HOUSE OF COMMONS

Seventh Session—Twenty-first Parliament

1952-53

SPECIAL COMMITTEE

ON

BILL No. 93 (LETTER O of the SENATE)

"An Act respecting The Criminal Law", and all matters pertaining thereto

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Chairman: Mr. DON. F. BROWN

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 4

TUESDAY, MARCH 10, 1953

WEDNESDAY, MARCH 11, 1953

WITNESSES:

Dr. B. K. Sandwell, Mr. Irving Himel and Mr. Ronald Grantham, for the Association of Civil Liberties;

Mr. Norman Borins, Q.C., Barrister, Rev. D. Bruce Macdonald and Mr. W. T. McGrath, for the Canadian Welfare Council.

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
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MINUTES OF PROCEEDINGS

HOUSE OF COMMONS, Room 268,
TUESDAY, March 10, 1953.

The Special Committee appointed to consider Bill No. 93 (Letter O of the Senate), An Act respecting the Criminal Law, and all matters pertaining thereto, met at 10.30 o'clock a.m. The Chairman, Mr. Don. F. Brown, presided.

Members present: Messrs. Brown (*Essex West*), Browne (*St. John's West*), Cannon, Carroll, Churchill, Laing, MacInnis, MacNaught, Montgomery, Noseworthy and Robichaud.

In attendance: Mr. A. J. MacLeod, Senior Advisory Counsel, Department of Justice; and the following delegations:

Association for Civil Liberties: Dr. B. K. Sandwell and Mr. Irving Himel, with Mr. Ronald Grantham, Chairman of the Ottawa Human Rights and Civil Liberties Council;

Canadian Welfare Council: Reverend D. Bruce Macdonald, Westboro United Church, Ottawa; Mr. Norman Borins, Q.C., Barrister, Toronto; and Mr. W. T. McGrath, Canadian Welfare Council, Ottawa.

The Chairman invited the members of the Association for Civil Liberties to address the Committee. Mr. Irving Himel commented on the Association brief which appears as Appendix A to this day's printed report of proceedings. Dr. B. K. Sandwell spoke briefly on certain aspects of the brief and Mr. Grantham, on behalf of the Ottawa Human Rights and Civil Liberties Council, supported the Association's presentation. In conclusion, the Chairman thanked the members of the delegation for their valuable contribution.

The delegation from the Canadian Welfare Council was also heard. Mr. Norman Borins, Q.C., presented the Council's brief which appears as Appendix B to this day's printed report to proceedings. The witness offered a few comments on the brief and was questioned thereon. Reverend Mr. Macdonald and Mr. McGrath were questioned briefly on a certain aspect of the brief. On the conclusion of the presentation, the Chairman thanked the members of the delegation for their valuable help.

At 12.45 p.m., the Committee adjourned to meet again tomorrow, Wednesday, at 3.30 o'clock p.m.

WEDNESDAY, March 11, 1953.

The Committee met at 3.30 o'clock p.m. The Chairman, Mr. D. F. Brown, presided.

Members present: Messrs. Brown (*Essex West*), Browne (*St. John's West*), Cameron, Cannon, Carroll, Henderson, Garson, Gauthier (*Lac St. Jean*), Laing, Macnaughton, Montgomery, Noseworthy, Robichaud.

In attendance: Mr. A. A. Moffatt, Q.C., and Mr. A. J. MacLeod, Senior Advisory Counsel, Department of Justice.

TUESDAY, March 10, 1953.

Mr. Robichaud read the report of the Steering Sub-Committee, as follows:

The Sub-Committee met at 3.30 o'clock p.m., under the Chairmanship of Mr. D. F. Brown, M.P., and were present the following members: Honourable Garson, Messrs. Noseworthy, Laing, Robichaud and Cannon.

A large number of communications relating to Bill 93 were considered by the Committee. Among those were requests for personal appearance from the following organizations: The Canadian Section of the International Union of Mine Mill and Smelter Workers; The National Council of Women of Canada; National Federation of Labor Youth.

In the case of the first named organization, a brief has been received. After some discussion, it was agreed that the Committee Secretariat would make a very careful study of the said brief to ascertain whether or not it contained anything of importance which has not already been fully discussed in the presentation of briefs from national and other regional organizations which have appeared before the Committee. When this analysis is completed, the Sub-Committee will consider anew the desirability of inviting a delegation from the Canadian Section of the International Union of Mine Mill and Smelter Workers to appear before the Committee.

The other two groups to be invited to send a written brief which will be dealt with in the same manner.

After a lengthy discussion on the matter, it was finally agreed to recommend that the Committee set March 24th as a limit to receive further briefs and unless any of these should contain material which will not have already been before the Committee, none of the sponsors thereof be called before the Committee to make representations.

On motion of Mr. Robichaud, the said report was unanimously adopted.

The Committee resumed from Wednesday, February 25, consideration, clause by clause, of Bill 93, an Act respecting the Criminal Law.

Clauses 391 to 412, 414 to 420, 422 to 433 were passed.

Clauses 413, 421 and 434 were allowed to stand.

At 5.30 o'clock p.m., the Committee adjourned to meet again at 10.30 o'clock a.m. Tuesday, March 17.

ANTOINE CHASSÉ,
Clerk of the Committee.

EVIDENCE

March 10, 1953.
10.30 a.m.

The CHAIRMAN: If you will come to order gentlemen, we will proceed with the business of the committee. We have two delegations appearing before the committee this morning. One is the Association for Civil Liberties, and the other is the Canadian Welfare Council. We have first the Association for Civil Liberties of which Dr. B. K. Sandwell and Mr. Irving Himel are the delegates, with Mr. Ronald Grantham, chairman of the Ottawa Human Rights and Civil Rights Council.

Are you the spokesman Mr. Himel?

Mr. HIMEL: Yes, sir.

The CHAIRMAN: Mr. Irving Himel is to be the spokesman. Gentlemen you have before you a copy of the brief which you have studied.

(*See appendix "A"*) I presume it is your wish that we ask Mr. Himel if he would like to add anything to what is contained in the brief. Is that your pleasure gentlemen?

Agreed.

The CHAIRMAN: Mr. Himel, have you anything you would like to add to the brief?

Mr. Irving Himel, Executive Secretary, Association of Civil Liberties, called:

The WITNESS: I would like first of all to say that we expected that representatives from the Montreal Civil Liberties Association would be present. Unfortunately, their representatives have not been able to come. We have received a wire from one of their representatives to state as follows:

> Regret university business prevented me joining your delegation. Would emphasize need for delay because amendments proposed amount to almost major revision and deserve more detailed study particularly public law crimes sentences contradictory evidence.

The CHAIRMAN: That telegram is from whom?

The WITNESS: From Mr. Maxwell Cohen, professor of law of the university of McGill in Montreal.

It is rather hard generally in a brief which embraces the scope of the Criminal Code to reduce our objections to a small number because, of necessity, the code in its revision is bound to change some of the existing law no matter how careful the draftsmen are. It is the opinion of our association that not only have changes to be made of necessity but there have been a number of deliberate changes that require careful examination. In our brief we have made reference to a number of those. The most important of course are the more serious crimes and it is our feeling that the code in a number of respects requires the most careful consideration.

The offence of treason, we feel, should be reviewed having in mind what the law of treason is in countries like Great Britain and the United States, and where the language used in the section is necessary and in fact so clear as to avoid possible injustices. We take the view that with an offence such as

treason the basic justification for its amendment must lie in the fact that the amendments are necessary to deal with a clear and present danger, and if, after the clearest kind of case has been made out that there is a clear and present danger, and these changes are necessary to deal with that danger, then we submit the language should be scrutinized with the greatest of care because in the language lies the offence and if the language is general there is a danger of abuse.

Our point on the service of warrants I think is founded on the traditional practice in Anglo-Saxon countries. We fail to see why it should be necessary to create an exception in the case of the service of a warrant and permit a warrant to be served without the officer having the warrant with him. We feel that that can lead to serious abuse. The time-honoured practice has been to insist, as you find in the present code, that if an officer wishes to execute a warrant he must have it with him so that the person against whom it is directed can say to him "what is your authority for searching my premises and what is your authority for arresting me" and certainly it is only sensible that he should be expected to produce his authority. If he is going to be allowed to say "I have my authority, but not with me", you can well appreciate that many abuses can creep in under procedure of that kind.

The offence of assisting an enemy alien to leave Canada and conspiring to communicate information—section 50: It is our submission that the language in this section is ambiguous and can be interpreted in many ways and is capable of an interpretation which might lead to grave abuse. Reference is made to the language in clause 50(1)(c). The use of the words "likely to be prejudicial to the safety of Canada"—it is submitted that those words are open to a wide number of interpretations, depending on the judge and depending on the particular point of view of jurors, and certainly it is the task of parliament to make the offence as clear as possible so that there will be no chance of a citizen misunderstanding how far he may go and where he must stop.

This business of sentences in the Code has given us considerable concern. There seems to be a general attitude, which is notable in the Code, that sentences should be increased without reference to the particular crime, to the number of times it may have been committed in the past, and the need for an increased sentence as a deterrent. We have cases, for example under clause 50, where the sentence has been increased from two to fourteen years. There is no suggestion that there has been such a wide number of offences under this section that you need to increase the sentence. This feature merely seems to lie within the scope of some particular person, who drafted that clause in the first place, to change the number from two to fourteen. We submit that the Code sentences must bear a correlation to the crime, to the extent with which that crime has been committed in the past, and how reasonable the sentence should be, having regard to the nature of the crime.

This question of sentences is reflected in clauses 77 and 78, dealing with the duty of care re explosives. It is suggested that if a man is lacking in care and causes an explosion which is likely to cause death, he should be liable to a penalty of imprisonment for life. Now, that seems to me to be a distinct departure in our law. Heretofore, if a person was guilty of a breach of duty, the only time the law provided for a penalty of imprisonment for life was in manslaughter cases. Now it is proposed that if you cause an explosion which is likely to cause death, you should be liable to the same penalty. And so, too, in the case of explosions which are likely to cause bodily harm or damage to property, the penalty there is fourteen years without reference to how serious the damage might be—the damage might be caused by a firecracker!

I submit that the language speaks for itself and it is not enough to say that you must rely on the court to act with prudence. I think the prudence must start in parliament and then, of course, carry through to the courts. If

you start off with an imprudent sentence, the danger is that someone who is charged under this section, where formerly he might have received six months, faces a maximum penalty of fourteen years, and the judge would be prompted to think he was letting him off leniently with a sentence of two years.

Now, a very important section that we view with considerable alarm is the section on perjury, clause 116. I think here I should call on Doctor Sandwell to add some further words to what I have said.

Mr. B. K. SANDWELL: All I want to say on this section, Mr. Chairman, is that if I were a lawyer—which I am not and heaven forbid—and this became a part of the Criminal Code, and I had a witness who had given evidence which I was very anxious to maintain, whether it was true or not, and I was afraid that the counsel on the opposite side might be able to break him down, I think I should spend about a day reading over this clause to him in order to make him realize that if he was broken down he would render himself liable to prosecution and penalty for perjury, and that the onus of proof would be shifted to him. I do not know whether this new consideration in matters of perjury has been adopted by any other jurisdiction. If it has not, it seems to me it is a rather dangerous experiment for Canada to start in on. I would like to suggest that it might be wiser for us to wait for somebody else to try it out before we adopt it ourselves, because I think that our point is that the use which could be made of this section in judicial proceedings might well thwart the course of justice. I can see that it would greatly simplify the task of the prosecution in a perjury case, but surely that is not the sole object of the Criminal Code.

The WITNESS: I think the point there is one which will particularly appeal to lawyers. Under the section as proposed, if the witness gives contradictory evidence in any judicial proceedings, he renders himself liable to a charge of perjury, and then the onus is established that he gave contradictory evidence of a material nature, and the onus is on the accused to disprove that he intended to give that evidence without misleading.

Every lawyer knows that it is a very common thing in judicial proceedings for witnesses to contradict themselves, and that they do it for the most honest of reasons such as a bad memory, a hasty remark, perhaps a misunderstanding of the question, and so forth. Frequently a witness fails to hear the question but he is so anxious to answer that he answers without thinking.

If it is going to be the law of Canada that a witness, once he gives contradictory evidence of a material nature is liable to a perjury charge, I think the greatest kind of abuse can creep into our entire administration of justice, and in particular in civil cases.

I wonder if Mr. Sandwell would care to comment on the Treason Section.

Mr. SANDWELL: That, Mr. Chairman, is another point on which I have been very considerably disturbed, that is, in so far as it relates to the results of a state of war.

In the past there has been no possibility of question as to the existence of a state of war; that is the result of an act by a government, a declaration of war, after which every person knows how to conduct himself.

I can realize that things have changed now, and that there is a good deal of fighting going on without there being any declaration of war. I realize that is the condition with which this amendment attempts to deal.

The CHAIRMAN: Pardon me, but you are dealing with treason, are you not?

Mr. SANDWELL: Yes.

The CHAIRMAN: I thought it was with mischief, and that you were following the brief.

Mr. SANDWELL: It is page 2 of our brief. I suggest that there should be some action by a government to indicate that Canadian forces are engaged

in hostilities against a certain country before our citizens should be required to govern themselves by this clause.

At the present time a citizen has to make up his mind whether he is assisting any armed forces against whom Canadian forces are engaged in hostilities. But if those hostilities are going on half way around the world, it may take some time before that citizen knows that Canadian forces are engaged in hostilities.

In any event, there might quite conceivably be a case of a country wherein there are two rival authorities claiming to exercise power and govern that country. There might conceivably be a question of whose forces are the forces of the country.

The expression used here is "the country whose forces they are". I wonder, having regard to recent times in the history of China, which forces of China were the forces of the country of China. It seems to me there could be a very great improvement in this section if something were added to the effect that it would not operate either until a state of war had been declared, or until the Canadian government had, by a proclamation, made it clear that certain armed forces are engaged in hostilities against Canadian forces. That is the suggestion I want to add to the brief as we have it.

The WITNESS: On the treason aspect of it, one thing I would like to draw attention to as well is the paragraph on page 3 of the brief which reads as follows:

> We should add that irrespective of the changes that are finally made the section should be amended to provide that no proceedings may be commenced under it without the consent of the Attorney General of Canada. The offence of treason is far too serious and important to allow charges to be laid under it without providing adequate safeguards. If the consent of the Attorney General of Canada were required it would afford a measure of protection against unwarranted charges.

Now, turn to page 5 dealing with disturbing certain meetings. I think also there is a need for closer study. It is proposed (1) to wilfully disturb or interrupt an assemblage of persons met for a moral, social or benevolent purpose; or (2) to disturb the order or solemnity of any such meeting.

I think that the point made by the association is a valid one.

Since it is not uncommon to have at least one or two people at a social affair interrupting or causing a disturbance, the enactment of these sections in their present form could render a large proportion of the social gatherings attended by members of the public illegal.

It is suggested that these sections be reddrafted to conform more closely to the existing section of the code, section 201. It provides, among other things, that everyone is guilty of an offence who wilfully disturbs, interrupts or disquiets any assemblage of persons met for any moral, social or benovelent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting.

Now, under vagrancy: "It has been our experience that the vagrancy section has been used at various times for a purpose for which it was never intended and that people have been improperly arrested on vagrancy charges. To prevent such abuse we would propose that the offence of vagrancy be defined as narrowly as possible. Furthermore, that s.s. (1) (a) (i) which provides that everyone commits vagrancy, who not having any apparent means of support lives without employment, should be revised to make clear that it is not intended to cover persons who, through no fault of their own, are out of work and without apparent means of support."

Under witchcraft, it is noteworthy that in Great Britain the Witchcraft Act of 1735 was recently repealed. If it is deemed that the offence should be

retained in the code, we would submit that the section should be redrafted. As it stands at the present time it would be an offence for a person to charge for reading tea cups under s.s. (b). We believe that the section would be materially improved if the word "fraudulent" was added to make it an essential element of the offence.

10. *Criminal Breach of Contract*—Section 365.

The offence of criminal breach of contract was first established in Canada in 1877. Since then there has been a considerable change in the public attitude concerning breach of contracts in labour disputes. As a result collective bargaining and other legislation have largely taken over the field. In the light of these events it is submitted that this section should be amended accordingly.

We would further submit that there is no justification for increasing the penalty for violations from a fine not exceeding $100.00 or three months to a possible sentence of five years. There is no evidence that there has been widespread abuse of this section. The penalty for the offence has been the same since 1877 and prosecutions under the existing section 499 have been almost negligible, so that there would appear to be no reason whatsoever for enlarging the penalty to five years.

The CHAIRMAN: Mr. Himel, could I interrupt you for a moment. I note that you are now reading the brief and I was going to suggest to you perhaps you would like to comment on these points as we go along so that the members of the committee may have time to submit questions to you at the conclusion if they so desire. Would that meet with your pleasure?

The WITNESS: The offence of mischief. There has been a great amount of criticism of this section and I think largely because it has been drafted in such vague and general terms. I think that the attempt to compress the five sections now in the Code into one section is perhaps trying to bite off more than you can chew and I think it is necessary to review the sections now in the Code and see whether the offence could be described there with much greater particularity to remove any doubt as to what would be criminal conduct and what would not be criminal conduct. There, too, the offences are far too severe having regard to the nature of the offence.

Three day verbal remand. This is something which in most jurisdictions is no problem, but in some jurisdictions it has been found to be a problem. A man is arrested and instead of being remanded to the custody of a jail he is remanded to the custody of the police for a three day period. In the past it has been found that people complained they have been subjected to unnecessary and embarrassing procedure during that three day period. I fail to see any reason for a provision of this kind. There may be, but to date no one has adduced any valid reason for it and unless there is a very good reason for such a procedure we would submit that it should be deleted from the Code.

The question of arrest. There, we hope that in your deliberations you will see fit to amend the arrest section, so that instead of vague words a person arrested should be brought before a justice as soon as possible and there should be a time limit in which it is required to bring him before a justice. That might be a little difficult in outlying regions, but possibly the answer is to provide for a period in city areas and another period for areas outside the immediate vicinity of the jail.

One provision that we feel rather strongly about is this provision for whipping. We feel that it is out of date; in fact, that it offends article V of the United Nations Declaration of Human Rights: "None shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . ."; and we seriously suggest that whipping is certainly cruel. It is not only our opinion. There was a departmental committee of government of Great Britain which went into the question of whipping in great detail and reported to the same effect. Great Britain at that time abolished whipping and we would

earnestly ask that you propose to parliament that it now be abolished in Canada, something that we feel is antiquated and meaningless and it should be done away with in the Code. A very important provision we feel should be in the Code is provision for the payment of fines on time. That is something that Great Britain started in 1914 and statistics are available that after it was introduced in Great Britain the prison population declined. Imprisonment in default of the payment of fines decreased from 79,000 some odd to 15,000 in a period of ten years. From 12,000 in 1930 to 7,900 in 1938. Now, that is a way in which we could in Canada save money in the amount of money spent on persons in prisons, certainly people who because of poverty cannot pay their fines at one time should be given every consideration by parliament. We suggest it is an appropriate time to seriously consider the introduction of a similar scheme to that which prevails in Great Britain to allow people who are unable to pay their fines in one lump to pay them on reasonable terms. I believe we have referred to the question of sentences already.

The subject of onus of proof is one that we are quite concerned about. We note in the Code a number of new sections which are designed to change the existing law and in effect to override a very strongly entrenched principle of our law that the onus of proof in criminal cases should be on the Crown and not on the accused.

The section on perjury is a good example of where people would find themselves in that position that they would have to prove their innocence rather than the Crown had to prove their guilt. There are sections dealing with explosives and dealing with trespassing at night and we have referred to them in this brief, and they are also new in the sense that the onus of proof on the production of evidence of a limited kind is shifted to the accused, and we submit that this is a very dangerous principle to incorporate in our Code and that only if it is absolutely essential for the administration of justice should the onus of proof be shifted to the accused.

Finally, if I may be allowed, Mr. Chairman, I should like to read the last part because it in a sense is the basis of our submission.

It is apparent that much work has to be done on Bill 93 before it can be said to be free from fundamental objection. The revision was undertaken in the first instance for the purpose of simplifying the code and not in order to make major substantive changes. There would therefore appear to be no great urgency to adopt a revised code.

Moreover, in our opinion there are a number of reasons for proceeding slowly and carefully with this undertaking. The last revision of the code was made in 1892. Since then many countries have attempted to experiment with new ideas in the field of crime and penology not found in Bill 93. The attitude of the public and views of social scientists on the problem of crime and punishment have changed radically in the last fifty years. In our submission before the code is finally approved there should be a re-examination and re-appraisal of its provisions and thorough study made in the light of modern developments in criminology and penology and the experience of other countries from which we may benefit.

Furthermore, Bill 93 attempts to condense 1,152 sections into 744. Of necessity many material changes of a substantive nature are bound to creep in as a result of this process of condensation. Moreover as appears from this brief many important changes of a substantive kind are in fact included in the code. Since they affect the rights of the people of Canada, we believe that the proposed changes should not be rushed through but should be further submitted for the fullest and most careful study to an independent body of experts on crime and punishment in the fields of law, medicine and social science.

It has been said that it is better that a score of guilty people go free than that one innocent individual be convicted. So too, it would be better that the enactment of the code be deferred for further study for as long as it should be required, than that through faulty draftsmanship, the exercise of hasty judgment, or the pressure of our times, a person should be unjustly convicted.

The CHAIRMAN: Does that complete your submission?

The WITNESS: Yes.

The CHAIRMAN: Now, before I ask you to submit questions, gentlemen, the Honourable Stuart Garson's secretary has just been in to see me and has spoke to me here to tell me that Mr. Garson unavoidably is absent this morning because of an important cabinet meeting which was not scheduled. He has asked me to express his regrets.

Mr. Grantham, who is the chairman of the Ottawa Human Rights and Civil Rights Council would like to say something to the committee at this time.

Mr. Ronald GRANTHAM (Chairman of the Ottawa Human Rights and Civil Rights Council): Thank you Mr. Chairman. The Ottawa council gives general endorsation to the brief presented by the Toronto association.

The CHAIRMAN: Just so we will not set a precedent here, I believe we have established a policy that we are not to hear local organizations at this time at least. We have heard the national organization represented by Mr. Himel and you could say something on that, but we would not like it to go out over the country that we are giving some privileges to one particular group or local organization.

Mr. GRANTHAM: If you wish to hear local organizations later, perhaps I could come back.

The CHAIRMAN: No, I do not suggest that.

Mr. MACINNIS: Is the brief submitted this morning which we have heard read and commented on from the Civil Liberties Association of Canada or from the Toronto branch of the association?

The WITNESS: Actually it is from the Toronto branch. There is a liaison between the different groups and Mr. Grantham in effect represents the Ottawa group.

The CHAIRMAN: I do not think you heard a telegram read at the opening of the session, Mr. MacInnis.

The WITNESS: It was from the Montreal Group where they indicated their point of view in that telegram and Mr. Grantham in a sense represents a local group and I think by and large they endorse this brief.

Mr. GRANTHAM: I can make no further remarks beyond that without expressing some of our own thoughts.

The CHAIRMAN: If you speak for the National Group we would be glad to hear you.

Mr. GRANTHAM: I cannot do that.

Mr. CARROLL: Is there any different opinion in your group in Ottawa and the brief presented here this morning?

Mr. GRANTHAM: No, sir.

The CHAIRMAN: Do you support the brief here this morning?

Mr. GRANTHAM: Yes.

The CHAIRMAN: Have you anything to add to what they have said which is of a national character?

Mr. GRANTHAM: If you want me to speak for myself I will do so.

Mr. LAING: I think Mr. Grantham should be allowed to say anything which supports the general view.

Mr. GRANTHAM: It seems to us, Mr. Chairman—I do not want to go into details at all, but we are concerned about certain aspects of the section on sedition and treason and we hope parliament will, before it finishes its work, make sure there are no loopholes. The Senate Committee did some very good work in tightening up the definitions and in linking the penalties directly to the offence. I think that was an excellent job, but we feel there are two or three weak points in Section 50. The word "likely" remains there, whereas it was taken out by the Senate in Section 46 which defines treason. The word "likely" in Section 50 we suggest is still rather vague and might be eliminated as it was in Section 46.

In the case of sedition, Mr. Chairman, we endorse the brief you have heard and commented upon, with respect to the section not being condensed, and that there is an urgent need in Canada to raise the sentence within a few years time from two to seven years and then double; we are not convinced there is a need to double at this time.

In a general way we endorse the apprehensions expressed by the Canadian Congress of Labour for example and other groups in relation to certain sections of the revised Code. We feel that in normal times the organized labour movement is in no danger, but we are thinking ahead to possibly times that are not normal when the country may be faced with difficulties and when there may be excitement in public opinion when a government or governments may be in office that are not so liberal minded as our present governments, provincial or federal, at such times. There is always a danger that sections of a criminal code which do not give explicit protection to organized labour may be abused by authority in those circumstances. In particular we would hope that you will study carefully sections 365, 366 and 372. These deal with breaking of contracts, the setting of watches at places of work and interfering with property. We feel that perhaps these sections are not ideally worded as yet for the protection of organized labour.

And again with respect to the code, Mr. Himel said a punishment such as whipping seems to us out of date in Canada and we suggest that the whole approach to crime in Canada is going through a change. We are taking a more sober approach. We are applying psychological and psychiatric knowledge and sober understanding to these problems of crime and we feel that the code as revised has not sufficiently reflected these trends of thought and these modes of treatment and we hope, therefore, that the House of Commons will be able to bring these to bear upon the revision of the code.

And finally, sir, if it would not be too much of an imposition for me to add a personal word, speaking not on behalf of the organization, but in connection with the penalties: would it be of any interest to the members of this committee to have a personal word? I have given considerable time to a study of the question of capital punishment.

Mr. ROBICHAUD: Mr. Chairman, is this in order? Are we going to deviate from the policy we have adopted to hear national bodies or are we going to hear individuals who are using the shield of a national body to express their own opinions?

Mr. GRANTHAM: I have no wish to pursue my—

The CHAIRMAN: Just a moment, please. You have completed your presentation. I think the point probably is well taken. We have deviated to some extent to hear Mr. Grantham because he was here. We have, of course, on other occasions had others slip in to present their briefs that were not of a national character but I think as much as possible we should avoid it; but on the other hand we do not want to be too rigid.

Mr. ROBICHAUD: Capital punishment has not been touched at all in the brief.

The CHAIRMAN: It was a personal view presented by Mr. Grantham and he has terminated his remarks.

Could we now have ten minutes of questions.

Mr. NOSEWORTHY: On the point just raised, can Mr. Himel tell us whether the national organization has considered the question of capital punishment even though it was not included in the brief.

The WITNESS: No. That question has not been considered at any length. I must admit it is an involved question and must need special treatment. But certainly there is no reason why this could not be contained in the proposal recommending the whole code should be turned over to a group of experts. Such a body might well go into the subject of capital punishment. I do not know what answers they would come up with, but certainly after fifty years we are entitled to review the question.

Mr. LAING: Do you know that this code came to you from a body of experts working on it for several years?

Mr. GRANTHAM: Yes, but I think in the main they have been people in the legal profession and I sometimes feel, much as I happen to be a member of the legal profession, it is a matter for having the point of view of people in other professions including medicine, social sciences, who also are concerned with the problem of crime and punishment, and probably we could benefit from their views, and certainly from the experience of people in other countries. To my knowledge, there has been no effort made to study what goes on in other countries in this field of crime and punishment with a view to seeing whether we can adopt some practices which are worthy of introduction in Canada.

By the Chairman:

Q. Don't you think, Mr. Himel, if we put it over another year, and from year to year, that each year we put it over there would be other opinions brought up each time? Don't you think it would be better to put something into effect and then, if necessary, amend it?—A. Well, if this was not an attempt to revise the Code, I would agree with you whole-heartedly, but since this is a job undertaken for the first time in fifty years, I think it is proper to seek out opinions other than those that have heretofore been obtained. I think, by and large, from my understanding of the people who have been responsible for the Code, they have been lawyers and judges.

Q. Yes, but the members of this committee now are not all lawyers, and they represent a large section of the people, the common people of the whole Dominion of Canada. Don't you think their opinions might be of some value? —A. I most certainly do feel that they would be of great value, but the question is whether you feel that you have enough time to consider in great detail each of the sections, having regard to the wording, and whether you also feel that among you are people of such breadth of knowledge that they are acquainted in considerable detail with the legislation and what has gone on in the fields of crime and penology, both here and abroad; for example, on the subject of the payment of fines and the statistics relating to that subject. For instance, on the subject of payment of fines on time, I think it would be most desirable to have someone do a statistical job in Canada on the number of people that have had to go to prison for the reason that they could not pay a fine, and to explore how the number might be cut down and what formula should be used to give people time to pay their fines, and also to find out how it has worked in England and what legislation they have there. I think those are all reasonable fields of inquiry.

The CHAIRMAN: May we go into that. Mr. Robichaud has some questions.

By Mr. Robichaud:

Q. In the last paragraph of your brief, you give three reasons why this revision should be deferred: faulty draftsmanship, the exercise of hasty judgment, or the pressure of our times; and you say there is danger of a hasty revision. Now, may I ask you this question. I understand you made a thorough study of the revision. In your opinion, is not the draftsmanship adopted throughout the wording of the new revision much better, considerably better, than we had under the old Code?—A. Well, that is a rather hard question to answer, sir. On the whole, through the onslaught of time—

Q. My question is directed to draftsmanship, which you mentioned. Will you answer that?—A. I am thinking that we have experimented with the present Code for 50 years and, by and large, if there had been any injustices that had crept in, they have been remedied by parliament through amendment. We know what we have at the present time, but we are not sure what we will get in the revision, and I think it would be presumptuous on my part to attempt to praise the revised Code and say it is better than the old one. I know what we have in the old one, but I am not sure what we are going to get in the new, and to that extent the old Code is better. We may be running into trouble with the new one. I am not suggesting that the revision should not go through, but I would respectfully suggest that the most careful study should be given to it, as there is no rush.

Q. May I direct the gentleman again to my question on draftsmanship. In your opinion, is it better or worse than it was before, or are you not prepared to give an opinion?

Mr. MACINNIS: He is answering on that.

Mr. ROBICHAUD: Just a minute.

The WITNESS: I have tried to answer it by saying that in the present Code we do know what we have and therefore it is good to that extent. In the new Code, we are not sure what we are going to have and it might well be a poorer job than the old Code. Surely if those criticisms levelled at the Code are not remedied, one could say on the question of perjury, for example, the revised Code would, I think, be a retrogression over the present Code if that section is included.

Mr. ROBICHAUD: I would like to direct the gentleman's attention to my question.

The CHAIRMAN: I do not think we should really pin the witness down. We are not in a court of law at the moment, we are just trying to ascertain from this witness what he knows and I think we have found out pretty much his view on it. Could you now go on to the next question?

Mr. ROBICHAUD: My next question is with reference to whipping. It has been referred to as having been abolished in England. We all know that. Now, is the gentleman aware that crimes of violence have considerably increased in England as a result of the abolition of whipping?

The CHAIRMAN: Can you say "as a result"?

Mr. ROBICHAUD: As one of the results.

The CHAIRMAN: Can you say "as one of the results", or is it that the statistics show they have increased?

Mr. ROBICHAUD: Let me put my question. According to statistics we have from England, crimes of violence have increased from 2,721, before this whipping was abolished, to 6,516 in 1952. Have you an explanation to offer?

Mr. MACINNIS: What was the previous year for which you quoted those figures?

Mr. ROBICHAUD: Before 1948.

Mr. MACINNIS: Well, there were a large number of years before 1948.

The WITNESS: I can only say this, that I have not the statistics available, but if I did I think it would not be very hard to put this to you. The statistics, say, of 1940, show crimes of violence to have been at a much lower rate than 1952 in Canada. Now, we have had whipping in both those years and certainly the conclusion does not follow that whipping is a deterrent, because crimes of violence have increased substantially in Canada, too, and we have had whipping to serve as an alleged deterrent. But I should go on further and say that those statistics, no doubt, were used by a certain group of the British parliament to try and change the law there, and the subject was thoroughly considered by British parliament on a motion apparently to reinstate whipping. Parliament decided, I think very definitely—the government decided, and I believe the Labour members overwhelmingly decided—against the reinstitution of whipping. Now, to the extent that that represents the considered opinion of the people of England, I would submit that they are not impressed with the fact that crimes of violence have increased because of the abolition of whipping.

Mr. CANNON: In the last paragraph of your brief, you refer to and make some rather sweeping statements on the question of faulty draftsmanship, on the exercise of hasty judgment in connection with this Code, which has been revised at great length by a committee which was established to that end.

The CHAIRMAN: It was a commission, I believe, was it not, Mr. Cannon?

By Mr. Cannon:

Q. A commission, I meant to say. It was carefully studied by the Senate and now it is being carefully studied by the House of Commons. In your brief you mention certain articles by number. Are there any other articles in which you say there is faulty draftsmanship, or hasty judgment has been exercised, or do these representations at the end of your brief refer only to the articles that are mentioned in your brief?—A. I can only say that no one can attempt to set himself up as a judge of the revised Code. It occurred to us that these were the main points that we, as an association, were interested in and should bring up.

Q. I gather you have no other representations to make on any individual article other than those mentioned in your brief?—A. I must say the language used was not intended as a reflection on any particular group, but it was intended as a general observation that we should not rush and then, through possible fautly draftsmanship or hasty judgment or something else, accept the Code and not consider it in the most careful and exacting way.

The CHAIRMAN: Now, if we could terminate—

By Mr. Carroll:

Q. In connection with your remarks at the top of page five, paragraph No. 7, disturbing certain meetings—section 161 (2) and (3). You reach a conclusion that under certain circumstances certain meetings which are described in section 161 (2) and (3) might become illegal under this section—certain meetings called for social, religious or other purposes. I cannot just understand what you say there.—A. Well, sir, the language is proposed to read: "to wilfully disturb or interrupt an assemblage of persons met for a moral, social or benevolent purpose";—

Q. That is a subsection?—A. Yes, and we seem to feel that the language is very broad—

Q. But how could that language in any possible way have the effect of declaring a meeting illegal which is legal for social, religious or other purposes?—A. Well, the fact that there are a number of people who are participating in a breach of the Criminal Code per se makes it illegal to that extent.

Q. It makes them do something illegal, but it certainly does not make the meeting, the assemblage, illegal if it is for the purposes described in

the Act.—A. That might be true except that if there were a number of people that were making a disturbance and others, as it were, aiding and abetting in creating that disturbance. I would say that the meeting as a whole was of an illegal nature. It is somewhat like people who are found in a gambling place, to the extent that they are engaged in betting on horses.

Q. I do not follow you on that, but there is one other question. When was the witchcraft provision in the common law done away with in England?—A. I believe it was in 1951. There is an article to which I can give you reference.

Q. If you will. You feel that this has been abolished?—A. Well, not entirely. I think there is some section which has taken its place, but that section deals with fraudulent activities.

Q. I see.

By Mr. Laing:

Q. Mr. Himel, you suggest that this bill be not passed now, but that it be returned for the fullest and most careful study by an independent body of experts on crime and punishment in the fields of law, medicine and social sciences. Is it not a case that you think this is the first opportunity, when the bill came before the Commons and before this committee—that this is the first chance the public has really had to look at it? Is that not your opinion?—A. That is quite true.

Q. Now, might I point out that we are endeavouring to obtain what you suggest in your brief by the hearing of all these groups or organizations, such as yours, who have come here with great conviction. By what other means could we obtain the information you suggest by setting up a committee, except by this means? Are you not suggesting that this, being the first opportunity that the public has had of getting a look at this proposed bill, and since all laws must depend for their effectiveness on preponderant common sense, is it not your opinion that the public at the present time is not sufficiently aware of this to justify us proceeding this year? Is that not the general substance of your brief?—A. I think that is true in part. I happen to be a member of the Civil Liberties Committee of the Canadian Bar Association in Toronto, and only last week that committee discussed, for the first time, the Criminal Code, and I must say that I understand they are coming here to Ottawa to make representations to you, as that committee is somewhat concerned over some sections of the Code.

The CHAIRMAN: When are they coming? They have not made any application.

The WITNESS: I understand from the chairman that they are asking for a date around the 30th March.

The CHAIRMAN: That is news to me.

By Mr. Laing:

Q. If this body were set up comprised of these people well versed in this sort of thing, and they made a report, their report then would be acted upon by a committee of the House of Commons, which would once again invite interested parties all over again to come and give their views. We would have relatively the same situation as we have today. Mind you, I am not dismissing your suggestion that the time is not opportune at the moment for the passing of this bill. Probably you are right; but I suggest if you were to set up a committee such as you suggest, we would have this same sort of thing all over again.—A. I think perhaps you could do in much the same way as it is done certainly in the United States—call upon certain people whom you feel are qualified to give you opinions on certain phases of the bill, invite them to submit their views so that you will have the benefit of more informed opinions, and then you proceed and sift everything you have. We are not trying to create

an austere body of experts, but we do feel that some reference should be made to people outside the legal profession for their points of view, not only on the sections that are in the Code but the sections that are not in the Code. We suggest that there is much merit in the idea of payment of fines on time, as an example. Now, if you could consult some qualified persons to give you a report on that phase of it, then you would be perhaps better qualified to render an opinion on it. It is only a question, primarily, of time. Do you feel, as a committee, that you have the time to go into this now that a revision is being undertaken and do the kind of job that should be done on a revision? If you feel that experts might assist you by reports on certain phases, then I submit it would be a good idea for the committee to call on such experts to give you reports on different subjects.

Mr. NOSEWORTHY: Are you, Mr. Himel, or is your association in a position to suggest what experts in the fields you mention here would be helpful to this committee if they were invited to give us their opinion?

The WITNESS: Well, that is a hard question to answer.

The CHAIRMAN: I draw to your attention that we are now encroaching on the time of the next delegation, to the extent of ten minutes. I hope you will bear that in mind when the next delegation comes along.

The WITNESS: I think the welfare council people are a good people on this phase. The mental association people are good, also. There are people working in law departments who approach the subject of crime more from a social point of view than from a strictly legal point of view. That would be most helpful. I think it would not be hard to find out who those qualified would be. I have reference to that type of person.

Mr. MACINNIS: I was going to ask Mr. Himel if his opinion is that the first commission that was set up to revise the present Code would be greatly benefited by the great amount of information and opinion that has come to us through the various organizations that have appeared before this committee, which is something that they did not have before, and which from my own point of view this committee will not have the time to digest and think through before the bill is referred back to the house.

The CHAIRMAN: Don't you think we have thrashed this out pretty well now? I do not think there are any further questions to ask this witness.

Mr. NOSEWORTHY: I do not know whether the member of the Department of Justice present here can answer my question or not, but I have been told—

The CHAIRMAN: If you are going to ask Mr. MacLeod a question, I think we could well reserve that. Mr. MacLeod is going to be with us each day and we will not take up the time of these witnesses, if you do not mind.

Doctor Sandwell, Mr. Himel and Mr. Grantham—I want to express, on behalf of this committee, our thanks for your attendance here today, and to assure you that the comments that you have made will be given serious consideration. We appreciate the help that you have given us and we thank you very kindly.

Mr. CARROLL: And I think we should be very proud to have such a man as Doctor Sandwell appear before us on a matter of this kind—a man who has given Canada some of the greatest benefits of any person that I know of.

The CHAIRMAN: I think, Judge Carroll, you speak on behalf of all the committee.

Gentlemen, we have now the Canadian Welfare Council represented by the Reverend D. Bruce Macdonald of Ottawa, Mr. Norman Borins, Q.C. of Toronto, barrister, and Mr. W. T. McGrath of the Canadian Welfare Council, Ottawa. Reverend Bruce Macdonald is the chairman and I would ask him if he would now like to introduce his delegation.

Rev. Mr. MACDONALD: Mr. Chairman and members of the committee I would like to say to you first of all that the members of the delinquency and crime division who have presented this report to you are represented across Canada by the members of the legal profession, social workers and both churches, Catholic and Protestant.

Mr. CANNON: Is Mr. Gareau who is president of your organization, from Quebec city?

Mr. MACDONALD: Yes.

Mr. CANNON: I know him well.

Mr. MACDONALD: In presenting this report we have confined ourselves to the sections which we think have social significance, and following the presentation in developing the seven sections brought to you by Mr. Borins, we would be delighted if you feel free to ask questions.

See Appendix "B".

Mr. Norman Borins, Q.C., Canadian Welfare Council, called:

The WITNESS: Mr. Chairman, may I say a few words by way of a preliminary introduction to the rest of my remarks. I just want to say, Mr. Chairman and gentlemen, that the Canadian Welfare Council is profoundly grateful for the opportunity of being represented here today. As you know I have with me the present chairman of the delinquency and crime division, Mr. Macdonald and the secretary, Mr. McGrath. I have been asked to make certain submissions for the reasons, I suppose, that during the time when certain briefs were prepared and which, I suppose, will be the subject matter of today's discussion, I was then chairman of the crime and delinquency committee.

This committee, one of six divisions of the Canadian Welfare Council has always found it most difficult to know just where to make a beginning in a field so vast and uncertain and yet so vital to the welfare of the nation. As in many other endeavours in the field of social studies, the committee has found little response from the public resulting quite often in a feeling of frustration.

The Canadian Welfare Council is, therefore, very appreciative of the support that it has been receiving from the government in recent years and for the privilege extended to this Committee here today.

The committee has been directing its efforts to reaching the public—in the work of public relations concerning the problem of crime and punishment—prison reform—rehabilitation, and has worked with the Canadian Penal Association, the John Howard Societies and the Elizabeth Fry organizations.

In June of 1950 we submitted—and when I say we I mean the crime and deliquency division with the approval of the board of directors of the Canadian Welfare Council—

The CHAIRMAN: I forgot to ask you if you all have your brief from the Canadian Welfare Council before you.

The WITNESS: In June of 1950 we submitted a brief to the Honourable the Minister of Justice and which was later followed by a report which I think is before you and the Minister of Justice, as I stated, referred the brief and the report to the commission working on the revision of the Criminal Code and we were happy to learn that some of our recommendations were included in the draft bill. I am referring particularly to the recommendation that mandatory minimum sentences be repealed. It may very well be that the commission acted on some of the recommendations of other groups on their own thinking but nevertheless that was something we had included in our brief of June 1950 and we were pleased to find it included in the draft bill. It is with some regret, however, that our recommendations were not accepted all

the way in the matter of suspended sentences without the concurrence of the Crown. We feel that in the matter of granting of suspended sentences, the court should be given complete independence.

The draft bill goes part way. Now, as I understand it, if the draft bill finally becomes the law, the court may grant suspended sentence to a first offender no matter what the sentence or penalty may be without the concurrence of the Crown; we feel perhaps you should go all the way and give the court complete freedom and complete independence to grant suspended sentences in all cases wherever the Court feels that that should be done. While I gathered from listening to the previous representations it is your desire that whatever is said here by the spokesman, he should confine himself to the thinking of the association, I hope you will forgive me if I add my own personal opinion on the matter of granting suspended sentences without the concurrence of the Crown. I was privileged to be in the Crown Attorney's office in Toronto and the County of York for a period of eleven years and that is a pretty busy court. About 60 per cent of the criminal law of the province is administrated within the County of York.

The CHAIRMAN: That is a serious confession.

The WITNESS: Yes, Mr. Chairman, it is.

Mr. MACINNIS: Hardly "Toronto the good".

The WITNESS: I know Crown counsel is quite often subjected to the influence of detectives and inspectors in charge of the particular cases who sit beside you and load you with a lot of stuff which sometimes we find is correct and unfortunately sometimes is incorrect and perhaps Crown counsel should not make representations based on what the police officers tell him, but nevertheless he is on the spot; he works with these people and gets up and makes certain representations that will prevent the judge or magistrate from granting the suspended sentence that he may want to impose. Now, the function of passing sentence is one that is entirely that of the judge of the Court. If the concurrence of the Crown counsel is required, then the crown counsel who is sometimes a very inexperienced person or who has limited thinking usurps the function of the court by refusing to give the concurrence that is required. That is all I wish to say on that point. The recommendation is that serious consideration be given to this particular point on the question of suspended sentence. The report is before you gentlemen and I am not going to read it again, except to touch on a few matters that we think deserve repetition. One of them is the matter of payment of fines on the instalment plan that was referred to by Mr. Hemil who was the spokesman for the previous delegation here this morning. Now, I think that in so far as Mr. Hemil's remarks are concerned concerning this matter alone I think I am safe in saying we subscribe to his remarks. I have a feeling myself that the matter of the payment of fines on the instalment plan does not appeal to the public very readily for the reason that there is a general belief that fines are imposed for almost every type of criminal offence. I think that if a careful analysis were made of cases where fines are imposed, I think you will find, Mr. Chairman and gentlemen, that in major offences fines are not imposed. I know myself as Crown Counsel I always detested the idea of imposing a fine where a person was found guilty of a major offence such as burglary, receiving of stolen goods which is very serious and in some cases of theft. The reason I detested it was that particular person, if able to pay his fine, has bought his way out of goal and out of punishment and I think that is the general belief of all magistrates and judges and most of the courts across the country with the odd exception. I think that the matter of fines is confined mostly to less important criminal cases, less serious crimes, and in most cases fines are imposed for violation of Provincial Statutes with which you are not concerned here. I think the majority of cases where fines are imposed are such cases. In so far as offences

under the criminal code are concerned there are very few fines imposed and whenever they are imposed the offence is not serious, the person is not likely an offender with a long criminal record. And for those reasons it is most important that that individual be given careful consideration. Usually when fines are imposed for the reasons I have stated they usually run from $25.00 to $100.00 or thereabouts. It is a rare case where we find a fine of $500.00 or $1,000.00 for an offence under the criminal code. In all my eleven years I recall one fine for a serious case of receiving stolen goods in the amount of $1,000.00 which I thought was a miscarriage of justice. Getting back to these small fines. If that particular person is unable to pay that small fine, then obviously he is a person who finds himself in destitute financial circumstances and must go to gaol for ten, fifteen, or whatever the period of days might be. Now, he is going to gaol for the reason he has not got ten, fifteen, twenty-five of fifty dollars with which to pay the fine and I am not going to say anything more on that. Mr. Hemil referred to statistics. But, I thought it might be interesting for you gentlemen to know as probably you do in one of our Federal Statutes, the Juvenile Delinquents Act, Section 20 (c) it provides that a fine may be imposed not exceeding $25.00 which may be paid in periodical amounts or otherwise, so that apparently we have a precedent in a Federal Statute. I do not know whether the language there is sufficient, whether the language is adequate, but nevertheless the magistrate or judge, as the case may be, has the authority by reason of that section to impose a fine on the instalment plan.

Now then, dealing with the draft bill in a general way, I just want to say this, and perhaps Mr. Macdonald might be able to add something to it, and that is that we stress the lack of a philosophical and social approach—when I say we I mean the Canadian Welfare Council—with reference to the criminal code. Using the language—this is not my own language, but an editorial which appeared in the Globe and Mail, Toronto, which I thought was particularly appropriate, (it is an editorial in that newspaper dated June 15th, 1953. I am sorry, January 15th, 1953) and, without reading all the editorial, because it is a lengthy one, the essence of it is this, that it is regrettable that there is a lack of philosophical approach to the new criminal code, especially in view of the considerable progress made in other jurisdictions, particularly in Great Britain, to deal with crime on a reformative basis rather than on a narrow punitive basis. Of course I must concede, gentlemen, that in England they are in a better position to stress the reformative basis because of the Borstal System, because of the ten institutions that constitute the Borstal System, and all the machinery that exists to enable the courts to stress the reformative basis. And sometimes I wonder, to be quite frank and ernest about it, in discussing the matter with my chairman and the secretary, they stress this even more than I do, and I asked them this morning, "What if we do have a preamble in the criminal code indicating to the court that when deliberating in a matter of punishment and prison sentences, that he should think of the individual and stress the reformative basis. I said to my two associates, well, supposing we had the preamble, and supposing the judge did think of it, what can he do? When all is said and done he has two alternatives: if it is less than two years it is the reformatory, and if it is more than two years it is the penitentiary; and well do I recall the great amount of mental anguish that would beset His Honour Judge Parker, of York County, who is now deceased, who was greatly distressed when it came to passing sentences, especially on young people. I worked with him for many years and he would put if off from week to week, and finally I would say to him, "you have to do it some time, so why not now—if it is less than two years it is the reformatory, and if you sentence him to a punishment of more than two years it is the penitentiary." So I said to my colleagues, "what if we have this preamble?", and they said this, "if such a preamble is contained in the new Criminal Code, then that may lead to the other", and I think there is a good deal in what they say. Apart from the obstacles that I have mentioned,

it seems to me if we did have such a section or preamble in the new Criminal Code, that perhaps the court might consider the matter more carefully, might ask for a report from the probation officers to a greater extent than they do, and ask to be guided by a report from the psychiatrist and the like. Of course, we lack the official machinery for that sort of thing, but perhaps it might encourage the court to ask for representations along these lines from defence counsel as well as from Crown counsel. Of course if this preamble, or this new section, should accomplish what my friends suggest, it might bring about some action on the part of the government in the matter of altering our system of punishment. This, of course, would be all for the good, because I think, gentlemen, we must all agree that our system of punishment as it exists today is one of the real causes of recidivism and all the tragic consequences that flow therefrom. Of course that matter was long ago dealt with by the Archambault Royal Commission back in 1938 and they recommended the Borstal system, but, of course, that was during the depression years, and along came the war and I suppose the government was not just able to deal with it.

Now, another matter which I would wish to stress a great deal, that is, that this committee is very much concerned with our recommendation of a scientific study of the sex offender. Now, gentlemen, in this new Code the royal commissioners provided in section 661 as follows—and I might say before I read it that this section is headed "Criminal Sexual Psychopaths", and it is under Part XXI of the new code, which is under the heading of Preventive Detention, and deals chiefly with habitual offenders.

Then the construction of Part XXI is as follows: First of all, there is section 659 dealing with interpretations of certain words; then follows section 660, dealing with the application for preventive detention of habitual offenders; and then comes section 661, dealing with criminal sexual psychopaths, and then section 662 is general in nature and deals chiefly again with the habitual offender.

Now, may I point out two technical objections to section 661. First of all, it provides that where an accused is convicted of one of a certain number of offences, sections 136, 138, 141, 147, 148 or 149, dealing with rape, indecent assault, gross indecency, and all the rest of the relevant offences, where an accused is convicted of an offence under any of those sections or of an attempt to commit an offence under any of these provisions, the court may, upon application, before passing sentence, hear evidence as to whether the accused is a criminal sexual psychopath. Subsection (2) reads:

> on the hearing of an application under subsection (1) the court may hear any evidence that it considers necessary, but shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the attorney general.

Subsection (3) reads:

> where the court finds that the accused is a criminal sexual psychopath, it shall, notwithstanding anything in this Act or any other Act of the parliament of Canada, sentence the accused to a term of imprisonment of not less than two years in respect of the offence of which he was convicted and, in addition, impose a sentence of preventive detention.

Now, in reading that, gentlemen, something occurred to me, something I did not realize before. We have a mandatory sentence here—"not less than two years". I thought that was all done away with in the revised Code, mandatory minimum sentences. They are not. Mr. Chairman, and that has particular significance. It just occurred to me now. In our opinion, Mr. Chairman and gentlemen, this has been a long step backwards and will be a long step backwards if parliament adopts section 661. Now, in the first place, when you deal with habitual offenders, in reading all the sections you will find the accused must have a certain number of criminal convictions before

he can be found to be a habitual offender. If you read section 661, you will find that a person may come along and be convicted for the first time of any of these offences, and he may, if an application is made, as a result of that application—although he may be a first offender—he may be found to be a sexual psychopath and be sentenced to an indeterminate period, which may very well be life imprisonement. Then, section 661 contains no provisions for allowing the accused to call on a doctor or to adduce evidence in rebuttal of the evidence that is adduced by the Crown. Now, you will find in section 663 of this part that where the court is dealing with an application to have a person found a habitual offender, that the accused may tender evidence as to his character and repute, and that evidence may be admitted on the question whether the accused is or is not persistently leading a criminal life, or is or is not a criminal sexual psychopath, as the case may be, but no similar provision exists in section 661. And what if he cannot afford to have a psychiatrist? It seems to me there should be more protection for that type of individual. He should have the opportunity of perhaps having a psychiatrist provided for him.

Mr. LAING: A defence psychiatrist?

The WITNESS: A defence psychiatrist, yes.

Mr. BROWNE: Excuse me. But under secton (2) of section 661 it reads:

> On the hearing of an application under section (1) the court may hear any evidence that it considers necessary, but shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the attorney general.

The WITNESS: But what worries me, sir, is the language is not like it is in section 663, and I think that the language has reference to evidence that may be adduced by the Crown, which is making the application. The language might be clarified. It might be, sir, that you are correct, but I am afraid.

The CHAIRMAN: We could let the witness complete his presentation and then we can ask him further questions.

The WITNESS: Now, those are technical objections in so far as the sex offender is concerned. We say that it is a long step backwards, because with all the advancement and progress that has been made in the last 15 or 20 years in the field of psychiatry, instead of taking some advantage and cognizance of all that has been discovered in that field and see if something can be done about that type of individual, putting him in a special type of institution, it would appear, with great respect, the matter as it is dealt with in section 661 is to throw the fellow away and get rid of him with an indeterminate sentence. The thought is to protect society, and society only. Reformatively treating the person, attempting to cure him, or dealing with the individual, is completely abandoned, with great respect, in my submission.

By Mr. Cannon:

Q. Have you any information on what percentage of these cases can be cured?—A. I have not, sir.

Q. Would it be practical, in other words, to provide for care or treatment? —A. Except that there have been a great many reports published that would indicate that something can be done for them, I am not prepared to answer that.

The CHAIRMAN: Could I again ask that you let the witness complete his presentation and then we will submit questions, if that meets with your pleasure.

The WITNESS: I just want to read very briefly a report that was prepared by Mr. McGrath, secretary of this division of the Canadian Welfare Council, and in reading it I find that what he has done is that he has studied many reports and then has stated his views. He says:

The whole question of sex behaviour has been clouded by a lack of factual information. Within the past few years the social scientists have carried on a number of studies in this area and if our criminal law is to reflect a realistic understanding of the situation the findings of these studies should be taken into consideration when our laws are framed. However, despite the work already done, the picture is still far from clear and a comprehensive and thorough study by a government commission is advocated. This study should not be a superficial one. It should be as extensive and as complete as possible. All disciplines interested should be involved. These would include anthropology, education, law, medicine, psychiatry, psychology, religion, social work and sociology.

Some of the problems that are identified by the studies carried out to date and which suggest our criminal law may not be sensitive to modern social conditions are the following:

(1) It is agreed that dangerous sex offenders should be segregated, but it is difficult to define the terms under which such detention should be carried out. Since only seven convictions have taken place under the present provision for preventive detention of dangerous sex offenders, it would appear that the provision is not fulfilling its intention of segregating dangerous people.

(2) Some sex offenders are recognized as mentally and emotionally ill people. In that case, should not treatment be provided for those who are to be segregated and should there not be provision for review of their case by qualified psychiatrists so they may be released when their dangerous tendencies have been removed?

(3) Some acts now defined as crimes are apparently so common in the population that provisions against them cannot be enforced. For example, Dr. Kinsey in his Report (Kinsey, Alfred Charles, "Sexual Behaviour in the Human Male", Philadelphia: W. B. Saunders Co., 1948) says that about one-third of males admit homosexual acts and one-sixth admit that homosexuality has been their chief sex interest for at least a period of three years.

(4) In most cases rape appears not to be primarily a sex crime but is rather an expression of a normal sex impulse coupled with lack of social inhibitions. The problem may not be a sex problem after all.

Some psychiatrists suggest that in our society we tend to associate sex with violence, crime and filth in the mind of the child; whereas it should be associated with home, love, the family, and so on. Sex education in the child might be simpler if the association with crime were kept to a minimum in our laws. There is also a suggestion that treatment of sexual abnormalties might be easier if abnormal sex activity that is not dangerous were not classified as crime. Tension, built up by the knowledge that he is a criminal, makes it more difficult for the sex deviate to use treatment.

By the Chairman:

Q. Did you read the whole of the brief that you are submitting?—A. I did not want to take the time of the committee, so I omitted sections here and there.

Q. Would you like to have the whole incorporated in the evidence?—A. Yes.

Agreed.

The WITNESS: It is recommended that section 661 be repealed, because it is a step backward, and that the two technical objections that I mentioned,

if it is not repealed, be amended, so that they might take care of the two problems I mentioned. But it is seriously recommended that a body be appointed to study the matter because it is somewhat new.

Now, I think that I have touched on the important matters. First of all, the psychological and the social approach to the new Criminal Code; we are very much concerned with section 661 and the sex offender; and the other matters are suspended sentences at all times whenever the court thinks fit, and the payment of fines on the instalment plan. I think the report deals likewise with the question of corporal punishment. We are not in favour of it, but I am not going to say any more on that. We say nothing about capital punishment.

The CHAIRMAN: Probably now we could have a few moments of questioning.

By Mr. Browne:

Q. Is there any evidence that this committee has that there has been an abuse caused by the existence of the provisions that are now incorporated in section 661?—A. This is new, as I understand it, sir.

Q. No, it is a compilation of section 1054A(1), (2), (3) and (5).—A. I know, but it just came in as a recent amendment.

Mr. ROBICHAUD: 1948 or 1950.

Mr. BROWNE: Is it not just a purely theoretical position that you have raised here, or have you any support for it at all on a medical or psychiatric basis?

Rev. Mr. MACDONALD: We are concerned primarily with the sex offender. When a sex offender is sentenced, there is no provision made for his reformation. It is purely a punitive sentence.

By Mr. Browne:

Q. Is there not a provision made here for his cure?—A. No.

Q. Is there nothing said about him being kept in a separate institution?

Mr. ROBICHAUD: Section 655(2)—"an accused who is sentenced to preventative detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose"—

The WITNESS: No one knows of any machinery that is available.

Mr. ROBICHAUD: I understand that is the only thing.

The WITNESS: And that section 665 is there chiefly for the habitual offender. Of course it may cover both. It covers anyone who is sentenced on the basis of preventative detention.

Mr. BROWNE: While we are on this section, may I ask the representative of the Justice Department—

The CHAIRMAN: May I again remind you that the Department of Justice will be with us at all times, and if we can dispose of these witnesses it will be greatly appreciated.

By Mr. Browne:

Q. I can only repeat the original question that I asked. Is there any evidence that by sentencing them to this indeterminate sentence that there has been any injustice, or has any injustice been done, or have any abuses come to light?—A. If there is no machinery set up, sir, for treating them, for ascertaining what improvement a person may be making, or for anyone to know, and by what method anyone is to know he is fit to be released, the danger is he is likely to be there for a long time.

Q. Now, a lot of these offences here I will agree have been committed from time immemorial without necessarily implying the sort of abnormality which would require examination by psychiatrists—for example, rape, carnel knowledge and indecent assault. You would not say that there was a tremendous abnormality in these offences on certain occasions?—A. Well, there would be abnormality in the case of carnal knowledge of a young girl of tender years, and likewise in the case of gross indecency.

Q. I did not mention the last one—I said, rape, carnal knowledge or indecent assault.—A. In some cases of carnal knowledge if it happens to be a girl of tender years I would think it is an indication of abnormality.

Mr. BROWNE: I agree there.

By Mr. Cannon:

Q. There is one point I would like to clear up. In arriving at the conclusion, you suggest 661 be repealed entirely if there is no provision for remedial treatment?—A. Yes.

Q. Wouldn't you agree there the primary object of the Criminal Code is to protect society and it is better to have a man like that who is a sexual psychopath locked up even if from his point of view there is no provision for him being treated; in other words is it not better to protect society and not cure the man than to let the man out and leave him free to being again committing the same crimes?—A. I think our position is that if we can identify the dangerous people segregation is essential, but the fact that only seven convictions have turned up under this section would indicate it is not fulfilling its purpose of segregating dangerous people. Our fear is that under this section you do not necessarily pick out the people who are dangerous. There is provision here for any number of people who are not dangerous to get this type of sentence and we are saying it is an extremely difficult thing to define who are dangerous people.

Q. If you repeal the section completely you are allowing dangerous people to go free.—A. That is a point too.

Q. I think there may be some merit in your suggestion there should be some provision for treatment for these people, but I think you are going too far when you say if we do not put in some provision for treatment we should leave the people entirely free.—A. If we think only of society yes, but if we think of the individual we do nothing for him and of course he is a product of society. This offender is no different than the person who repeatedly commits armed robbery. He is as harmful as a sex offender and is not sent away for an indeterminate period.

Q. You are going too far when you want to remove the article completely if you do not get the amendment you suggest.

By Mr. Robichaud:

Q. I might agree with your point about the treatment, but is not there something in 665-2. They are confined to a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformative treatment as may be prescribed by law. Isn't there an opening there for reformative treatment? If you will note 666 "The Minister of Justice shall, at least once in every three years, review the condition, history and circumstances of that person." There is a provision for revision.—A. So far as we understand that review, it would be this: We may be wrong, but that merely consists of a report which comes from the warden to the Minister of Justice. Obviously the Minister of Justice does not know. That report is information gathered from the chief guard or a guard who may have a grudge against the individual.

Q. 666 goes further than that: "Review the condition, history and circumstances".—A. That consists of a report.

Mr. NOSEWORTHY: On page 9 your recommendations are for the setting up of a Royal Commission for further study. Just where do you suggest that that Royal Commission should fit into our time scheme; do you want the whole code held up until then, or the whole section dealing with sex offenders be held up and the old code used in the interim. What is your suggestion?—A. Just that the sections on the sex offender be held up.

Mr. ROBICHAUD: How long would it be in a Royal Commission—two years.

The WITNESS: The Commissioners here have done exceptional work in the time allotted to them, very capable people chaired by the Hon. Mr Justice Martin, Chief Justice of Saskatchewan.

By Mr. Noseworthy:

Q. What is your suggestion dealing with the sex offender while that commission is making its report?—A. I would say, speaking for myself that some more protection be given to the accused before he is found to be a sexual psychopath, and perhaps an application should not be made where he is just a first offender because we all know in many rape cases they are just borderline cases and it may be a yound man eighteen, nineteen or twenty years of age and in the opinion of the particular crown counsel he thinks an application should be made and in the opinion of that particular presiding judge he thinks he should find that man is a sexual psychopath and away he goes for an indeterminate period.

Mr. LAING: We have only seven.

The WITNESS: If seven people have been improperly dealt with that is quite a number.

Mr. Carroll:

Q. Do you not think a great deal has been done in the last five or six years to give reformatory correction in our main criminal institutions or penitentiaries?—A. Not with respect to sex.

Q. Everything I think.—A. It must be conceded a great deal has been done in the penitentiaries in Ontario. There is an institution in Brampton which is a Provincial institution. But, in the penitentiaries you still could have a seventeen year old mingling with hardened criminals.

Q. I agree with that. I only wanted your opinion on the reformative attitude of the Department in the last few years based, no doubt, on the report that is made?—A. A real attempt has been made and good work has been done.

By Mr. Montgomery:

Q. I would like to get the witness' opinion on mandatory sentences. You feel that they should be eliminated?—A. Mandatory minimum sentences, yes.

Q. In section 661(3) now, it is two years. You feel it would be some help from the reformative standpoint if these words "not less than" were struck out to give the court a chance to use its discretion?—A. Well, I think they should be struck out. Either we believe, or we do not believe in the principle of doing away with mandatory minimum sentences, and if we do there should not be any exception. I am surprised in my reading of this, as I had not noticed it till today. While the commissioners in their report say they have done away with minimum mandatory sentences, I must confess that right here we have a mandatory minimum sentence of two years, and, of course, that is only conditional on the judge finding that the person is a sexual psychopath. If he wishes to send him away for an indeterminate period then he must sentence him on the substantive offence on which he is charged, rape, or whatever it is.

By Mr. Laing:

Q. It has to be declared by at least two psychiatrists that he is a sexual psychopath. I do not know what that means, but I think it is just like the fellow in Kansas who said: "He has gone just about as far as he can go".—A. May I suggest this, that the experts who are sometimes called in a hurry by Crown attorneys in criminal cases are not always to be relied upon. They are departmental people, and I am not trying to criticize civil servants or departmental people, but sometimes their evidence is amazing.

Q. Your suggestion is, then, to get a defence psychiatrist to contest the evidence of the Crown psychiatrists.

Mr. CANNON: Does it not say one Crown psychiatrist?

The WITNESS: It says one shall be appointed by the attorney general.

Mr. CANNON: I would presume the second one was to be appointed by the defence.

The CHAIRMAN: If there are no further questions, I want to extend to Rev. Mr. Macdonald, Mr. Borins and Mr. McGrath our thanks for attending before this committee and giving us the benefit of their studies and their experience. I am sure that the evidence that they have given will be studied with interest by this committee and will be of considerable help to it. I thank you gentlemen sincerely for the trouble that you have gone to in coming before us.

There will be a meeting of the steering committee this afternoon, gentlemen, at 2.30 in this room.

There will be a further meeting of the committee tomorrow afternoon at 3:30 in this room, also.

If there is no further business, the meeting stands adjourned.

APPENDIX "A"

BRIEF

of

THE ASSOCIATION FOR CIVIL LIBERTIES

to the

HOUSE OF COMMONS SPECIAL COMMITTEE
ON CRIMINAL LAW ON THE REVISION OF THE CRIMINAL CODE

The Association for Civil Liberties is appreciative of this opportunity to submit its views on the proposed new Criminal Code. The task of re-writing the code, we recognize, is not a simple one. And it is appreciated that much thought and hard work have gone into the code to this point.

However we are certain that those responsible for the preparation of the proposed code would be the first to say that if the code is at fault anywhere, or if it can be improved upon, then by all means let us have the improvements. Moreover, we, as an Association dedicated to the protection of the civil liberties of the individual, and you, as representatives of your constituents, both have a duty to approach the code with a fresh mind and examine it carefully, critically and constructively.

It is hard to know in a document as large as the code where to start. May we therefore begin with these general observations.

1. It would seem that the proposed code has been written more from the viewpoint of the prosecution than from the viewpoint of the defence and that the code could provide more adequate safeguards for an accused person.

2. It has always been a recognized principle of our law that criminal offences should be clearly and precisely defined so that there will be no mystery about the offence. The revised code somewhat departs from this principle by the use of definitions at times which are too general in scope and language which is too vague and uncertain.

3. The sentences on the whole in the proposed code have been increased. In many cases there would appear to be no justification for the change.

4. One would like to see a greater spirit of reform pervade the code and a greater effort made to bring the code more closely in line with modern scientific and sociological thought in the field of human rights, criminology and penology.

In particular we should like to propose these specific changes to Bill 93 for your earnest consideration.

1. *Service of Warrants*—Section 29 (1)

It has always been a recognized principle of Anglo-Saxon jurisprudence that anyone who executes a warrant should have the warrant with him and produce it if requested. This principle is incorporated in section 40 of the present code.

Under Bill 93 it is proposed to modify this principle so that it would not be necessary for a person who executes a warrant to have it with him and produce it when it is not feasible to do so.

We believe that this exception is unwarranted, and undesirable, since it might well open the door to infringements of the rights of the individual. We would therefore submit that the words "where it is feasible to do so" in Section 29 (1) be deleted.

2. *Treason*—Section 46

Much has been said and written about the treason section of Bill 93. Concern has been expressed over the wording of the section and the vagueness of some of the language used therein. The question has been raised whether a person who engaged in trading with China at the present time could be charged under s.s. 1 (c) with "assisting any armed forces against whom Canadian forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are".

Doubt has been expressed about the meaning and scope of s.s. 1 (*f*) "forms an intention to do anything mentioned in paragraphs (*a*) to (*e*) and manifests that intention by an overt act" and what precise activities it makes treasonous.

The revised section provides for a number of important changes in our present law of treason and what is regarded as treason in the United States and in Great Britain, where the law has remained unchanged since 1785.

We are of the opinion that with an offence as serious as treason, which carries with it possible sentence of death and is so closely linked to our civil liberties, any proposed extensions to the existing treason law shoud be scrutinized with the greatest caution and care. Futhermore, that the present law of treason should only be extended provided that the clearest kind of a case has been made out that the proposed changes are necessary to deal with a clear and present danger and to fill a serious gap in the law.

"We should add that irrespective of the changes that are finally made the section should be amended to provide that no proceedings may be commenced under it without the consent of the Attorney General of Canada. The offence of treason is far too serious and important to allow charges to be laid under it without providing adequate safeguards. If the consent of the Attorney General of Canada were required it would afford a measure of protection against unwarranted charges."

3. *Assisting an alien enemy to leave Canada and conspiring to communicate information*—Section 50.

Section 50 (*a*) (ii) provides for a new offence, that of assisting a subject of a state against whose forces Canadian forces are engaged in hostilities whether or not a state of war exists between Canada and the state whose forces they are, to leave Canada without the consent of the Crown.

It is felt that this section is somewhat ambiguous. It might be asked, for instance, whether a person who assisted a Chinese subject, who had lived in Canada for a number of years without becoming a citizen, to return to his native country, would run the risk that he might be charged under this section if he did so without obtaining the consent of the Crown.

With reference to section 50(1)(c) it is submitted that it too is ambiguous and open to a variety of interpretations. To base an offence on the interpretation of what is "an act that is likely to be prejudicial to the safety of Canada", we would suggest, is to invite trouble. The Official Secrets Act covers with greater particularity most, if not all, of the illegal activities contemplated by this section and we would seriously question whether it is necessary to have this section at all in the code. Certainly if the section is to be included the words "likely to be prejudicial to the safety of Canada" ought in our opinion, to be replaced with words which define the offence more clearly and with greater particularity.

Finally we note that the maximum penalty for violations under section 50 has been increased from two to fourteen years. There is no evidence to suggest that offences under this section have become so numerous that it is necessary to increase the penalty to serve as a deterent. In fact prosecutions under this section in the past have been very scarce and we fail to see any sound ground for extending the penalty beyond the present maximum of two years.

4. *Duty of care re explosives and breach of duty*—Sections 77 and 78.

It is proposed that every person who fails, without lawful excuse, to take reasonable care and as a result an explosion of an explosive substance occurs that is likely to cause death shall be liable to imprisonment for life. We believe this penalty to be unusually severe. Heretofore where there was a breach of duty, our criminal law has confined the penalty of imprisonment for life to manslaughter cases. We see no reason for departing from this principle. We would submit that a more reasonable penalty be provided both for this offence, and also, for the maximum penalty of fourteen years proposed in section 78(*b*) in cases where the explosion causes bodily harm or damage to property or is likely to cause bodily harm or damage to property.

5. *Perjury—witness giving contradictory evidence*—Section 116.

It is submitted that this proposed new section is open to serious objection and should be deleted for these reasons:

(1) The section fails to take into account that in a large number, if not most judicial proceedings, witnesses may honestly and without any intention to mislead give contradictory evidence. Indeed the very purpose of cross-examination is to elicit contradictory evidence from the witness.

(2) The offence contemplates that once contradictory evidence of a material nature is given the onus of proof is shifted to the accused. This surely is contrary to our whole concept of justice that an accused shall be deemed innocent until proven guilty.

(3) The use which could be made of this section in judicial proceedings might well thwart the course of justice.

6. *Public mischief*—Section 120.

We believe that this offence would be defined more clearly and appropriately if after the word "wilfully" the words "and with intent to mislead" were added.

It is further submitted that the offence of public mischief is not of such a serious type that a person found guilty of it should be liable to imprisonment for five years. It is suggested that the penalty be reduced to a more reasonable period.

7. *Disturbing certain meetings*—Section 161 (2) and (3).

These two sections propose among other things to make it an offence:

(1) to wilfully disturb or interrupt an assemblage of persons met for a moral, social or benevolent purpose;

(2) to disturb the order or solemnity of any such meeting.

Since it is not uncommon to have at least one or two people at a social affair interrupting or causing a disturbance, the enactment of these sections in their present form could render a large proportion of the social gatherings attended by members of the public illegal.

It is suggested that these sections be redrafted to conform more closely to the existing section of the code, section 201. It provides, among other things, that everyone is guilty of an offence who wilfully disturbs, interrupts or disquiets any assemblage of persons met for any moral, social or benevolent

purpose, by profane discourse, by rude or indecent behaviour, or by making a noise either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting.

8. *Vagrancy*—Section 164.

It has been our experience that the vagrancy section has been used at various times for a purpose for which it was never intended and that people have been improperly arrested on vagrancy charges. To prevent such abuse we would propose that the offence of vagrancy be defined as narrowly as possible. Furthermore, that s.s. (1) (a) (i) which provides that everyone commits vagrancy, who not having any apparent means of support lives without employment, should be revised to make clear that it is not intended to cover persons who, through no fault of their own, are out of work and without apparent means of support.

9. *Witchcraft*—Section 308.

It is noteworthy that in Great Britain the Witchcraft Act of 1735 was recently repealed. If it is deemed that the offence should be retained in the code, we would submit that the section should be redrafted. As it stands at the present time it would be an offence for a person to charge for reading tea cups under s.s. (b). We believe that the section would be materially improved if the word "fraudulent" was added to make it an essential element of the offence.

10. *Criminal Breach of contract*—Section 365.

The offence of criminal breach of contract was first established in Canada in 1877. Since then there has been a considerable change in the public attitude concerning breach of contracts in labour disputes. As a result collective bargaining and other legislation have largely taken over the field. In the light of these events it is submitted that this section should be amended accordingly.

We would further submit that there is no justification for increasing the penalty for violations from a fine not exceeding $100.00 or three months to a possible sentence of five years. There is no evidence that there has been widespread abuse of this section. The penalty for the offence has been the same since 1877 and prosecutions under the existing section 499 have been almost negligible, so that there would appear to be no reason whatsoever for enlarging the penalty to five years.

11. *Mischief*—Section 372.

There has been much public criticism of this section. When it was considered in the Senate a prominent lawyer stated "no strike ever took place in this country that did not do one or other of the things prohibited by this section".

We would urge that this section be carefully redrafted and that the offence be described with much greater certainty and particularity. It is perhaps too much to attempt to compress in one section that which has heretofore required almost fifteen sections to cover.

In addition we would submit that the penalties provided in s.s. (2) to (5) are far too severe having regard to the nature of the offence and should be reduced to reasonable proportions.

12. *Three day verbal remand*—Section 451, s.s. (c) (ii).

The time honoured and recognized procedure observed when an accused is remanded without bail is to remand him to custody in a prison. For some reason, which is not too clear, a provision has crept into the code allowing a justice orally to remand an accused to the custody of a peace officer or

other person, where the remand is for a period not exceeding three clear days. We submit that the proper place to remand an accused without bail is to the custody of a prison. It has been our experience that a three day verbal remand to the custody of a peace officer or other person can be abused and we would urge that this provision be deleted from the code.

13. *Arrests*—Section 438 (2) and (3)

To safeguard the rights of the individual we would urge, that if practical, this section be amended to provide a definite time within which a peace officer is required to bring an arrested person before a justice to be dealt with according to law.

14. *Whipping*—Section 641.

We believe the time has come that for a re-examination of the punishment of whipping to determine whether it should be continued.

In our submission whipping should be abolished because it offends this basic human right—"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"—Article 5 United Nations Declaration of Human Rights.

In Great Britain whipping was abolished by the Criminal Justice Act of 1948 following a report prepared by a Departmental Committee on Corporal Punishment. According to this report the Committee found:—"Corporal punishment is purely punitive; and it is out of accord with modern ideas which stress the need for using such methods of penal treatment as give an opportunity of subjecting the offender to reformative influences....

"In its own interests society should, in our view, be slow to authorize a form of punishment which may degrade the brutal man still further and may deprive the less hardened man of the last remaining traces of self respect." "The use of corporal punishment as a penalty for criminal offences by adults has been discontinued in all the fifteen foreign countries covered by this enquiry, with the sole exception of two States in the United States of America, where it is recognized by State law as a penalty for a limited number of offences"..."In our view, the retention of corporal punishment can be justified only if it can be shown (a) that a sentence of imprisonment or penal servitude combined with corporal punishment operates more effectively as a deterrent than a sentence of imprisonment or penal servitude not combined with corporal punishment; and (b) that for some offences or classes of offence sentences of imprisonment or penal servitude are so ineffective as deterrents that it is necessary, for the protection of society, to add a further penalty containing an exceptional element of deterrence." The Committee reported that it could find no evidence that corporal punishment operates as a deterrent to further crime by the individual or by others.

The subject of whipping was also considered by the Ontario Court of Appeal in the case of Rex-*vs*-Childs, 1939 Ontario Reports, p. 9. In that case the Court observed:—"While we are content to remain among the backward nations of the earth and have upon our Criminal Code provisions for punishment having their origin in the dark ages, Judges can do but little. Parliament alone can interfere."

In an article written in 1949 Canadian Bar Review, p. 1010, Chief Justice McRuer, of the Supreme Court of Ontario, has this to say about whipping:

"If the punishment of whipping is to be retained, the provisions of the law governing it should be revised and clarified. The sentence of whipping is quite harsh enough without leaving the number of strokes to be administered unlimited. A law exposing an offender to three repeated whippings has in it a great element of cruelty.

The instrument to be used for whipping should be clearly defined. It should never be possible for a prison official to keep the execution of the sentence of whipping hanging over the head of a convicted person during an uncertain portion of the prison term."

15. *Hard Labour*

In our opinion the sentence of hard labour in criminal cases is antiquated and meaningless. Great Britain abolished hard labour in 1948 by the Criminal Justice Act. We would urge that it now be abolished in Canada.

16. *Fines*

Every year thousands of people are sentenced to prison for want of sufficient money to pay a fine. In England action was taken as long ago as 1914 to mitigate any tendency of the law to penalize a man because of poverty. Legislation was passed giving people time for payment of fines and for payment in instalments. As a result imprisonments for default in the payment of fines fell from 79,583 in 1913 to 15,261 in 1923; from 12,497 in 1930 to 7,936 in 1938.

We believe that it is time similar provision were made in Canada for the payment of fines on time. Everyone in Canada is supposed to enjoy equal rights under the law. But this can hardly be said to be true as long as people have to serve jail sentence because they are not financially able to pay a fine except in instalments.

In Canada we have been looking for ways and means of reducing our prison population and the expense of maintaining our prisons. From the English experience it would seem that by allowing people to pay fines on time the population of our prisons could be materially reduced and public funds saved in the process. We would therefore urge that Bill O be amended to allow for the payment of fines on time in appropriate cases.

17. *Sentences*

We note a general tendency throughout the code to make the penalties more severe. In some cases there may well be justification for an increased punishment. However, in many instances, some of which have been referred to before, we feel that the maximum sentence has been raised for no apparent reason whatsoever.

We would urge that your Committee review the proposed changes in the penalties to see that they are appropriate to the offence and are kept within reasonable limits.

18. *Onus of Proof*

We view with concern the tendency in the proposed code to enlarge on the offences for which the onus of proof is shifted from the Crown to the accused. Sections 50 (1) (a) (ii), 80, 116, 162, are some examples of cases in point.

We would submit that only where it is absolutely necessary in the interests of the administration of justice should this practice be permitted. We would therefore ask your Committee to scrutinize most carefully those sections where the onus of proof is placed on an accused to determine whether or not they are of an essential nature.

It is apparent that much work has to be done on Bill O before it can be said to be free from fundamental objection. The revision was undertaken in the first instance for the purpose of simplifying the code and not in order to make major substantive changes. There would therefore appear to be no great urgency to adopt a revised code.

Moreover, in our opinion there are a number of reasons for proceeding slowly and carefully with this undertaking. The last revision of the code was made in 1892. Since then many countries have attempted to experiment with new ideas in the field of crime and penology not found in Bill O. The attitude

of the public and views of social scientists on the problem of crime and punishment have changed radically in the last fifty years. In our submission before the code is finally approved there should be a re-examination and re-appraisal of its provisions and thorough study made in the light of modern developments in criminology and penology and the experience of other countries from which we may benefit.

Furthermore, Bill O attempts to condense 1152 sections into 744. Of necessity many material changes of a substantive nature are bound to creep in as a result of this process of condensation. Moreover as appears from this brief many important changes of a substantive kind are in fact included in the code. Since they affect the rights of the people of Canada, we believe that the proposed changes should not be rushed through but should be further submitted for the fullest and most careful study to an independent body of experts on crime and punishment in the fields of law, medicine and social science.

It has been said that it is better that a score of guilty people go free than that one innocent individual be convicted. So too, it would be better that the enactment of the code be deferred for further study for as long as it should be required, than that through faulty draftsmanship, the exercise of hasty judgment, or the pressure of our times, a person should be unjustly convicted.

APPENDIX "B"

THE CANADIAN WELFARE COUNCIL

A National Clearing House for Canadian Social Welfare
245 Cooper Street, Ottawa, 4, Canada

President: J. M. GUÉRARD
Executive Director: R. E. G. DAVIS

The Delinquency and Crime Division

REPORT

of

THE COMMITTEE ON REVISION OF THE CRIMINAL CODE

The Delinquency and Crime Division of the Canadian Welfare Council welcomes the Government's decision to amend the Criminal Code. The Division is strongly of the opinion that the opportunity provided by this review of the Criminal Code should be seized to express in our laws modern principles of penal philosophy, as far as these apply.

To this end the Delinquency and Crime Division set up a Committee to study Bill H8, An Act respecting the Criminal Law, which was given first reading in the Senate on May 12, 1952, and to prepare recommendations thereon. The Committee hereby submits its Report.

The Canadian Welfare Council presented a Brief on Revision of the Criminal Code to the Minister of Justice on June 8, 1950, dealing with many of the points covered in this Report.

1. The purpose of punishing the criminal is to protect society from lawbreakers. However, the only ultimate protection for society lies in the reform of the individual offender. It must be borne in mind that every convicted offender—with the exception of the few who are executed or who die a natural death in prison—will some day be returned to society. The population of our prisons remains relatively constant. For every new prisoner admitted, another is freed to play his part, good or bad, in the community. The crucial question is whether the released prisoner is more suited to social living than he was when starting his sentence. If he is not, his incarceration has accomplished little and if, as is too often the case, his imprisonment had made him even more dangerous, society has suffered a loss. It is not protected but endangered.

If, then, our criminal law is to fulfil its purpose of protecting society from lawbreakers, it must provide the maximum opportunity for reforming the individual offender, and no provision that makes such reformation more difficult should be retained.

This Committee recommends inclusion in the Criminal Code of a statement of the purpose of criminal punishment emphasizing that the aim is the protection of society through the reform of the individual. This statement might be contained in a preamble to the Criminal Code or in a separate section thereof. It could then serve as a guide to the courts in determining appropriate sentences.

Such a guide is provided in similar legislation. Section 38 of the Juvenile Delinquents Act, 1929, states:

> This Act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

In Great Britain, the Criminal Justice Act, 1948, contains no broad statement. But in its provisions for the extension of probation, for Borstal treatment, and for the limitation of imprisonment it clearly recognizes the reformative purpose of the law. The necessity for consideration of the individual offender is expressed in the sections on restriction on imprisonment:

> 17. *Restriction on Imprisonment*
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> (1) A court of summary jurisdiction shall not impose imprisonment on a person under seventeen years of age; and a court of assize or quarter sessions shall not impose imprisonment on a person under fifteen years of age.
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> (2) No court shall impose imprisonment on a person under twenty-one years of age unless the court is of the opinion that no other method of dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition.
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> (3) Where a court of quarter sessions or a court of summary jurisdiction imposes imprisonment on any such person as is mentioned in the last foregoing subsection, the court shall state the reason for its opinion that no other method of dealing with him is appropriate, and if the court is a court of summary jurisdiction the reason shall be specified in the Warrant of commitment. . . .

The Federal Youth Correction Act, passed in 1951 by the Congress of the United States, defines treatment as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders".

The preamble to the Corrections Act, 1950, of the Province of Saskatchewan reads:

> Whereas it is desirable that, for the ultimate protection of society, a juvenile adjudged to have committed a delinquency and a person adjudged to have committed an offence to be examined with a view to determining as accurately as may be the cause or causes of the delinquency or offence, and that so far as practicable every delinquent or offender be given such help, guidance, retraining and treatment, whether within or outside a correctional institution, as may appear most likely to remedy or correct conditions believed to underlie his delinquency or offence.

2. We commend the omission from the Bill H8 of most of the mandatory minimum sentences provided in the present Criminal Code for specific offences.

3. We commend the provisions of Section 421 (3) of Bill H8 which would make it possible for an accused to have offences committed in another province, and to which he pleads guilty, taken into consideration by a court in the province in which he is in custody.

4. We commend the provisions of Section 638 of Bill H8 insofar as they remove the necessity for consent of the Crown before the court can suspend sentence. We do not, however, agree that the power of the court to suspend sentence should be limited to first offenders, or to those whose one previous offence occurred five years prior to the offence under consideration or which was of a character not related to the offence under consideration. We are of the opinion that the number of offences does not in itself preclude successful treatment on probation, and though the court would obviously take previous convictions into consideration in determining whether the offender should be placed on probation the power of the court should not be restricted in this respect.

5. We are impressed by the fact that in recent years all Western European countries and most of the United States have considered it desirable to abolish corporal punishment. On the other hand, in England, where corporal punishment was abolished by the Criminal Justice Act in 1948, there presently appears to be a large body of experienced opinion in favour of the reinstitution of corporal punishment as a deterrent in cases of crimes of violence of a more aggravated nature. Under these circumstances, we feel ourselves unable at the present time to make a definitive recommendation regarding the abolition or retention of corporal punishment. We feel the matter is one of very great importance and unanimously recommend that it be made the subject of an immediate study under the supervision of the Minister of Justice with a view to determining whether corporal punishment has sufficient merit as a deterrent to warrant its continuance in the face of the many objections which are made to it on social and humanitarian grounds.

We are unanimously of the opinion that everything possible should be done to humanize the execution of sentences of corporal punishment, and in any event, we are unanimously of the opinion that the use of the cat or the lash should be abolished. It would appear that our recommendations in this regard could be adopted by effective action of the Governor-in-Council under the provisions of Section 641(3) of Bill H8, and that no amendment to the proposed statute would be necessary.

6. In the Brief on the Revision of the Criminal Code submitted to the Minister of Justice by the Canadian Welfare Council on June 8, 1950, it was recommended that there be included in the Criminal Code provision for the instalment payment of fines. This recommendation was intended (1) to remove the inequality before the law between the person with means who can pay a fine and the person without funds who cannot pay the fine and must go to jail, and (2) to keep all persons possible from being exposed to the dangers of imprisonment. This provision is not included in Bill H8 and we urge that the matter be given further consideration.

The report of the Archambault Commission also deals with this question (page 167):

> Time for payment of fines, and
> imprisonment for non-payment
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> The attention of your Commissioners has frequently been drawn to the large number of persons who are annually committed to jail for non-payment of fines. The number shown by the Canadian Criminal Statistics for 1936, to have been sentenced to jail with the option of a fine was 9,593, but statistics are not available to show how many of these served sentences in jail.
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> Under the provisions of the Criminal Justice Administration Act passed in England in 1914, the Court is obliged to allow time for payment of fines and for investigation of inability to pay.
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> During the five years ending in 1913, the average number of persons in England and Wales sent to prison annually for default in payment of fines was 83,187. For a similar five year period ending in the year 1930 the average number of persons admitted to prison for non-payment of fines was 12,497. While the difference may not be entirely accounted for by the operation of the statute, it is no doubt largely responsible for the results. The matter was the subject of an extensive investigation and report by a departmental committee in England in 1934. The report resulted in the enactment of the Money Payments Act (Justices Procedure Act) of 1935. The Act makes further provision for the investigation of the means of the defaulter when time is allowed for payment. Supervision of defaulters under 21 years of age is made obligatory, except where the court is satisfied that it is undesirable or impracticable. The statute provides that no one is to be sent to jail for non-payment of a fine unless it can be shown that he might reasonably be expected to pay such fine. This Act came into force on January 1, 1936, and the results of its first year of operation are shown by a substantial reduction in imprisonments for non-payment.

The following statement was made by the Home Secretary, Sir John Simon, in the English House of Commons, on February 4th, 1937:

"The number of committals to prison in default of payment of moneys during 1935, as compared with 1936, were as follows:

Number of persons imprisoned	1935	1936
(1) In default of payment of fines	10,825	7,424
(2) For failure to pay sums due under wife maintenance orders	2,324	1,876
(3) For failure to pay sums due under affiliation orders	1,300	859
(4) In default of payment of rates	2,118	1,464
	16,567	11,623"

Your Commissioners recommend that the principle embodied in these English statutes should be introduced into Canada.

Imprisonment for non-payment, when the convicted person has not the means or ability to pay, is, in fact, imprisonment for poverty. The injustice of such a law is patent. The poverty-stricken man is punished more severely for the commission of the same offence than the man with means. Your Commissioners are of the opinion that many recidivist criminals often receive their first education in crime upon being committed to prison for non-payment of fines.

It should be noted that the Juvenile Delinquents Act 1929, contains provision for the instalment payment of fines.

7. In our opinion the sections of Bill H8 that deal with sex offences were framed without sufficient consideration being given to the knowledge of human sexual behaviour collected by the social scientists over the past few years. These scientific studies have uncovered information regarding the causality and frequency of certain sexual habits presently defined as criminal offences which raises questions as to the wisdom of the laws covering these matters. This is well illustrated by Section 661 of Bill H8 which provides that a person may be deemed to be a sexual psychopath and sentenced to a term of preventive detention of indeterminate length, *without any provision for treatment.* It may be necessary for the protection of society and for the protection of the offender himself that certain dangerous sexually maladjusted persons be kept in detention, but if the offenders are recognized as ill persons, treatment should be provided. The fact that there have been only eight convictions under the corresponding section of the present Code would indicate the provision is unsatisfactory. In the Committee's opinion the provision is loosely framed and represents a real danger to the liberty of the individual. In our opinion it should either be omitted from the Act or amended.

The Committee would like to call attention to the Interim Report of the Committee on the Sex Offender, published by the Canadian Penal Association in 1948. This Report introduces some of the problems that are peculiar to Canada, as well as dealing with some of the more generic issues.

The Committee knows of no thorough study of the sex offender prepared in Canada, and believes that without such a study good legislation covering this difficult matter cannot be framed. *We therefore recommend that a Royal Commission be set up to study further the whole matter of the sex offender and to make recommendations thereon to the Federal Government. This Royal Commission should include in its membership representatives of education, law, medicine, psychiatry, psychology, religion, social work and sociology.*

A number of similar studies have been undertaken by some of the United States. The following appear to be of particular interest:

Michigan. *Report of the Governor's State Commission on the Deviated Sex Offender.* 1951

New Jersey State Commission. *The Habitual Sex Offender.* 1950

New York, Commissioner of Corrections. *Report on Study of 102 Sex Offenders at Sing Sing Prison.* 1950