". On the myriad of impaired driving decisions, *see* the index by Angene, *Impaired Driving and Breathalyzer Cases*, 32 C.R.N.S. 249 (1976).

[485] Regina v. Drouin, 10 C.C.C. (2d) 18 (P.E.I.S.C. 1972) and Regina v. MacDonald, 10 N.S.R. (2d) 293, 22 C.C.C. (2d) 350 (C.A. 1974).

[486] Regina v. Loutitt, 21 C.C.C. (2d) 84, at 86 (Man. C.A. 1974).

[487] *E.g.*, Regina v. Penner, [1973] 6 W.W.R. 94, 22 C.R.N.S. 35, 39 D.L.R. (3d) 246 (Man. C.A.); Regina v. Balkin, [1973] 6 W.W.R. 617, 13 C.C.C. (2d) 482 (Alta. C.A.).

should be afforded in all cases, [488] or whether it must be requested. [489] Both these views must now be read subject to the important decision of the Supreme Court of Canada in *Jumaga v. The Queen*. [490] The accused was charged with failing, without reasonable excuse, to comply with a demand by a peace officer to submit to a breathalyzer test under section 235(2). The accused would not take the breathalyzer until he had spoken to his lawyer. He was afforded the opportunity to do so, but not in private; the police were in fact taking notes of the conversation. The defendant then refused to take the test. The Supreme Court of Canada unanimously reversed the Manitoba Court of Appeal's decision to convict on the basis of the first refusal. Laskin C.J.C. characterized that action as being nothing more than a deferring of a decision. The main issue, however, was whether or not the failure to afford an opportunity to consult his lawyer in private, which had not been requested, constituted a reasonable excuse. On this, the highest court was divided five to four.

For the majority, Pigeon J. [491] held that it was crucial that the accused had accepted without question the facilities offered to him by the police officers. One cannot be "deprived" of the right to counsel under the Bill of Rights when such is not requested. Although the matter was expressly left open, the majority opinion also contains an ominous remark indicating that they would probably not even require that the communication with a lawyer must be in private if requested:

> I think I should point out that there would be serious difficulties involved in allowing persons in the situation of the accused to have the free use, unsupervised for any length of time, of a private room such as a sergeant's office. It would also be a serious matter to require the provision of safe and adequate facilities for private communication with legal counsel wherever [a] breathalyzer test is to be performed, failing which everyone would have a reasonable excuse for refusing it. [492]

In contrast, Laskin C.J.C., in dissent, [493] ruled that all circumstances must be considered in determining the extent of privacy, but "the fact that it may have to be limited in some cases does not call for an unqualified denial of any privacy in all cases". [494] The right to counsel should not be diluted by requiring that the accused must ask for the right to consult counsel in private. Here no effort had been made to ensure privacy: the officers could easily have observed the accused from the adjoining room.

Clearly, this decision continues the debate between those who wish and those who do not wish to ensure that the right to counsel at the pre-trial

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[488] *E.g.*, Regina v. Maksimchuk, [1974] 2 W.W.R. 688, 15 C.C.C. (2d) 208, 43 D.L.R. (3d) 478 (Man. C.A.); Regina v. Izard, [1975] W.W.D. 72, 22 C.C.C. (2d) 441 (B.C.C.A.).

[489] *E.g.*, Regina v. Stasiuk, [1974] 2 W.W.R. 439, 25 C.R.N.S. 309 (Sask. Dist. Ct.); Regina v. Baker, 23 C.C.C. (2d) 361, [1975] W.W.D. 82 (Sask. Dist. Ct. 1975).

[490] [1977] 1 S.C.R. 486, [1976] 3 W.W.R. 637, 29 C.C.C. (2d) 269.

[491] Martland, Judson, Ritchie and de Grandpré JJ. concurring.

[492] *Supra* note 490, at 497-98, [1976] 3 W.W.R. at 640, 29 C.C.C. (2d) at 278.

[493] Spence, Dickson and Beetz JJ. concurring.

[494] *Supra* note 490, at 494-95, [1976] 3 W.W.R. at 645, 29 C.C.C. (2d) at 275.

stage is not a sham. The majority obviously do not want to foist upon the police an active advisory role. The fact that most of the Canadian cases on the pre-trial right to counsel have involved the breathalyzer in a situation in which a lawyer can offer little if any advice is unfortunate, and has probably mired the issues.

6. *External Review of Citizen Complaints Against the Police*

The need for such a procedure and the details thereof are beyond the scope of the present review, but mention should be made of the Commissions investigating the Metropolitan Toronto Police [495] and the Royal Canadian Mounted Police. [496] Both called for legislation permitting the independent investigation and review of police conduct. In each case the mechanism suggested is the creation of an independent Police Ombudsman. [497]

7. *The Powers of Prosecutors* [498]

There are several recent decisions of constitutional significance which will be briefly noted without comment. In 1969, section 2 of the Code was amended to include within the authority of the Attorney General of Canada "proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation of or conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this Act." It was contended in *Regina v. Pelletier* [499] that this amendment was unconstitutional, and hence that any acts by a federal prosecutor were invalid, as an improper invasion of the provincial domain under section 92(14) of the British North America Act, which gives the provinces jurisdiction in respect of "administration of justice". This argument was dismissed by the Ontario Court of Appeal. However, in *Regina v. Miller* [500] the Quebec Court of Appeal refused to follow the *obiter* ruling in *Pelletier* that the Attorney General of Canada has jurisdiction to prosecute Criminal Code offences not mentioned in section 2. The *Miller* interpretation was preferred by the British Columbia Court of Appeal in

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[495] REPORT TO THE METROPOLITAN TORONTO BOARD OF COMMISSIONERS OF POLICE (A. Maloney, 1975), accepted in the ROYAL COMMISSION INTO METROPOLITAN TORONTO POLICE PRACTICES (The Morand Report, 1976).

[496] THE REPORT OF THE COMMISSION OF INQUIRY RELATING TO PUBLIC COMPLAINTS, INTERNAL DISCIPLINE AND GRIEVANCE PROCEDURE WITHIN THE ROYAL CANADIAN MOUNTED POLICE (The Marin Report, 1976).

[497] Maloney, *supra* note 495, speaks of a "Commissioner of Citizen Complaints" and Marin, *supra* note 496, speaks of a "Federal Police Ombudsman". *Cf.* Barton, *Civilian Review Boards and the Handling of Complaints Against the Police*, 20 U.T.L.J. 448 (1970).

[498] *See* now the stimulating chapter three of COHEN, *supra* note 481, where the author fully examines the powers of prosecutors and laments their virtual immunity from checks.

[499] 4 O.R. (2d) 677, 28 C.R.N.S. 129, 18 C.C.C. (2d) 516 (C.A. 1974). *See Betesh*, note 534 *infra;* Regina v. Dunn, 38 C.R.N.S. 383 (Que. C.A. 1977).

[500] 27 C.C.C. (2d) 438, 30 C.R.N.S. 372 (Que. C.A. 1975).

Regina v. Hancock.[501] In view of the conflict between *Pelletier* and *Miller*, it is amazing that leave to appeal to the Supreme Court of Canada was refused by that Court in both cases.

The powers of Crown prosecutors have remained largely unchecked. Basically, they have unfettered discretion to determine what, if any, charge to lay.[502] In the case of hybrid offences, they may determine whether to proceed by way of indictment or summary conviction,[503] with the consequence that the prosecutor determines in these cases whether or not there is a possibility of a jury trial. Finally, the prosecutor may decide whether or not to withdraw a charge, to offer no evidence (sometimes called an invitation to dismiss) or, in the case of the Attorney General or a lawyer instructed by him, to enter a stay of proceedings. The difference between a withdrawal and a stay is that in the latter case there are statutory rules,[504] and it lies outside the authority of the court.[505] The power to withdraw, on the other hand, is a common law power. The prevailing view[506] is that the Crown has a right to withdraw a charge until a plea has been entered and evidence led. After this time it is in theory only within the power of the court to control the withdrawal. A prosecutor must present fresh documents to continue a charge that has been withdrawn. This is not so where proceedings are stayed.

Some recent decisions have rejected the conventional wisdom about the power to withdraw. Clendenning J. in *Regina v. Taylor*[507] held that the enactment of section 732.1 in 1972, conferring the option to stay in the case of summary conviction offences, superseded the common law power to withdraw in such proceedings. This holding runs contrary to several other decisions.[508] It was approved, however, in *Regina v. Mullen*[509] by Kerans J., who further held that there was no such thing in Canada as a power to withdraw which leaves the accused in jeopardy, at least after a plea in an indictable matter.

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[501] [1976] 5 W.W.R. 609, 36 C.R.N.S. 102 (B.C.C.A.). *See also Re* Regina & Knechtel, [1975] 4 W.W.R. 203, 23 C.C.C. (2d) 545 (B.C.S.C.).

[502] Regina v. Verlaan, [1972] 2 W.W.R. 764, 18 C.R.N.S. 190, 6 C.C.C. (2d) 160 (B.C.C.A.)

[503] Regina v. Smythe, [1971] S.C.R. 680, 3 C.C.C. (2d) 366, 19 D.L.R. (3d) 480.

[504] *E.g.*, time limitation of one year in ss. 508 and 732.1.

[505] *See* the excellent article by Sun, *The Discretionary Power to Stay Criminal Proceedings*, 1 DALHOUSIE L.J. 482 (1974). It was held in Regina v. Velvick, 33 C.C.C. (2d) 447 (Alta. Dist. Ct. 1976), that a court could not resort to any discretion to stay as an abuse, to control the Crown's power to stay.

[506] *See Re* Blasko & The Queen, 29 C.C.C. (2d) 321, 33 C.R.N.S. 227 (Ont. H.C. 1975), and the decisions discussed by Chasse, *The Crown's Power to Withdraw Charges*, 33 C.R.N.S. 218 (1976). *But see* Regina v. Scheller (No. 1), 32 C.C.C. (2d) 273, 37 C.R.N.S. 332 (Ont. Prov. Ct. 1976).

[507] 19 C.C.C. (2d) 79 (Ont. Prov. Ct. 1974).

[508] *See* Chasse, *supra* note 506.

[509] [1975] 5 W.W.R. 538, 25 C.C.C. (2d) 381 (Alta. Dist. Ct.). *See also* Regina v. Grocutt, 35 C.C.C. (2d) 76 (Alta. S.C. 1977).

In view of this conflict in the case law on so fundamental an issue, remedial legislation is urgent. The Law Reform Commission [510] does not want to place any limits on the power of the Crown to withdraw a charge. They would prefer that the court be able to determine the effect of termination on possible future proceedings against the accused, and to award costs to the accused if the case is terminated without an adjudication on the merits. The latter reform is a good idea and could help avoid difficult dilemmas such as that in *Mullen,* where the issue of *autrefois convict or acquit* was raised after the first charge was withdrawn. However, it is submitted that the predominant view, that the court can refuse to allow a withdrawal once there has been a plea and evidence led, is a safeguard which should not be easily jettisoned.

The recommendation of the Law Reform Commission [511] that the personal decision of the Attorney General or of his Deputy should be required as a safeguard against abuse of the power to enter a stay, seems desirable, especially in view of the disparity that has been noted among the provinces. [512] It might also be desirable to incorporate the effect of the ruling in *Regina ex rel. McNeil v. Sanucci,* [513] where it was held that the entry of a stay was no bar to a different informant—there a private citizen—commencing a new prosecution. Clearly that decision was a blow against the unfettered discretion to stay and in favour of the power of a private citizen to prosecute.

In respect of private prosecutions, the Canadian anomaly that a private prosecutor must, in the case of proceedings on indictment, obtain the written consent of the Attorney General if the accused elects a speedy trial, [514] or that of a judge or the Attorney General or the leave of the court if the accused elects a jury trial, [515] should be abolished to free an individual to prosecute where the Crown has not done so. [516] What eventually occurred in *Sanucci* is that the Crown intervened to take over the proceedings instituted by the private citizen (the accused was acquitted). That power was recently asserted successfully in a summary conviction proceeding in *Re Bradley & The Queen,* [517] where the Ontario Court of Appeal allowed the Crown to continue with the charge of intimidation which arose out of a labour dispute (which had by then been settled) and which the complainant wished to withdraw. Notwithstanding the obvious interest in allowing freedom for private prosecution, it is easy to justify the ultimate authority being preserved to the

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[510] THE LAW REFORM COMMISSION OF CANADA, CRIMINAL PROCEDURE: CONTROL OF THE PROCESS, WORKING PAPER 15 (1975).

[511] *Id.*

[512] Sun, *supra* note 505.

[513] [1975] 2 W.W.R. 203, 28 C.R.N.S. 223 (B.C. Prov. Ct. 1974).

[514] S. 496(1).

[515] S. 507(2).

[516] *See* THE LAW REFORM COMMISSION, *supra* note 510. *Cf.* Burns, *Private Prosecutions in Canada: The Law and a Proposal for Change,* 21 MCGILL L.J. 269 (1975).

[517] 9 O.R. (2d) 161, 24 C.C.C. (2d) 482 (C.A. 1975).

Crown, who, after all, must be the final arbiter of policy matters in law enforcement. [518]

In proceedings on indictment, in consequence of amendments in 1976, [519] in every province except Nova Scotia, grand juries have been abolished and all that is necessary is that an indictment be preferred. The anomalous direct indictment possibility has thus become more significant. The governing section is section 507(3):

> where
>
> (a) a preliminary inquiry has not been held, or
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> (b) a preliminary inquiry has been held and the accused has been discharged, an indictment . . . shall not be preferred except with the written consent of a judge of the Court, or by the Attorney General.

It has been recently held [520] that an *ex parte* application by the Crown to a judge under this section is not a denial of natural justice. One might have expected that the judge is performing a judicial act and that the *audi alteram partem* rule would apply. One judge, Grange J., has held upon separate occasions, that it is a denial of natural justice to start but then stop a consent hearing, [521] and that it would be rare indeed that representation of the accused would not be required where the accused had been discharged at the preliminary inquiry. [522] Another line of recent decisions holds [523] that the Attorney General under the section must act personally but not necessarily in person: his signature will do.

There is much to be said for the abolition of this anomalous power of direct indictment. [524] It confers an extraordinary discretion upon the prosecutor who may attempt to by-pass the preliminary inquiry, or proceed again against one who has been discharged. In the latter case, assuming that the accused has not been discharged by reason of a perverse ruling on the facts or a mistake of law, and that there is no new evidence, it is surely an abuse to proceed again, with or without the connivance of a judge or the Attorney

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[518] *See also* THE LAW REFORM COMMISSION, *supra* note 510, which insists on the Attorney General or his Deputy taking personal responsibility.

[519] S. 507(1), *as amended by* Bill C-71.

[520] Regina v. Joynt, 24 C.C.C. (2d) 227 (Man. C.A. 1975); *Re* Stewart & The Queen (No. 1), 35 C.C.C. (2d) 160, *sub nom.* Rosenberger v. The Queen, 38 C.R.N.S. 109 (Ont. H.C. 1977).

[521] *Re* Stewart & The Queen, *supra* note 520.

[522] Regina v. Lynch, 38 C.R.N.S. 118 (Ont. H.C. 1977).

[523] Regina v. Harrigan, 33 C.R.N.S. 60 (Ont. C.A. 1975), refusing to follow a contrary decision in *Re* Arseneau & The Queen, 9 N.B.R. (2d) 391, 21 C.C.C. (2d) 432 (S.C. 1974); Regina v. Mitchell, 33 C.C.C. (2d) 98 (Ont. H.C. 1976); Regina v. Laberge, 38 C.R.N.S. 342 (Que. C.A. 1976).

[524] *See* THE LAW REFORM COMMISSION, *supra* note 510, and caution voiced in Regina v. Welsh, 12 O.R. (2d) 553, 30 C.C.C. (2d) 132, 31 C.R.N.S. 337 (H.C. 1976) and *Lynch, supra* note 522. Similar arguments would apply to decisions that hold that the Crown, having lost a preliminary inquiry, may launch another, such as: Regina v. Ewanchuk, [1974] 4 W.W.R. 230, 16 C.C.C. (2d) 517 (Alta. C.A.); *Re* Hibbs & The Queen, 32 C.C.C. (2d) 549 (N.S.S.C. 1976). *But see* Regina v. Dunlop, 37 C.R.N.S. 261 (B.C. Prov. Ct. 1976); Regina v. Sheehan, 14 C.C.C. (2d) 23 (Ont. H.C. 1973).

General. It is curious, to say the least, that a judge is involved at all, since a decision whether or not to prosecute compromises his independence. What seems to be required, if the preliminary inquiry is to be retained, is to abolish the direct indictment procedure and to replace it by a simple appeal, by the Crown or the accused, from a verdict at the preliminary inquiry. At the moment, probably the only remedy for a defence counsel is the hybrid *habeas corpus* application with *certiorari* in aid. [525]

The one way in which some courts have acted to control the exercise of discretion by prosecutors is through use of the power to stay proceedings as an abuse of process. [526] The leading decision on this point was that of the Supreme Court of Canada in *Regina v. Osborn.* [527] Three judges [528] declined to rule on the existence of the power, since in their view there was no abuse on the facts, and three judges [529] clearly rejected such a power, ruling that it was the duty of the court to apply the law and not to enforce it at its discretion. The delphic behaviour of the seventh judge, Fauteux J., in pronouncing, after more than a year's consideration, "I agree that the appeal should be allowed", has permitted many subsequent judges [530] to rule that, since the Supreme Court of Canada was deadlocked, they are free to recognize such a power. Judges have seldom been satisfied that an abuse was shown on the facts before them, but there are four recently reported cases in which they were. In *Regina v. Burns* [531] the court stayed a charge of importing cannabis resin which had been added to the indictment more than two years after the arrest. *Regina v. Falls* [532] involved the delay of a rape trial for more than a year, but here the delay was the result of the conduct of the complainant who had caused the accused to appear no less than seventeen times, and the original information to be withdrawn once and then re-laid. Also stayed as an abuse, in *Regina v. Buckley,* [533] was a trial delayed twelve times over a one-year period, in most instances because no court facilities were available. The most interesting exercise of the stay to date is the decision in *Regina v. Betesh.* [534] A member of the Canadian Union of Postal Workers had been charged with an assault on a security guard during the 1974

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[525] *See, e.g., Ex parte* Pickett, 12 O.R. (2d) 195, 28 C.C.C. (2d) 417, 31 C.R.N.S. 239 (C.A. 1976). *But cf.* Attorney General of Quebec v. Cohen, 32 C.C.C. (2d) 446, 34 C.R.N.S. 362 (Que. C.A. 1976).

[526] *See generally* COHEN, *supra* note 481, ch. 6.

[527] [1971] S.C.R. 184, 12 C.R.N.S. 1, 15 D.L.R. (3d) 85 (1970).

[528] Hall, Ritchie and Spence JJ.

[529] Pigeon, Martland and Judson JJ.

[530] *See* the judgments referred to by Ewaschuk, *The Rule Against Multiple Convictions and Abuse of Process,* 28 C.R.N.S. 28 (1975) and Angene, *Case References on Abuse of Process,* 37 C.R.N.S. 153 (1977). *But contra,* the incredible decision in Regina v. Forrester, 1 Alta L.R. (2d) 326, 37 C.R.N.S. 320, 33 C.C.C. (2d) 221 (S.C. 1976), that if the abuse stay exists at all, it does so only in the case of private prosecutions.

[531] [1975] 4 W.W.R. 305, 25 C.C.C. 391, 30 C.R.N.S. 387 (B.C. Cty. Ct.).

[532] 26 C.C.C. (2d) 540 (Ont. Cty. Ct. 1976).

[533] 38 C.R.N.S. 12 (Ont. Cty. Ct. 1976).

[534] 30 C.C.C. (2d) 233, 35 C.R.N.S. 238 (Ont. Cty. Ct. 1975).

postal strike. The charge, initiated by a provincial Crown Attorney, was laid after an immunity had been obtained by the Union from the Government of Canada as part of the strike settlement. Graburn J. held that the provincial and federal Crowns were one and indivisible in criminal prosecutions under the Criminal Code. To renege on the binding agreement not to prosecute constituted an abuse of the process of the court.

Appeal courts [535] have avoided the issue by ruling that there is no abuse on the facts. Recently, despite such a ruling on the facts, a five-judge panel of the British Columbia Court of Appeal in *Re Regina & Rourke* [536] unanimously recognized the inherent jurisdiction of a trial judge to exercise the power to stay for abuse. McIntyre J.A., for the court, emphasized that the discretionary power should not be used to the point that judges become, not judges of the cases presented to them, but judges of what cases they permit to come before them. It is only in the most unusual circumstances that the power should be used. Specific approval was given to the remarks of Berger J. in *Re Regina & Croquet* [537] that:

> It is not for the Judge to determine what he considers to be fair or unfair. The doctrine of abuse of process must be one founded on legal principles and exercisable on legal principles, and not according to the judge's own idiosyncratic conceptions of fairness. [538]

The material facts in *Rourke* were that there had been a delay in proceedings for about two years due to dilatory investigation by the police. The court observed that it had not been argued before that the discretion to stay as an abuse could arise from police misconduct. Although none was found in *Rourke*, the court acknowledged that real prejudice could result from such a delay, but stated that the remedy would ordinarily be the "substantive defence" of the right to make full answer and defence. Why it was considered necessary to rely on the latter uncertain concept in the case of a pre-trial abuse, is unclear.

In any event, this is all past history. On further appeal in *Rourke* to the Supreme Court of Canada, [539] Pigeon J., in rejecting the appeal, repeated his view expressed in *Osborn* that there was "no general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive". [540] On this occasion Pigeon J. was joined by four other judges [541] to form a clear majority. It is difficult to see how this judgment can rightfully be distinguished. Admittedly, the case involved police conduct, rather than the prosecutorial conduct which is usually involved in this area, but Pigeon J.'s remarks are widely phrased

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[535] *Re* Regina & Neish, 24 C.C.C. (2d) 379 (Alta. C.A. 1976); Regina v. Davis, 34 C.C.C. (2d) 388, 37 C.R.N.S. 302 (Ont. C.A. 1977).

[536] [1975] 6 W.W.R. 591, 25 C.C.C. (2d) 555, 62 D.L.R. (3d) 650 (B.C.C.A.).

[537] [1972] 5 W.W.R. 285, 8 C.C.C. (2d) 241, 21 C.R.N.S. 232 (B.C.S.C.).

[538] *Id.* at 295, 8 C.C.C. (2d) at 252, 21 C.R.N.S. at 242.

[539] 35 C.C.C. (2d) 129, 38 C.R.N.S. 268 (S.C.C. 1977).

[540] *Id.* at 145, 38 C.R.N.S. at 272.

[541] Martland, Ritchie, Beetz and de Grandpré JJ. concurred.

and clearly the key part of the majority judgment. Earlier he expressly cast the net broadly as to the consequence of a delay:

> I cannot find any rule in our criminal law that prosecutions must be instituted promptly and ought not be permitted to be proceeded with if a delay in instituting them may have caused prejudice to the accused. [542]

What policy reasons are offered? Pigeon J. expresses concern again over a lack of uniformity in the exercise of any such discretion by the judges, and the blurring of the role of the judge with that of the prosecutor. [543] He also rests on a procedural argument: there is no Code provision conferring such a power or permitting an appeal from the decision by a superior court judge to stay the proceedings.

It is submitted that there is urgent need for remedial legislation to restore the power to stay for abuse of process [544] to criminal courts. Judges should not remain stripped of a residual power to deal with clear cases of oppressive proceedings. The extreme caution shown by judges in exercising this power in the last several years suggests that nothing dramatic will occur if the power is restored, except that it will be exercised in rare instances where a judge moves to achieve what most would regard as justice. These were largely the sentiments of Laskin C.J.C. in dissent. [545] Although holding that there was no abuse on the facts, there being no evidence that the police delay was for some ulterior purpose, Laskin C.J.C. approved in *obiter* the power to stay. He observed:

> I have paraded this long list of cases to show how varied are the fact situations in which Judges of different levels and of different Provinces have used abuse of process as a way of controlling prosecution behaviour which operates prejudicially to accused persons. I pass no judgment on the correctness of any of the decisions, but they do indicate by their very diversity the utility of a general principle of abuse of process which Judges would be able to invoke in appropriate circumstances to mark their control of the process of their Courts and to require fair behaviour of the Crown towards accused persons. [546]

Such considerations surely outweigh the concerns of Pigeon J., especially if the procedural gaps he identifies are overcome by legislation.

It should however be noted that even the Law Reform Commission [547] rejects the possibility of giving the judiciary a general power to review the exercise of Crown discretion. They reason that the power of review would impose upon the judiciary "a burden its resources could not bear", that it is

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[542] *Supra* note 540.

[543] Adopting the views of Viscount Dilhorne in D.P.P. v. Humphrys, [1976] 2 All E.R. 497, at 510-11 (H.L.).

[544] This power is distinguishable from the issue of any discretion to exclude technically admissible evidence: Regina v. Smith, [1975] 3 W.W.R. 454, 30 C.R.N.S. 383 (B.C.S.C. 1974).

[545] Judson, Spence and Dickson JJ. concurred.

[546] *Supra* note 539, at 139, 38 C.R.N.S. at 283.

[547] *Supra* note 510.

not possible to give them all the information that a prosecutor must have to exercise his discretion, and that such a power would involve the judiciary in undesirable political controversy and identify them too closely with the police and prosecutor. Their recommended solution is to give the Attorney General the personal discretion to enter any stay. It is submitted that these reasons are weak. If we trust our judges with the job of achieving justice, we can entrust to them the ultimate control of their own processes. That they cannot be apprised of all the pertinent information seems incredible, and surely they will be more closely identified with the Crown and police if they are limited to referring an abuse to the Attorney General.

8. *Plea Bargaining*

Apart from the judgment of Graburn J. in *Betesh* [548] in which he sought to explain previous decisions [549] that a bargain is binding on the basis that a repudiation would be an abuse of process, there have been no new Ontario decisions. In contrast, the Alberta Supreme Court Appellate Division in *Regina v. Wood* [550] and the Quebec Court of Appeal in *Perkins v. The Queen* [551] have repeated that the Crown can repudiate its bargain. In fact, in *Wood,* the majority, [552] while confirming that the Crown's position at trial could not bind the appeal court, in effect allowed it to do just that. It was acknowledged that an important factor in their decision to deny the Crown leave to appeal the sentence was that the accused had been induced to plead guilty in return for the Crown's not seeking a jail sentence. Other factors indicated in the decision were the findings that a grant of a new trial would be unduly prejudicial because damaging evidence of two psychiatrists would then be admissible, and that there had been an unusually long delay of about a year in bringing the sentence to appeal. The majority indicated that otherwise they would have supported a substantial term of imprisonment.

This is not the forum to argue the merits of plea bargaining, but it should be noted that the Law Reform Commission [553] has recommended that the practice be eliminated. This view was rejected by the Attorney General of Ontario, who indicated [554] that there was nothing wrong with the practice provided that it was controlled by responsible people. Subsequently, he supported [555] existing guidelines sent to all Crown Attorneys in Ontario in 1972, [556] subject to two *caveats*:

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[548] *Supra* note 534.

[549] Regina v. Agozzino, [1970] 1 O.R. 480, 6 C.R.N.S. 147 (C.A. 1968); Regina v. Brown, 8 C.C.C. (2d) 227 (Ont. C.A. 1972).

[550] [1976] 2 W.W.R. 135, 26 C.C.C. (2d) 100 (Alta. C.A. 1975).

[551] 35 C.R.N.S. 222 (Que. C.A. 1976).

[552] Moir and Haddad JJ.A. for the majority. McDermid J.A. dissented, *i.e.*, he would have ordered a new trial.

[553] *Supra* note 510.

[554] The Globe and Mail (Toronto), February 24, 1976, at 5, cols. 1-6.

[555] Memorandum from Attorney General Dalton Bales, June 30, 1972.

[556] Memorandum from Deputy Director of Crown Attorneys, W. H. Langdon, February 26, 1976.

1. Expediency in reducing work load is not acceptable as a reason for accepting a plea to a lesser offence or to a lesser number of offences. Expediency in this sense does not include weaknesses in the Crown's case on the major charge or charges, which may be a valid reason for accepting a plea to a lesser offence or to a lesser number of offences.
2. [Whenever] you accept a plea to a lesser offence or to a lesser number of offences you should state in open court your reasons for doing so. The statement need not be lengthy but should be sufficient to satisfy the public in each case that there is nothing sinister or clandestine in the process of plea discussion.

B. *Trial*

1. *Jurisdiction*

(a) *Statutory changes*

Bill C-71 contained many detailed amendments to jurisdictional sections of the Code.

The recent trend to creating hybrid offences was continued. Particularly significant was the making of the formerly indictable offence of causing bodily harm hybrid (section 245(2)). In the case of such a common offence it is now in the unfettered discretion of the prosecution to decide what type of proceeding there will be, and hence whether the accused will have a right to choose a jury trial. The right to a jury trial was removed for the indictable offence of placing a bet and the now hybrid offence of fraud not exceeding $200.

There were also amendments to give Canadian courts extra-territorial jurisdiction over "internationally protected persons", [557] and in respect of a conspiracy entered into within Canada to commit an unlawful act outside Canada or a conspiracy entered into outside Canada to commit an unlawful act within Canada. [558] Formerly, a summary conviction court acquired exclusive jurisdiction once it had accepted the plea, and this could only be waived before the trial proper had commenced. The waiver provisions have been abolished, and there is only exclusive jurisdiction in respect of a provincial judge who has accepted a plea and heard evidence. [559] The eight-clear-day maximum for adjournments in the case of a preliminary inquiry [560] or a summary conviction court [561] can still only be exceeded if the accused and the prosecutor consent to a proposed adjournment for a longer period. It is now clear, however, that such consent can be obtained when the accused is in custody. There is also a provision clearly designed to limit jurisdictional attacks:

> 440.1(1) The validity of any proceeding before a court, judge, magistrate or justice is not affected by any failure to comply with the provisions of this Act relating to adjournments or remands, and where such failure has

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[557] S. 6.
[558] S. 423(3)-(6).
[559] S. 725(4).
[560] S. 465.
[561] S. 738(1).

> occurred and an accused or a defendant does not appear at any such proceeding or upon any adjournment thereof, the court, judge, magistrate or justice may issue a summons or, if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

(b) *The decision in Doyle*

By far the most important jurisdictional decision was the unanimous ruling of the Supreme Court of Canada in *Doyle v. The Queen.* [562] In early December 1973, a millionaire industrialist was charged, *inter alia,* with fraud of $540,000. By the first of April, he had been released on conditions including cash bail, and, on the date of his appearance before a provincial court judge, the charges against him were read for the first time. The accused opposed a further adjournment, but the Crown's request for an additional four months was nonetheless granted. The Crown was having difficulty extraditing the co-accused from the United States. The narrow ruling of Ritchie J. was that the only power to adjourn without the accused's consent is found in section 465(1) which contains an eight-clear-day maximum period. The presiding judge had thus lost jurisdiction and the recognizance was vacated.

The difficulty in the decision lies not in this narrow ruling, but in the wider remarks made. [563] Probably the most important *obiter* is that the procedural powers of a magistrate or justice are exhaustively stated in the Code:

> Whatever inherent powers may be possessed by a superior court judge in controlling the process of his own court, it is my opinion that the powers and functions of a magistrate acting under the Criminal Code are circumscribed by the provisions of that statute and must be found to have been thereby conferred either expressly or by necessary implication. [564]

Surely, Ritchie J. could not have intended to strip lower court judges of all their power to remedy gaps in procedural sections, such as the absence of an included offence provision in respect of summary conviction courts.

Doyle also held that on first appearance a justice must determine whether the offence allows for election (presumably this also covers a hybrid offence proceeded with on indictment) and then the election must be put to the accused. Attempts to meet this requirement have resulted in what has been described as procedural chaos. [565] The difficulty is that the accused, especially in the large jurisdictions, often does not have counsel on his initial appearance. Some justices have nevertheless insisted that the accused make his election on first appearance, while others have allowed adjournments to obtain counsel to advise as to the election. Others have allowed a reservation of the exercise of the election. Indeed, Luther M. in *Regina v. Locke* [566]

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[562] *Supra* note 539.

[563] *See* the instructive annotation by Ewaschuk, *The Wonderful World of Practice,* 35 C.R.N.S. 14 (1976).

[564] *Supra* note 539, at 291, 35 C.R.N.S. at 6, 68 D.L.R. (3d) at 275.

[565] Editorial, [1976] 2 CRIMINAL LAWYERS ASSOCIATION NEWSLETTER 1.

[566] 31 C.C.C. (2d) 441 (Nfld. Prov. Ct. 1976).

held that a rigid adherence to this *obiter dictum* from *Doyle* would abrogate the accused's right to a fair hearing under section 2(b) of the Canadian Bill of Rights. It was held that the accused should be put to his election as soon as he is prepared and, in any case, within a reasonably short period of time: "probably no later than his second or third appearance unless there are extenuating circumstances for not so doing." [567] Recently, the British Columbia Court of Appeal in *Geszthelyi v. The Queen* [568] also held that as the *Doyle* ruling was mainly concerned with a different type of improper adjournment, it was not to be interpreted as requiring the election after the first reading of the information. It is doubtful whether this is the correct reading of Ritchie J.'s judgment but, like *Locke*, it seeks to avoid injustice.

Another conundrum in the *Doyle* decision is whether or not the distinction between loss of jurisdiction over the offence and loss of jurisdiction merely over the person, which would allow new process on the same documents, has been abolished. It would seem that it has, [569] since the judge in the case, although he had acted irregularly, was held to have become *functus*. It was made express that, although the information had lost its potency, a fresh information could be proceeded upon.

A final point about *Doyle*. The narrow ruling that there had been a loss of jurisdiction because of the improper adjournment would probably be different under the new remedial section 440.1 quoted above. [570] It may be added that the specific ruling that the time limit for adjournments mentioned in section 465 applied is difficult to accept. [571] Section 465 relates to the actions of a justice other than a magistrate, and the magistrate here was clearly acting under Part XVI rather than XV, in which case the proper section is section 501, which confers the power to adjourn "from time to time".

2. *Submission of "No Case to Answer"*

Controversy remains concerning the principles underlying this motion, sometimes called a motion for non-suit, made at the close of the case for the prosecution and calling for an acquittal if there is no evidence upon which a properly instructed jury might convict. [572]

In Ontario, a long-standing difference of view amongst trial judges has apparently been settled. In *Regina v. Angelantoni*, [573] the Ontario Court of Appeal held that a trial judge should not reserve his judgment upon the motion for non-suit and subsequently put the accused to his election as to whether he will call evidence. The issue must be decided before the trial proceeds further.

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[567] *Id.* at 445.

[568] 33 C.C.C. (2d) 543, 38 C.R.N.S. 15 (B.C.C.A. 1977).

[569] Ewaschuk, *supra* note 563, at 19.

[570] *Contra*, a narrow interpretation by Ewaschuk, *supra* note 563, at 20.

[571] *Contra*, Ewaschuk, *supra* note 563, at 17.

[572] *See generally*, Pomerant, *The Submission of No Case in Canadian Criminal Cases*, 15 CRIM. L.Q. 52 (1972), and P. MCWILLIAMS, CANADIAN CRIMINAL EVIDENCE 478-80 (1974).

[573] 28 C.C.C. (2d) 179, 31 C.R.N.S. 342 (Ont. C.A. 1975).

It has now been restated by the Supreme Court of Canada in *Regina v. Paul* [574] that a judge must, when deciding whether to grant a submission of "no case", consider merely whether there is any evidence to weigh, rather than actually weighing it. [575] On the other hand, it was pointed out by de Grandpré J., dissenting on the facts in *Paul*, that "the expression 'absence of evidence' does not mean that the motion for a non-suit must be dismissed whenever there is an iota of evidence, no matter how inconsequential this may be". [576]

That judges are still in dispute as to the application of this principle is clear from a split in the highest court in the extradition case of *United States v. Sheppard* [577] where it was held that the tests were the same as for the submission of no case. In a judgment delivered by Ritchie J., the majority of five affirmed that credibility cannot be assessed at this stage. The dissenting judgment of Spence J. held that a court has a discretion to direct a verdict not only in cases where the evidence is wholly circumstantial, but also in a case such as the present one, where the evidence was "dangerous and dubious because it was given by a witness who was quite evidently acting in hope of a reward which had been promised to him in detail". [578]

3. *Formal Attacks on the Indictment or the Information*

(a) *Grounds*

(i) *Insufficiency*

The general Code requirements in respect of sufficiency of a count in an indictment or an information are stated in section 510, while section 512 specifies eight defects which by themselves will not render a count insufficient. [579] Often the issue will be determined by an interpretation of the words of section 510(3):

> A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

These sections are reasonably easy to interpret literally, and obviously strive to compromise between ensuring that an accused gets adequate notice of the offence with which he is charged and avoiding undue technicalities. In the early common law, formal attacks on indictments were necessary to give the courts a device to avoid extreme penalties such as death.

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[574] 4 N.R. 435, 27 C.C.C. (2d) 1, 64 D.L.R. (3d) 491 (S.C.C. 1975).

[575] *Id.* at 439, 27 C.C.C. (2d) at 5, 64 D.L.R. (3d) at 495.

[576] *Id.* at 444, 27 C.C.C. (2d) at 9, 64 D.L.R. (3d) at 499.

[577] 9 N.R. 215, 30 C.C.C. (2d) 424 (S.C.C. 1976).

[578] *Id.* at 235, 30 C.C.C. (2d) at 441, Laskin C.J.C., Dickson and Beetz JJ. concurred.

[579] Section 729(1) invokes ss. 510 and 512, *mutatis mutandis*, for summary conviction proceedings.

The decision usually relied upon by the defence is the Supreme Court of Canada decision in *Brodie v. The King* [580] quashing an indictment, charging named and unnamed conspirators with a seditious conspiracy, which stated the place and time, but not the fundamentals of the particular agreement. It was held in *Brodie* that the indictment did not describe the offence "in such a way as to lift it from the general to the particular" [581] and that it should not have merely categorized the offence, but should have specified the time, place and matter. [582] Subsequently, there has been a marked tendency, particularly in the appellate courts, to interpret *Brodie* narrowly. [583] This tendency has been even more evident since a unanimous decision of the Supreme Court of Canada in *Regina v. McKenzie,* [584] where it was held that it was not necessary to specify which of the many types of theft defined in the Code were charged.

In 1976, for example, there were only four of the many reported decisions [585] in which motions to quash based on insufficiency succeeded. [586] It is interesting to note that in one of these, *Livingstone,* [587] it did not avail the prosecutor that the suggested form for charging robbery in *Martin's Criminal Code* had been followed. The court preferred the form suggested in *Snow's Criminal Code of Canada.* Where the form of robbery committed could only have been that set out in section 302(a), there had to be an allegation that the threats of violence were "for the purpose of extorting what was stolen".

The general abhorrence of technical objections was recently illustrated by the Supreme Court of Canada in *Regina v. Côté.* [588] The material part of the information alleged that the accused "did refuse to comply with the demand by a peace officer to provide a sample of breath suitable for analysis to determine if any, the proportion of alcohol in his blood, contrary to Section 235(2) of the Criminal Code". The Saskatchewan Court of Appeal [589] had quashed the conviction on the basis that the information did not allege

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[580] [1936] S.C.R. 188, 65 C.C.C. 289, [1936] 3 D.L.R. 81.

[581] *Id.* at 198, 65 C.C.C. at 297, [1963] 3 D.L.R. at 88.

[582] *Id.* at 193, 65 C.C.C. at 293, [1963] 3 D.L.R. at 85.

[583] In Regina v. Nadin, [1971] 3 W.W.R. 481, 14 C.R.N.S. 201 (B.C.C.A.), for example, a majority of the court upheld an information lacking detail of the exact time and place of the offence.

[584] [1972] S.C.R. 409, 16 C.R.N.S. 374, 21 D.L.R. (3d) 215 (1971).

[585] *See* Ewaschuk, *Criminal Pleadings,* 35 C.R.N.S. 273 (1976), which conveniently classifies many of the reported cases in recent years.

[586] Regina v. West, 26 C.C.C. (2d) 551 (B.C.S.C. 1975) ("did unlawfully carry on business as a mortgage broker"); *Re* Regina & Basaraba, [1976] 3 W.W.R. 233, 24 C.C.C. (2d) 296, 30 C.R.N.S. 358 (Man. C.A. 1975) ("did by word of mouth, knowingly utter a threat"); *Re* Deakin, [1976] W.W.D. 29, 29 C.C.C. (2d) 247, 26 C.R.N.S. 236 (Man. Q.B. 1975) ("did unlawfully conspire . . . to commit . . . [r]obbery"); *Re* Livingstone & The Queen, [1976] 2 W.W.R. 349, 29 C.C.C. (2d) 57 (B.C.S.C. 1975) (" did unlawfully steal a pizza . . . and at the time thereof did use threats of violence").

[587] *Re* Livingstone & The Queen, *supra* note 586.

[588] Regina v. Coté, 13 N.R. 271, 33 C.C.C. (2d) 353 (S.C.C. 1977).

[589] 21 C.C.C. (2d) 474, 26 C.R.N.S. 26 (Sask. C.A. 1974).

the essential element that the refusal was "without reasonable excuse". Leave to appeal to the Supreme Court of Canada on that specific ruling had been denied. In the Supreme Court of Canada, de Grandpré J., with five judges concurring, [590] indicated that this point was still open. The unanimous opinion of the eight judges in the Supreme Court of Canada who heard this appeal (Laskin C.J.C. was absent) was that there was no defect in the information because the correct number of the section was indicated. The majority referred to section 510(5):

> A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

It was then held that:

> [T]he golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be mislead. To hold otherwise would be to revert to the extreme technicality of the old procedure. [591]

One wonders if we have not gone too far in rejecting technicalities, particularly when it is remembered that in most cases [592] the Crown can proceed again if an information or indictment is quashed for a technical defect. It is surely not too much to expect police and prosecutors to know how to draw up charges. The current law in respect of section numbers indicates just how lax they can be. Section 510(5) is permissive. *Côté* holds that if the section number is included and it is correct, it will remedy a serious defect, while there is also authority for the proposition that a wrong section number will not be crucial if the wording of the charge is correct. [593] The degree of vagueness now permitted is also clear from the rulings in three provinces [594] that it is sufficient to allege that an accused "did unlawfully traffic" in a prohibited drug to charge him with the most serious drug offence, with the corollary that the defence is not informed at an early stage as to whether the Crown intends to rely on such disparate definitions of trafficking as selling, transporting or delivering.

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[590] Martland, Judson, Ritchie, Pigeon and Beetz JJ. Spence and Dickson JJ. refused to comment on this point.

[591] *Supra* note 588, at 357.

[592] The six-month limitation period for summary conviction proceedings in s. 721(2) is the main exception.

[593] *E.g.*, Regina v. J.D. Irving Ltd., 12 N.B.R. (2d) 108, at 113, 28 C.C.C. (2d) 242, at 245-46 (C.A. 1975).

[594] Regina v. Mills, [1972] 2 W.W.R. 531, 8 C.C.C. (2d) 480, 18 C.R.N.S. 400 (Sask. C.A. 1971); Regina v. Peebles, 24 C.C.C. (2d) 144 (B.C.C.A. 1975); Regina v. Labine, 23 C.C.C. (2d) 567 (Ont. C.A. 1975).

(ii) *Duplicity*

In a recent Working Paper, [595] the Law Reform Commission of Canada suggested that any elimination of the technicality and confusion surrounding duplicity and insufficiency would be welcomed by all. It is unfortunate that the Commission has not moved in this area itself. The law is particularly vexed in the case of duplicity, because the Code has contradictory sections. In proceedings on indictment, how can one reconcile the requirement in section 510(1) that each count "shall in general apply to a single transaction", with section 519(1) which states, *inter alia,* that a count is not objectionable by reason only that it is "double or multifarious"? [596]

An interesting decision on the facts was that in *Regina v. Barnes.* [597] A doctor had been charged with one count of defrauding the provincial Medicare scheme by submitting false claims for services. The Crown produced evidence relating to about seventy claims, but only nine fraudulent ones were substantiated. The court confirmed that in Canada, as opposed to England, [598] there can be an attack based on duplicity, not because the charge is objectionable on its face, but because the evidence adduced at trial shows that more than one offence was committed. Basically, the court had to choose between two earlier decisions. In *Regina v. Hulan,* [599] a count alleging sexual intercourse with a female under the age of fourteen, over a six-month period, was not duplicitous because the several acts in question were in respect of the same victim, in the same house and in the same manner. In *Regina v. Rafael,* [600] a charge of fraud by obtaining money through promises of landed immigrant status to twenty-four individuals over a five-year period, at different localities and involving quite different representations, was duplicitous. In *Barnes* it was held that the charge in question was not duplicitous. Quite correctly, it is submitted, *Rafael* was distinguished on the basis that here the offences were alleged against one body, the representations were the same and the period was only six months.

(b) *Curative devices*

The courts seem reluctant to restrict the wide discretion given to trial judges to amend an indictment in section 529 or an information in section 732. For example, in *Regina v. Hancock (No. 6),* [601] the court allowed a Crown amendment as to the date of the alleged offence in the information at trial, after both counsel had concluded their final argument but before the court had retired to reach a decision. It is also clear that, in sum-

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[595] *Supra* note 510, at 57.

[596] In summary conviction proceedings, the competing sections are 510(1) and 724(1)(b) on the one hand, and 731 on the other.

[597] 11 N.S.R. (2d) 272, 26 C.C.C. (2d) 112, 63 D.L.R. (3d) 452 (N.S.C.A. 1975).

[598] Regina v. Greenfield, [1972] 3 All E.R. 1050 (C.A. 1973).

[599] [1969] 2 O.R. 283, [1970] 1 C.C.C. 36, 6 C.R.N.S. 296 (C.A. 1969).

[600] [1972] 3 O.R. 238, 7 C.C.C. (2d) 325 (C.A.).

[601] [1975] 6 W.W.R. 220, 32 C.R.N.S. 107 (B.C. Prov. Ct.).

mary conviction proceedings, amendments will be permissible where the complaint is that the count is duplicitous, [602] notwithstanding the absence of such a specific power to amend in the case of proceedings on indictment in section 519(1). The prosecutor is given the choice of which offence to proceed upon, and the other offence or offences are deleted. If he decides not to elect, the whole charge is bad. [603]

Motions to quash indictments or informations for defects apparent on their face must be brought before an accused has pleaded, or thereafter by leave of the trial court. [604] In such cases particularly, [605] appeal courts have continued to reject an objection to an indictment or information which is raised for the first time on appeal. This is generally because of their traditional reluctance not to substitute their discretion for that of the trial judge [606] and their fear that technical objections might otherwise deliberately be left for appeal. [607] This attitude seems to be hardening. For example, de Grandpré J., in *Côté,* [608] held that even if there has been a defect apparent on the face, there would have been no necessity to amend the information, since no objection was made at trial, and "the matter ends there." [609]

In the *City of Sault Ste. Marie* [610] the Ontario Court of Appeal dealt with an attack for duplicity raised for the first time on appeal from a summary conviction to the Divisional Court in respect of a charge which read "discharge or cause to be discharged or permitted to be discharged or deposited". The unanimous ruling on this point [611] was that this formal objection of duplicity was in respect of a defect apparent on the face of the document. Under section 732(1) this objection could be raised before the plea or after it only by leave of the court. It could not be raised on appeal without leave of the appeal court which would only be granted on grounds of prejudice, something not alleged, or at least not established, in the present case. Furthermore, the defect was a defect "in substance or in form", which section 755(4) (now section 755(7)) specified could not be raised in the *de novo* appeal as it had not been raised at the trial.[612]

Although the result is harsh, it is difficult to criticize the Ontario Court of Appeal's interpretation of the sections. Clearly, the ruling could not affect objections for duplicity based on the charge read in conjunction with the evidence adduced, and it should be noted that there is no equivalent of section 755(4) (now section 755(7)) in respect of appeals from proceedings

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[602] *Supra* note 127, at 294 (*obiter*).

[603] *Id.*

[604] Ss. 529(1) and 732(1).

[605] *Coté, supra* note 588.

[606] Regina v. Keshane, [1975] 1 W.W.R. 294, at 295, 20 C.C.C. (2d) 542, at 544, 27 C.R.N.S. 331, at 333 (Sask C.A. 1974).

[607] *City of Sault Ste. Marie, supra* note 127.

[608] *Supra* note 588.

[609] *Id.* at 279, 33 C.C.C. (2d) at 359.

[610] 30 C.C.C. (2d) 257 (Ont. C.A. 1976).

[611] Lacourciere J. dissented on another point.

[612] The Divisional Court had been of the unanimous opinion that it was a duplicitous defect not covered in ss. 732(1), 755(4) [now (7)].

on indictment. [613] Although the *Côté* and *Sault Ste. Marie* decisions demand a rigorous application of the sections, both envisage appeal courts acting only in rare cases—perhaps those characterized by an earlier judge as cases of "shocking injustice". [614]

4. *Joint Trials*

Where persons are jointly charged with the commission of an offence, as will often occur in conspiracy cases, the trial judge is given the discretion before or during a trial to order separate trials upon one or more counts in the indictment (under section 520(3)) or the information (under section 736(4)), if "satisfied that the ends of justice require it". Section 519(3) gives the court the same discretion to order that a count in an indictment be divided into two or more counts. The leading decision, often applied in Canada, has long been that of the Court of Criminal Appeal in *Regina v. Grondkowski,* [615] in which Lord Goddard C.J. held that there will usually be a joint trial where the prisoners were engaged in a common enterprise, [616] the interests of justice being by no means synonymous with the interests of the prisoners.[617] Three recent Ontario decisions have applied these principles and have emphasized how difficult it is to make a successful motion to sever.

In *Regina v. Racco (No. 1)* [618] the defence counsel sought to sever an indictment which contained a count of possession of counterfeit money and a count of possession of an explosive substance. The subject matters of the counts had been found at the accused's home within minutes of each other—the money in a bedroom dresser drawer and the explosive under the front-door steps. The main defence against both counts was that the evidence had been planted by the police. In dismissing the motion, Graburn J. held:

> Certainly, where an accused is facing more than one count and evidence on one may not be *prima facie* relevant on another count, it would appear that an accused may well be prejudiced or embarrassed in his defence, but I query whether the words "ends of justice" mean only the interests of the accused and, in my judgment, they embrace the interests of the administration of justice generally. It seems to me that where the issue is substantially credibility and where there is a close *nexus* in time and place in relation to the counts as exists in this case, it is in the interests of justice that both of these counts be tried together . . . . In my view, the interests of justice require that the issue of a plant by the police be resolved by one tribunal and not by two tribunals. [619]

The judge added that he could adequately instruct the jury so as to negate the danger of their being unconsciously influenced on the one count by the

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[613] *But see* now a similar ruling in an appeal from a trial on indictment: Regina v. Cochrane, 33 C.C.C. (2d) 549 (B.C.C.A. 1976).

[614] Regina v. Batorski, 16 C.R.N.S. 204 (Ont. S.C. 1971).

[615] 31 Cr. App. R. 116, [1946] 1 All E.R. 559 (C.C.A.).

[616] *Id.* at 119, [1946] 1 All E.R. at 560-61.

[617] *Id.* at 120, [1946] 1 All E.R. at 561.

[618] 29 C.R.N.S. 303 (Ont. Cty. Ct. 1975).

[619] *Id.* at 306.

evidence relating to the other. [620]

In *Regina v. Agawa* [621] the accused had been convicted of the murder of a fellow inmate at the Collins Bay Penitentiary in Kingston. Martin J.A., for the court, held that the trial judge had rightly refused the motion to sever. The five grounds for severance, pronounced long ago in *Regina v. Weir (No. 4),* [622] are:

> (1) that the defendants have antagonistic defences;
> (2) that important evidence in favour of one of the defendants which would be admissable [*sic*] on a separate trial would not be allowed on a joint trial;
> (3) that evidence which is incompetent against one defendant, is to be introduced against another, and that it would work prejudically to the former with the jury;
> (4) that a confession made by one of the defendants, if introduced and proved, would be calculated to prejudice the jury against the other defendants; and
> (5) that one of the defendants could give evidence for the whole or some of the other defendants and would become a competent and compellable witness at the separate trials of such other defendants. [623]

These are not mandatory rules of law but merely principles for the judge to consider when exercising discretion. [624] In the present case the motion to sever had been based on grounds one, two (involving a statement by Mallet to a police officer that it was he and not Agawa who had done the stabbing [625]) and five. Martin J.A. found the statement simply unbelievable and observed [626] that, if Mallet was unwilling to give evidence exonerating Agawa at the joint trial, there would be very little likelihood that his evidence would materially assist Agawa at a separate trial, particularly as he had said in respect of his statement that "if any of this is said outside, I will deny it". It was also observed [627] that Agawa had not testified in his own defence.

In *Regina v. Sternig,* [628] a case involving a charge of conspiracy to traffic in methamphetamine, Martin J.A. even upheld the dismissal of a motion to sever where an accused intended to take the stand and wished to call one of his co-accused to advance the defence theory that the police had planted the evidence on Sternig. The court confirmed that it was a valid ground for severance that a co-accused would only be compellable on a separate trial, but indicated that they could find no precedent in Canada or any Commonwealth

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[620] *Id.* at 307.

[621] 11 O.R. (2d) 176, 28 C.C.C. (2d) 379, 31 C.R.N.S. 293 (C.A. 1975).

[622] 3 C.C.C. 351 (Que. Q.B. 1899).

[623] *Id.* at 352.

[624] *Supra* note 621, at 184, 28 C.C.C. (2d) at 387, 31 C.R.N.S. at 302, adopting Regina v. Quiring, [1974] 6 W.W.R. 13, at 23, 19 C.C.C. (2d) 337, at 348, 27 C.R.N.S. 367, at 380 (Sask C.A. 1974).

[625] The statement would in fact be inadmissible hearsay at a separate trial of Agawa, as it could not be admitted as an admission of a party.

[626] *Supra* note 621, at 186-87, 28 C.C.C. (2d) at 388-89, 31 C.R.N.S. at 303-304.

[627] *Id.*

[628] 31 C.R.N.S. 272 (Ont. C.A. 1975).

court where a miscarriage of justice had occurred when a trial judge had denied a motion to sever advanced on that basis. The case was strong: the accused had testified and had also indicated the nature of the evidence that he expected the co-accused would give. But it was held that a miscarriage of justice had not occurred because the evidence could not have affected the verdict of the jury; it did not logically support the inference that the fifth bag of the drug had been taken by the police to Sternig's house in order to plant his fingerprints on it.

There are many cogent arguments as to why the joint trial option is desirable. [629] But one wonders, particularly in the case of *Sternig*, whether or not the interests of the accused were unduly sacrificed. As elsewhere contended, [630] it is by no means certain that a joint trial can adequately protect the co-accused from being wrongfully implicated by evidence admissible only against another accused, especially if one retains a healthy scepticism about the ability of a trier of fact, whether judge or jury, to eradicate from consideration inadmissible evidence. It would seem to be urgent that the law relating to joint trials be re-thought and, in this respect, Glanville Williams [631] makes the following interesting suggestions:

> Something can be done to alleviate the position if the judge sums up and takes the verdict of each defendant separately, as he has cause to do: unfortunately, the practice is not obligatory. Wherever possible, each defendant should be separately represented, for juries tend to convict in a bunch those who engage the same counsel. It is also desirable that too many defendants should not be tried together. [632]

5. *Plea*

The limited nature of the mandate imposed on trial judges by the majority of the Supreme Court of Canada in *Adgey v. The Queen* [633] as to the acceptance of a guilty plea has recently been emphasized. In *Adgey*, Dickson J., for the majority, [634] confirmed that a trial judge was not bound as a matter of law in all cases to conduct an inquiry after a guilty plea, either as to its voluntariness, or to establish that there were enough facts to convict. In *Regina v. Leonard,* [635] the Ontario Court of Appeal refused to allow the withdrawal of a guilty plea to a charge of rape. The accused was only sixteen, but there was no obligation on the trial judge to investigate the guilty plea. Following the plea of guilty, evidence by the complainant and the statement of the accused had been introduced. The court pointed out that neither the accused nor his counsel had made any objection. The court simply glossed over the suggestion that the accused spoke only French. The un-

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[629] *See* Vamplew, *Joint Trials?*, 12 CRIM. L.Q. 30, at 42-44 (1969).
[630] Stuart, *Conspiracy*, 8 OTTAWA L. REV. 107, at 155 (1976).
[631] G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 683 (2d ed. 1961).
[632] Were twelve accused in *Sternig* inherently too many?
[633] [1975] 2 S.C.R. 426, 13 C.C.C. (2d) 177, 39 D.L.R. (3d) 553 (1973).
[634] Judson and Ritchie JJ. concurring; Laskin and Spence JJ. dissenting.
[635] 29 C.C.C. (2d) 252 (Ont. C.A. 1975).

easiness one feels about this decision arises because the accused was never specifically asked whether he understood what his guilty plea meant. Less disturbing, but still disturbing, was the decision in *Regina v. Sode* [636] upholding the trial judge's decision not to allow an accused to withdraw his guilty plea to a charge of trafficking in marihuana. There was evidence that he had done so reluctantly, obeying the order of his father who, as head of the Muslim family, had despotic power. The court expressly noted that the accused had been previously convicted on three occasions, and pointed out that it was not argued that he did not know the nature of the charge or the effect of his plea.

Two decisions suggest that the British Columbia Court of Appeal might be more watchful. In one case, [637] it allowed two accused to withdraw their guilty pleas to a charge of conspiracy to traffic in marihuana where their lawyer had convinced them to plead guilty in exchange, *inter alia*, for a stay against another of his clients who had put up their joint $10,000 fee. There was certainly an "appearance" of unfairness there. In the other case, [638] it was held that a motion to withdraw a guilty plea to a charge of theft of gasoline had been wrongly dismissed as the judge had implied that the accused would be liable as an accessory although he merely sat in the car. The Court of Appeal did not mention the passive acquiescence fracas. [639]

It has been clear for some time [640] that a trial judge can vacate a guilty plea at any time before sentence. Martin J.A., in *Regina v. Lessard*, [641] has now held that, in exceptional cases, there is even a power to vacate an adjudication of guilt on disputed facts before sentence. The sad case involved an alleged indecent assault of an eighty-three-year-old woman by her grandson, who did not testify. It became clear when he was remanded for presentence report that he was innocent and had been too nervous and shy to testify. Martin J.A. noted in *obiter* that a similar power could not be exercised where there was an adjudication of not guilty by a trial judge (in which case the judge would be *functus officio*) or in respect of a verdict in a jury trial. [642]

In respect of pleas generally, in the case of proceedings on indictment, section 534(4) is important:

> Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea of guilty and, if such plea is accepted, shall find the accused not guilty of the offence charged.

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[636] 10 N.S.R. (2d) 250, 22 C.C.C. (2d) 329 (C.A. 1974).

[637] Regina v. Stork, 24 C.C.C. (2d) 210, 31 C.R.N.S. 395, [1975] W.W.D. 127 (B.C.C.A. 1975).

[638] Regina v. Voorwinde, 29 C.C.C. (2d) 413 (B.C.C.A. 1975).

[639] *See* text *supra* between notes 183 and 188.

[640] Thibodeau v. The Queen, [1955] S.C.R. 646, 21 C.R 265.

[641] 33 C.R.N.S. 17 (Ont. C.A. 1976).

[642] *Id.* at 20.

This subsection has recently been the subject of two important decisions in the Ontario Court of Appeal. *Regina v. Pentiluk* [643] emphasized that part of the section which requires the prosecutor's consent. On a charge of two counts of murder, the accused had tendered a plea of guilty to manslaughter. This had not been accepted by the prosecutor and was, therefore, a nullity. The decision in *Regina v. Hogarth* [644] is more significant. On a charge of theft of a motor vehicle, the appellant had, with the prosecutor's consent, pleaded not guilty to the charge of theft but guilty to "another offence under section 295, that is, driving without the owner's consent". The Ontario Court of Appeal quashed the conviction, apparently on the basis that the joy-riding offence was not an included offence on the charge, [645] nor was it an "other offence" within the meaning of section 534(4) as this did not mean "any other offence". Evans J.A. reasoned as follows:

> On any reasonable construction the new provision in the Code is limited to an acceptance of a guilty plea to: (a) an included offence; or (b) any other offence of which the accused could, by law, be convicted on the indictment before the Court. An example of the latter is an indictment for murder of a child where because of s. 589(4) a conviction for infanticide can be registered even though infanticide is not an included offence to murder. "Other offence" would also encompass any offence which is included by virtue of the manner in which the indictment is phrased. If, for instance, the present indictment had been phrased to include the offence of taking a car without the owner's consent, then the Judge could properly have accepted a plea of guilty to that offence by the combined operation of ss. 534(6) and 589(1) even though it was only a summary conviction offence. [646]

It is doubtful whether the second example of an "other offence" is correct, as it is a description of one type of included offence specified in section 589(1). It is pleasing to see a limitation placed on the phrase "other offence" in section 534(4). It has sometimes been thought [647] that the section is an easy way around, at the pleading stage, the strictures of the doctrine of an included offence.

6. *Included Offences*

The most interesting recent decision in relation to the doctrine of included offences generally is *Regina v. Morton.* [648] The court reviewed the conflicting case law as to whether the offence of having care and control of a motor vehicle while impaired is necessarily included in the offence of impaired driving, both offences falling under section 234. In adopting the view that it

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[643] 21 C.C.C. (2d) 87, 28 C.R.N.S. 324 (Ont. C.A. 1974). On the facts however, it was held that there had been "no substantial wrong or miscarriage of justice".

[644] 31 C.C.C. (2d) 232 (Ont. C.A. 1976).

[645] The five-to-four decision to this effect in Lafrance v. The Queen, [1975] 2 S.C.R. 201, 13 C.C.C. (2d) 289, 39 D.L.R. (3d) 693 (1973), was not cited.

[646] *Supra* note 644, at 234.

[647] *See* Chasse, Practice Note, 29 C.R.N.S. 301 (1975).

[648] 14 N.S.R. (2d) 384, 29 C.C.C. (2d) 518 (C.A. 1975).

was, [649] the court pointed out that the Code does not specify that an included offence must necessarily be of less gravity in terms of a penalty. [650] Furthermore, it upheld the view that, although section 589 appears in the part of the Code dealing only with proceedings on indictment, it is declaratory of fundamental law and applies also in the case of summary conviction proceedings. [651] Whether this latter ruling will survive the *Doyle obiter* [652] that the procedure to be followed by summary conviction courts is exhaustively specified in the Code, is a moot point. It is likely that remedial legislation, long overdue, will be necessary to ensure that the practice adopted in the summary conviction courts across the land is in line with *Doyle*.

In *Regina v. Longston*, [653] McIntyre J.A., for the British Columbia Court of Appeal, confirmed that a trial judge must instruct a jury about all included offences of which there is evidence:

> Where there is in a count in the indictment, or in the enactment creating the offence, an offence included in the specific offence charged, and where there is evidence upon which a jury could convict of such included offence if not satisfied of guilt upon the specific offence charged, the jury must be properly instructed upon the law relating to it and told if they are not satisfied upon the guilt of the accused on the specific offence they must then consider the included offence or offences of which they have been informed and render a verdict upon them. [654]

7. *Double Jeopardy*

It is notorious [655] that there is no agreed terminology in this area. Friedland, [656] for example, uses the phrase *res judicata* to embrace the special pleas of *autrefois acquit* and *autrefois convict*, issue estoppel and the rule (which serves as part of the wider principle of abuse of process) that the Crown must not unreasonably split its case. The main rationale of the whole area was well expressed by Black J. in *Green v. United States*:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

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[649] The other approach was recently adopted in the case of the ".08" s. 236 offence in Regina v. Faer, [1975] 5 W.W.R. 681, 26 C.C.C. (2d) 327 (Sask. C.A.).

[650] *But see* the test adopted in Regina v. Maika, 17 C.C.C. (2d) 110, 27 C.R.N.S. 115 (Ont. C.A. 1974): "is the lesser offence an essential ingredient of the major one". *See also* the lengthy annotation by Chasse, *supra* note 647.

[651] *See also* Regina v. M., 18 C.C.C. (2d) 505, 27 C.R.N.S. 145 (Ont. Fam. Ct. 1974) applying the provisions in a juvenile delinquency hearing.

[652] *Supra* note 564.

[653] [1976] 6 W.W.R. 534, 31 C.C.C. (2d) 421 (B.C.C.A.).

[654] *Id* at 538, 31 C.C.C. (2d) at 425.

[655] M. FRIEDLAND, DOUBLE JEOPARDY 89 (1969).

[656] *Id.*

> anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [657]

The special pleas of *autrefois acquit* or *convict* under sections 535-538 of the Code appear to be available only in proceedings on indictment, but there are some decisions that apply them also to summary conviction proceedings. [658] There was a full discussion by Vanek J. in *Regina v. Lawson* [659] of the requirement that there must have been a final verdict on the merits on the first charge which was free of procedural error. [660] In respect of the particular problem of the Crown having withdrawn the first charge and then proceeding again, the orthodox view [661] is that the Crown, having withdrawn a charge before a plea is made and evidence adduced, is not precluded from proceeding again. Only where the court refuses to allow a withdrawal after plea and evidence would there seem to be an adjudication which could be a ground for a subsequent special plea. There was *obiter* by Vanek J. suggesting that this might also be the case where there is a withdrawal after plea but *before* evidence is led. One may also recall the ruling in *Regina v. Mullen* [662] that there cannot be a withdrawal of an indictable offence, at least after plea, where the accused is left in jeopardy.

By far the most significant development in double jeopardy has not been under the heading of special pleas, but in respect of a defence that can be raised under a plea of "not guilty". This defence was recognized by the majority in *Kienapple v. The Queen.* [663] The accused had been indicted on two counts, one of rape contrary to section 143, and one of unlawful sexual intercourse with a female under fourteen years of age contrary to section 146(1). The charges arose out of a single act of intercourse with one female. For the majority of five judges, Laskin J. held [664] that the charges had to be treated as alternative. There should not be multiple convictions for the same delict against the same girl, and, because there was a rape conviction, the conviction for unlawful sexual intercourse had to be quashed, together with the concurrent sentence of ten years imposed on that count. It was held that the ancient maxim, *nemo debet bis puniri pro uno delicto,* although framed in terms of double punishment, was directed also against double or multiple convictions. The key principles envisaged were expressed

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[657] 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957); quoted by FRIEDLAND, *supra* note 655, at 4 (1969); he was in turn quoted in Regina v. Leier, 74 W.W.R. 339, 11 C.R.N.S. 344 (Alta. S.C. 1970).

[658] *See* Attorney General of Alberta v. Riddle, 19 CRIM. L.Q. 244 (Alta. S.C. 1976). *But see* Regina v. Osborne, 11 N.B.R. (2d) 48, 33 C.R.N.S. 211 (C.A. 1975).

[659] 17 CRIM. L.Q. 287 (Ont. Prov. Ct. 1975). *See also* Regina v. Ross, 34 C.C.C. (2d) 483 (B.C.C.A. 1977).

[660] Vanek J. prefers the term "adjudication" in place of "final verdict".

[661] *Supra* note 506.

[662] *Supra* note 509.

[663] [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 44 D.L.R. (3d) 351 (1974). *See* annotations: Sheppard, Comment, 54 CAN. B. REV. 627 (1976); Chasse, Annot., 26 C.R.N.S. 20 (1974); Mewitt, Note, 16 CRIM. L.Q. 382 (1974); Ewaschuk, *The Rule Against Multiple Convictions and Abuse of Process,* 28 C.R.N.S. 28 (1975).

[664] Judson, Spence, Pigeon and Dickson JJ. concurring.

at three points in the judgment as follows:

> In my view, the term *res judicata* best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences. [665]

> The relevant inquiry so far as *res judicata* is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences. [666]

> If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in the second count, the situation invites application of a rule against multiple convictions. [667]

Speaking for the dissenting judges, Ritchie J. [668] drew attention to section 11, which he interpreted as recognizing that more than one offence may be committed as a result of a single act:

> Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

It was held that section 11 is equally applicable to charges under two sections of the Criminal Code, and that there is nothing in the Code to prohibit the conviction of an accused for two separate and distinct offences. Martland J. agreed, and added that the majority view was an "academic exercise", [669] merely preventing the addition to the already lengthy criminal record of the accused of the crime of unlawful sexual intercourse with a female under fourteen, an offence which he clearly had committed.

The majority judgment in *Kienapple* was firmly established when the full bench of the Supreme Court of Canada reversed the contradictory judgment in *Doré v. Attorney-General of Canada* [670] on a re-hearing. [671] A *Kienapple* defence was later rejected, however, in *Côté v. The Queen.* [672] The accused had been convicted of a robbery of money, bonds and documents to the value of $723,300. On his release from prison over three years later, he was found in possession of some of the spoils of the robbery. Fauteux C.J.C., for the majority of the court, [673] held that the new charge of possession of stolen property under section 312(1), could result in a

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[665] *Id.* at 748, 26 C.R.N.S. at 7, 44 D.L.R. (3d) at 364.
[666] *Id.* at 750, 26 C.R.N.S. at 8, 44 D.L.R. (3d) at 366.
[667] *Id.* at 751, 26 C.R.N.S. at 9, 44 D.L.R. (3d) at 367.
[668] Fauteux C.J.C., Abbott and Martland JJ. concurring.
[669] *Supra* note 663, at 731, 26 C.R.N.S. at 19-20, 44 D.L.R. (3d) at 353.
[670] [1975] 1 S.C.R. 756, 27 C.R.N.S. 237, 44 D.L.R. (3d) 370.
[671] Doré v. Attorney General of Canada (No. 2), [1975] 1 S.C.R. 784, 17 C.C.C. (2d) 359, 46 D.L.R. (3d) 703. *See* the discussion in Ewaschuk, *supra* note 663.
[672] [1975] 1 S.C.R. 303, 26 C.R.N.S. 26, 49 D.L.R. (3d) 574.
[673] Abbott, Judson and Ritchie JJ. concurred with Fauteux C.J.C.; Pigeon J. (Martland J. concurring) agreed in the result.

conviction without offending the principle of *Kienapple*. The majority adopted the remarks of the British Columbia Court of Appeal in *Regina v. Van Dorn,* [674] which read in part:

> [Where] the possession charged is so removed in time and place from the actual offence of theft as not to be or form a part of the theft, or is not so intimately identified in time and place with the theft as to form a part of it, then it is a distinct and separate offence for which the person may be convicted.

In a lonely dissent in *Côté,* Laskin J. stated that he found it:

> [i]mpossible, both as a matter of logic and of legal principle, to appreciate how, in the face of the accepted finding that the accused was in continuous possession of the stolen articles, the possession can, without more, become the basis of a conviction of a separate offence merely because the charge of that offence relates the possession to a different date and to a different place than the earlier charge of robbery upon which the accused was convicted. [675]

He saw no reason for not applying the *Kienapple* principle "as precluding successive prosecutions for different offences with a substantial common element where there has been, as here, a conviction on the first prosecution". [676]

The torrent of decisions since *Kienapple* indicates that the principles elaborated by Laskin J. in his new defence of *res judicata,* while undoubtedly narrower than the meaning ascribed to the phrase by Friedland, [677] are ambiguous. [678] At least three major problems have arisen:

1. What is the meaning of "same cause or matter" (rather than the same offence)?

Put more precisely, the question is whether the *Kienapple* principle applies to any offences, however different, arising out of the same act or transaction, or whether, in addition, the offences must contain substantially common elements. Laskin J. himself spoke at one point in *Kienapple* of "the same or substantially the same elements mak[ing] up the offence charged in a second count", and, dissenting in *Côté,* of "different offences with a substantial common element". One can therefore readily understand why McFarlane J.A. in *Regina v. Houchen* [679] could dissent from the now prevalent view [680] that *Kienapple* operates to prevent a conviction on a count of impaired driving under section 234 and driving with more than eighty milligrams of alcohol in the blood under section 236. Certainly it is arguable that these offences contain substantially different elements. In a brief judg-

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[674] 20 W.W.R. 231, 25 C.R. 151, 116 C.C.C. 325 (B.C.C.A. 1957).
[675] *Supra* note 672, at 322, 26 C.R.N.S. at 41-42, 49 D.L.R. (3d) at 588.
[676] *Id.* at 327, 26 C.R.N.S. at 45, 49 D.L.R. (3d) at 591.
[677] *Supra* note 655.
[678] Great complexity is envisaged by Chasse, Annot., 26 C.R.N.S. 20, 48, 64.
[679] 31 C.C.C. (2d) 274, 71 D.L.R. (3d) 739 (B.C.C.A. 1977).
[680] *See also* Regina v. Boivin, 34 C.R.N.S. 227 (Que. C.A. 1976).

ment in *Regina v. Schilbe* [681] the Ontario Court of Appeal, considering charges of having the care and control of a motor vehicle while impaired and refusing to provide a sample of breath, clearly relied in part on the nature of the offences:

> In our view the offences under ss. 234 and 235(2) of the Code are separate or distinct acts or delicts. In addition, on the facts of this case, the acts were separate, both as to time and place, as would almost invariably be the case, in charges arising under the two sections. [682]

Similarly, in *Regina v. Wildeman,* [683] *Kienapple* was held not to preclude convictions for ".08" and dangerous driving. The offences were distinct. One could drive dangerously without being impaired and *vice versa.*

At least it is clear that the defence of *res judicata* is only available where there was one act. Thus it was not successful in the case of counts of dangerous driving and leaving the scene of an accident, [684] or in respect of charges of perjury and murder where the perjury count was based on evidence obtained three years after the murder trial. [685] As the decision on the facts in *Côté* vividly illustrates, there might be difficulty in deciding whether there is one continuous act or two separate ones. Equally debatable is the majority decision in *Regina v. Rodriquez* [686] that the accused had committed two acts of possession of heroin for the purpose of trafficking, when heroin had been contained in his motorcycle helmet which was retained for almost a month by the police following an accident, before it was returned to him. [687]

2. Does the *Kienapple* doctrine apply to convictions not flowing from the same indictment?

This question seems to have been resolved in *Côté* where none of the judges considered material the fact that the convictions were not in the same trial.

3. This being so, the next question is, does the *Kienapple* doctrine apply where there has been an acquittal on the first count?

The decisions on this point are conflicting. It was not questioned that this would be so in the *Gushoe* case, and Allan J. in *Regina v. Heric* [688]

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[681] 30 C.C.C. (2d) 113 (Ont. C.A. 1976). *See also* Regina v. Malekoff, [1977] 3 W.W.R. 180, 34 C.C.C. (2d) 224 (Sask. Dist. Ct.); Regina v. Haubrich, [1977] 3 W.W.R. 727, 38 C.R.N.S. 257 (Sask. Dist. Ct.).

[682] *Id.* at 119. *See also* Regina v. Dubois, 30 C.C.C. (2d) 412, at 414 (Ont. C.A. 1976).

[683] [1977] 4 W.W.R. 126, 38 C.R.N.S. 262 (Sask. Q.B.).

[684] Regina v. Simpson, 25 C.C.C. (2d) 102 (Ont. C.A. 1976) (*obiter*). *See now* Regina v. Carriere, 32 C.C.C. (2d) 209 (Ont. C.A. 1977); *Re* Regina & Conway, [1977] 1 W.W.R. 378, 32 C.C.C. (2d) 375 (B.C.S.C.).

[685] Regina v. Gushue, 35 C.R.N.S. 304 (Ont. C.A. 1976).

[686] [1975] 3 W.W.R. 577, 22 C.C.C. (2d) 302 (B.C.C.A. 1975).

[687] *See also* Regina v. Winsor, 9 Nfld. & P.E.I.R. 310, 31 C.C.C. (2d) 228 (Nfld. Prov. Ct. 1977).

[688] [1975] 4 W.W.R. 422, 23 C.C.C. (2d) 410 (B.C. Prov. Ct.).

stated:

> It follows, I think, from the reasoning in the *Kienapple* case, that not only may a person not be convicted of two offences arising out of the same act, but he may not be convicted of an offence if he has already been acquitted of an offence which was based upon the same act. [689]

Bearing in mind the fundamental policy considerations behind the doctrine of double jeopardy, there is much to be said in favour of this view where charges are proceeded with separately. On the other hand, where they are tried simultaneously, as in *Regina v. Casson,* [690] there is clearly less argument for allowing a double jeopardy defence. In *Casson,* it was in fact held that such a defence was not open on the basis of a close reading of Laskin J.'s judgment. [691]

8. *Preliminary Inquiry*

Amazingly, there is still uncertainty as to the appropriate test for committal. Recently, judges [692] have approved the stringent test of sufficient evidence to show that the accused is probably guilty—mere suspicion or possibility not being enough. However, this formulation has almost certainly not survived the *Sheppard* test [693] requiring evidence upon which a jury properly instructed could convict. The majority was particularly insistent that the provincial court judge not weigh the evidence.

It is now clear that the committal must be with respect to a specific charge [694] though it might differ from the charge as drafted. [695] But it is as yet undecided whether this is true of an "unrelated" offence. [696] It is submitted [697] that a committal on an unrelated charge should not be allowed as the procedure would smack of an inquisitorial system in which an accused is brought to a preliminary inquiry in the hope that the inquiry itself might reveal the appropriate charge.

On more technical matters, it has been held [698] that section 469(4) is mandatory and thus requires the justice to "hear each witness called by the accused", and not to commit until he has heard them all. In respect of form, a decision [699] that the committal must be by written warrant was overruled by a holding [700] that an endorsement on the information is sufficient.

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[689] *Id.* at 425, 23 C.C.C. (2d) at 414. *See also* Osborne v. The Queen, *supra* note 658.

[690] [1976] 4 W.W.R. 561, 30 C.C.C. (2d) 506 (Alta. C.A.).

[691] On careful analysis, it becomes apparent that the defence of issue estoppel was also rejected.

[692] Regina v. Unan, 24 C.C.C. (2d) 50 (Ont. Prov. Ct. 1976); Regina v. Spacinsky, [1975] 3 W.W.R. 269, 31 C.R.N.S. 252 (Alta S.C.).

[693] *Supra* note 577.

[694] *Re* Harasyn & The Queen, [1974] 2 W.W.R. 204, 15 C.C.C. (2d) 72 (B.C.S.C.).

[695] *Re* Carriere, 14 C.R.N.S. 20 (Ont. C.A. 1971).

[696] Regina v. Monkman, [1975] 5 W.W.R. 594, 30 C.R.N.S. 338 (Man. C.A.).

[697] As argued by defence counsel in *Monkman, supra* note 696.

[698] *Re* Ward & The Queen, 31 C.C.C. (2d) 446 (Ont. H.C. 1977). An appeal to the Ontario Court of Appeal was dismissed on February 18, 1977.

[699] Regina v. Karaim, [1974] 5 W.W.R. 46, 27 C.R.N.S. 196 (B.C. Cty. Ct.).

[700] Regina v. Stevenson, [1975] 5 W.W.R. 152, 22 C.C.C. (2d) 244 (B.C.S.C.).

Despite its obvious use in practice as a discovery device for the defence, the majority of the Supreme Court of Canada in *Caccamo v. The Queen* [701] continued to insist that the only purpose of a preliminary inquiry is to determine whether or not there is sufficient evidence to put the accused on trial. This blinkered view, and decisions such as that in *Sheppard*, heighten the need for reform in this pre-trial area. [702]

9. *Discovery*

The law provides precious little discovery as of right to the accused. [703] This has been confirmed in two recent decisions. In the notorious capital murder case of *Regina v. Hutchinson*, [704] it was held that the production of notes by police officers for the purpose of cross-examination was a matter for the discretion of the trial judge. In *Re Klassen & The Queen* [705] it was held, not surprisingly, that section 533(1), which empowers a judge to release exhibits on application by the accused for the purpose of an independent scientific examination (here by a bite expert) is discretionary. Further, the section does not authorize the sending of evidentiary exhibits outside Canada to an English expert. In the circumstances, *i.e.*, months of inactivity by the defence and the absence of evidence indicating that they had searched for an expert in Canada, the application was refused.

This is not the occasion to debate the controversial proposals of the Law Reform Commission [706] to abolish preliminary inquiries and to enact detailed discovery procedures for all criminal offences. Legislation of this type seems desirable, particularly on the basis that the current system of leaving such matters to unfettered practice seems to militate against discovery for all defence counsel, irrespective of their experience or past relationships with the Crown. At least one positive result has come from the work of the Law Reform Commission in this context: several discovery experiments have been initiated, for example, one by the Provincial Court in Ottawa [707] and another by the Ontario High Court, [708] Both these ongoing experiments involve cases where the accused has the option of having a preliminary inquiry and require the consent of the Crown and the accused. The work of the Law Reform Commission also prompted a memorandum (now published) [709] by the Associate Deputy Minister of Justice, which was branded by the Criminal

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[701] [1976] 1 S.C.R. 786, 29 C.R.N.S. 78, 54 D.L.R. (3d) 685. *But see Lynch, supra* note 522, at 125.

[702] *See* Taylor, *The Test for Committal on the Preliminary Inquiry: U.S.A. v. Shephard — A View of Sufficiency*, 11 U.B.C. L. REV. 213 (1977).

[703] *See* THE LAW REFORM COMMISSION OF CANADA, CRIMINAL PROCEDURE: DISCOVERY, WORKING PAPER 4 (1974).

[704] 11 N.B.R. (2d) 327, 26 C.C.C. (2d) 423 (C.A. 1976).

[705] [1976] 4 W.W.R. 675, 31 C.C.C. (2d) 235 (Sask. Q.B.).

[706] *Supra* note 703. *See, e.g.*, Cassells, 7 OTTAWA L. REV. 281, 288, 295 (1975); Branson, 17 CRIM. L.Q. 24 (1974); Wilkins, 18 CRIM. L.Q. 355 (1976).

[707] The Globe and Mail (Toronto), September 22, 1976, at 8, cols. 1-3.

[708] 2 CRIMINAL LAWYERS ASSOCIATION NEWSLETTER 11 (1976).

[709] 35 C.R.N.S. 129 (1976).

Lawyers Association as "totalitarian".[710] One of the document's controversial proposals was a detailed recommendation that for certain "high volume indictable offences" such as theft or obtaining by false pretences and fraud where the value exceeds $200 but is less than $2,000, breaking and entry, robbery, and trafficking in narcotics, the present right of the accused to elect trial before a provincial court judge, a judge without a jury, or a judge and jury, would be limited, at the option of the Attorney General, or a counsel acting on his behalf, to the first two options, *i.e.*, to non-jury trials. No persuasive argument was advanced for thus restricting the right to a jury trial. Nor has data yet been advanced to show undue delay in the criminal justice system has resulted from a proliferation of jury trials.

10. *Manner of Trials*

(a) *Non-jury trials*

In *MacDonald v. The Queen,*[711] Laskin C.J.C., speaking for an overwhelming majority[712] of the full Supreme Court of Canada, confirmed that there is no obligation under the Criminal Code or at common law for a trial judge to give reasons in a criminal trial. It was held that the desirability of giving reasons is "unquestionable", in order to enhance the decision-making process, facilitate an informed appeal and advance the interests of the victim in knowing why a particular verdict had been reached. But there are also insuperable practical difficulties:

> [T]he volume of criminal work makes an indiscriminate requirement of reasons impractical, especially in provincial criminal Courts, and the risk of ending up with a ritual formula makes it undesirable to fetter the discretion of trial judges.[713]

One is left to wonder whether a body such as the Law Reform Commission cannot develop a better scheme—one that would not bow in such an obvious way to expediency.

(b) *Jury trials*

The most significant developments in selection of a jury have occurred in respect of the appropriate procedure for challenges for cause. Conflicting decisions were reached by the British Columbia Court of Appeal in *Regina v. Makow*[714] and the Ontario Court of Appeal in *Regina v. Hubbert.*[715] There is agreement in the two judgments that the Canadian position differs from that in the United States, the accused in Canada being entitled to an indifferent, but not a favourable jury. The accused has a right to a fair trial, but the challenge procedure must also be fair to jurors. The difference in the decisions lies in the accepted procedure for challenges for cause.

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710 C.B.C. Television, *The National,* September 9, 1976.
711 *Supra* note 263.
712 Spence J. dissenting.
713 *Supra* note 711, at 262-63, 68 D.L.R. (3d) at 655.
714 [1975] 1 W.W.R. 299, 28 C.R.N.S. 87 (B.C.C.A.).
715 31 C.R.N.S. 27, 29 C.C.C. (2d) 279 (Ont. C.A. 1975).

In *Makow*, it was held [716] that the accused does not have an unfettered right to challenge for cause and examine or cross-examine the prospective juror: a *prima facie* foundation must be established in which a first step might be a particularized challenge. This is especially so when the court requires the challenge to be put in writing. In contrast, in *Hubbert*, it was held that the challenge for cause need not be in writing or be particularized, but an acceptable reason must be presented to the judge; evidence to establish a *prima facie* case need not be adduced before calling a prospective juror and at all times the questions must be "relevant, succinct and fair". The *Hubbert* procedure was approved when the further appeal to the Supreme Court of Canada [717] was unanimously dismissed. In a short oral judgment, Laskin C.J.C. pronounced that it was "a useful guide for trial judges".

The ruling on the facts in *Hubbert* is of interest. The accused had been found fit to plead to a charge of a brutal murder. The defence's psychiatric evidence, that the public would be biased against the accused if it was revealed that he had been detained for five years in Penetanguishene Mental Hospital, was held to have been rightly excluded as not relevant or within the psychiatrist's expertise. The further proposal to ask each prospective juror: "Would evidence the accused had been in Penetanguishene keep you from keeping an open mind?" had also been rightly disallowed. There was no evidence that the fact of the incarceration was known in the community or that any particular juror would not be impartial if he knew that fact. It is submitted that this ruling leaves the suspicion of prejudice. Should we not be less reluctant to adopt some of the American procedures in respect of challenges for cause? [718] It must always be remembered that the Crown has fact-finding resources, and an undue restriction on the defence right to ask prospective jurors questions might mean that in practice an accused is denied adequate tools with which to ferret out undue prejudice.

The majority decision of the Quebec Court of Appeal in *Regina v. Palombo (No.3)* [719] ensures that in Quebec, as well as Ontario, [720] an accused now has the right to peremptorily challenge a juror notwithstanding that he has unsuccessfully challenged him for cause.

The other major developments in respect of jury trials concern charging the jury. Various courts of appeal have debated whether or not a trial judge can give law books to the jury. In *Regina v. Schimanowsky*, [721] Culliton J., for the Saskatchewan Court of Appeal, flatly disapproved of the

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[716] The approach of Hughes J. in Regina v. MacFarlane, 3 O.R. (2d) 467, 25 C.R.N.S. 78 (S.C. 1973), was preferred to the contrary decision of Haines J. in Regina v. Elliott, [1973] 3 O.R. 475, 22 C.R.N.S. 142, 12 C.C.C. (2d) 482 (S.C.).

[717] 33 C.C.C. (2d) 207, 38 C.R.N.S. 381 (S.C.C. 1977).

[718] *See* the thoughtful and thorough judgment of Haines J. in *Elliott*, *supra* note 716. *See also* the helpful review of Hamilton, *Challenging for Cause*, 39 C.R.N.S. 58 (1977).

[719] 24 C.C.C. (2d) 19 (Que. C.A. 1976), *overruling* the three-to-two ruling in Regina v. Rose, 12 C.C.C. (2d) 273 (Que. C.A. 1973).

[720] Regina v. Ward, [1972] 3 O.R. 665, 8 C.C.C. (2d) 515 (C.A.).

[721] [1974] 1 W.W.R. 738, 25 C.R.N.S. 332 (Sask. C.A.).

practice, mainly on the basis that giving the jury sections of the Criminal Code for study and review would open the door to the possibility of their placing their own interpretations on the law. However, in *Regina v. Stanford,* [722] the majority of the Quebec Court of Appeal held that it was "not only permissible but even prudent" to give the jury the text. In the circumstances of the case, the fact that it was an annotated Code was immaterial, since the annotations conformed to the rules given by the judge. Similarly, in *Regina v. Tennant,* [723] where the jury had requested copies of the sections of the Code, the Ontario Court of Appeal held that, while juries should not be encouraged to seek copies of the Code, the whole matter is in the discretion of the trial judge. This discretion must be exercised with great caution, and with clear instructions as to the limited use which can be made of such copies. Two recent decisions affirm that a jury has a right to return and have re-read to them excerpts from the evidence on any point, or to request and obtain additional instructions. [724]

The tradition in Canada that jury deliberations are secret, and the fact that it is an offence under section 576.2 to reveal any information relating to jury deliberations, led the Saskatchewan Court of Appeal in *Regina v. Perras (No. 2)* [725] to hold that a certain affidavit of a lawyer was inadmissible to impeach a jury verdict. The lawyer had been told by a sheriff that he had overheard the foreman of the jury saying, "Let's do this in the democratic way", and then the words "eight for". One can sympathize with the lawyer in this case, but it is easy to envisage the abuse that could result if a different decision had been reached. In contrast, there was no such problem for the Ontario Court of Appeal in *Regina v. Mayhew.* [726] The court ordered a new trial on evidence that conversations by two police officers about previous convictions of the accused had probably been overheard by the jury, and that there were several innocent conversations between police officers and the foreman in the corridors. Nothing would be done which would jeopardize public confidence in the jury system.

C. *Post Trial*

1. *Sentence Options* [727]

(a) *Capital punishment*

Until the abolition of the death penalty by the passage of Bill C-84 in

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[722] 27 C.C.C. (2d) 520, at 525-26 (Que. C.A. 1976).

[723] *Supra* note 142.

[724] Regina v. Mace, 25 C.C.C. (2d) 121 (Ont. C.A. 1976) and Regina v. Smith, [1975] 5 W.W.R. 456, 25 C.C.C. (2d) 270 (B.C.C.A.).

[725] [1974] 5 W.W.R. 187, 18 C.C.C. (2d) 47, 48 D.L.R. (3d) 145 (Sask. C.A.).

[726] 29 C.R.N.S. 242 (Ont. C.A. 1975).

[727] On this subject, *see* C. RUBY, SENTENCING (1976), which conveniently collects and discusses authorities but is by no means definitive. For example, the leading article on the law of probation, Domek, *Probation,* 17 CRIM. L.Q. 401 (1975), is not even referenced, nor are several articles on discharges. *See* the highly critical review by Mandel, Book Review, 55 CAN. B. REV. 385 (1977). *Cf.* Grant, Book Review, 15 OSGOODE HALL L.J. 269 (1977) and Fox, Book Review, 19 CRIM. L.Q. 251 (1977).

1976, the death sentence was the mandatory penalty for some types of treason, for piracy and for the murder, *inter alia,* of a police officer or jail warden acting in the course of his duties. On the very day that the House of Commons gave second reading to Bill C-84, an argument was being advanced before the Supreme Court of Canada that sections 214(2) and 218(1), which specified the death penalty, were inoperative as amounting to "cruel and unusual treatment or punishment" contrary to section 2(b) of the Canadian Bill of Rights. The unanimous decision of Canada's highest court, reported as *Regina v. Miller,* [728] was that there was no conflict with the Canadian Bill of Rights. Ritchie J., with four judges concurring, [729] rested his judgment on the narrow basis that the Bill of Rights does not create new rights and that section 2 is subordinate to the rights set out in section 1. The latter was interpreted as permitting an individual to be deprived of his life by due process of law. Parliament had, furthermore, re-enacted the death penalty since the inception of the Canadian Bill of Rights. [730] The words "cruel and unusual" had to be read conjunctively, and the death penalty, having been a feature of the criminal law of Canada since Confederation, could not be said to be unusual in any normal sense. [731] Beetz J. found it necessary only to express his agreement with the latter two points. [732] On the other hand, Laskin C.J.C. [733] persuasively rejected the view that the Canadian Bill of Rights could be governed in its interpretation by ordinary legislation. It would thereby be reduced to a mere interpretative act, contrary to the majority judgment in *Regina v. Drybones.* [734] Section 2 was not subordinate to section 1. The four grounds of challenge to the death penalty raised—severity, arbitrariness, unacceptability and excessiveness—were each carefully analyzed and dismissed. [735] A full critique of the decision cannot be attempted here, but it may be added that it is surprising that even Laskin C.J.C. easily dismissed the relevance of the fact there had not been an execution in Canada since December 11, 1962.

Bill C-84 [736] introduced for the first time in Canada a concept of "degrees of responsibility". A person convicted of first degree murder is normally not eligible for parole until twenty-five years have elapsed. For one convicted of second degree murder, the parole eligibility date is set at ten years, but may be set at up to twenty-five years if the judge so decrees, with or without a recommendation from the jury. As these are incredibly long sentences, particularly in the case of first degree murder, one would have expected great precision in definition. Unfortunately, this is not the case. The umbrella definition of first degree murder in section 214(2) is a

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[728] *Supra* note 200.
[729] Martland, Judson, Pigeon and de Grandpré JJ.
[730] *Supra* note 728, at 196.
[731] *Id.* at 197.
[732] *Id.* at 204-205.
[733] Spence and Dickson JJ. concurring.
[734] [1970] S.C.R. 282, 10 C.R.N.S. 334, 9 D.L.R. (3d) 473.
[735] *Supra* note 728, at 181-82.
[736] Now s. 214 and ss. 669-674.

"planned and deliberate" killing. Just how "planned and deliberate" must a killing be? Will fetching a knife from the kitchen suffice? Also declared to be first degree murder, irrespective of whether the killing is planned and deliberate, are contract killings (section 214(3)), murder where the victim is a police officer or jail warden acting in the course of his duties (section 214(4)), and murder in the course of committing or attempting to commit a hijacking, kidnapping, rape or, amazingly, indecent assault (section 214(5)) and murder committed by a person previously convicted of the same crime (section 214(b)).

Two other features of the Bill deserve comment. Under section 672, where a person has served at least fifteen years of his sentence for first degree murder, or for second degree murder where the parole eligibility date was set for more than fifteen years, he may apply to have a jury constituted for the specific purpose of reconsidering his parole eligibility date, the decision to be determined by a two-third majority vote. This curious provision means that, for the first time in Canada, a determination of sentence can be made directly by a jury. It also departs from the usual rule that a jury's verdict must be unanimous. The other noteworthy aspect of the Bill is its severe transitional provisions. These have already persuaded a majority of the Ontario Court of Appeal in *Regina v. Pineault* [737] to rule that an appellant convicted of non-capital murder before the passing of Bill C-84, but successful in his appeal against conviction after the passage of the Bill, was liable to be indicted at a new trial on a charge of first degree murder. This ruling could have very severe effects on his parole eligibility date, if he were convicted.

(b) *Discharges* [738]

There are still some surprising ambiguities in the basic law. In some provinces it is still arguable [739] that discharges are available for provincial offences. The topic defies generalization because it is a matter of statutory construction of individual provincial statutes. It should, however, be noted that it has been held in Nova Scotia [740] and British Columbia [741] that the discharge provisions are not available for provincial offences.

In *Regina v. Bradshaw* [742] it was held, not surprisingly, that section 234, defining the offence of impaired driving, lays down a minimum penalty, although it prescribes alternative penalties, and that therefore a discharge is not possible under the section. Amendments in Bill C-71 would allow conditional discharges for "curative treatment" for impaired driving [743] and ".08" [744] offences, but there is no such provision for the offence of failing

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[737] 32 C.C.C. (2d) 391 (Ont. C.A. 1977).
[738] *See* Wilkins, *Absolute and Conditional Discharges*, 19 CRIM. L.Q. 454 (1977).
[739] *See* RUBY, *supra* note 727, at 199, for Ontario.
[740] Regina v. Gower, 21 C.R.N.S. 230, 10 C.C.C. (2d) 543 (N.S.S.C. 1973).
[741] Regina v. Button, [1975] 3 W.W.R. 670, 21 C.C.C. (2d) 371 (B.C.S.C.).
[742] [1976] 1 S.C.R. 162, 29 C.R.N.S. 221, 54 D.L.R. (3d) 507.
[743] S. 234(2).
[744] S. 236(2).

to provide a breath sample. [745] It is curious that these new discharge options in impaired driving offences are only proclaimed in Alberta and in the Northwest Territories and probably apply only in respect of the ".08" offence because of a drafting error. [746]

The law concerning discharges at the appeal level has become clearer. It is now beyond dispute that a court of appeal can, in the case of an appeal against sentence, substitute a discharge for the trial judge's sentence. [747] It was unanimously held by the Supreme Court of Canada in *Miles v. The Queen* [748] that the Crown can appeal the imposition of a discharge at trial. Further, the Court interpreted the old wording of section 662.1(3)(a), which provided that the Crown, on appeal, could treat the discharge as "a finding that the accused was not guilty of that offence". It was held that this did not mean that the appeal was a Crown appeal against an acquittal, where a question of law alone is required. [749] In addition, the entering of a conviction on appeal did not give the accused an appeal as of right to the Supreme Court of Canada. [750] Presumably, the latter two rulings have now been superseded by the enactment in Bill C-71 of a new section, 662.1(3)(a.1), which confers the right on an Attorney General to appeal a discharge as if "that direction were a judgment or verdict of acquittal referred to" in section 605(1)(a). [751]

(c) *Probation* [752]

The Law Reform Commission of Canada's recommended new sentence alternatives in this area, [753] namely, good conduct, reporting, residence, performance, community service, and restitution and compensation orders, can be largely achieved through the existing wide power to utilize probation and impose "reasonable conditions". [754] Legislation is needed, as the Law Reform Commission suggests, primarily to emphasize that each sentence "may serve a distinct, specified purpose". [755] This is underscored by several recent decisions.

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[745] S. 235.

[746] *See* MARTIN'S ANNUAL CRIMINAL CODE 1977. In Regina v. Ritcey, 32 C.C.C. (2d) 354 (N.S.S.C. 1977), s. 236(2) was held to be in force.

[747] *See, e.g.*, Regina v. Christman, [1973] 3 W.W.R. 475, 22 C.R.N.S. 338, 11 C.C.C. (2d) 245 (Alta. C.A.); Regina v. McInnis, [1973] 1 O.R. (2d) 1, 23 C.R.N.S. 152, 13 C.C.C. (2d) 471 (C.A.).

[748] 32 C.C.C. (2d) 291, 33 C.R.N.S. 265 (S.C.C. 1977).

[749] S. 605(1)(a).

[750] S. 618(2).

[751] In respect of a discharge appeal in summary conviction proceedings, *see* Regina v. Ash, 32 C.C.C. (2d) 239 (Ont. Cty. Ct. 1977).

[752] *See* Dombek, *supra* note 727; Barnett, *Probation Orders Under the Criminal Code*, 38 C.R.N.S. 165 (1977).

[753] THE LAW REFORM COMMISSION OF CANADA, GUIDELINES—DISPOSITIONS AND SENTENCES IN THE CRIMINAL PROCESS 63 (1976).

[754] S. 663(2)(h).

[755] *Supra* note 753, at 63.

In *Regina v. Stennes,* [756] the British Columbia Court of Appeal dismissed a condition in a probation order of "40 hours of community work per month" as "quite inappropriate", [757] leaving it unclear if the court disapproved of the new type of sentence, or simply of its use in the case before them. In contrast, in *Regina v. Shaw,* [758] the Ontario Court of Appeal approved of conditions of community service projects in respect of two youths convicted of trafficking in marihuana and L.S.D. The court remarked, "Not only do [we] think that the provisions in the probation orders relating to this matter are valid, but in appropriate cases [they] should be more extensively used." [759]

Submerging the new sentencing alternatives in the present legislation also avoids squarely facing issues such as new roles for probation officers and unlawful delegation of the judicial function. The latter has not yet been touched upon in a reported decision on community service orders. Recently, however, in *Regina v. Shorten,* [760] the British Columbia Court of Appeal struck down a condition in the probation order which, *inter alia,* provided for "restitution in such amounts and at such times as [*sic*] Probation Officer shall order, at his complete discretion, until $4,260.50 is repaid". The judge had unlawfully delegated to the probation officer the duty of forming a judicial opinion of the accused's ability to pay, and the power to make an order. [761]

(d) *Compensation and restitution*

There can be no doubt after the decision in *Regina v. Zelensky* [762] that there is a need for legislation to reinforce the meagre compensation and restitution provisions of the Criminal Code, as the Law Reform Commission has suggested. [763] In brief, the majority of the Manitoba Court of Appeal [764] held section 653(1) to be unconstitutional. That section provides that a court convicting an accused of an indictable offence may, upon application of the victim at the time of sentence, order the accused to pay compensation. This was held to be an unwarranted invasion of the provincial jurisdiction in respect of civil rights. [765]

(e) *Imprisonment*

The main development here, of course, was the Report of the Sub-Committee on the Penitentiary System in Canada, published in June 1977.

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[756] 35 C.R.N.S. 123 (B.C.C.A. 1976).

[757] *Id.* at 126. For a decision on other conditions, *see Stennes, supra* note 756, and Regina v. Melnyk, [1974] 6 W.W.R. 202, 19 C.C.C. (2d) 311 (B.C.S.C.).

[758] 36 C.R.N.S. 358 (Ont. C.A. 1976).

[759] *Id.* at 362.

[760] [1976] 3 W.W.R. 187, 29 C.C.C. (2d) 528 (B.C.C.A.).

[761] The Ontario Court of Appeal imposed such a condition in Regina v. Stein, 15 C.C.C. (2d) 376 (1974). *See also* RUBY, *supra* note 727, at 211.

[762] [1977] 1 W.W.R. 155, 36 C.R.N.S. 169 (Man. C.A.). Note the article by Chasse, *Restitution in Canadian Criminal Law,* 36 C.R.N.S. 201 (1977) that follows the latter report.

[763] *Supra* note 753, at 64.

[764] Matas, Hall and O'Sullivan JJ.A. concurring. Monnin and Guy JJ.A. dissenting.

[765] B.N.A. Act, s. 92(13).

It falls beyond the scope of the present survey.

Another major development is the recently proclaimed new dangerous offender legislation in Bill C-51. Criticism of preventive detention legislation for persistent recidivists is widespread in Canada as elsewhere. [766] The main objections have been associated with injustices occurring as a result of extreme inequality of enforcement, the indefinite sentencing of many who have been found to be no serious threat to personal safety, and plea bargaining abuses. It is difficult to see how the new dangerous offender provisions will overcome these criticisms. Admittedly, with respect to the second objection, the former habitual offender category will be restricted to those convicted of an offence (note, not offences) of "serious personal injury" (section 687) plus evidence of "a pattern of repetitive behaviour" (section 688(a)(i)), "a pattern of persistent aggressive behaviour" (section 688(a)(ii)) or particularly "brutal" behaviour (section 688(a)(iii)). However, at least two of these subsections further rest in effect on a criterion of prediction of dangerousness. Many writers and researchers suggested that psychiatrists or any other experts lack the ability to make such predictions with acceptable levels of accuracy.

Even stronger objections may be levelled at the new dangerous sexual offender provisions. The explanatory notes to the Bill suggested that the status of "dangerous sexual offender" and "habitual criminal" would be replaced by "dangerous offender". This is patently misleading. The new dangerous sexual offender definition is separate and much wider. It ensnares one convicted of a single sexual offence listed in part (b) of section 687—including the comparatively minor offences of sexual intercourse with consent of a girl under sixteen, indecent assault and gross indecency—and who the court also determines has shown "a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons". The singling out of sexual offenders in this way, the extremely vague terms used and the imposition of a life sentence for such crimes as those listed above are particularly unenlightened and repressive.

With the above considerations in mind, there is much to commend the Law Reform Commission's recommendation [767] that the ordinary sentencing provisions confer adequate power on judges to protect society from those

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[766] *See, e.g.*, REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS, ch. 13 (Ouimet J. Chairman 1969); Price, *Psychiatry, Criminal-Law Reform and the "Mythophilic" Impulse: On Canadian Proposals for the Control of the Dangerous Offender*, 4 OTTAWA L. REV. 1 (1970); Klein, *Habitual Offender Legislation and the Bargaining Process*, 15 CRIM. L.Q. 417 (1973); THE LAW REFORM COMMISSION OF CANADA, IMPRISONMENT AND RELEASE, WORKING PAPER 11, at 29-31 (1975); Klein, *The Dangerousness of Dangerous Offender Legislation: Forensic Folklore Revisited*, 18 CAN. J. CORR. 109 (1976); Price & Gold, *Legal Controls for the Dangerous Offender*, in LAW REFORM COMMISSION OF CANADA, STUDIES ON IMPRISONMENT, (1976).

[767] WORKING PAPER 11, *supra* note 766.

who have committed truly dangerous acts. [768]

A brief note may be made of the demise of Borins J.'s bold decision in *Regina v. Shand* [769] to strike down the mandatory minimum sentence of seven years imprisonment for importing narcotics contrary to the Narcotic Control Act, as constituting cruel and unusual punishment under the Bill of Rights. It was reversed on appeal by a five-judge panel of the Ontario Court of Appeal. [770]

2. *Appeals*

The major decision on appeals during the survey period was *Morgentaler v. The Queen* [771] in which the majority of the Supreme Court of Canada approved of the substitution by the Quebec Court of Appeal of a conviction after a jury had acquitted the accused. Laskin C.J.C., in dissent, [772] announced that he had been unable to find any reported Canadian case where an appellate court had followed this course rather than ordering a new trial. Pigeon J., for the majority, did indicate that the power was to be used "with great circumspection". [773] Subsequently, Bill C-71 abolished the power, and now, on an appeal from a jury verdict of acquittal, the court of appeal may only dismiss the appeal or order a new trial. [774]

Section 613(1)(b)(iii) empowers a court of appeal to dismiss an appeal from conviction notwithstanding an error of law if it is of the opinion that "no substantial wrong or miscarriage of justice has occurred". There is no equivalent phrase in respect of an appeal from an acquittal, but the Supreme Court of Canada, unanimously on this point, confirmed in *Vezeau v. The Queen* [775] that such a curative rule was to be applied.

In *Hill v. The Queen (No. 2)* [776] the Supreme Court of Canada held, five to four on a re-hearing, that on appeals of sentence under section 614, a court of appeal can increase the sentence even if the Crown does not cross-appeal. The Canadian penchant for increasing sentences on appeal seems harsh, particularly so in the procedural circumstances of *Hill*.

In the case of summary conviction appeals, the most important change

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[768] The only other forms of indeterminate prison sentences in Canada have existed under the Prisons and Reformatories Act, R.S.C. 1970, c. P-21, in the case of certain provinces. *See generally,* Dombek & Turner, *The Indeterminate Sentence Under the Prisons and Reformatories Act,* 3 QUEEN'S L.J. 332 (1977). These authors identify many deficiencies with the current law but advocate its retention with substantial modifications. Primarily because of the dangers of undue discretion being left to prison and parole officials, and inequality among the provinces, this reviewer, however, welcomes the repeal of the relevant provisions by Bill C.-51.

[769] [1976] 11 O.R. (2d) 28, 33 C.R.N.S. 82, 64 D.L.R. (3d) 626 (Cty. Ct.).

[770] [1976] 13 O.R. (2d) 65, 35 C.R.N.S. 202 (C.A.).

[771] [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 53 D.L.R. (3d) 161 (1975). *See* text *supra,* between notes 294 and 312.

[772] *Id.* at 621, 30 C.R.N.S. at 233, 53 D.L.R. (3d) at 164.

[773] *Id.* at 670, 30 C.R.N.S. at 257, 53 D.L.R. (3d) at 203.

[774] S. 613(4)(b)(ii).

[775] 28 C.C.C. (2d) 81, 8 N.R. 235, 66 D.L.R. (3d) 418 (S.C.C. 1976).

[776] 25 C.C.C. (2d) 6, 7 N.R. 373, 62 D.L.R. (3d) 193 (S.C.C. 1976).

has been the repeal and substitution of section 755 by Bill C-71. The previous option of a *de novo* trial has been considerably attenuated: under section 755(1) there is now a more conventional appeal, and, where a new trial is ordered, it will be before a summary conviction court (section 755(2)). Parliament did, however, preserve an option to hold a trial *de novo* if "the interests of justice would be better served" (section 755(4)).